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Habeas Corpus Relief and the Concurrent Sentence Doctrine

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state legislatures will be under pressure from hospitals and their insurers to initiate legislation to prevent such imposition of liability. The Florida legislature was under this sort of pressure after the decision in *Russell v. Community Blood Bank, Inc.*,[34] and a statute effectively overruling that decision resulted.[35]

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HABEAS CORPUS RELIEF AND THE CONCURRENT SENTENCE DOCTRINE

The petitioner, who was serving concurrent sentences for convictions of robbery and uttering a forged instrument,[1] sought to have the robbery conviction set aside on the ground that his right of appeal from the conviction had been thwarted. Petitioner contended that he had requested his privately retained attorney to file a motion for new trial and notice of appeal; however, his attorney had advised him that he had been retained for trial work only and that if he wished for an appeal to be taken, a separate fee would have to be paid. Since this fee was not paid, the attorney never filed the motion for a new trial or notice of appeal.[2] After an unsuccessful attempt to have the judgment vacated,[3] petitioner then petitioned the Florida Supreme Court for a writ of habeas corpus. The respondent argued that the writ could not be issued because Florida recognized the concurrent sentence doctrine which precluded issuance of the writ when the petitioner attacks only one of the sentences he is serving. *Held:* A prisoner serving concurrent sentences may use habeas corpus to attack the one sentence while still serving the other

34. In Russell v. Community Blood Bank, 196 So.2d 115 (Fla. 2d Dist. 1966), it was held that the supply of blood from a commercial blood bank was a sale and consequently, a cause of action was allowed for breach of an implied warranty.

35. The legislature then adopted FLA. STAT. § 672.316(5) (1969), which declared that any procurement or distribution of blood for transfusions is "the rendering of a service by any person participating therein, and does not constitute a sale, . . . and the implied warranties of merchantability . . . shall not be applicable. . . ." This effectively overrules the result of *Russell* and takes the blood bank out of the scope of liability based on implied warranty.

It is conceivable that a legislature might pass a similar statute declaring that blood shall not be considered an unreasonably dangerous product for the purposes of the imposition of strict tort liability, and thus avoid the result of the principal case.

1. Petitioner, James D. Frizzell, was incarcerated under two sentences for a term of ten years.

2. This alleged error was first raised and considered on a motion to vacate under FLA. R. CRIM. P. 1.850. The circuit court denied the motion and, on appeal, the District Court of Florida, Second District, affirmed, holding that in a collateral post-conviction proceeding a defendant cannot seek reversal for what his privately retained counsel failed to do. Frizzell v. State, 213 So.2d 293 (Fla. 2d Dist. 1968).

3. *Id.*

even though it will not entitle him to immediate release. *Frizzell v. State*, 238 So.2d 67 (Fla. 1970) (writ discharged on other grounds).[4]

The writ of habeas corpus is deeply rooted in the common law. Essentially, it is a writ of inquiry which challenges the jurisdiction of the court that incarcerated the prisoner.[5] It is a high prerogative writ which traditionally afforded relief only in cases of illegal confinement.[6] Originally, such a writ would not be issued unless it resulted in the immediate release of the prisoner from confinement. Therefore, even if a prisoner serving concurrent sentences successfully argued that one of them was unlawful, the writ would not lie for it would not result in his immediate release. Likewise, if a prisoner used the writ to challenge the validity of a consecutive sentence, the petition would be discharged as *premature*; the principal reason being the historical conception of habeas corpus as a remedy only for those unlawfully detained. Accordingly, the test for granting a petition was whether the issuance of the writ would result in the restoration of the petitioner's liberty.

In *McNally v. Hill*,[7] the United States Supreme Court established the federal rule that a writ of habeas corpus is unavailable to a petitioner unless his present confinement is pursuant to the challenged sentence. McNally was originally sentenced on a three-count indictment. While he was serving sentence for the second count, he sought habeas corpus relief on the ground that the third count was defective.[8] The Court refused to rule on the merits and discharged the writ as *premature*. Thus, in this narrow interpretation of the federal habeas corpus statutes,[9] the Supreme Court gave birth to the *prematurity rule*. Relying primarily upon historical precedent the Court interpreted *in custody* to mean both that petitioner be presently incarcerated under an invalid sentence[10] and that the issuance of the writ result in the prisoner's immediate release from confinement.[11]

4. The Court discharged the writ holding that the petitioner's contentions were "utterly devoid of merit." However, the Court expressly receded from all its prior decisions concerning the concurrent sentence doctrine and the prematurity rule.

5. The writ does not extend to the record itself but only reaches the body of the prisoner.

6. Fay v. Noia, 372 U.S. 391, 400 (1963).

7. 293 U.S. 131 (1934).

