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## Criminal Law: The Use of Habeas Corpus for Collateral Attacks on Criminal Judgments

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## Comment

### CRIMINAL LAW: THE USE OF HABEAS CORPUS FOR COLLATERAL ATTACKS ON CRIMINAL JUDGMENTS

The writ of habeas corpus occupies a unique position in our body of law. It is a special criminal proceeding,<sup>1</sup> available to "every person unlawfully imprisoned or restrained of his liberty . . . to inquire into the cause of such imprisonment or restraint."<sup>2</sup> The writ will be granted either before or after trial in the proper case,<sup>3</sup> and may merely postpone a determination of the merits of the criminal charge.<sup>4</sup> A regularly instituted criminal appeal, on the other hand, lies only after trial,<sup>5</sup> must be instituted within a given time limit or be forever lost, and is determinative of all issues properly raised. It was this method

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<sup>1</sup> The proceedings under the writ are so described by CAL. PEN. CODE, pt. II, tit. XII, c. 1. In most states it is considered a civil proceeding. 25 AM. JURIS. 151.

<sup>2</sup> CAL. PEN. CODE § 1473.

<sup>3</sup> Matter of Zany (1912) 20 Cal. App. 360, 129 Pac. 295.

<sup>4</sup> CAL. PEN. CODE § 1496.

<sup>5</sup> CAL. PEN. CODE § 1237 allows a defendant to appeal from an order after trial, from an order denying a motion for a new trial, or from any order made after judgment which affects the defendant's substantial rights.

of appellate review that the legislature designed for the orderly disposal of criminal cases. Habeas corpus was not intended to replace criminal appeal as a means of obtaining appellate review of detentions under criminal judgments.<sup>6</sup> Yet, because of its nature, it cuts directly through the statutory provisions for such appeal,<sup>7</sup> and the restriction of the function of the writ of habeas corpus to its proper sphere has been the paramount concern of the courts when dealing with requests for relief by means of the writ.<sup>8</sup> Admittedly, the task has been difficult. The popular historical concept of the writ as a protector of individual liberty, the emotional appeal of a petition alleging that a person is imprisoned without legal cause, together with the vagueness of the substantive rules concerning the use of the writ, all have contributed to conflicts in decisions by the same appellate courts. California courts have been no exception. Two recent cases<sup>9</sup> decided by the California Supreme Court seem to be in conflict with what was supposed to be settled authority. Whether or not these cases have extended the use of habeas corpus as a collateral attack on criminal judgments will be the main inquiry of this comment. The use of habeas corpus to question the detention of individuals by private citizens and to attack contempt orders will not be considered herein.

### *Habeas Corpus in California*

In 1829, in the leading case of *Ex parte Watkins*,<sup>10</sup> Chief Justice Marshall established two propositions of lasting importance:<sup>11</sup> (1) the object and purpose of habeas corpus is to liberate those persons imprisoned by order of a court, officer, or private person without lawful cause; (2) an imprisonment under a judgment cannot be unlaw-

<sup>6</sup> Modern authority for this proposition is legion. 25 AM. JUR. 162; 39 C. J. S. 444; 13 CAL. JURIS. 236; 9 HALS. LAWS OF ENG. (2d ed.) 711.

<sup>7</sup> There is no requirement that a petitioner exhaust all his other remedies before resorting to habeas corpus. The writ will lie before trial, *Matter of Zany*, *supra* note 3; after judgment, but before appeal has been taken, *In re Garbarini* (1933) 129 Cal. App. 618, 19 P. (2d) 27; and after trial and after an appeal has resulted in affirmance of the trial court's decision, *In re Tipton* (1942) 54 Cal. App. (2d) 306, 129 P. (2d) 41. For cases suggesting limits on the use of habeas corpus: *In re Alpine* (1928) 203 Cal. 731, 265 Pac. 947, 58 A. L. R. 1500 (where there is a statutory remedy provided for a specific case, and that remedy is adequate, it must be used); *In re Connor* (1940) 16 Cal. (2d) 701, 108 P. (2d) 10 (issues which petitioner could have raised on a previous appeal which he had prosecuted to judgment cannot later be raised on habeas corpus for the first time); *In re Burns* (1947) 78 Cal. App. (2d) 294, 177 P. (2d) 649. (Certain grounds of defense, e.g., double jeopardy, might support a petition for the writ *before* judgment, but not after judgment has been entered.)

