IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-85,447-01

EX PARTE JEREMY WADE PUE, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS CAUSE NO. CR2008-214-1 IN THE 207TH DISTRICT COURT FROM COMAL COUNTY

YEARY, J., filed a dissenting opinion.

DISSENTING OPINION

Today the Court grants habeas relief to a defendant on the basis of his claim that one of two paragraphs in his indictment relied upon by the State to enhance his punishment should have been unavailable for enhancement purposes because it was not a "final" conviction. He argues that, because the conviction was not—he claims—a "final" conviction, it should not have been relied upon as a reason to enhance his punishment. Because it was relied upon as an enhancement, he has suffered an "illegal sentence," which this Court has held can be challenged at any time. *See Mizell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003) ("A trial or appellate court which otherwise has jurisdiction over a criminal conviction may always notice and correct an illegal sentence."). As I expressed only a few

weeks ago in dissenting under similar circumstances, the Court should not grant habeas corpus relief without first addressing the propriety of reaching such a claim when raised for the first time in a post-conviction habeas corpus proceeding. *Ex parte Clay*, ___ S.W.3d ___ (Tex. Crim. App., No. WR-87,763-01, dec. Jan. 31, 2018). Because the Court grants relief without addressing this fundamental threshold issue, I dissent.

What strikes me immediately about the Applicant's claim is that it is not a direct claim that a sentence is illegal in the sense addressed by this Court in *Mizell*. There, the issue the Court addressed was whether the sentence was illegal because it was "outside the maximum or minimum range of punishment [that was] unauthorized by law and therefore illegal." 119 S.W.3d at 806. Here, in contrast, the defendant claims that his sentence is "illegal" because of some error that occurred preliminary to the imposition of sentence. He focuses on an error that occurred at his trial that he then, in turn, claims to have caused the sentence assessed to be illegal, *i.e.*, an offense was improperly alleged and proven as an enhancement, and the finding of true to that enhancement permitted him to be sentenced outside the proper legal range.

I have no quarrel with the notion that an "illegal sentence"—that is to say, a sentence that on its face falls outside the range of punishment authorized by law—should be regarded as cognizable even if complained of for the first time in post-conviction habeas proceedings. A trial court judge who sentences a third degree felon to a term of life in the penitentiary, for example, has imposed a sentence that far exceeds that which is authorized by law. Quite apart

from the wishes of the parties themselves, society simply will not tolerate the imposition of any punishment beyond the legal maximum. *See Gutierrez v. State*, 380 S.W.3d 167, 175 (Tex. Crim. App. 2012) (observing that "the requirement that a defendant be sentenced within the statutorily applicable range of punishment is an 'absolute and nonwaivable' feature of the system within the *Marin* rubric, the contravention of which can be raised at any time") (referencing *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993)). I agree that the flouting of any such systemic requirement or prohibition ought to be subject to a judicial remedy even if not raised until initial post-conviction habeas corpus proceedings. *Ex parte Moss*, 446 S.W.3d 786, 788 (Tex. Crim. App. 2014). But not every claim of "illegal sentence" rises to this level of systemic requirement or prohibition so as to justify entertaining it when it is only raised for the first time in an initial habeas corpus collateral attack.[1]

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[1] Judge Keel's concurring opinion accuses me of inconsistency. *See* Concurring Opinion at 2 ("On the one hand, [my dissenting opinion] would grant relief from a sentence that is outside the non-enhanced range of punishment even if raised for the first time on habeas. * * * On the other hand, however, the dissent advocates limiting habeas relief *to* cases in which the sentencing error was not apparent from the direct appeal record.") (emphasis added). That is indeed my position (more or less), but there is no inconsistency inherent in it. A sentence that, on its face, exceeds the maximum sentence authorized for the grade of offense for which a defendant is convicted would, in my estimation, fall within *Marin*'s first category—systemic requirements or prohibitions so vital to the proper functioning of the criminal justice system that their violation is subject to correction even when raised for the first time in a post-conviction writ application, as we recognized in *Moss*. But a sentence that appears on the face of the record to be authorized, but which may be subject to challenge, does not necessarily rise to that level. There is nothing inconsistent about accepting the proposition that a sentence that blatantly exceeds the statutory maximum may be collaterally attacked while at the same time accepting that a sentence that has apparently been enhanced, but that may be subject to challenge based upon some aspect of the prior conviction used to enhance, should likewise be subject to vindication when challenged for the first time in a collateral attack only if for some