8. The petitioner contended that the third count did not state an offense under federal law. McNally v. Hill, 293 U.S. 131, 134 (1934).

9. In 1934, the statutes involved were 28 U.S.C. §§ 451-453. *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, *as amended*, 28 U.S.C. § 2241 (1964). The present statutory successor to 28 U.S.C. §§ 451-453, Section 2241 provides in part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless—
> (1) He is in the custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
> (3) He is in custody in violation of the Constitution or Laws or Treaties of the United States; . . .

10. McNally v. Hill, 293 U.S. 131, 136-37 (1934).

11. *Id.* at 137-38.

The fact that the United States Supreme Court began immediately to whittle away at the principle enunciated in *McNally* evidenced its weaknesses and foreshadowed its demise. *Ex Parte Hull*[12] was the first in a long line of decisions which circumvented the *McNally in custody* requirement. In *Hull*, the petitioner's parole was repealed because of a conviction which occurred during his parole period. Hull was thereafter remanded to prison to complete the term for his first conviction. The Court held that the petitioner could successfully challenge the second conviction notwithstanding that he was validly in custody under the first sentence. The governing rationale of the Court in not invoking the *prematurity rule* was that the validity of the petitioner's present confinement was entirely dependent on the second conviction.[13] Thus, in effect, the petitioner was in custody under the second sentence. Subsequent to *Hull* the Supreme Court relaxed its strictness in defining *custody*[14] and eventually struck down the prematurity rule in the landmark case of *Peyton v. Rowe*.[15] In *Rowe*, the Court held that a prisoner serving consecutive sentences is *in custody* under any one of them for purposes of habeas corpus proceedings.[16]

It is surprising that the Supreme Court took as many years as it did to strike down the untenable principle it established in *McNally*. Except for its adherence to the custody requirements of the federal habeas corpus statutes, the *prematurity rule* had no basis in logic or reason. Postponing the adjudication of invalid convictions diminishes the chances for both the prisoner and the state that "final disposition of the case [would] do substantial justice."[17] This follows since postponement results in the death of witnesses, dimmed memories, loss of records, and other impediments which were "bound to render it difficult or impossible to secure crucial testimony in disputed issues of fact."[18] Also, the *prematurity rule* in many instances led to the extended confinement of many prisoners entitled to release. This was clearly "at odds with a principle aim of the writ which [was] to provide swift judicial review of alleged unlawful

12. Ex Parte Hull, 312 U.S. 546 (1941).

13. In other words, the Court reasoned that the confinement should be treated as being caused by the challenged sentence, although technically Hull was not in custody under the challenged term. *Id.*

14. In Jones v. Cunningham, 371 U.S. 236, 243 (1963), the Court held, *inter alia*, that the prisoner, although paroled, was still very much "in custody" within the meaning of the federal habeas corpus statutes because the parole board imposed restrictions and conditions which "significantly confine and restrain his freedom."

Another example is the circuit court case of Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965), wherein the court held that when sentences to be served in the future bar one's eligibility for parole, the prisoner is validly "in custody" thereunder because a valid restraint on liberty exists.

15. 391 U.S. 54 (1968).

16. In Stepp v. Beto, 398 F.2d 814 (5th Cir. 1968), the court extended *Rowe* to the situation where one was serving concurrent sentences.

17. Peyton v. Rowe, 391 U.S. 54, 62 (1968).

18. *Id.* at 62.

restraints on liberty."[19] Prisoners were precluded from challenging consecutive or concurrent convictions until the end of the valid sentence for which they were in custody. Consequently, the time the prisoner remained in prison while attacking the alleged invalid sentence was time he should have spent as a free man. Thus, the effect of *Rowe* was to obviate the requirement of eligibility for immediate release and to provide for the fundamental right of swift judicial review.

Initially all state courts followed *McNally*, although they were never subject to its scriptures and were free to establish their own precedents. However, before the *McNally rule* was formally laid to rest in *Rowe*, a few state courts had already discarded the *prematurity rule*.

California, in *Ex parte Chapman*,[20] was the first state to question the propriety of the *McNally* dogma. The court overruled a demurrer which was based on the *prematurity rule* that the writ of habeas corpus cannot be issued unless the prisoner is entitled to immediate release. Apparently, the court recognized the harshness of the effect of the *prematurity rule* on parole eligibility.

Many other states have abandoned the *prematurity* concept in at least one of its aspects.[21] It is difficult to ascertain which states still adhere to the rule because a few provide statutory post-conviction remedies,[22] while others provide a broad remedy through the writ of error coram nobis. Under whatever guise the remedy might fall is of no consequence, so long as there exists some vehicle to challenge invalid sentences.