<sup>8</sup> *Ex parte McCullough* (1868) 35 Cal. 97; *Ex parte Gibson* (1861) 31 Cal. 619; *In re Myrtle* (1905) 2 Cal. App. 383, 84 Pac. 335.

<sup>9</sup> *In re McVickers* (1946) 29 Cal. (2d) 264, 176 P. (2d) 40; *In re Seeley* (1946) 29 Cal. (2d) 294, 176 P. (2d) 24; (1947) 60 HARV. L. REV. 823; (1947) 20 SO. CALIF. L. REV. 305.

<sup>10</sup> (U. S. 1829) 3 Pet. 193.

<sup>11</sup> *Id.* at 202.

ful unless the judgment is an absolute nullity, which cannot be so if the court has general jurisdiction over the subject matter and persons before it. These propositions were widely adopted as general rules, and conceptual limitations, difficult to apply, were introduced into the substantive law of habeas corpus.<sup>12</sup>

The early California courts adopted Marshall's analysis.<sup>13</sup> Their decisions show an extreme concern for the need to limit habeas corpus to its proper function.<sup>14</sup> To effect this end, the appellate courts held that when a petitioner seeking release through the writ was detained by order of a court, the only question open to inquiry on the hearing of the return was that of the jurisdiction of the court to make such an order. If the court had jurisdiction, an exercise of its power might be erroneous, but could not be void.<sup>15</sup> The court could give no relief on habeas corpus where there was no lack of, or action in excess of, jurisdiction.<sup>16</sup>

Very often the meaning of "jurisdiction," the key term in the rule, was assumed.<sup>17</sup> Only by examining the precedents does the term take on a semblance of meaning. Petitioners were found to be imprisoned illegally, because the court ordering the imprisonment had no jurisdiction, in the following cases: where the imprisonment was based on an unconstitutional statute or ordinance,<sup>18</sup> where the detention was based on accusatory pleadings that totally failed to state a criminal offense;<sup>19</sup> where a conviction of a minor was in violation of the ju-

<sup>12</sup> Comment (1935) 35 COL. L. REV. 404. Although dealing specifically with the use of habeas corpus in the federal courts, the problems discussed there are necessarily encountered by state courts, which generally adopt a similar approach to the problem. See also (1948) 61 HARV. L. REV. 657.

<sup>13</sup> *Ex parte* Gibson, *supra* note 8.

<sup>14</sup> *People v. Smith* (1850) 1 Cal. 9; *Ex parte* McCullough, *supra* note 8.

<sup>15</sup> *Ex parte* Max (1872) 44 Cal. 579.

<sup>16</sup> *Ibid.*; *Ex parte* Sternes (1888) 77 Cal. 156, 19 Pac. 275; *Ex parte* Long (1896) 114 Cal. 159, 45 Pac. 1057.

<sup>17</sup> For an early case discussing the meaning of jurisdiction, see *Ex parte* Bennett (1872) 44 Cal. 84 (power to hear and determine). For a comment on the difficulty inherent in "jurisdiction," as that word is used in connection with the extraordinary writs of certiorari and prohibition, and the various meanings that courts assign to the word, see (1948) 36 CALIF. L. REV. 75 at 80.

<sup>18</sup> *In re* Mark (1936) 6 Cal. (2d) 516, 58 P. (2d) 913; *Ex parte* Westerfield (1880) 55 Cal. 550; *In re* Sidebotham (1938) 12 Cal. (2d) 434, 85 P. (2d) 453 (reaffirming the rule but remanding the petitioner on other grounds).

