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NOTES

CONSTITUTIONAL LAW — MOOT QUESTIONS — ADJUDICATION AFTER RELEASE OF PRISONER

Petitioner was convicted of forgery in a Texas District Court, and his conviction was affirmed by the Court of Criminal Appeals of Texas.[1] He applied to the latter tribunal for a writ of habeas corpus, alleging that he was denied due process of law guaranteed him by the Fourteenth Amendment because he was ill at the time of the trial and could not intelligently defend himself, and because he had been denied representation by counsel. Upon denial of his application for the writ, petitioner applied to the United States Supreme Court for a writ of certiorari. This application was denied per curiam.[2] Having exhausted state remedies, the petitioner sought relief under the federal habeas corpus act[3] in a federal district court, but he was again unsuccessful. The decision of the lower federal court was affirmed by the Fifth Circuit Court of Appeals,[4] and the United States Supreme Court granted certiorari.[5] However, before the case was heard, petitioner completed his sentence and was released from prison. The United States Supreme Court, in a per curiam opinion from which four Justices dissented, *held*, remanded, with directions to the district court to dismiss the application for the writ of habeas corpus. The Court will not adjudicate a matter in which its judgment cannot operate, and, as the only judicial relief provided for by the statute authorizing the issuance of the habeas corpus writ is the discharge of the prisoner or his admission to bail,[6] the issue has become moot. *Parker v. Ellis*, 80 Sup. Ct. 909 (U.S. 1960).

The United States Constitution provides that the federal judicial power shall extend to cases and controversies.[7] However, owing to the abstruseness of these terms, it seems that any actual circumscription of jurisdiction has been self-imposed by the

1. Parker v. State, 276 S.W.2d 533 (Tex. Crim. App. 1955).
2. Parker v. Ellis, 350 U.S. 971 (1956).
3. 62 STAT. 869 (1948), as amended, 28 U.S.C. §§ 2241-2255 (1959).
4. Parker v. Ellis, 258 F.2d 937 (5th Cir. 1958).
5. Parker v. Ellis, 359 U.S. 924 (1959) (the Court also granted permission to petition to proceed *in forma pauperis*). Petitioner's motion for assignment of counsel was allowed. Parker v. Ellis, 359 U.S. 951 (1959).
6. Citing McNally v. Hill, 293 U.S. 131 (1934).
7. U.S. CONST. art. III, § 2.

judiciary.[8] Over a century ago, in *Mills v. Green*,[9] the United States Supreme Court announced the principle of jurisdictional abnegation where "moot questions or abstract propositions" are presented the Court. The Supreme Court has adhered to this rule of abstention even to the extent of dismissing an already perfected appeal upon discovering that the case was moot at the time it was heard on appeal.[10]

One instance in which a case may become moot is by an alteration of the factual composition pending final disposition.[11] In *St. Pierre v. United States*,[12] the Supreme Court in a unanimous decision held that the expiration of the petitioner's sentence before the case was heard rendered the issue moot and necessitated the dismissal of the writ of certiorari.[13] Most state courts follow the position taken by the Supreme Court when dealing with the question of mootness due to the satisfaction of a crim-

8. The theory which seems to underlie this rule of abstention has its grass roots in the doctrine of *stare decisis*. Great importance is attached to decisions of the Court, as they constitute the precedents which are looked to as authority for subsequent adjudications in similar matters. Thus, it is vital to the judicial process that these precedents be sound and workable. The most competent way to arrive at a new precedent which will fulfill its purpose in the future is to have adversaries competing before the court over issues in which they have substantial interest. Consequently, the rule of non-adjudication on the merits of cases in which one side or the other has not a substantial interest developed; for the party lacking the requisite interest will not ordinarily make any real effort to urge the merits of his case, and hence the hazard of holding for the party on whose side the law may not be and thereby establishing poor precedents is present.

It is to be noted that there is a distinction between cases which the Court declines to hear on their merits because, as a policy matter, it rules that they do not meet the case or controversy requirement and those which were, but, owing to some alteration in the parties or facts, for example, are no longer to be considered cases or controversies. However, when it comes to drawing the distinction between these categories, the conclusions are seldom certain and arriving at them does not appear to serve any useful purpose.

9. Mills v. Green, 159 U.S. 651, 653 (1895): "The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) ("Judicial power can be exercised only as to matters . . . if they . . . constitute 'Cases' or 'Controversies'"); *Ex parte* Steele, 162 Fed. 694, 701 (N.D. Ala. 1908) ("a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy").