The Court today cites *Ex parte Rich*, 194 S.W.3d 508, 511 (Tex. Crim. App. 2006), for the proposition that we have applied the *Mizell* "illegal sentence" principle to review previous post-conviction claims of defective enhancements. Majority Opinion at 3 n.7. In *Rich*, one of the enhancement paragraphs alleged a prior felony, but later-developed evidence showed that it had been reduced to a misdemeanor, and thus was not available for felony enhancement. It is true that we granted post-conviction relief under these circumstances. But in doing so, we also observed that "[t]he fact that the record on direct appeal would not have revealed that there was a problem with Applicant's sentence makes habeas corpus the appropriate avenue for affording him relief." *Id*. Whether the "illegal sentence" principle should apply to justify habeas corpus relief when the appellate record *does* affirmatively reveal the defect in the enhancement process, as in the present case, remains uncertain from our case law. *Rich* does not unequivocally support the proposition that the Court cites it for today.

Moreover, there is other case law that seems to conflict with the Court's reading of *Rich*. In 1982, this Court handed down its opinion on rehearing in a case called *Hill v. State*, 633 S.W.2d 520 (Tex. Crim. App. 1982) (op. on reh'g). On original submission in *Hill*, a case on direct appeal, the Court had set aside the conviction because one of the prior

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reason it could not have been raised on direct appeal of if it was not raised on direct appeal because of the ineffectiveness of counsel. Judge Keel simply declares, without elaboration, that "[t]here is no principled reason for granting relief in one circumstance but not the other." Concurring Opinion at 2. The principle requiring the result that her concurring opinion rejects is simply that, if a non-category-one *Marin* claim can be raised on direct appeal, then it should be or else it will be forfeited.

convictions used to enhance the punishment to habitual status had later proven to be invalid on the ground that the appellant had not had the assistance of counsel when he appeared in court for the pronouncement of sentence. *Id*. at 522 (op. on orig. subm.). The Court reversed itself on rehearing, however, holding that "the failure to object at trial to the introduction of proof of a[n] allegedly infirm prior conviction precludes a defendant from thereafter attacking a conviction that utilized the prior conviction." *Id*. at 525 (op. on reh'g). And we soon applied the holding of *Hill* to deny relief for claims of improper enhancement raised for the first time in post-conviction habeas corpus proceedings. *See Ex parte Ridley*, 658 S.W.2d 177 (Tex. Crim. App. 1983) ("The failure to object at trial to the introduction of an infirm prior conviction precludes the defendant from thereafter collaterally attacking the conviction that utilized the infirm conviction."); *Ex parte Cashman*, 671 S.W.2d 510, 512 (Tex. Crim. App. 1984) (op. on. reh'g) (refusing to grant habeas relief with respect to a claim that one of the prior convictions used to enhance had been invalidated because the applicant had made no trial objection to the use of the prior conviction to enhance, relying on *Hill* and *Ridley*).

It thus appears that the *Mizell* principle that an "illegal sentence" may be raised "at any time," regardless of whether there was a contemporaneous objection lodged at trial, does not apply with respect to improper-enhancement claims—or at least not *all* (and maybe not even *most*) improper-enhancement claims. *See* George E. Dix & John M. Schmolesky, 43B TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 59:55, at 886-87 (3d ed. 2011) ("*Hill* and *Cashman* thus bar habeas attack—if no proper trial demand for relief was made—when a

habeas applicant asserts that a prior conviction used for enhancement was tainted by denial of his constitutional right to counsel or by permitting the same jury that found him competent to also determine guilt or innocence. An applicant relying upon the State's use of such a prior conviction must most likely both plead and prove both the invalidity of the prior conviction and a trial request for appropriate trial relief.").