<sup>19</sup> *Ex parte* Greenall (1908) 153 Cal. 767, 96 Pac. 804; *Ex parte* Kearney (1880) 55 Cal. 212; *In re* Avdaldas (1909) 10 Cal. App. 507, 102 Pac. 674. Fine distinctions were drawn in this type of case, as when the pleadings totally failed to charge the petitioner with a public offense and when they did in fact charge the offense, but did so defectively. In the latter situation, habeas corpus would afford no relief. The writ cannot serve the office of a demurrer. *In re* Stambaugh (1931) 117 Cal. App. 659, 4 P. (2d) 270; *In re* Hayward (1923) 62 Cal. App. 177, 216 Pac. 414; *In re* Bergen (1923) 61 Cal. App. 226, 214 Pac. 521.

venile court act;<sup>20</sup> where the detention was based on an order or judgment of a court having no legal existence;<sup>21</sup> where the order of a committing magistrate was without probable cause;<sup>22</sup> where the defendant had not been brought to trial within the statutory period;<sup>23</sup> where the prosecution for the crime had been barred by the statute of limitations;<sup>24</sup> where the petitioner was imprisoned and threatened with a criminal prosecution based on testimony he gave before a legislative committee, and immunity from any criminal prosecution so supported was conferred by law;<sup>25</sup> where the petitioner was held for acts which did not constitute a crime;<sup>26</sup> and where the petitioner had been held to answer for a crime committed outside the territorial jurisdiction of the committing magistrate.<sup>27</sup>

It is difficult, if not impossible, to find a common feature tying these cases together. If jurisdiction is said to "amount to no more than the power to hear and determine as well as to hear and not determine,"<sup>28</sup> these precedents are even more confusing. For example, had the trial court found in favor of the petitioner in most of the above cases, there is no doubt that the decision would not have been void.<sup>29</sup> Yet, by definition, the petitioner was granted relief on the ground that the judgment ordering him imprisoned was void.<sup>30</sup>

As habeas corpus is a collateral attack, certain limitations were imposed upon petitioners employing the writ.<sup>31</sup> The court petitioned

<sup>20</sup> *In re Tasse* (1927) 81 Cal. App. 287, 253 Pac. 948; *cf. In re Wolff* (1920) 183 Cal. 602, 192 Pac. 33. (Petitioner denied relief when he did not properly object at trial to the superior court's lack of jurisdiction.)

<sup>21</sup> *Ex parte Giambonini* (1897) 117 Cal. 573, 49 Pac. 773; *cf. Ex parte Fedderwitz* (1900) 6 Cal. Unrep. 562, 62 Pac. 935 (writ cannot be used to attack the office of the justice of peace or judge).

<sup>22</sup> *In re Martinez* (1940) 36 Cal. App. (2d) 687, 98 P. (2d) 528; *In re Williams* (1921) 52 Cal. App. 566, 199 Pac. 347 (commitment based on evidence taken out of presence of committing magistrate); *cf. In re Plummer* (1947) 79 Cal. App. (2d) 651, 180 P. (2d) 771.

<sup>23</sup> *In re Begerow* (1901) 133 Cal. 349, 65 Pac. 828. *Contra: In re Alpine*, *supra* note 7; *cf. In re Ford* (1911) 160 Cal. 334, 116 Pac. 757 (mandamus, not habeas corpus, is the proper remedy when petitioner is not brought to trial within the statutory period).

<sup>24</sup> *In re Davis* (1936) 13 Cal. App. (2d) 109, 56 P. (2d) 302.

<sup>25</sup> *In re Connolly* (1936) 16 Cal. App. (2d) 709, 61 P. (2d) 490. The court reasoned that this immunity was analogous to the statute of limitations case, *supra* note 24, and not comparable to those defenses which must be pleaded at the trial.

<sup>26</sup> *Ex parte Mirande* (1887) 73 Cal. 365, 14 Pac. 888. CAL. PEN. CODE § 1004 (4) now provides for a demurrer to the indictment or information on this ground. Is the plea by demurrer now the exclusive remedy? See *In re Alpine*, *supra* note 7.

<sup>27</sup> *In re Huber* (1930) 103 Cal. App. 315, 284 Pac. 509.

<sup>28</sup> *Ex parte Bennett*, *supra* note 17.

<sup>29</sup> For a discussion of the inherent inconsistency in denoting as "void" a judgment based on an unconstitutional statute, see *In re Bell* (1942) 19 Cal. (2d) 488, 492, 122 P. (2d) 22, 25 and cases and notes there cited.

<sup>30</sup> *Ex parte Watkins*, *supra* note 10; *Ex parte Ah Men* (1888) 77 Cal. 198, 19 Pac. 380; *Ex parte McCullough*, *supra* note 8.

