

1991

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

Utah Supreme Court

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Allen T. Hefner; Respondent Pro Se.

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BRIEF

910536

DOCKET NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE STATE OF UTAH

ALLEN TIM HEFNER,

Plaintiff/Respondent,

v.

UTAH DEPARTMENT OF CORRECTIONS;  
VICTORIA PALACIOS; and UTAH BOARD  
OF PARDONS,

Defendants/Petitioners.

:

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:

:

:

Case No.

910536

Priority No. \_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
FROM THE UTAH COURT OF APPEALS

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Respondent Pro Se

FILED

DEC 3 1991

CLERK SUPREME COURT  
UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ALLEN TIM HEFNER, :  
 :  
 Plaintiff/Respondent, : Case No.  
 :  
 v. : Priority No. \_\_  
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 UTAH DEPARTMENT OF CORRECTIONS; :  
 VICTORIA PALACIOS; and UTAH BOARD :  
 OF PARDONS, :  
 :  
 Defendants/Petitioners. :

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PETITION FOR WRIT OF CERTIORARI  
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IN THE SUPREME COURT OF THE STATE OF UTAH

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 Plaintiff/Respondent, : Case No.  
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 VICTORIA PALACIOS; and UTAH BOARD :  
 OF PARDONS, :  
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 Defendants/Petitioners. :

---

PETITION FOR WRIT OF CERTIORARI  
FROM THE UTAH COURT OF APPEALS

- - - - -

QUESTION PRESENTED

Whether the court of appeals erred in holding that the general tolling provision of Utah Code Ann. § 78-12-36 (enacted 1977), tolled the specific statute of limitations governing habeas corpus petitions contained in Utah Code Ann. § 78-12-31.1 (1953 as amended) and enacted in 1979, in light of this Court's opinion in Smith v. Cook, 803 P.2d 788 (Utah 1990)?

OPINION BELOW

The court of appeals' opinion sought to be reviewed is Hefner v. Department of Corrections, No. 910338-CA (Nov. 20, 1991) (a copy of which is attached hereto as Addendum A).

JURISDICTION OF THIS COURT

The decision in this case was issued on November 20, 1991. The State timely filed a request for a stay of remittitur which

was granted. This Court has jurisdiction to consider this petition under Utah Code Ann. § 78-2-2(3)(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Utah Code Ann. § 78-12-1 (1953 as amended) (amended 1987).

Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute.

2. Utah Code Ann. § 78-12-31.1 (Supp. 1979).

Within three month:

For relief pursuant to a writ of habeas corpus. This limitation shall apply not only as to grounds known to petitioner but also to grounds which in the exercise of reasonable diligence should have been known by petitioner or counsel for petitioner.

3. Utah Code Ann. § 78-12-36 (Supp. 1977) (amended 1987).

If a person entitled to bring an action, other than for recovery of real property, is at the time the cause of action accrued either under the age of majority or mentally incompetent and without a legal guardian, or imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than for life, the time of the disability is not a part of the time limited for the commencement of the action.

4. Utah Code Ann. § 76-1-301 (1953 as amended).

A prosecution for a capital felony, murder in the first or second degree, manslaughter, embezzlement of public moneys, or the falsification of public records may be commenced at any time.

5. Utah Code Ann. § 76-1-302 (1953 as amended).

(1) Except as otherwise provided in this part, prosecution for other offenses are



subject to the following periods of limitations:

(a) a prosecution for a felony or negligent homicide shall be commenced within four years after it is committed;

(b) a prosecution for a misdemeanor other than negligent homicide shall be commenced within two years after it is committed;

(c) a prosecution for any infraction shall be commenced within one year after it is committed.

(2) A prosecution is commenced upon the finding and filing of an indictment by a grand jury or upon the filing of a complaint of information.

#### STATEMENT OF THE CASE

On February 16, 1984, Allen Tim Hefner (Appellant) was found guilty of Arson and sentenced to serve 0-5 years in the Utah State Prison. See Memorandum Decision, Utah Court of Appeals (attached as Addendum A). Hefner paroled from the Utah State Prison in 1985. Id. But on June 16, 1986, he was convicted of Burglary, Arson and Aggravated Arson. Id.

In August 1986, the Board of Pardons held a parole revocation hearing, based on Hefner's new felony convictions, and subsequently revoked Hefner's parole. Id. The Board has taken no action against Hefner since 1986. See Memo. in Opp. to Summ. Rev. at 2, ¶ 7 (attached as Addendum B).

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 challenging the due process that he was afforded at the 1986 revocation hearing and alleging deviations from the sentencing guidelines. Addendum at A; Petition for Habeas Corpus (attached as Addendum C). Respondents moved to dismiss the

petition, claiming that the 3-month statute of limitations contained in Utah Code Ann. § 78-12-31.1 barred such an action. Id.

