

1978

# Randy A. Ziegler v. William Milliken and State of Utah : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

----- :  
RANDY A. ZIEGLER, :

Plaintiff-Appellant, :

-vs- :

Case No.  
15533

WILLIAM MILLIKEN and  
STATE OF UTAH, :

Defendants-Respondents. :  
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BRIEF OF RESPONDENTS  
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APPEAL FROM A JUDGMENT IN THE THIRD  
JUDICIAL DISTRICT COURT, IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH, DIS-  
MISSING WITH PREJUDICE APPELLANT'S  
PETITION FOR A WRIT OF HABEAS CORPUS,  
THE HONORABLE DEAN E. CONDER, JUDGE  
-----

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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RANDY A. ZIEGLER, :  
Plaintiff-Appellant, :  
-vs- : Case No.  
WILLIAM MILLIKEN and : 15533  
STATE OF UTAH, :  
Defendants-Respondents. :  
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BRIEF OF RESPONDENTS  
-----

STATEMENT OF THE NATURE OF THE CASE

The plaintiff-appellant is appealing the dismissal of his petition for writ of habeas corpus filed in the Third District Court, Salt Lake County, State of Utah, by the Honorable Dean E. Conder.

DISPOSITION IN THE LOWER COURT

The court below granted the respondent's motion to dismiss the petition because the writ is not the proper avenue in Utah to challenge the administrative processes of the prison.

RELIEF SOUGHT ON APPEAL

The respondent seeks an affirmance of the decision of the lower court.

## STATEMENT OF FACTS

The appellant, a prisoner at the Utah State Prison, initiated this action pro se by filing two virtually identical pleadings entitled "A petition for a writ of habeas corpus" (R.1-13). Those pleadings contained no prayer for relief, nor has any subsequent pleading. The appellant alleges that he has been subjected to conditions at the prison that constitute cruel and unusual punishment. He also alleges denial of due process, religious discrimination, denial of access to legal materials, denial of access to the mails, and physical abuse. No allegations were made regarding the processes that led to his conviction, or that he has made an effort to seek redress by any other means.

On September 15, 1977, the application and motion to dismiss were heard by the Third District Court, with the appellant now represented by Randall Gaither. No witnesses were called and the parties argued the role of 65B(i) and 65B(f) of the Utah Rules of Civil Procedure in the application (T.1-4), the unavailability of the writ to challenge prison conditions (T.5-9), and the availability of other means of redress (T.9-11). Counsel were requested to submit memoranda on the points argued, and on November 2, 1977, the court granted the respondents' motion for

dismissal (R.31). The court based its decision on Utah case law and the availability of relief both before the Board of Corrections and under 42 U.S.C. § 1983.

## ARGUMENT

### POINT I

HABEAS CORPUS IS NOT GENERALLY AVAILABLE TO CHALLENGE THE CONDITIONS OF CONFINEMENT IN THE STATE PRISON.

The Great Writ of Habeas Corpus is one of the cornerstones of democracy, a traditional remedy that has been administered with initiative and flexibility in the courts. Because of the important role it has played in the development of constitutional law, it should be used in a discriminate manner. The primary use of the writ has been to seek release of persons actually in custody, by challenging the conditions that led to their imprisonment. Currently, there is a developing body of case law that recognizes the use of the Great Writ to challenge the conditions of a prisoner's confinement. See Summary in Armstrong v. Cardwell, 457 F.2d 34 (6th Cir. 1972). With the increased recognition being given to the constitutional rights of prisoners, the writ is certain to become an important instrument in the protection of these rights.

"The Writ is not now and never has been a static, narrow, formalistic remedy." Peyton v. Rowe, 391 U.S. at 66 (1968). The real issue presented in this case is under what circumstances might habeas corpus be available to the state prisoner to challenge the constitutionality of the conditions of his confinement.

While there are still many jurisdictions that adhere firmly to the position that habeas corpus is not available to challenge anything other than the conditions precedent to confinement, Dutton v. Eyman, 95 Ariz. 96, 387 P.2d 799, cert. denied 377 U.S. 913 (1963), Bishop v. Sheriff, Clark County, 88 Nev. 441, 498 P.2d 1340 (1972), or that it is not available in the absence of a statute authorizing its use, In re Application of Dunn, 150 Neb. 669, 35 N.W.2d 673 (1949), the Utah Supreme Court has maintained a consistent position that the Great Writ is available to challenge the conditions of confinement only in a "rare case" in which the petitioner has been subjected to cruel and unusual punishment. Chapman v. Graham, 2 Utah 2d 156, 270 P.2d 821 (1954); Smith v. Turner, 12 Utah 2d 66, 362 P.2d 581 (1961).

The Utah Rules of Civil Procedure deal with the use of habeas corpus in Rules 65B(i) and 65B(f). It is clear that Rule 65B(i) is not available to the prisoner to



challenge anything other than the proceedings which resulted in his commitment. However, under Rule 65B(f), "habeas corpus proceedings shall be granted whenever it appears to the proper court that any person is unjustly imprisoned or otherwise restrained of his liberty." The balance of 65B(f) lists the conditions under which habeas corpus will be granted. It seems that in that "rare case" when habeas corpus is available to challenge conditions of imprisonment, Rule 65B(f) is the appropriate section.