<sup>31</sup> *In re Stevenson* (1922) 187 Cal. 773, 204 Pac. 216.

was confined to the face of the record of the judgment being attacked.<sup>32</sup> If the jurisdiction of the lower court making the order complained of appeared on the face of the record,<sup>33</sup> the court indulged in a presumption in favor of that court having jurisdiction, and the petitioner had the burden of overcoming the presumption in favor of the verity of the judgment.<sup>34</sup> Thus, the mechanics applicable to the hearing on habeas corpus served effectively to keep the writ within its assigned functions.<sup>35</sup>

The first departure from the earlier precedents took the form of widening the scope of the inquiry permissible on habeas corpus.<sup>36</sup> This expanded review was allowed only to determine the jurisdiction of the court whose order or judgment was placed in issue, but it permitted the court to look beyond the face of the record.<sup>37</sup>

In cases arising in the inferior courts, the usual presumptions raised in favor of the judgment were soon abandoned,<sup>38</sup> and the appellate courts announced that evidence outside the record would be received for the purpose of determining the jurisdiction of the inferior court rendering the judgment placed in issue by the petitioner.<sup>39</sup> These rules regarding inferior court cases have become settled law in this state.<sup>40</sup> If the petitioner can find an alleged jurisdictional error, he can get the appellate court to review the evidence heard in the inferior court;<sup>41</sup> otherwise, a person convicted in an inferior court has no appeal beyond the superior court.

From the foregoing summary, it is readily apparent that criminal appeal, regularly instituted, for the most part has been the only gen-

<sup>32</sup> *Ex parte* Sternes, *supra* note 16. CAL. PEN. CODE § 1484 has not been amended since 1872. It reads "[The petitioner] may . . . allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge . . ." This section has been construed as stating the common law rule as to the scope of review. *In re* Myrtle (1905) 2 Cal. App. 383, 84 Pac. 335.

<sup>33</sup> The record in these cases is the judgment roll. *In re* Todd (1919) 44 Cal. App. 496, 186 Pac. 790.

<sup>34</sup> *In re* Dal Porte (1926) 198 Cal. 216, 244 Pac. 355; *Ex parte* Morrison (1891) 88 Cal. 112, 25 Pac. 1064.

<sup>35</sup> Rarely, if ever, could the petitioner overcome these procedural burdens cast upon him from the record that was available to the petitioned court. The common law doctrine of construction of pleadings most strictly against the pleader found its way into these cases. 13 CAL. JURIS. 276.

<sup>36</sup> *In re* Smith (1904) 143 Cal. 368, 77 Pac. 180; *In re* Mooney (1936) 10 Cal. (2d) 1, 73 P. (2d) 554; *In re* McCoy (1909) 10 Cal. App. 116, 101 Pac. 419; *In re* Chaus (1928) 92 Cal. App. 384, 268 Pac. 422.

<sup>37</sup> *Ibid.*

<sup>38</sup> For an excellent summary of this development, see *In re* Garbarini (1933) 129 Cal. App. 618, 19 P. (2d) 27.

<sup>39</sup> *In re* Wyatt (1931) 114 Cal. App. 557, 300 Pac. 132.

<sup>40</sup> *In re* Bell, *supra* note 29.

<sup>41</sup> *E.g.*, *In re* Wyatt, *supra* note 38 (court reviewed the evidence to determine where the crime was in fact committed).

erally effective method of securing a review of criminal proceedings.<sup>42</sup> This is as it should be. The writ remained a valuable tool, however, to secure release when the petitioner's detention was without justification in law. The boundaries between the collateral attack and regular criminal appeal were zealously preserved.

*In Re Bell—Habeas Corpus Reconsidered*

In 1942, in the case of *In re Bell*,<sup>43</sup> the California Supreme Court took occasion to review the precedents applicable to habeas corpus. The petitioners in this case had been charged with violating an anti-picketing ordinance of Yuba County. The complaint did not specify the alleged acts of misconduct, but followed the words of the ordinance. The justice court found the petitioners guilty "as charged in the complaint," and the judgment was affirmed on appeal to the superior court of Yuba County. The supreme court, in a split decision,<sup>44</sup> found the ordinance only partially invalid,<sup>45</sup> and remanded the petitioners to custody.