The district court dismissed the petition based on the Appellees' statute of limitations defense, and the court of appeals summarily reversed the district court because of this Court's opinion in Smith v. Cook, 803 P.2d 788 (Utah 1990). Id. at 1-2. Quoting Smith, the court of appeals held that "section 78-12-31.1 does not run against a person who is at the time the cause of action accrued either . . . imprisoned on a criminal charge, or in execution under the sentence of a criminal court." Id. at 2 (quotations and citations omitted). This petition for certiorari follows.

#### ARGUMENT

THE SPECIFIC PROVISIONS OF SECTION 78-12-31.1 SHOULD CONTROL OVER THE MORE GENERAL PROVISIONS OF SECTION 78-12-36 AND THUS SMITH SHOULD NOT GOVERN THE OUTCOME OF THIS CASE.

Smith v. Cook, 803 P.2d 788 (Utah 1990), was the only case used by the court of appeals to resolve the issue presented here. See Addendum A at 1-2. However, for the reason stated below Smith should not be controlling in this case. In Smith, the petitioner filled a petition for habeas corpus in the district court on June 22, 1987, claiming that his probation was unlawfully revoked on December 14, 1984. Smith, 803 P.2d at 789. The district court dismissed Smith's petition on several grounds,

one of which was that the applicable statute of limitation for habeas corpus barred the petitioner's claims. Id. at 789-90.

On appeal this Court determined that the threshold question was "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." Id. at 790. The Court found that the general provisions of section 78-12-36 (pre-April 27, 1987), containing a disability provision for incarcerated persons, controlled over the specific provisions of section 78-12-31.1. Id. And since Smith's claims arose prior to the April 1987 amendments to section 78-12-36, the Court concluded that the habeas corpus petition was not barred by law. Id.

In this case, as was in the Smith, all actions complained of occurred before April 27, 1987. Thus all of Hefner's causes of action "arose" prior to the effective date of the 1987 amendments. Therefore, those amendments have no bearing whatsoever in this matter. Indeed, the only real issue is whether the specific habeas corpus provisions of the 1979 amendments to chapter 12 of Title 78 control over the general tolling provisions of that chapter. If so, Hefner's action was barred by the three-month statute of limitation contained in section 78-12-31.1, as found by the district court.

This Court made its ruling in Smith upon the premise that any ambiguity in a criminal statute should be "resolved in favor of [the] criminal defendant." See Smith, 803 P.2d at 791. Such

a premise is highly questionable in light of the fact that Smith was merely a petitioner in a "civil" proceeding and not a defendant in a criminal action. See id., n.10 (cases cited by the Court relate only to criminal proceedings not civil cases); Utah R. Civ. Pro. 65B (habeas corpus is a civil action) and should not be followed in subsequent cases. Accordingly, neither Smith nor Hefner should be entitled to benefit from an ambiguity in a civil statute dealing with time limitations for bringing civil actions. See U.C.A. §§ 78-12-1 et seq. (1953 as amended) (limitations of actions for civil cases). The Court in Smith mistakenly addressed the ambiguity in 78-12-36 as though it were a criminal statute even though it is clearly civil in nature. See Smith, 803 P.2d at 791; U.C.A. §§ 76-1-301 et seq. (limitations of actions for criminal cases).

Because this is merely a civil action, no deference should be given to either party when interpreting the meaning of the controlling law. Instead, in the interest of fairness and justice, the exact meaning of any ambiguous statute should be determined in accordance with correct principles of statutory construction. The Court should resolve any conflicts between section 78-12-36 and section 18-12-31.1 in favor of the three-month statute of limitations contained in section 78-12-31.1.

First, the law is clear that when irreconcilable conflicts exist between the general provision of one statute and the specific provision of another, the specific provisions control and should be given precedent over the general provisions. 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). In this instance, the provisions of section 78-12-36 are very general in nature dealing with all types of civil actions, not just habeas corpus proceedings; whereas, the provisions of 78-12-31.1 are very specific in nature and deal only with habeas corpus proceedings. Therefore section 78-12-31.1 should be controlling.

Second, when two acts irreconcilably conflict, the latest legislative expression prevails and the prior act yields to the full extent of the conflict. See e.g., United States v. Yuginovich, 256 U.S. 450 (1921); Thiokol Chemical Corp. v. Peterson, 393 P.2d 391 (Utah 1964); Uniform Statutory Construction Act § 18; 73 Am. Jur. 2d, Statutes § 255, 256; 2A C. Sands, Sutherland Statutory Construction § 23.09 (4th ed. 1985); Francis J. McCaffrey, Statutory Construction § 9 (1953). Section 78-12-31.1 was enacted by the Legislature in 1979, two years after the enactment of the general provisions of section 78-12-36. Section 78-12-31.1 was specifically intended to limit the amount of time that incarcerated persons had to file habeas corpus actions. See U.C.A. § 78-12-31.1 (Supp. 1979); 1977 Laws of Utah ch. 133, §§ 1 & 2 (preamble states that the act relates to post-conviction remedies and provides limitations to habeas actions). Furthermore, section 78-12-31.1 did not exist when section 78-12-36 was enacted; thus its provisions could not and

were not intended to govern the specific provisions of section 78-12-31.1. Accordingly, section 78-12-31.1 must be construed to govern section 78-12-36. Any other interpretation of these two statutes would nullify the very propose for which the statute of limitation provision of section 78-12-31.1 was enacted.

