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IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK GRANATO,

Plaintiff-Appellant,

-v-

THE SALT LAKE COUNTY GRAND JURY, et al.,

Defendants-Respondents.

Case No. 14425

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the
District Court of Salt Lake County
Honorable Ernest F. Baldwin, Jr., Judge

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and D. FRANK WILKINS
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FILED

AUG 6 - 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK GRANATO,	:	
Plaintiff-Appellant,	:	
-v-	:	Case No. 14425
THE SALT LAKE COUNTY GRAND JURY, et al.,	:	
Defendants-Respondents.	:	

REPLY BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE,

DISPOSITION IN THE LOWER COURT,

RELIEF SOUGHT ON APPEAL,

STATEMENT OF THE FACTS (Relating to Indictment), and

STATEMENT OF THE FACTS (Relating to Habeas Corpus)

are as previously stated and explained in the appellant's original brief.

ARGUMENT

Point I

A PERSON RELEASED ON BAIL HAS APPROPRIATE RELIEF BY HABEAS CORPUS PROCEEDINGS TO CHALLENGE THE CONSTITUTIONALITY OF THE RESTRAINT OF HIS LIBERTY.

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The respondents totally rely on ancient case law to support the position that a person released from custody on bail is not so restrained of his liberty as to be entitled to a writ of habeas corpus. Stallings v. Splain, 253 U.S. 339, 77 A.L.R.2d 1308 (1920). However, in Hensley v. Municipal Court, San Jose Milpitas J.D., Cal., 411 U.S. 345 (1973), the United States Supreme Court completely rejected the respondents' position and ruled that a person released on bail is in sufficient constructive custody to permit the application for a writ of habeas corpus. Expressly overruling Stallings, supra (see Hensley, footnote 8), the Court reasoned that although a person released on bail is not in actual physical confinement, the restraint on his freedom of movement is a sufficient restraint of his liberty to warrant the issuance of a writ of habeas corpus.

> He [the accused] cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobedience is itself a criminal offense. The restraint on his liberty is surely no less severe than the conditions imposed on the unattached reserve officer whom we held to be in custody in Strait v. Laird, supra. 411 U.S. at 351.

The Supreme Court's position in Hensley, supra, is not one unrecognized by other courts, but, in fact, reflects the position taken in the majority of state and federal jurisdictions when a person released on bail seeks habeas corpus as a remedy for illegal restraint. 411 U.S. at

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349. According to the majority position, the writ of habeas corpus must be administered with initiative and flexibility.

> The very nature of the writ demands that it be administered with initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected. (Citations omitted.)
>
> Thus, we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the nanacles of arcane and scholastic procedural requirements. The demand for speed, flexibility and simplicity is clearly evident in our decisions concerning the exhaustion doctrine. (Citations omitted, emphasis added.) 411 U.S. at 350.

As the Supreme Court has "consistently rejected interpretations of the habeas corpus statute that would suffocate the writ or hobble its effectiveness," it is incumbent that the Utah Supreme Court make a similar ruling. Rule 65B(f), Utah Rules of Civil Procedure provides that habeas corpus is the proper remedy when it appears that "any person is unjustly imprisoned or otherwise restrained of his liberty." (Emphasis added.) A reading of In re Petersen, 51 Cal. 2d 177, 331 P.2d 24, cert. denied, 360 U.S. 314 (1958), and Franklin v. State, 513 P.2d 1252 (Nev. 1973) indicates the widely adopted position that a person released on bail may utilize the pretrial remedy of habeas corpus to challenge the constitutionality of the legislation restraining him or to challenge the

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sufficiency of probable cause to hold him for trial. Due to the appellant's attack on the constiutionality of the legislation restraining him, and due to his allegations of insufficiency of probable cause to hold him for trial, he must be afforded appropriate relief by habeas corpus proceedings. Thus, the trial court erred in dismissing the appellant's complaint for failure to state a claim for which relief could be granted. Any other conclusion would contradict the position taken by the majority of courts today, hobble the effectiveness of the writ of habeas corpus and would oppose the position taken by the United States Supreme Court in the recent case of Hensley v. Municipal Court, supra.

Point II

AFTER AN INDICTMENT IS RETURNED AND AN ACCUSED IS ARRESTED, THERE IS NO REASON TO DENY A REQUEST FOR VERBATIM COPIES OF TRANSCRIPTS OF GRAND JURY WITNESSES.

The respondents' argument in Point II of their brief rests on the theory that the historical secrecy of grand jury proceedings warrants the denial of appellant's request for verbatim copies of transcripts of witnesses who testified against him. Relying on United States v. Kirkland, 5 Utah 123, 13 P. 234 (1887), respondents urge that secrecy of grand jury proceedings should be retained after an indictment has been returned and the accused has been arrested. The Kirkland decision perhaps reflects this court's position in 1887 but does not indicate its more recent rulings on the question of secrecy.

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In State v. Faux, 9 Utah 2d 350, 345 P.2d 186 (1959), the Utah Supreme Court came to a conclusion opposite to the respondent's position, wherein it was stated:

> It will be noted that after the indictment is returned and an accused is arrested, the reasons for secrecy have largely been spent. At 187.

