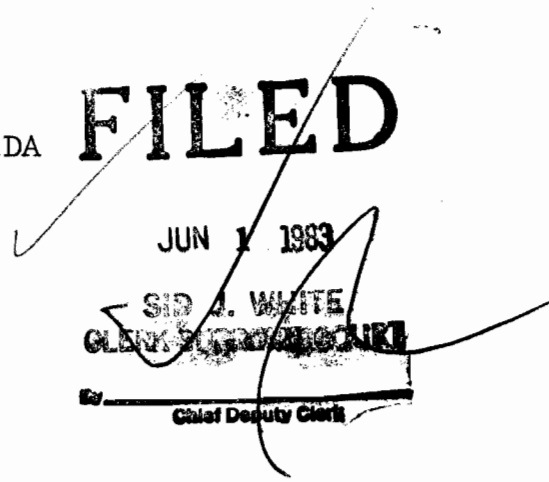
IN THE SUPREME COURT OF FLORIDA



JOHN H. JAMASON, and JAMES GABBARD,

Petitioners,

vs.) CASE NO. 63,571

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND THE FACTS

The opinion of the District Court sets out certain facts "in brief". Since, however, this appeal stems from a certified question regarding the Petitioners' refusal to obey a telephonic "order", given in lieu of a forthcoming written order, more facts must be provided.

On January 18, 1982, John Melody was taken into custody by officers of the police department of the City of West Palm Beach.

It is generally agreed that Melody received his rights, after which he was taken into an interrogation room for both questioning and polygraphing. (R. 30, 178).

Attorney Gomberg arrived at the station having been retained by Melody's "wife" (later identified as his girl friend) to represent Melody, and demanded to see his client. (R. 31).

Refused access, Gomberg wanted the police to tell Melody that he had been hired and would like to speak to him. This, too, was refused.

Gomberg left the station.

A short time later, Lt. Gabbard received a telephone call from Judge Barkett. The Judge informed Gabbard that she was issuing an oral writ of habeas corpus for Melody.

Gabbard, at this time, had absolutely no idea whether Gomberg or someone on his staff had applied for the

writ in writing, or had presented evidence, or any other fact supporting his eventual legal arguments regarding jurisdiction. All Gabbard knew was that he was being ordered by the court.

Gabbard refused to obey.

Judge Barkett was turned over to Chief Jamason who, again, was totally ignorant of any happenings surrounding Gomberg's application to the court. (R. 140).

Judge Barkett repeated her "oral" writ, but, in doing so, advised Jamason that the written order was en route to him! (R. 83, 119).

When the writ arrived at the jail, it was intercepted by Major Mann of the police department. (R. 61). Although a simple document, expected from Judge Barkett, the Major was compelled to study it until 12:35, p.m.

Meanwhile, while the writ was "detained" by Major Mann, the suspect was shipped out to the county jail.

This failure to permit service of the writ was not held against the Petitioners, but happened nonetheless.

As a final point relating to their "good faith", it must be noted that the Petitioners were told to obey any oral writ, or challenge it properly, by the attorneys they consulted. (R. 35, 60). At no time were they advised they could ignore it.

That decision was made by Chief Jamason, who apparently felt that the only way to contest the writ and bring the issue "to a head" was to defy it.

CERTIFIED QUESTION

WHETHER THE WILLFUL REFUSAL TO OBEY A TELEPHONIC ORDER (IN THE NATURE OF A WRIT OF HABEAS CORPUS) ISSUED BY A COURT OF GENERAL JURISDICTION AND BASED UPON AN ORAL APPLICATION THEREFOR BY AN ATTORNEY FOR THE INDIVIDUAL SAID TO BE ILLEGALLY RESTRAINED, MAY CONSTITUTE CRIMINAL CONTEMPT.

It is suggested that the certified question be answered in the affirmative.

The Petitioners argue forcefully that no one may ever petition for a writ of habeas corpus in any way, under any circumstance, despite any emergency, or for any reason, unless the (perceived) strict procedural niceties of chapter 79 Florida Statutes are satisfied.

The Petitioners further assert that the court may not, by telephone, communicate the writ to the police and have it obeyed, even if it is subsequently delivered.

Finally, the Petitioners assert that they have the right to simply refuse to comply with court orders they perceive as being improper.