The mere availability of habeas corpus to the prisoner to challenge the conditions of confinement should not mean that it be used as a general remedy. The Great Writ is one that should be used sparingly. It has traditionally been used to correct conditions that society finds outrageous or clearly against its moral standards. Weems v. United States, 217 U.S. 349 (1910). While numerous courts, state and federal, recognize the availability of the Writ, its actual use has been severely limited. Among the key factors that have been considered by the courts in applications for the Writ are the availability of other relief, and the likelihood that the conditions complained of will continue. In the Oregon Appellate case of Newton v. Cupp, 30 Or.App. 434, 474 P.2d 532 (1970), the plaintiff alleged a number of brutal beatings, and the likelihood

that they would continue. The court there addressed many of the problems attendant to the relief of habeas corpus, but addressed a key issue when it stated "to hold that habeas corpus is also unavailable would be to leave the petitioner in the medieval position of possessing a right for which there exists no remedy." Newton, supra, at 535. By so stating, the Oregon court recognized the limited availability of civil remedies to the prisoner to protect his constitutional rights. The Oregon court also discussed two other problems that are of significance. First, the need of the prison to place reasonable limits on some freedoms to maintain order in the prison and protect the lives of employees and other inmates. Second, that release from imprisonment is not the only available remedy in a habeas corpus action; corrective measures may be sufficient relief. Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967).

None of the cases cited by the appellant in his brief stand for that proposition that habeas corpus is generally available for the relief sought by appellant. In the Oregon case, Newton, supra, the prisoner was trapped by a conflict in Oregon statutes which severely restricted his remedies. The federal courts have granted habeas

corpus to prisoners in instances where prison regulations have effectively eliminated any other means of redress. Johnson v. Avery, 393 U.S. 483 (1969). In Bryant v. Harris, 465 F.2d 365 (7th Cir. 1972), where the petitioners had been in solitary confinement for as long as 230 days, and prison policy worked a severe limitation on religious freedom, the court found that habeas corpus may be available. In Ex Parte Hull, 312 U.S. 546 (1941), the prison had a regulation that prohibited an inmate application for habeas corpus without prior approval by prison officials. The court held only that the application for the writ cannot be regulated at the prison. In at least two California cases, In Re Allison, 57 Cal.Rptr. 593, 425 P.2d 193, cert. denied 389 U.S. 876 (1967), and In Re Riddle, 22 Cal.Rptr. 472, 372 P.2d 304, cert. denied 371 U.S. 914 (1926), the court recognized the availability of habeas corpus to challenge prison conditions, but read the use of that remedy to be available only upon a proper showing of cruel and unusual punishment.

The federal and state courts that have granted hearings on conditions of confinement have done so where the petitioner's other remedies were effectively foreclosed, or where further attempts at relief were futile because of

lack of assurances that their claims would be heard elsewhere. Wilwording v. Swenson, 404 U.S. 249 (1971). These conditions do not exist in the immediate case. The application for the writ has been often considered, but seldom granted.

In the instant case there is no evidence that the petitioner has made any effort to seek administrative relief, or relief through any other remedy. There is a growing body of case law which indicates that 42 U.S.C. § 1983 is a more appropriate measure of relief in these circumstances than a writ of habeas corpus. The availability of this remedy has been recognized by the Utah Supreme Court in Kish v. Wright, 525 P.2d 625 (Utah 1977), as an action that can properly be initiated within the jurisdiction of the state.

If the action is brought in federal court, the petitioner need not have exhausted his state court remedies. Wilwording v. Swenson, supra. In addition, he need not request "total release" as a remedy. The use of Section 1983 makes available injunctive or declaratory relief and damages, as well as the potential for class actions. In the instant case, where the petitioner asserts a claim of violation of his constitutional rights, Section 1983 would provide a more effective remedy.

The petitioner does have other forms of relief available to him other than habeas corpus. These include administrative remedies as well as suits under 42 U.S.C. § 1983. The petitioner has made no effort to seek these remedies, and he has a duty to do so. Chapman, supra.

#### POINT II

THE UTAH SUPREME COURT AND OTHER STATE SUPREME COURTS HAVE ESTABLISHED THE CRITERIA UNDER WHICH A PETITION FOR A WRIT OF HABEAS CORPUS WILL BE CONSIDERED WHEN CONDITIONS OF CONFINEMENT ARE CHALLENGED.

In Smith, supra, the Utah Supreme Court acknowledged the need of the prisoner to direct an appeal to the warden or to the Board of Corrections to allow them an opportunity to take action if they deem it merited by the conditions alleged. The Kansas Supreme Court, in a very well reasoned case, Levier v. State, 209 Kan. 442, 497 P.2d 265 (1972), accepted this requirement as a prerequisite to an application for the writ. The Kansas court went further when it said at 273 that "the particular type of administrative procedure to be employed should be left to the sound discretion of correctional authorities so as to accommodate the needs of the penal system as well as the interests of the inmates." The proceeding must afford the inmate the basic elements of due process.