The historical foundation of the respondents' argument concerning the need for secrecy in the present case has crumbled in a more recent Utah decision, Faux, supra. Because the appellant has been indicted and arrested, the reasons for secrecy of grand jury proceedings are nonexistent, and his request for verbatim copies of witnesses' transcripts was improperly denied.

Point III

THERE IS NO REASON TO JUSTIFY THE LOWER COURT'S DENIAL OF APPELLANT'S MOTION FOR A PRELIMINARY EXAMINATION.

The respondents do not deny that, according to Utah case law, an accused charged by information has a fundamental right to a preliminary examination, whereas the appellant, charged with the crime of bribery, was denied such fundamental right by the trial court. The appellant was denied a preliminary hearing by the mere fact that he was indicted rather than charged by information. There thus exists a striking discriminatory procedure in bringing the appellant to trial by denying him a fundamental right afforded all other defendants in criminal

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matters. Apart from the denial of a preliminary examination, the appellant shares the same fundamental rights enjoyed by the defendant charged by information; e.g., the right to a jury trial, the right to remain silent, etc. The inequities apparent in bringing the appellant to trial must be cured unless there exists some compelling reason justifying such discriminatory procedural practice in this state. Jackson v. Indiana, 406 U.S. 715 (1972); Baxtrom v. Herold, 383 U.S. 107 (1966); Humphrey v. Cody, 405 U.S. 504 (1972).

Respondents have failed to produce any reason indicating why a person charged by information has a pretrial right to a determination of probable cause by a neutral and detached magistrate while such pretrial determination in the present case was left solely to the grand jury who received evidence only from the prosecutor. The absence of any compelling reason justifying the discrimination against the appellant mandates this court to conclude that he, as well as other defendants, has a fundamental right to a pretrial preliminary examination of probable cause by a neutral magistrate.

Relying on the case of Thiede v. Territory of Utah, 159 U.S. 510 (1895), the respondents argue that an indictment, standing alone, establishes probable cause sufficient to bring the accused to trial. However, the Thiede decision was rendered before Utah achieved statehood and before the Utah Constitution was adopted. Article I, Section 13 of the Utah Constitution provides that persons charged by information or

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indictment have a right to a preliminary examination by a magistrate unless such examination is waived. It would seem proper for this court to accept the language of the Constitution of the State of Utah rather than the 81-year-old Thiede decision which was rendered before the Constitution was adopted. Reliance on the Utah Constitution mandates the conclusion that the trial court erred in denying the appellant's motion for a preliminary examination of probable cause by a magistrate.

Point IV

AFTER AN INDICTMENT IS RETURNED AND AN ACCUSED IS ARRESTED, THERE IS NO REASON TO DENY A REQUEST TO TAKE DEPOSITIONS OF GRAND JURY WITNESSES.

Respondents have failed to produce any valid reason to support the position that the appellant should be afforded pretrial discovery rights inferior to those of a defendant in a civil case. At page 20 of their brief, respondents contend that the secrecy of the grand jury would be destroyed if the appellant were permitted to depose grand jury witnesses. However, appellant's request for depositions was made after he had been indicted and arrested, at a time when no reason for secrecy exists. (See Point II of this reply brief.) Thus his request avoids any threat of destruction to the grand jury system.

As noted on pages 23 and 24 of appellant's brief, at least four justices of this present court have agreed that a defendant in a criminal case should be granted equal if not superior pretrial discovery

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rights to those enjoyed by a defendant in a civil matter. Such majority agreement with the appellant's position mandates a ruling that the lower court erred in denying his request to take depositions.

CONCLUSION

The authority for the respondents' arguments throughout their brief is antiquated to the degree of being inapplicable in the present case. Recent case law, including the Hensley decision, supra, indicates that the appellant's application for a writ of habeas corpus was his proper remedy due to his constitutional attack on the restraint of his liberty. The appellant's requests to obtain verbatim copies of transcripts and to take depositions in no way threatens the secrecy of the grand jury system as these requests were made after indictment and arrest. In light of the fact that no such threat has been made and due to the respondents' failure to provide any compelling reason justifying the denial of a preliminary examination by a magistrate, the appellant's restraint is illegal and in violation of the Utah Constitution and the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

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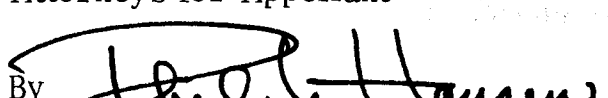
By 
Phil L. Hansen

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief of Appellant was served on counsel for the respondents, R. Paul Van Dam, Salt Lake County Attorney, C-220 Metropolitan Hall of Justice, Salt Lake City, Utah 84111; Walter R. Ellett, 5085 South State Street, Murray, Utah 84107; and Stephen H. Anderson, 400 Deseret Building, Salt Lake City, Utah 84111, by delivering two copies thereof on the 6th day of August, 1976.

Kaye Dalley, PLS

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