10. Gardner v. Goodyear Dental Vulcanite Co., 131 U.S. ciii (1873).

11. See STERN & GRESSMAN, SUPREME COURT PRACTICE 362 (2d ed. 1954); Diamond, *Federal Jurisdiction To Decide Moot Cases*, 94 U. PA. L. REV. 125, 133 (1946).

12. 319 U.S. 41 (1943). See also Bergdoll v. United States, 279 Fed. 404 (3d Cir. 1922), *cert. denied*, 259 U.S. 585 (1922).

13. Likewise, the Court has dismissed an appeal as moot when the appellant suffered the death penalty before his appeal was heard. Director of Prisons v. Court of First Instance of Cavite, 239 U.S. 633 (1915).

inal sanction.[14] Some of these courts have advanced the proposition that defendants who have paid a fine in lieu of imprisonment have waived the right to appeal.[15] However, other jurisdictions have rendered judgment on the merits in such appeals.[16] Several reasons for adjudication in such cases have been advanced by courts taking the minority position, the most common being that there should be an opportunity to eradicate the stigma which accompanies conviction.[17] It seems uncertain what minimum interest an ex-convict must show in order to obtain a hearing on the merits of the case which led to his conviction. It is certain that the decision in *St. Pierre v. United States*[18] stands for the narrow proposition that, in a case in which the already released petitioner fails to demonstrate that "under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment"[19] which has been satisfied, the appeal will be dismissed. However, since the *St. Pierre* decision, at least two cases of importance to this discussion have been decided by the Court. The first of these is *Fiswick v. United States*,[20] in which the Court held that service of sentence by the alien petitioner did not render his case moot, since the conviction might impair his defense to a deportation proceeding,

14. *E.g.*, State v. Conkling, 54 Kan. 108, 37 Pac. 992 (1894); McCarthy v. Wayne County Circuit Judge, 294 Mich. 368, 293 N.W. 683 (1940); People v. Melovicz, 221 Mich. 620, 192 N.W. 562 (1923); State v. Cohen, 45 Nev. 266, 201 Pac. 1027 (1921); *Ex parte* Kirk, 16 Okla. Cr. 722, 185 Pac. 706 (1919); Commonwealth v. Gipner, 118 Pa. 379, 12 Atl. 306 (1888); *Ex parte* Kent, 124 Tex. Cr. 31, 60 S.W.2d 786 (1933); State v. Zisch, 243 Wis. 175, 9 N.W.2d 625 (1943); Thoenig v. City of Adams, 236 Wis. 319, 294 N.W. 826 (1940).

15. State v. Conkling, 54 Kan. 108, 37 Pac. 992 (1894); People v. Melovicz, 221 Mich. 620, 192 N.W. 562 (1923); Commonwealth v. Gipner, 118 Pa. 379, 12 Atl. 306 (1888). It does not appear from the reports of these cases whether the sentences of the trial courts could have been stayed pending the appeals.

It is not captious to suggest that such treatment seems cavalier in light of the fact that "waiver" has traditionally embodied the concept of autonomous selection; and there is little doubt that a "pay-or-be-confined" atmosphere is hardly likely to conduce free exercise of the will in the forfeiture of appeal rights by payment. "The assumption . . . that a convicted defendant, who is ordered to be committed to jail, unless the fine and costs be paid or secured, and, under that threat from a *valid judgment*, pays the penalty assessed, does so *voluntarily*, is but a grim form of jesting, and utterly at war with the generally accepted notion of the meaning of that term." Somerville, J., in Johnson v. State, 172 Ala. 424, 430, 55 So. 226, 228 (1911). *A fortiori*, like rationalization to explicate a holding that one who, absent the element of choice, ended his time in a penal institution prior to final review of his case was without remedy is fraught with the same weakness.

16. *E.g.*, *In re* Byrnes, 26 Cal.2d 824, 161 P.2d 276 (1945); State v. Smiley, 98 Mo. 605, 12 S.W. 247 (1889); People v. Marks, 64 Misc. 679, 120 N.Y. Supp. 1106 (Gen. Sess. 1909); State v. Winthrop, 148 Wash. 526, 269 Pac. 793 (1928).

17. *In re* Byrnes, 26 Cal.2d 824, 161 P.2d 376 (1945); Village of Avon v. Popa, 121 N.E.2d 254 (Ohio App. 1953). *Cf.* People v. Chamness, 109 Cal. App. 778, 288 Pac. 20 (1930).

18. 319 U.S. 41 (1943).

19. *Id.* at 43.

