The Burger Court Opinion Writing Database

Swain v. Pressley

430 U.S. 372 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 8, 1977

Re: 75-811 - Swain v. Pressley

MEMORANDUM TO THE CONFERENCE:

Enclosed is concurring opinion in the above. I may refine it somewhat.

Regards,

Swain v. Pressley
No. 75-811

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Circulated: MAR 3 1977

Recirculated:

MR. CHIEF JUSTICE BURGER concurring:

I join Section I of the Court's opinion and concur in the Court's judgment. However, I find it unnecessary to examine the adequacy of the remedy provided by section 110(g) for I do not consider that the statute in any way implicates the respondent's rights under the Suspension Clause, Art. I, § 9, cl. 2 of the Constitution.

The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted. See, Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 Chi. L. Rev. 142, 170 (1970 The scope of the writ during the seventeen and eighteenth centuries has been describe as follows:

> Once a person had been convicted by a superior court of general jurisdiction a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court.

Oaks, Legal History in the High Court, 64 Mich. L. Rev. 451, 468 (1966). Thus,

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: MAR 10 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-811

C. L. Swain, Superintendent, Lorton Reformatory, Petitioner, *v.* Jasper C. Pressley.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1977]

MR. CHIEF JUSTICE BURGER concurring in part and concurring in the judgment.

I join Part I of the Court's opinion and concur in the Court's judgment. However, I find it unnecessary to examine the adequacy of the remedy provided by § 110 (g) for I do not consider that the statute in any way implicates the respondent's rights under the Suspension Clause, Art. I, § 9, cl. 2, of the Constitution.

The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 Chi. L. Rev. 142, 170 (1970). The scope of the writ during the 17th and 18th centuries has been described as follows:

> "Once a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court." Oaks, Legal History in the High Court, 64 Mich. L. Rev. 451, 468 (1966).

Thus, at common law, the writ was available (1) to compel adherence to prescribed procedures in advance of trial; (2) to inquire into the cause of commitment not pursuant to judicial

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 16, 1977

Re: 75-811 - Swain v. Pressley

MEMORANDUM TO THE CONFERENCE:

In response to John's new footnote 13 I have amended my concurrence to make it clear that, in the context of Judge Friendly's article the quote as I originally had it very accurately reflects the Friendly view. Any implication that Friendly endorsed the "ratchet" theory of habeas corpus is quite firmly refuted by inter alia the following quote:

> "It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did."

38 U.Chi. L.Rev. at 170 (footnote omitted). See also, id, footnote 142 where Judge Friendly characterizes as unconvincing a law review note which endorsed the "ratchet" theory.

In any case, I have now inserted the above quote from Friendly's article at the end of the first full paragraph of page 2 of my concurrence, and have deleted the quote with which John's footnote took issue. I hope that this will avoid any possible misunderstanding.

Regards,

WEB

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

3rd DRAFT Recirculated: MAR 18 1977

SUPREME COURT OF THE UNITED STATES

No. 75-811

C. L. Swain, Superintendent, Lorton Reformatory, Petitioner, *v.* Jasper C. Pressley.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1977]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, concurring in part and concurring in the judgment.

I join Part I of the Court's opinion and concur in the Court's judgment. However, I find it unnecessary to examine the adequacy of the remedy provided by § 110 (g) for I do not consider that the statute in any way implicates the respondent's rights under the Suspension Clause, Art. I, § 9, cl. 2, of the Constitution.

The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 170 (1970). The scope of the writ during the 17th and 18th centuries has been described as follows:

> "Once a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court." Oaks, Legal History in the High Court, 64 Mich. L. Rev. 451, 468 (1966).

Thus, at common law, the writ was available (1) to compel adherence to prescribed procedures in advance of trial; (2) to inquire into the cause of commitment not pursuant to judicial

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated:

Recirculated: MAR 18 1977

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-811

C. L. Swain, Superintendent, Lorton Reformatory, Petitioner, *v.* Jasper C. Pressley.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1977]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, concurring in part and concurring in the judgment.

