

1991

# Hefner v. Utah Board of Pardons : Petition for Writ of Certiorari

Utah Supreme Court

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Allen T. Hefner; Pro Se.

Lorenzo Miller; Attorney for Petitioner.

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DOCKET NO.

ALLEN T. HEFNER

BRIEF

910536

IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

MOTION TO DISMISS THE PETITION

FOR WRIT OF CERTIORARI

Plaintiff/Respondent

DEC 16 1991

V.

UTAH BOARD OF PARDONS Et.

Defendants/Petitioners

CLERK SUPREME COURT

Court of Appeals No. 91033-CA

UTAH

910536

On November 5, 1991 Petitioners filed a Memorandum in the Utah Court of Appeals ( copy enclosed ). In this Memo, Petitioners Cited the same material as that now contained in their Writ of Certiorari. Said Memo was filed in Support of Summary Reversal....

Petitioners , in essence, have Plead Guilty and are now attempting to appeal their Plea without first recanting same.

Since no further points have been raised, other than the single contention ruled on by the Utah Court of Appeals, Petitioners Writ should be Dismissed and Respondents Case remanded to the District Court for further proceedings.

Signed

*Allen T. Hefner* Dec. 10, 1991

ALLEN T. HEFNER Attny. Pro Se

Box 550

Gunnison, Ut. 84634

I certify that on this date I mailed a copy of the foregoing motion to the following;

Lorenzo Miller

6100 S. 300 W. Suite 204

Salt Lake City, Ut. 84107

Signed

*Allen T. Hefner* Dec. 10, 1991

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IN THE UTAH COURT OF APPEALS

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ALLEN TIM HEFNER,	:	MEMORANDUM IN RESPONSE
	:	TO SUMMARY REVERSAL
Petitioner/Appellant,	:	
	:	
v.	:	
	:	
	:	
UTAH DEPARTMENT OF CORRECTIONS,	:	
et al.,	:	Case No. 910338-CA
	:	
Respondents/Appellees.	:	
	:	

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Respondents, by and through their counsel, Lorenzo K. Miller, Assistant Attorney General, hereby submit this memorandum in response to the Court's notice of sua sponte consideration of summary reversal, pursuant to the October 2, 1991 request.

**MATERIAL FACTS**

All facts material to this memorandum have been set forth in Respondents' previous memorandum in opposition to summary reversal, dated September 13, 1991. However, for the convenience of the Court the following facts are restated:

1. The Board of Pardons has taken no action against Hefner

since the 1986 parole revocation hearing. Resp's Memo. in Supp. of Motion to Dismiss, Ex. No. 1 at 3, ¶ 13

2. On April 9, 1991, four years and seven months after the last action of the Board of Pardons, Hefner filed a petition for writ of habeas corpus. Id. at 3, ¶ 15.

3. On October 2, 1991, this Court requested the parties to explain to the Court why this case should not be summarily reversed "on the basis that the statute of limitations was tolled during the period of imprisonment. Smith v. Cook, 803 P.2d 788, 790-91 (Utah 1990)."

#### ARGUMENT

FOR THE REASONS STATED BELOW SUMMARY REVERSAL  
OF THE DISTRICT COURT'S DECISION IS APPROPRIATE  
IN THIS CASE.

According to Rule 10(e) of the Utah Rules of Appellate Procedure, the Court of Appeals should only summarily reverse a district court's decision in cases of "manifest error." For the reasons stated below such error exists in the record of this case, and therefore, the Court should summarily reverse the district court's order dismissing the Appellant's habeas corpus petition.

In Smith v. Cook, the petitioner, Michael Smith, filled a petition for habeas corpus in the third district court on June 22, 1987, claiming that his probation was unlawfully revoked on December 14, 1984. 803 P.2d 788, 789 (Utah 1990). The district

court dismissed the petition on several grounds, one of which was the application of the applicable statute of limitations for habeas corpus actions, Utah Code Annotated § 78-12-31.1 (Supp. 1987). Id. at 789-90.