Since the Court decided *Hill*, *Ridley*, and *Cashman*, it has qualified their holdings. Even in *Hill* itself, the Court acknowledged that an objection might not be required to collaterally attack prior convictions "based upon void charging instruments." 633 S.W.2d at 523.[2] And, indeed, in subsequent cases, we continued to grant post-conviction habeas corpus relief to reverse convictions with enhanced sentences based upon prior convictions that were predicated on fundamentally defective indictments, since such indictments had deprived the convicting courts—in those prior convictions—of jurisdiction to render judgments in the first place. *See*, *e.g.*, *Duplechin v. State*, 652 S.W.2d 957, 957-58 (Tex. Crim. App. 1983) (distinguishing *Hill* on the basis that the prior conviction had been based upon a fundamentally defective indictment, and granting relief on appeal despite the lack of a trial objection); *Ex parte White*, 659 S.W.2d 434, 435 (Tex. Crim. App. 1983) (continuing to grant

[2] In several pre-*Hill* cases, the Court had granted relief in post-conviction habeas corpus cases on claims of improper enhancement because one of the prior convictions used to enhance had been based upon a fundamentally faulty charging instrument. *Ex parte Sanford*, 562 S.W.2d 229, 230 (Tex. Crim. App. 1977); *Ex parte Howeth*, 609 S.W.2d 540, 541 (Tex. Crim. App. 1980); *Ex parte Nivens*, 619 S.W.2d 184, 185 (Tex. Crim. App. 1981). We explained in *Nivens* that we were granting relief "despite the fact [that] the petitioner offered no objection" to the charging instrument at the time of trial, but we did not explain why that should be so. 619 S.W.2d at 185.

post-conviction habeas corpus relief for a claim that an enhancement had been improper, notwithstanding *Hill*, because the prior conviction had been predicated on a fundamentally defective charging instrument); *Ex parte Todd*, 669 S.W.2d 738, 739 (Tex. Crim. App. 1984) (granting post-conviction habeas corpus relief because "[i]t is an exception to the [*Hill*] rule that . . . the prior conviction complained of is based on a void indictment").[3]

But the Court has not laid out what other types of defects in prior convictions—making them unfit for use to enhance subsequent sentences—may serve to obviate *Hill*'s contemporaneous objection requirement. And, specifically, so far as I can tell, since *Hill* was decided, the Court has never addressed whether the error of using a prior conviction that was not final to enhance a punishment falls under the *Hill* rule requiring a contemporaneous objection, or the *Hill* exception for "fundamental" defects. Until we do, the Court should not grant relief based upon such a claim.

What is more, even if the *Hill* exception should apply, rather than the rule, that would

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[3] Of course, since the 1985 amendment that added Subsection (b) to Article 1.14 of the Code of Criminal Procedure, there are precious few defects in a charging instrument that will render it "fundamentally defective" in the sense that would justify habeas corpus relief. *See* Acts 1985, 69th Leg., ch. 577, § 1, p. 2197, eff. Dec. 1, 1985 (requiring a trial level objection to defects of form or substance in a charging instrument before a defendant may raise any such complaint on appeal or in post-conviction proceedings); George E. Dix & John M. Schmolesky, 42 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE §25:18, at 32-33 (3d ed. 2011) ("The 1985 changes appeared for all practical purposes to abolish the category of 'fundamental' defects, at least insofar as a matter constitutes 'a defect, error, or irregularity of form or substance in an indictment or information.' Such matters must be raised before trial under Article 1.14(b) of the Code of Criminal Procedure and therefore are by statute 'nonfundamental' in the traditional sense."); *Studer v. State*, 799 S.W.2d 263 (Tex. Crim. App. 1990).

mean that Applicant could have raised his improper enhancement claim for the first time on direct appeal. He did not.[4] We suggested in *Ex parte Rich* that the failure to do so may itself constitute a procedural default that would prohibit a later collateral attack on post-conviction habeas corpus. *See* 194 S.W.3d at 513 & n.9 (noting that "our holdings in *Ex parte Nelson*, 137 S.W.3d 666 (Tex. Crim. App. 2004), and *Ex parte Townsend*, 137 S.W.3d 79 (Tex. Crim. App. 2004), limit the ability of inmates to bring claims on habeas corpus that they could have raised on direct appeal," but declining to impose that limitation to Rich himself because the impropriety of the enhancement in his case was not apparent from the appellate record). In other contexts, we have recently addressed the question of whether an error that can be, but is not, raised for the first time on appeal is thereby procedurally defaulted for purposes of raising it in post-conviction habeas corpus proceedings. *Cf. Ex parte Carter*, 521 S.W.3d 344, 347-48 (Tex. Crim. App. 2017) (because applicant could have raised his improper-cumulation claim for the first time on appeal, but did not, he forfeited it for purposes of post-conviction habeas corpus relief, under *Townsend*); *Ex parte Marascio*, 471 S.W.3d 832, 834-36 (Tex. Crim. App. 2015) (Keasler, J., concurring) (inquiring whether an issue, not subject to contemporaneous objection at trial in order to be raised on appeal, may