The actual holding of the case is not out of line with established legal principles. The writ was employed to test the constitutionality of an ordinance;<sup>46</sup> the burden of proof was placed on the petitioners to prove that their conviction was based on the invalid portion of the ordinance;<sup>47</sup> since the petitioners failed to sustain this impossible burden, they were remanded. The case is important, however, because the opinion dealt at length with the use of the writ as a collateral attack on criminal judgments.

Justice Traynor, speaking for the court, first pointed out that in the case of a conviction under an unconstitutional statute or ordinance, habeas corpus lies, not because the trial court lacks jurisdiction, but because of the importance of the rights guaranteed by the

<sup>42</sup> This process of severely limiting the function of habeas corpus has not been peculiar to California. See Boudin, *Has Habeas Corpus Been Abolished in New York?* (1935) 35 *Col. L. Rev.* 850.

<sup>43</sup> (1942) 19 *Cal. (2d)* 488, 122 P. (2d) 22.

<sup>44</sup> Justice Traynor wrote the majority opinion, concurred in by Gibson, C. J., Shenk and Houser, JJ. Justice Edmonds filed a concurring opinion, signed by Justice Curtis, which agreed with the result reached by the majority, but not their reasoning. Justice Carter dissented.

<sup>45</sup> Compare *In re Bell* (1940) 37 *Cal. App. (2d)* 582, 100 P. (2d) 339, holding the entire ordinance valid.

<sup>46</sup> *Supra* note 18.

<sup>47</sup> The court pointed out that the judgment, in view of the ordinance, was ambiguous. Had the petitioners been before the supreme court on a direct attack, a reversal would have been required, as there was no truly separable part of the complaint upon which the verdict could be upheld. Here the petitioners had exhausted their direct appeal to state courts, and the presumption of regularity present in collateral attacks prevented relief on habeas corpus. This is an excellent example of how limited the opportunities for relief are in habeas corpus cases. The California cases are collected at 15 *CAL. JURIS.* 64, *et seq.* Compare text at notes 61 and 64 *infra*.

federal and state constitutions.<sup>48</sup> "There are other situations," he continued, "in which habeas corpus is used, not as a test of jurisdiction, but to review a question of law that cannot otherwise be raised or is so important as to render the ordinary procedure inadequate."<sup>49</sup> It seems clear from the opinion, however, that the court did not intend to create a new formula to govern habeas corpus cases; nor did it intend to explain all of the habeas corpus cases that have been decided by the California courts. At most, the opinion sought to clear the air with respect to previous inconsistencies in the constitutional cases. There seemingly was no intent to broaden the function of the writ of habeas corpus.

The court also discussed the scope of review on the hearing of the return of a writ of habeas corpus: "A petitioner seeking habeas corpus is, however, not confined to the face of the record in attempting to sustain the burden of proving that his conviction was in violation of his constitutional rights. The courts of both the United States and California have declared that the remedy of habeas corpus permits an examination not only of the actual evidence introduced at petitioner's trial but of any necessary additional evidence bearing upon the infringement of petitioner's constitutional rights."<sup>50</sup>

It must be remembered that this case originated in a justice court; hence a broader scope of review was applicable, as previously discussed,<sup>51</sup> under the California precedents.<sup>52</sup> The majority probably intended to summarize the effect of these precedents, rather than to extend the rules previously announced.

Admittedly, the general statements in the *Bell* case are susceptible of more than one construction. First, and obviously, the broad language of the court could be restricted to cases involving attacks upon the constitutional validity of legislative enactments or judicial procedure. Second, it could be construed as stating a formula governing all habeas corpus cases; then, the issues in each case where there has been a petition for the writ would be: (1) Is this a question of law which could never otherwise be raised? (2) Is this a question of law that is

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<sup>48</sup> *Supra* note 43 at 494, 122 P. (2d) at 26.