I join Part I of the Court's opinion and concur in the Court's judgment. However, I find it unnecessary to examine the adequacy of the remedy provided by § 110 (g) for I do not consider that the statute in any way implicates the respondent's rights under the Suspension Clause, Art. I, § 9, cl. 2, of the Constitution.

The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted. The scope of the writ during the 17th and 18th centuries has been described as follows:

> "Once a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court." Oaks, Legal History in the High Court, 64 Mich. L. Rev. 451, 468 (1966).

Thus, at common law, the writ was available (1) to compel adherence to prescribed procedures in advance of trial; (2) to inquire into the cause of commitment not pursuant to judicial process, and (3) to inquire whether a committing court had

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 11, 1977

RE: No. 75-811 Swain v. Pressley

Dear John:

Please join me.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 8, 1977

75-811, Swain v. Pressley

Dear John,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 11, 1977

Re: No. 75-811 - Swain v. Pressley

Dear John:

Please join me.

Sincerely,

Mr. Justice Stevens

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 16, 1977

Re: No. 75-811, Swain v. Pressley

Dear John:

Please join me.

Sincerely,

T.M.

Mr. Justice Stevens

cc: The Conference

HAB

March 14, 1977

Re: No. 75-811 - Swain v. Pressley

Dear Chief:

I am sympathetic to the position you have taken in your concurring opinion. The following suggested changes represent my thinking. If you feel free to incorporate them into your opinion, I shall join you; if not, I shall probably set them forth separately:

1. Substitute the following for the first sentence of the first full paragraph on page 2:

> "Dicta to the contrary in Fay v. Noia, 372 U.S. 391 (1963), have since been shown to be based on an incorrect view of the historic function of habeas corpus. Schneckloth v. Bustamonte, 412 U.S. 218, 252-56 (1973) (Powell, J., concurring)."

2. Revise the seven lines of the last paragraph to read as follows:

> "Since I do not believe that the Suspension Clause requires Congress to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction, I see no issue of constitutional dimension raised by the statute in question. 'What Congress has given, Congress can . . . take away.' Friendly, supra, 38 U. Chi. L. Rev., at 171. Under this view of the case, I need not consider the important constitutional question whether the Suspension

Clause protects the jurisdiction of the Article III courts. A doctrine that allowed transfer of the historic habeas jurisdiction to an Article I court could raise separation-of-powers questions, since the traditional Great Writ was largely a remedy against executive detention. See P. Bator, et al., Hart and Wechsler's The Federal Courts and the Federal System 1513-14 (2d ed. 1973). However, I agree . . . "

Sincerely,

HAB

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 16, 1977

Re: No. 75-811 - Swain v. Pressley

Dear Chief:

Please join me in the recirculation today of your opinion concurring in part and concurring in the judgment.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 16, 1977

No. 75-811 Swain v. Pressley

Dear John:

Please join me in your opinion for the Court.

In view of the Chief's concurring opinion, I think I will add something along the following lines:

> "I concur in the opinion of the Court. In view, however, of the concurrence filed today by the Chief Justice, I write merely to make clear that I do not read Part II of the Court's opinion as being incompatible with the views I have expressed previously with respect to the nature and scope of habeas corpus. Scknecloth v. Bustamonte, 412 U.S. 218, 250 (Powell, J., concurring)."

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-811

C. L. Swain, Superintendent, Lorton Reformatory, Petitioner, *v.* Jasper C. Pressley.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1977]

MR. JUSTICE POWELL, concurring.