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[4] In his writ application, Applicant also alleges ineffective assistance of both trial and appellate counsel for failing to fully investigate the finality of the California conviction. The scope of our file and set seems to have extended to Applicant's ineffective counsel claims. As I advocated in *Clay*, the Court should remand the present application to the convicting court for factual development of this issue. *See Ex parte Clay*, slip op. at 8 (Yeary, J., dissenting) (urging the Court to remand to address the applicant's alternative claim of ineffective assistance of counsel).

nevertheless be procedurally defaulted for post-conviction habeas corpus purposes by not raising it on appeal). The Court should not grant relief in a post-conviction proceeding on a claim of improper enhancement without also first addressing, if necessary, whether that claim is forfeited because not raised on direct appeal.[5]

The Court today acknowledges that not all purported claims of "illegal sentence" will necessarily prove to be "automatically . . . cognizable" in post-conviction habeas corpus proceedings. Majority Opinion at 3 n. 7. I am glad for that. But the Court offers neither a limiting principle nor any explanation why it deems Applicant's particular claim of improper enhancement to fall within the *Hill* exception instead of the *Hill* rule. Indeed, the Court does not recognize or discuss our holding in *Hill* at all. In my view, resolution of the issue that the Court addresses today—which forum's law will control the question of whether an out-of-state conviction is "final" for habitual-enhancement purposes—is purely advisory in the

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[5] Another example of this principle of forfeiture-on-direct-appeal is legal sufficiency of the evidence. We have said that a claim of legally insufficient evidence need not be preserved in the trial court in order to raise it on appeal. *Rankin v. State*, 46 S.W.3d 899, 901 (Tex. Crim. App. 2001). A claim of legal sufficiency is *not* cognizable, however, in state post-conviction collateral attack. *Ex parte Perales*, 215 S.W.3d 418, 419 (Tex. Crim. App. 2007). Perhaps legal sufficiency is not cognizable in habeas, not because it is not a claim of constitutional dimension (since it *is*), but because it can always be raised on direct appeal, and habeas is not a substitute for appeal. *See Ex parte Nelson*, 137 S.W.3d at 667 ("We have said countless times that habeas corpus cannot be used as a substitute for appeal, and that it may not be used to bring claims that could have been brought on appeal."). A claim that there is *no* evidence *whatsoever* to support a conviction, by contrast, is always cognizable in a post-conviction habeas corpus proceeding, regardless of whether it was, or could have been, raised at any previous stage. *Ex parte Perales*, 215 S.W.3d at 419-20. The notion must be that a conviction based upon *no* evidence is so antithetical to the proper functioning of the criminal justice system that it simply will not be tolerated; it should be remedied even if it comes to the judicial attention only for the first time in an initial post-conviction application for writ of habeas corpus.

absence of a principled holding that a claim of improper enhancement is cognizable in a post-conviction collateral attack to begin with.

There is good reason to think that the *Hill* rule, not the *Hill* exception, ought to apply. The Court's recent opinion in *Proenza v. State*, ___ S.W.3d ___, 2017 WL 5483135, No. PD-1100-15 (Tex. Crim. App., del. Nov. 15, 2017), provides some guidance. There the Court said that, when the law places an onus or positive duty on the trial judge to comply, regardless of the will of the parties, then a party need not complain at trial concerning the lack of compliance in order to preserve a complaint for appeal. *Id*. at *7. Such a claim is not forfeitable. The *Mizell* "illegal sentence" principle presumes that a trial judge has just such a duty to refrain from sentencing a defendant to a punishment beyond the statutorily applicable range.[6] *See Grado v. State*, 445 S.W.3d 736, 741 (Tex. Crim. App. 2014) ("In the absence of a defendant's effective waiver, a judge has an independent duty . . . to identify the correct statute under which a defendant is to be sentenced[.] * * * The unfettered right to be sentenced by a sentencing judge who properly considers the entire range of punishment is a substantive right necessary to effectuate the proper functioning of the criminal justice system. * * * The nature of this right is too significant to the judicial system to conclude