It is a generally accepted rule that prisoners are entitled to the protection of their constitutional rights, even while imprisoned. Logan v. United States, 144 U.S. 263 (1896); Levier, supra. But at the same time, the fundamental distinction between free citizens and those who have lawfully been subjected to imprisonment cannot be ignored. Courts have universally held that they should not substitute their judgment for that of prison officials, Smith, supra; Hughes v. Turner, 14 Utah 2d 128, 378 P.2d 888 (1963); and as long as the punishment imposed is not so unreasonable as to be characterized as vindictive, cruel or inhuman, there should be no right of judicial review. Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963). Disciplinary measures properly administered in accord with reasonable prison regulations are not subject to judicial review. Levier, supra at 272. It must be kept in mind that prison officials face unique problems in the area of discipline, and conditions imposed by them to remedy a situation should not be subject to constant scrutiny by the courts. Nor should the prisoners be allowed to test the rules by violating them in hope of a subsequent finding by the courts that the rules were constitutionally improper. In re Harrell, 87 Cal.Rptr. 504, 470 P.2d 640, cert. denied 401 U.S. 914 (1970). This

possibility alone supports the requirement that the prisoners seek administrative relief first. This possibility also supports the position of many courts that if the condition or restriction alleged to be violative of the prisoner's constitutional rights has been corrected, or will be corrected in the very near future, that no action for habeas corpus ought to lie. Armstrong, supra. The prisoner must be required to show that the condition complained of is likely to continue. Mootness is a factor that must be considered by the courts in this context.

The initial showing that every prisoner should be compelled to make before a petition for habeas corpus will be considered by any court is that he has made use of his administrative remedies; or a clear showing that any effort in that direction will be futile. The prisoner should also be held to prove that the treatment he alleges is likely to continue in the absence of judicial intervention.

At least three state supreme courts have set forth the procedure that must be followed by a prisoner to bring his petition before the courts. The Minnesota Supreme Court in State ex rel. Cole v. Tahash, 269 Minn. 1, 129 N.W.2d 903 (1964), in accepting the conclusion that habeas corpus does exist for a prisoner challenging conditions of confinement, stated at 907 that the petitioner must present a petition "supported by a prima facie showing of

cruel and unusual punishment occurring at a time and place and under circumstances giving rise to the inference that the treatment will continue or be repeated in the absence of judicial intervention." "The minimal requisites of such a showing should include a verified statement detailing: (a) the facts respecting the treatment claimed to be cruel and unusual; (b) the time and place of such treatment; and the identity of the person or persons considered responsible for it."

The Idaho Court has also considered the procedure that ought to be followed in Mahaffey v. State, 87 Ida. 288, 392 P.2d 279 (1964). The Idaho court stated at 281 that the petitioner "must allege facts which go beyond mere prison discipline." They then added this caveat:

"Because of the fact that we may not, on an application for a writ of habeas corpus, dispute the veracity of the allegations contained in the petition, it is foreseeable that any number of fabrications could be employed in order that the writ might issue. If such tactics are used, this court will not hesitate to deal harshly, through either its power of contempt or by reference to the proper authorities for prosecution on the charge of perjury, against those who would employ fraud and deceit to win a minor legal victory. Any individual who attempts to make a mockery out of procedures designed to benefit the wronged is tampering with the very foundation of our judicial process and risks having additional punishment imposed."



The Kansas Court, in two opinions issued on May 6, 1972, Levier, supra, and Hamrick v. Hazelet, 209 Kan. 383, 497 P.2d 273, adopted the Idaho caveat in Mahaffey, supra, and added the requirement that the petition must be accompanied by an affidavit that the petition is filed in good faith.

#### CONCLUSION

The Utah Supreme Court, as well as the United States Supreme Court, have recognized that the Eighth Amendment standards of cruel and unusual punishment are subject to change with the conscience of society. Chapman, supra; Weems, supra. To establish a firm test of what constitutes a prima facie showing of cruel and unusual would be a futile effort. In addition, the scope of this case does not require that one be established. But it is possible for the court to establish in explicit terms the procedure it will require to be followed to permit the hearing of a habeas corpus petition in the state courts. In this matter the court should be mindful that it is not its role to second-guess the actions of prison authorities, who are vested with broad discretion, unless they act unlawfully, arbitrarily, or capriciously. The prison officials should be allowed the opportunity to correct a policy through the use of administrative hearings.

The courts should also recognize that not every gripe or complaint is of sufficient merit to warrant even administrative review.

In the instant case, the petitioner has not made use of any administrative procedures, nor does he allege that the treatment claimed is likely to continue. In addition, his allegations are general in nature. Until he can meet the threshold requirements for seeking the writ, the action of the lower court in dismissing the case without examining the merits is proper.

Respectfully submitted,

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