A APPLICATION FOR HABEAS CORPUS

The means by which one may apply for a writ of habeas corpus has become an issue in this case. This is because, by good fortune, and after their contemptuous defiance of the court, the Petitioners discovered that the writ issued on oral application. The Respondent wonders what their case would be if the request had turned out to be written.

The Petitioners assert that "jurisdiction" flows from the act of taking a request and reducing it to writing.

Article I §13 , Florida Constitution, states:

> "The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety."

The Respondent submits that the terms "of right", "freely" and "returnable without delay" do not anticipate a legal process by which mandatory procedural hoops must be "jumped through", even in extremely exigent circumstances.

If exigencies may permit a warrantless arrest, or a warrantless search, why can they not permit an emergency, oral application for habeas corpus relief?

Even the Petitioner's cited cases confess that applications for writs of habeas corpus are not bound by the rules of pleading. Crane v. Hayes, 253 So.2d 435 (Fla. 1971); Sneed v. Mayo, 66 So.2d 865 (Fla. 1953).

The fact is that courts are free to treat any communication, where necessary, as a petition for habeas corpus relief. Little v. Wainwright, 287 So.2d 124 (Fla.4th DCA 1973); Anglin v. Mayo, 88 So.2d 918 (Fla. 1956); Gibbs v. Wainwright, 303 So.2d 7 (Fla. 1974).

The Petitioners cite a number of general decisions regarding the need for service of process in a traditional civil case, and somehow manage to confuse post conviction "habeas corpus" under §2242, USC, with our situation.

Then, of course, the Petitioners drag out some "scenarios".

The Respondent would also indulge in a scenario. In this scenario a suspect in a major felony escapes justice because over zealous cops extract a confession out of him while a valid request for habeas corpus is being dictated, typed, proofread, photocopied, delivered to the clerk, a file is opened, it is transported to the judge and "satisfactory physical evidence" (which the Petitioners seem to insist does not include direct testimony) is presented.

It is submitted that under the Petitioners' odd theory of habeas corpus, they would get their confession - but the confession would be suppressed and the criminal set free.

Again we restate that the exigent writ of habeas corpus is no less valid than the exigent search or warrantless arrest.

This is why Florida Statutes 79.01 does not require that the application for writ of habeas corpus be in writing.

B. COMMUNICATION OF THE WRIT

The second question involves delivery of the writ. Here, again, the Respondents invoke the double standard.

Judge Barkett informed Chief Jamason that her "oral" writ was being followed by actual delivery of the written "writ". Indeed, this was done.

The analogy must again be made to search warrants. Once a valid warrant has been issued, the purely ministerial act of delivery is not an absolute prerequisite to the actual

search. State v. Henderson, 253 So.2d 158 (Fla. 4th DCA 1971); State v. Williams, 374 So.2d 609 (Fla. 3rd DCA 1979); Nofs v. State, 295 So.2d 308 (Fla. 2d DCA 1974).

Chief Jamason knew Judge Barkett, and had himself obtained oral "orders" from her. He knew the caller was a judge who had issued a valid order, an order that was in the process of being delivered to him.

Judge Barkett's oral pronouncement of a written order of the court was valid and binding from its pronouncement, even though not yet typed. Brisend v. Perry, 417 So.2d 813 (Fla. 5th DCA 1982); Luhrs v. State, 394 So.2d 137 (Fla. 5th DCA 1981).

The Respondent does not wish to advocate a system of unrecorded oral decrees, but submits that a phone call can effectively "deliver" an order which is in the process of being written. Indulging in another scenario, the classic example of the telephone call which stops an execution comes to mind.

Serious rights, not just of Melody, but of the people and state were at risk. Jamason and Gabbard's selective reliance upon written orders could cause a felon to go free. Like Pontius Pilate, they could "wash their hands" and blame the "system" - but in truth the fault would lie with them.

C. DEFIANCE OF THE COURT

First, Jamason, at least, knew the written order was en route, and had a legal duty to prevent non compliance with the writ; including not interfering with its delivery. See

Brown v. Cook, 260 P.2d 544 (Utah 1953); Eatchel v. Lamphere, 463 P.2d 457 (Colo. 1970).