[6] Judge Keel says I have read too much into *Mizell*, because in that case the jury assessed the unauthorized punishment, not the judge. Concurring Opinion at 2-3. But a jury may only assess punishment within the range authorized by law, as reflected in the jury charge the trial court has given it. When a jury purports to assess a punishment that is, on its face, more harsh than either the law or the jury charge authorized, a trial judge still has a duty to refrain from actually imposing that unauthorized sentence.

that it is extinguished by mere inaction."). The criminal justice system simply will not tolerate any upward deviation.[7]

But we have never identified a comparable duty on a trial court's part to police the legitimacy of the State's allegations and proof when it comes to punishment enhancement counts. The system does not expect the trial court to monitor the adequacy or finality of the prior convictions alleged to enhance in order to ensure its own authority to impose a sentence within an enhanced range. The onus is instead placed on the defense to investigate the legitimacy of the State's enhancement counts, and to call any apparent deficiencies to the trial court's attention. In the absence of an objection, the trial court has no particular reason to doubt its authority to assess an enhanced sentence. The goal of preventing potentially unauthorized enhancements is not so critical to the proper functioning of the criminal justice system as to outweigh the State's legitimate interest in the repose of its final convictions.[8] Such claims ought not to be regarded as subject to post-conviction collateral attack under the *Mizell* rubric of "illegal sentence."

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[7] By contrast, and notwithstanding the *Mizell* principle, the system *will* sometimes tolerate a sentence that is less than the statutory *minimum* under certain circumstances. In *Deen v. State*, 509 S.W.3d 345, 351 (Tex. Crim. App. 2017), we recently reiterated that an appellant may be estopped from collaterally attacking an illegally *lenient* sentence, if he bargained for that sentence and subsequently "accepted the benefit of the lenity in the judgment he collaterally attacks."

[8] *See Ex parte Pointer*, 492 S.W.3d 318, 325 (Tex. Crim. App. 2016) (Yeary, J., concurring) ("After all, habeas corpus is an extraordinary remedy. The effect of post-conviction habeas corpus relief is to upset society's hard-won conviction—a conviction that in many cases has already survived the rigorous scrutiny of an appeal. The State has a legitimate interest in maintaining the finality of such convictions.").

In an improper-enhancement claim, the "illegality" of the sentence is what I would call derivative. The enhanced sentence is not illegal on its face; the illegality is dependent upon some ancillary finding of fact that renders a sentence, which appeared to be authorized at the time it was imposed, ultimately improper.[9] But what limiting principle does the Court propose to this potential Pandora's Box it is opening? When, in the Court's view, will an "illegal sentence" claim prove to be too derivative to be sustained on habeas? My concern is that there may be no end to the situations in which applicants may claim—on post-conviction habeas, no less—that some ordinary error in the process led to their having been sentenced illegally. It makes me wonder whether there are any limits, anymore, to the claims that can be brought on post-conviction collateral attack.

I respectfully dissent.

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[9] In *Rich*, the finding of fact that rendered the enhancement illegal was not readily apparent on the appellate record, and the improper-enhancement claim was arguably deemed cognizable in post-conviction habeas corpus proceedings only because the facts rendering the enhancement illegal could not have been developed in time to raise the claim on direct appeal, despite trial and appellate counsels' best efforts. 194 S.W.3d at 513 & n.9. Applicant in this case may be entitled to habeas corpus relief on the basis of his claim of ineffective assistance of counsel, but the Court today grants relief without resort to that claim. *See* note 4, *ante*. I would not, as Presiding Judge Keller suggests, simply grant relief on an ineffective assistance of counsel claim without first remanding the case to the trial court for development of a record showing why both trial and appellate counsels failed to raise the issue that the Court resolves today.