<sup>49</sup> *Id.* at 493, 122 P. (2d) at 26. The court gave these illustrations of instances where habeas corpus will lie even though there is no jurisdictional question involved: to test whether or not there was probable cause to justify the committing magistrate's holding of the petitioner for trial, and to determine whether the complaint charges a public offense. These cases fall within subsections 7 and 3 respectively of CAL. PEN. CODE § 1487, and, being governed by a specific code section, cannot fairly support the generalization of a "rule." The remaining category of cases cited by the court, those dealing with the statute of limitations, fall within subsection 1 of the same code section, if the statute is held to be jurisdictional. California so holds. *In re Davis* (1936) 13 Cal. App. (2d) 109, 56 P. (2d) 302. See also (1935) 23 CALIF. L. REV. 525.

<sup>50</sup> *Supra* note 43 at 501, 122 P. (2d) at 30.

<sup>51</sup> See text at notes 38 and 39, *supra*.

<sup>52</sup> *Supra* note 36.



so important as to render ordinary procedure inadequate?<sup>53</sup> As a third possibility, *In re Bell* might be cited as indicating that habeas corpus will lie to correct any error committed in the course of the proceedings resulting in the petitioner's imprisonment if there is no present adequate remedy to protect the petitioner's rights. This view necessarily assumes that any judicial error forever taints the validity of the judgment,<sup>54</sup> and that a defendant has a continuing right not to be imprisoned on an erroneous conviction. This view, if adopted, would set up a dual system of criminal appeals in California, and would effectively negate the previous efforts which the California appellate courts have made to confine habeas corpus and the regular method of criminal appeals to their respective channels.<sup>55</sup>

### *The Recent History of In Re Bell*

Although the *Bell* case merely attempted to restate the law, the California appellate courts have apparently agreed that the rules announced in that case have settled the law applicable to constitutional issues raised on habeas corpus.<sup>56</sup> Where the case before the court has challenged habitual criminal adjudications, however, there has been a consistent split of the court.

Two recent cases, *In re McVickers* and *In re Seeley*,<sup>57</sup> presented this fact situation: petitioners had been adjudicated "habitual criminals," having been convicted of felonies and having two prior felony convictions of the type specified in Penal Code section 644 either admitted or found. After having allowed time for appeal to lapse, or having prosecuted an unsuccessful appeal, they petitioned for release on habeas corpus on the ground that one or more of the "priors" they had confessed or allegedly committed were out-of-state felonies, not of the type enumerated in Penal Code section 644.<sup>58</sup> In each case the

<sup>53</sup> No case has been found which has considered whether the grounds stated in CAL. PEN. CODE § 1487 are exclusive. Assuming that the grounds stated there are not exclusive, there is certainly little to be gained by substituting "importance of the question of law" for that other troublesome test, "jurisdiction." Some California cases expressly or impliedly require that the existing remedies be inadequate before relief by habeas corpus will be granted. *In re Connor* (1940) 16 Cal. (2d) 701, 108 P. (2d) 10. All available remedies need not be exhausted. *Matter of Zany*, *supra* note 3.

<sup>54</sup> This would be a revolutionary change in the philosophy underlying our criminal procedure. *Supra* note 6. *Cf. In re Plummer*, *supra* note 22.

<sup>55</sup> *Supra* note 8.

<sup>56</sup> *In re Blaney* (1947) 30 Cal. (2d) 643, 184 P. (2d) 892; *In re Wallace* (1944) 24 Cal. (2d) 933, 152 P. (2d) 1; *In re Herrera* (1943) 23 Cal. (2d) 206, 143 P. (2d) 345; *In re Portnoy* (1942) 21 Cal. (2d) 237, 131 P. (2d) 1.

<sup>57</sup> Both *supra* note 9. The decisions in both cases were announced the same day and should be read together.

<sup>58</sup> PENAL CODE § 644 includes out-of-state felonies of the enumerated type, but only if they would have been felonies if committed in California. *In re Taylor* (1944) 64 Cal. App. (2d) 47, 148 P. (2d) 143. *McVickers* was convicted of grand theft (stealing property worth more than \$50) in Utah. California requires, for grand theft, the taking of

court allowed an attack upon the habitual criminal adjudication by habeas corpus.