By diverting the written order to Major Mann, who somehow needed to study the document until 12:35, p.m., while shipping Melody out the back door, it becomes obvious that the dispute had escalated beyond an intellectual discourse on habeas corpus. (Again, the Judge charitably did not hold this against the Petitioners, despite being within her rights to do so).

The Petitioners, despite receiving legal advice to obey the writ, chose to bypass the legal process and contest the writ by ignoring it.

The Fourth District addressed this issue, quoting from United States v. Dickenson, 465 Fed.2d 496, 510 (5th Cir. 1972):

> "...the deliberate refusal to obey an order of the court without testing its validity through established processes requires further action by the judiciary."

In Dickenson, a "gag rule" which clearly and grossly violated the First Amendment was ignored by the defendant, a news reporter. The "gag rule" was eventually held to be illegal, but the contempt conviction was affirmed, the court stating:

(at 509)

> "There remains the very formidable question of whether a person may with impunity knowingly violate an order which turns out to be invalid. We hold that in the circumstances of this case he may not."

In Walker v. City of Birmingham, 388 U.S. 307, 87

S.Ct. 1824, 1832 (1967) civil rights activists chose to contest an injunction restraining a planned demonstration. The order was clearly illegal, but rather than a lawful court challenge, Walker just ignored the order. His contempt conviction was affirmed, with the Supreme Court holding:

> "No man can be judge in his own case, however exalted, however righteous his motives."

Accord: Howatt v. Kansas, 42 S.Ct. 277 (1922); So. Railway v. Lanham, 408 Fed. 2d 348 (5th Cir. 1969).

Jamason and Gabbard disobeyed Judge Barkett's valid order even though, at the time, they had no idea that the application (for the writ) was oral. They had no idea what evidence the Judge had received.

They did, however, know that a "written" writ was in transit to them.

The serendipitous (post contempt) discovery that lawyer Gomberg made an "oral" application provoked their only hope; a jurisdictional defense.

It is not disputed that Circuit Courts in Florida have subject matter jurisdiction to issue writs of habeas corpus. Chapter 79, Florida Statutes.

Habeas corpus proceedings, however, are not "actions" or "lawsuits ", but are "summary remedies" designed as a means to test, quickly, one's detention. State ex rel Deeb v. Fabinski, 111 Fla. 454, 152 So.2d 207 (1934); Ex Parte Amos 93 Fla. 5, 112 So.2d 289 (Fla. 1927).

Since"Habeas Corpus" is a constitutional writ granted freely and of right, on informal application, the courts have retained their broad, common law powers to utilize the great writ. Passett v. Chase, 107 So.2d 689 (Fla. 1926). The cited sections of the Florida Statutes do not in any manner restrict jurisdiction.

The second question involves in personam jurisdiction. Again, the application for habeas corpus need not be "served", as this is not a "lawsuit". The defendant was clearly within the Court's jurisdiction, as were the police.

This brings us back to the question of whether in personam jurisdiction over the Petitioners existed prior to delivery of the writ.

Again, it is submitted that the telephone call constituted sufficient service to effect the writ.

As noted by the Fourth District, however:

> "We need not decide the issue, however, as it involves jurisdiction over the person, which, if defective, renders the order voidable only, not void. One may not disobey with impunity the order of a court which is merely voidable, as here."

Crane v. Hayes, 253 So.2d 435 (Fla. 1971) noted the difference between a court's personal jurisdiction for purposes of habeas corpus and personal jurisdiction as to any underlying civil case. There, this court found jurisdiction for habeas corpus despite a lack of jurisdiction to modify an underlying custody decree. (Note: The father was held in contempt for ignoring a custody decree - this was vacated for want of juris-

diction, but the mother's contempt for ignoring the writ of habeas corpus was not even challenged).

Thus, Jamason and Gabbard were properly held in contempt for openly defying a valid court order.

CONCLUSION

The certified question of the Fourth District should be answered in the affirmative.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to David Roth, Esquire, P.O. Box 3466, West Palm Beach, Florida 33402; Larry Klein, Esquire, Suite 201 - Flagler Center, 501 S. Flagler Drive, West Palm Beach, Florida 33401; and Leon St. John, Esquire, 325-C Clematis Street, West Palm Beach, Florida 33401, this 31 day of May, A.D. 1983.

OF COUNSEL