I concur in the opinion of the Court. In view, however, of the concurrence filed today by THE CHIEF JUSTICE, I write merely to make clear that I do not read Part II of the Court's opinion as being incompatible with the views I have expressed previously with respect to the nature and scope of habeas corpus. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 250 (1973) (POWELL, J., concurring).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 11, 1977

Re: No. 75-811 - Swain v. Pressley

Dear Chief:

Please join me in your concurring opinion.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: MAR 8 1977

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–811

C. L. Swain, Superintendent, Lorton Reformatory, Petitioner, *v.* Jasper C. Pressley.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

NO WRIT

[March —, 1977]

MR. JUSTICE STEVENS delivered the opinion of the Court.

Respondent is in custody pursuant to a sentence imposed by the Superior Court of the District of Columbia.[1] He has filed an application for a writ of habeas corpus in the United States District Court for the District of Columbia asking that court to review the constitutionality of the proceedings that led to his conviction and sentence. The question presented to us is whether § 110 (g) of the District of Columbia Code [2] prevents the District Court from entertaining the application.

[1] He received concurrent sentences of 32–96 months and 20–60 months following his conviction of grand larceny and larceny from the District of Columbia Government, in violation of 22 D. C. Code §§ 2201 and 2206. He is now on parole.

[2] 23 D. C. Code § 110 provides:

"(a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

"(b) A motion for such relief may be made at any time.

"(c) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 10, 1977

Re: 75-811 - Swain v. Pressley

Dear Bill:

Potter has suggested that I add the enclosed footnote 13A on page 9. I think this is a good suggestion and is consistent with your comment to me yesterday.

I will probably add the enclosed footnote 14A on page 10.

Respectfully,

John

Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Personal

March 11, 1977

Re: 75-811 - Swain v. Pressley

Dear Bill:

In reviewing page 8 of my draft, I find that I did not accurately state the first part of the Government's argument. I have therefore made changes in the text as indicated on the enclosure. I have also made a second attempt at a reference to The Chief Justice's concurrence which may remove your objection. Frankly, one reason for the quote from Judge Friendly's article is to include the word "partially" which The Chief conveniently omitted from his quotation. See his concurrence at p. 2.

Respectfully,

JPS

Mr. Justice Brennan

pp. 2, 8
Footnotes renumbered.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: Mr. Justice Stevens

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 75–811

Recirculated: 3/16/77

C. L. Swain, Superintendent, Lorton Reformatory, Petitioner, *v.* Jasper C. Pressley.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1977]

MR. JUSTICE STEVENS delivered the opinion of the Court.

Respondent is in custody pursuant to a sentence imposed by the Superior Court of the District of Columbia.[1] He has filed an application for a writ of habeas corpus in the United States District Court for the District of Columbia asking that court to review the constitutionality of the proceedings that led to his conviction and sentence. The question presented to us is whether § 110 (g) of the District of Columbia Code[2] prevents the District Court from entertaining the application.[3]

[1] He received concurrent sentences of 32–96 months and 20–60 months following his conviction of grand larceny and larceny from the District of Columbia Government, in violation of 22 D. C. Code §§ 2201 and 2206. He is now on parole.

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"(b) A motion for such relief may be made at any time.

"(c) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice

[*Footnote 3 is on p. 2*]

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 17, 1977

Re: 75-811 - Swain v. Pressley

MEMORANDUM TO THE CONFERENCE

Enclosed please find a copy of page 8 containing some minor revisions in footnote 13.

Respectfully,

John

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAR 17 1977

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-811

C. L. Swain, Superintendent, Lorton Reformatory, Petitioner, *v.* Jasper C. Pressley.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1977]

MR. JUSTICE STEVENS delivered the opinion of the Court.

Respondent is in custody pursuant to a sentence imposed by the Superior Court of the District of Columbia.[1] He has filed an application for a writ of habeas corpus in the United States District Court for the District of Columbia asking that court to review the constitutionality of the proceedings that led to his conviction and sentence. The question presented to us is whether § 110 (g) of the District of Columbia Code [2] prevents the District Court from entertaining the application.[3]

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"(c) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice

[*Footnote 3 is on p. 2*]