In the *McVickers* case the majority rested its decision on the theory that the scope of habeas corpus as a collateral attack upon judgments of conviction has been broadened rather than narrowed.<sup>59</sup> From this premise they reasoned that, since the adjudication of habitual criminality is not part of the judgment of conviction, but is separable from the judgment proper and in effect is nothing more than "fact-finding," the use of habeas corpus in this type of case is particularly justified.<sup>60</sup> On such an attack, the court is not confined to the face of the record, but may consider evidence outside the record. The court, in effect, refused to indulge in the usual presumptions raised in favor of judgments under collateral attack; instead it presumed that, in the absence of contrary evidence, the "prior" suffered was for the least offense punishable under the out-of-state statute, and thus but a misdemeanor under California law.<sup>61</sup> The petitioner was remanded to custody as being entitled to the benefits of one having two, rather than three, prior convictions for felonies.<sup>62</sup>

In the *Seeley* case, the majority stated: ". . . a petitioner may attack and secure relief in habeas corpus from an erroneous adjudication of habitual criminal status where the facts, appearing either from the face of the record or by satisfactory proof, show that as a matter of law the prior conviction is of a crime which does not meet the definition of an offense included in said section 644. We conclude that the court in this proceeding should inquire into the facts presented in arriving at a determination of the question of whether the petitioner is being held under excessive sentence, and therefore is, to that extent, illegally restrained of his liberty. But the petitioner must meet the burden of overcoming the presumption of regularity which attaches to the judgment of the trial court, by proof of facts sufficient to show that the sentence imposed upon him was unauthorized and excessive."<sup>63</sup> The court found that the petitioner successfully met that burden. The petitioner was remanded to custody as a felon with but one prior conviction.

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property worth more than \$200. *McVickers* had stolen a 1923 Studebaker in 1924; no value, however, had been placed on the car by the Utah court or jury, and so it was argued that petitioner had not been convicted of taking property worth more than \$200.

<sup>59</sup> The majority relied on *In re Bell* as a leading case extending the function of the writ. *Cf.* text at notes 49 and 50 *supra*.

<sup>60</sup> The dissent insisted that the adjudication of habitual criminality was part of the judgment itself, and consequently immune from collateral attack.

<sup>61</sup> The court thus accepted petitioner's argument, *supra* note 58. Compare this court's view as to the necessity for, and the effect of, presumptions in favor of the regularity of the judgment with the opinion in the *Bell* case.

<sup>62</sup> This substantially hastened the petitioner's eligibility for parole. See CAL. PEN. CODE §§ 3047, 3048 and 3048.5.

<sup>63</sup> *In re Seeley*, *supra* note 9 at 299, 176 P. (2d) at 28. *Cf.* note 61 *supra*.

Justice Spence wrote a dissenting opinion in each case.<sup>64</sup> In the *McVickers* case, he stated that, assuming the use of the writ to be proper, the petitioner had not sustained the burden of proof cast upon him in a habeas corpus proceeding.<sup>65</sup> In the *Seeley* case, however, Justice Spence concerned himself with an examination of the function of the writ of habeas corpus in California generally, and argued that when the writ is used to attack the adjudication of habitual criminality, the "jurisdiction" of the court making that adjudication is the only issue presented. On such an attack the inquiry of the petitioned court should not extend beyond the face of the record; if it affirmatively appears that the trial court had jurisdiction to make the adjudication, then the adjudication should not be nullified on habeas corpus. Justice Spence felt that the *Bell* case exceptions were applicable only to "fundamental constitutional questions . . . such as due process and the like."<sup>66</sup> Only in these exceptional cases should the court be permitted to extend the scope of its review beyond the face of the record; when the jurisdiction of the lower court is the sole issue, jurisdiction must be determined in the traditional manner. In the *Seeley* case, then, there was no ground upon which the court could correctly grant relief on habeas corpus. In fact, Justice Spence felt that there was no further judicial remedy available to the petitioner. By lapse of time, his only recourse now was to petition for executive clemency.<sup>67</sup>

Several recent cases<sup>68</sup> have reaffirmed the holdings of the *McVickers* and *Seeley* cases. Thus far, this seemingly broadened view of habeas corpus has been confined to cases involving adjudications of habitual criminal status.<sup>69</sup> There are portions of the opinions in these cases, however, that seem definitely to broaden certain aspects of the writ by (1) enlarging the scope of review available on the hearing of

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<sup>64</sup> Justices Traynor and Edmonds concurred in each dissent.