On appeal, the Utah Supreme Court had to determine a threshold question of "whether Smith's two- and one-half-year delay in challenging the 1984 revocation hearing bar[red] his petition for habeas corpus in light of Utah's three-month statute of limitations on habeas corpus petitions." Id. at 790. In determining this issue, the Court determined that general provisions of section 78-12-36 of the Utah Code Annotated (pre-April 27, 1987), which contained a disability provision for persons incarcerated at the Utah State Prison, was controlling over the specific provisions of section 78-12-31.1. Id.<sup>1</sup> Since Mr. Smith's claims arose prior to

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<sup>1</sup> The Court made its ruling upon the premise that any ambiguity in such a statute should be determined in favor of the criminal defendant. Smith, 803 P.2d at 791. Such a determination is questionable in light of the fact that Smith was the petitioner in a civil proceeding and not a defendant in a criminal action. See id., n.10 (cases cited relate to criminal proceedings not civil cases); See generally, Busic v. United States, 446 U.S. 398 (1980); Chelsea Plaza Homes, Inc. v. Moore, 601 P.2d 1100 (Kan. 1979); Uniform Statutory Construction Act § 17; 73 Am. Jur. 2d, Statutes § 257; Earl T. Crawford, The Construction of Statutes § 167 (1940) (cases and materials stating that under statutory construction principals, in the event that there is an irreconcilable conflict between the general provision of one statute and the specific provision of another, the specific provision will control and be given precedence over the general provision); See generally, United States v. Yuginovich, 256 U.S. 450 (1921); Thiokol Chemical Corporation v. Peterson, 393 P.2d 391 (Utah 1964); Uniform

the April 27, 1987 amendments to section 78-12-36, the Court held that his habeas corpus petition was not barred by law. Id.

The Supreme Court's conclusion is further supported by the exact language of the act from which the 1977 version of section 77-12-36 was codified. The act specifically states that "[t]he amendments in this act apply only to causes of action that arise after the effective date of this act . . . ." See 1987 Laws of Utah ch. 19, § 6 (emphasis added); see also Smith, 803 P.2d at 790 n.7. In the present appeal, all actions complained of by Appellant occurred prior to April 27, 1991. Thus all of Appellant's alleged causes of action "arose" prior to the effective date of the 1987 amendments. Therefore, Smith is directly applicable in this case and Appellant's claims are not barred by

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Statutory Construction Act § 18; 73 Am. Jur. 2d, Statutes § 255, 256; Sands, Sutherland Statutory Construction § 23.09 (4th ed. 1985) (cases and materials stating that under statutory construction principles, where there are two acts that are in irreconcilable conflict, the latest legislative expression prevails and the prior law yields to the extent of the conflict).

According to the preceding rules of statutory construction, the conflict between section 78-12-36, which was enacted in 1977, and 78-12-31.1, which was enacted in 1979, must be resolved in favor of the three month statute of limitation of 78-12-31.1 because it is the latest expression of the legislature and it is a specific provision that will govern over the general disability provision of 78-12-36. To give preference to the general disability provision of 78-12-36 would leave the later provision of 78-12-31.1 with almost no effect, because there is only a limited number of situations where a writ of habeas corpus may be available where no one is actually incarcerated. Smith v. Cook, 803 P.2d 788, 791, n.9 (1990).

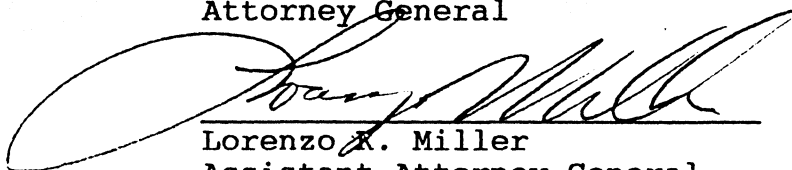
section 78-12-31.1. Accordingly, the Court should reverse the district court's ruling that section 78-12-31.1 barred Appellant's cause of action.

CONCLUSION

The Court should summarily reverse the lower court's final order, as it relates to the applicable statute of limitations only, and should remand this case back to the district court for further consideration in light of Smith v. Cook, 803 P.2d 788 (Utah 1990).

Dated this 5th day of November, 1991.

R. PAUL VAN DAM  
Attorney General

A handwritten signature in black ink, appearing to read "Lorenzo K. Miller", is written over a horizontal line.

Lorenzo K. Miller  
Assistant Attorney General  
Attorneys for Respondents