20. 329 U.S. 211 (1946).

subject him to the loss of certain civil liberties, such as his voting franchise and office-holding rights, and lessen his chances of naturalization. The other is *United States v. Morgan*,[21] the majority opinion in which, relying on the authority of the *Fiswick* case, answered any contention of mootness with the statement: "Subsequent convictions may carry heavier penalties, civil rights may be affected."[22]

As the instant case involved certiorari to review the habeas corpus proceeding, a collateral attack which distinguishes it from direct reviews taken to the United States Supreme Court, consideration should be given to the federal habeas corpus act. In interpreting the federal writ, Mr. Justice Stone, in *McNally v. Hill*,[23] concluded his thorough examination of the history and significance of habeas corpus with the statement: "Without restraint of liberty, the writ will not issue."[24] The rule that *detention* is an absolute requisite for the issuance of the writ has been followed unwaveringly by the Court.[25] It would seem that the narrow, well-defined scope of the writ of habeas corpus justifies the majority opinion in the instant case.

The dissenting Justices would interpret the statute allowing the writ to issue from federal courts so as to permit adjudication on the merits of the petitioner's appeal even after his incarceration had ceased.[26] This result at which the dissenters would have arrived indicates an assumption that the adjudication on the merits would have been constitutional. However, even pretermitting the question of statutory interpretation, it may be

21. 346 U.S. 502 (1954).
22. United States v. Morgan, 346 U.S. 502, 512 (1954).
23. 293 U.S. 131, 138 (1934).
24. Citing Stallings v. Splain, 253 U.S. 339 (1920); Wales v. Whitney, 114 U.S. 564 (1885).
25. In Heflin v. United States, 358 U.S. 415, 421 (1959), Justice Stewart, concurring, wrote: "The very office of the Great Writ, its only function, is to inquire into the legality of the *detention of one in custody*." (Emphasis added.)
26. "The Court has not hesitated to expand the scope of habeas corpus beyond its traditional inquiry into matters of technical 'jurisdiction.' The statute permitted this adaptation in the interests of 'law and justice,' and the Court has responded to the demands of that compelling standard. We have the same latitude in this case, and the character of the writ does not impose upon applicants what will amount to a 'time-is-of-the-essence' strait jacket." Dissenting opinion of Chief Justice Warren, in which he was joined by Justices Black, Douglas, and Brennan, Parker v. Ellis, 80 Sup. Ct. 909, 916 (U.S. 1960). "It is the fault of the courts, not Parker's fault, that final adjudication in this case was delayed until after he had served his sentence. Justice demands that he be given the relief he deserves. Since the custody requirement, if any, was satisfied when we took jurisdiction of the case, I would grant the relief as of that date." Justice Douglas, with whom the Chief Justice concurred, dissenting, Parker v. Ellis, 80 Sup. Ct. 909, 923 (U.S. 1960).

wondered whether such a result would comply with the decisions of the Supreme Court relative to justiciability under the "case or controversy" concept. Were adjudication held to be appropriate under the circumstances of the instant case, there can be no doubt that the requirement of true adversity in proceedings before the Court would be greatly diminished. When the petitioner in the instant case satisfied the sentence imposed upon him by the State of Texas, the respondent, General Manager of the Texas Prison System, ceased to have any interest in his further detention. Thus, it appears that should the decision which the dissenters urged have obtained, it would not only have been an unwarranted expansion of the traditional limitations of the writ of habeas corpus, but also it would accord with neither the spirit nor the letter of the constitutional demand for adversity.

The instant case poses yet another problem, *viz.*, its possible impact on the rule derived from the *Fiswick* and *Morgan* cases. It is suggested that, considering the fact that the petitioner in the instant case did apprise the Court of the conviction's potentially adverse effects on his civil rights,[27] if his case had come before the Court on direct review, rather than as a collateral attack under the habeas corpus statute, the case would have received attention on its merits in spite of the petitioner's release. The fact that four Justices would have heard the case despite the limited scope of the writ of habeas corpus strengthens this conclusion. It is felt the allowance of such reviews would not do violence to the adversity requirement, because the state would be the adverse party and its interest in maintaining proper convictions would be opposed to that asserted by ex-convicts in seeking to have their convictions overturned.

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CRIMINAL LAW — SUFFICIENCY OF STATUTORY DEFINITION UNDER STATE AND FEDERAL CONSTITUTIONS

Defendant, a nightclub dancer, was charged with a violation of the Louisiana obscenity statute,[1] in having allegedly commit-

27. Brief for Petitioner, pp. 29-30, Parker v. Ellis, 80 Sup. Ct. 909 (U.S. 1960).

1. LA. R.S. 14:106(3) (1950).