<sup>65</sup> The dissent argued that the judgment should have been presumed regular in all respects and the petitioner should have been forced to prove affirmatively that the auto in question was worth less than \$200.

<sup>66</sup> *In re Seeley*, *supra* note 9 at 311, 176 P. (2d) at 35.

<sup>67</sup> *Id.* at 312, 176 P. (2d) at 40. CAL. PEN. CODE § 3050 ("Any person imprisoned as an habitual criminal who has not been previously twice or three times convicted of any of the felonies mentioned in Section 644 may be released on parole.") might at first seem to authorize a subsequent re-determination of habitual criminal status, as sought in the *McVickers* and *Seeley* cases. The section was enacted, however, to permit the parole of defendants whose habitual criminal status depended on conviction for offenses once enumerated in but subsequently deleted from § 644; its effect should be limited to its purpose. See 3 OPS. ATT'Y GEN. 20.

<sup>68</sup> *In re Wolfeson* (1947) 30 Cal. (2d) 20, 180 P. (2d) 326; *In re Pearson* (1947) 30 Cal. (2d) 871, 186 P. (2d) 401; *In re Bramble* (1947) 31 A. C. 43, 187 P. (2d) 411.

<sup>69</sup> The majority opinion in *In re Bramble*, *supra* note 68, inquired at length into this issue raised by the petitioner: was the petitioner in fact sentenced for a different offense than that charged in the indictment? Although the majority found he was not, Spence, Edmonds and Traynor, JJ., felt even this inquiry improper as allowing the writ to be used to attack the indictment.

the return,<sup>70</sup> and (2) restricting the presumptions that will be raised in favor of the judgment.<sup>71</sup> Nevertheless, because of the stress laid by the majority opinion in the *McVickers* and *Seeley* cases on the peculiar nature of the habitual criminal adjudication, it is difficult, if not impossible, to say whether further extensions of the use of habeas corpus as a collateral attack on criminal judgments can be expected. The *ratio decidendi* in these cases presents the court with an excellent opportunity to restrict the "priors" cases to their facts.

### Conclusion

Factually the plight of an habitual criminal, erroneously adjudicated, presents an appealing case. The habitual criminal law, technical at the outset, is much more so when enmeshed with the intricacies of out-of-state criminal classifications; add, then, the compelling practical reasons why a criminal defendant in California should admit, rather than put in issue, his "priors," and the system fairly invites the type of errors found in the *McVickers* and *Seeley* cases. Equally strong are the factors that demand that criminal judgments attain finality within the time allowed for criminal appeals, whether that judgment be for the commission of a major crime or merely determinative of habitual criminal status.

Since the "priors" cases have thus far presented the most difficulty, and seem to threaten to enlarge unduly the scope of habeas corpus, the legislature might well provide a special statutory appeal on this issue alone, being extremely liberal as to the time during which it may be prosecuted. It might further require the prosecution to make out a prima facie case for the adjudication of habitual criminal status, despite a plea of guilty by the accused. It does not seem that such requirement would in any way impair the philosophy that underlies the habitual criminal statutes. Rather, it would give the trial judge a clearer picture of the nature of the defendant's prior convictions.

It may be hoped that if the "hard" cases are removed from the purview of the court, the temptation to extend the scope of the writ of habeas corpus as a collateral attack will be lessened, and resolutely resisted. Nothing but hopeless confusion in our criminal appeals can be expected unless use of regular criminal appeal channels is insisted upon in all cases except those in which habeas corpus has heretofore been permitted, cases very closely analogous to them, or cases falling

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<sup>70</sup> The holding of the majority in the *McVickers* and *Seeley* cases seems to be that the broadened review is available to petitioners for the writ in *all* cases where habeas corpus is employed. The dissent contends that the broader scope of review is available only where fundamental constitutional questions are involved.

<sup>71</sup> For instance: "But if the presumption of the verity of a judgment were implicitly relied upon in habeas corpus proceedings then such proceedings could rarely if ever benefit a defendant after conviction." *In re McVickers*, *supra* note 9 at 276, 176 P. (2d) at 48.