The Florida courts' treatment of the prematurity rule is essentially the same as that of the federal courts. Traditionally, the question of prematurity arose in the following situations:

1) *Concurrent Sentences, One of Which is Challenged.* The federal courts would not issue the writ in this situation, because even if a prisoner successfully challenged one sentence, he would still be legally *in custody* under the other. Florida has followed the federal decisions in all cases,[23] with the exception of one decision which can be easily reconciled.[24]

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19. *Id.* at 63.

20. 43 Cal. App. 2d 385, 273 P.2d 817 (1954).

21. *See, e.g.*, Commonwealth *ex rel.* Stevens v. Meyers, 419 Pa. 1, 213 A.2d 613 (1965), where in a well-documented opinion, Justice Roberts, speaking for the majority, traced the history of the archaic prematurity rule. In this writer's opinion, Mr. Robert's erudite discourse resulted in the United States Supreme Court's abrogation of the rule.

22. *See, e.g.*, ORE. REV. STAT. §§ 34.330, 138.510-.680 (1963). The statute does not expressly require that the petitioner be in custody for the sentence he is attacking.

23. Alderman v. State, 188 So.2d 803 (Fla. 1966); Hollingshed v. Mayo, 79 So.2d 774 (Fla. 1955).

24. In Dora v. Cochran, 138 So.2d 508 (Fla. 1962), petitioner successfully challenged a consecutive robbery conviction, notwithstanding that he was validly in custody for escape. At the time petitioner was convicted for robbery, he was a minor and notice was not given to his parents as required by FLA. STAT. § 932.38 (1969). Thus, petitioner was denied his constitutional right of procedural due process. The proper relief at that time was through

2) *Consecutive Sentences, the First of Which is Challenged.* In this situation the prisoner is illegally confined under the first sentence, but there exists a valid consecutive sentence. Thus, assuming arguendo that the courts issued the writ to invalidate the first sentence, the prisoner would then be detained under the valid consecutive sentence. Until 1968,[25] the federal courts refused to issue the writ in this situation.[26] On the other hand, Florida has never questioned the right of a prisoner to attack an invalid sentence presently being served.[27] Unlike the federal courts, Florida was never restricted by the *immediate release* concept[28] and thus, was free to issue the writ.

3) *Consecutive Sentences, the Second of Which is Challenged.* This was the *McNally* situation which the Supreme Court overruled in *Rowe* and which Florida, by way of very strong dicta, receded from in the instant case. It presented the greatest conceptual difficulty because the prisoner was neither confined under an illegal sentence nor (assuming a favorable decision) entitled to immediate release. Historically, this line of reasoning had a rational basis. The writ was primarily used to release from jail prisoners who had been sentenced erroneously. Today, however, the writ is not generally used to attack the jurisdiction of the sentencing court. Instead it is a means to challenge the grounds for the conviction and the procedures used by the court.

The state, in the instant case, argued that the abrogation of the applicability of the concurrent sentence doctrine to this situation would "result in a substantially increased load of cases on the already overburdened courts as persons serving several concurrent sentences attack each of them individually."[29] Similar attempts to resist change in the name of "judicial convenience" were inveighed against *Gideon*;[30] but to no avail. Judicial convenience does not outweigh the convenience to those imprisoned for far too long. Delaying a prisoner's right to attack any conviction on its merits would not aid the administration of justice; it would only postpone until tomorrow decisions which could be more fairly made today.

The *prematurity rule* was an anachronism in a society which has

habeas corpus proceedings. Today, such relief would be obtained through FLA. R. CRIM. P. 1.850 (formerly FLA. R. CRIM. P. 1).

25. The Supreme Court in Walker v. Wainwright, 390 U.S. 335 (1968), held that a prisoner can successfully challenge an invalid first sentence notwithstanding that there existed a valid consecutive sentence and that he would not be entitled to immediate release from confinement.

26. This was because of dicta in *McNally* to the effect that a writ of habeas corpus could not be used as a means of securing judicial decisions of questions which, even if determined in the prisoner's favor, would not result in immediate release. McNally v. Hill, 293 U.S. 131, 136-37 (1934).

27. Keene v. Cochran, 146 So.2d 364 (Fla. 1962); Vellucci v. Cochran, 138 So.2d 510 (Fla. 1962); Falagon v. State, 167 So.2d 62 (Fla. 2d Dist. 1964).

28. One of the provisions of 28 U.S.C. § 2255 (1964), in effect says that the prisoner must be entitled to immediate release.

29. Frizzell v. State, 238 So.2d 67, 69 (Fla. 1970).

30. Gideon v. Wainwright, 272 U.S. 335 (1963).

steadily increased the rights of prisoners. It belonged to an age where there was a distinct line between imprisonment and freedom. With the advent of modern penal, parole, and probation techniques the rule became obsolete.

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