Finally, under the "golden rule" of statutory construction, courts are to interpret conflicting statutes in a manner which gives both statutes rational meaning. See 2A C.Sands, Sutherland Statutory Construction § 45.12, at 54 (4th ed. 1985); Francis J. McCaffrey, Statutory Construction § 9 (1953). Courts should not interpret two statutes in a manner that makes one or the other statute meaningless or creates absurd results. See generally Sands, Sutherland Statutory Construction § 45.12; Kuzma v. I.R.S., 821 F.2d 930 (2d Cir. 1987); Snyder v. Clune, 390 P.2d 915 (Utah 1964). "[C]onstruction that converts a statute into an absurdity is a forbidden construction unless no other is possible." Bachicha v. Municipal Court of City of Thornton, 581 P.2d 746 (Colo. 1978) (emphasis added). This is so because it is presumed that legislatures do not "deliberately engage in unnecessary or meaningless acts." State v. Cunningham, 598 P.2d 756 (Wash. App. 1980). Instead, courts should apply a common sense approach to interpreting statutes. Amica Mut. Ins. Co. v. Barton, 474 A.2d 104 (1984).

Applying Smith in this case would have just the opposite effects. By using the Smith analysis, incarcerated persons can file petitions for habeas corpus relief indefinitely, so long as

their cause of actions arose prior to April 1987 and they remain incarcerated. This is true despite the fact that section 78-12-31.1 was enacted two years after the tolling statute of section 78-12-36 which specifically limits the time to file a habeas petition to three months. Likewise, persons with claims falling into the above category and serving any sentence less than "life" may wait until their eventual release "plus three months" before filing a petition challenging the constitutionality of their confinement. See Smith, 803 P.2d at 789-91.<sup>1</sup>

Common sense dictates that one who is confined unconstitutionally should bring a habeas corpus petition prior to release. Indeed, the traditional function of habeas corpus is to assure that a person is not "unjustly imprisoned or otherwise restrained of his liberty." See Spain v. Steward, 639 P.2d 166, 168 (Utah 1981). A petitioner substantially moots any relief that a court can grant in a habeas action by waiting for actual release before filing a claim.<sup>2</sup> See id. at 168. Furthermore, habeas corpus is

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<sup>1</sup> This actually encourages prisoners to intentionally wait before filing habeas corpus petitions since the longer a prisoner waits the greater the chance of being released. Elapsed time leads to unavailable witnesses, misplaced or lost evidence and faded memories, which in turn, assists claims of ineffective counsel, judicial or Board of Pardons misconduct, insufficient evidence, and lack of procedural due process.

<sup>2</sup> The "limited number of situations" in which incarceration is not the basis for a habeas action is minuscule when compared with the number of petitions filed challenging the legality of incarceration. Compare Smith, 803 P.2d at 791, n.9. Furthermore, those limited cases would not generally, if ever, involve persons that have been incarcerated prior to the running of the three-month limitation. Thus, the Court's analysis on the tolling statute's applicability to section 78-12-31.1 leads to irrational results.

intended to be a speedy remedy, not an action that lurks indefinitely and controlled only by a prisoner's own agenda. The Smith opinion fails to consider the preceding arguments and therefore should be reconsidered in lieu of this appeal.

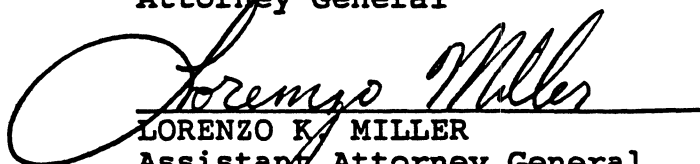
#### CONCLUSION

By giving preference to the general disability provision of section 78-12-36, this Court has virtually eliminated any meaning or application that section 78-12-31.1 has during the ten years immediately following the statute's enactment (or those years prior to April 1987). Certainly the legislature could not, nor did it, intend such a meaningless result when it enacted this section of the civil limitations provisions. Thus, the holding in Smith v. Cook, 803 P.2d 788 (Utah 1990) should be over-turned, and the three-month statute of limitations contained in Utah Code Ann. § 78-12-31.1 reinstated as enacted by the legislature.

WHEREFORE, Appellees ask that the Court grant certiorari in this instance, pursuant to Rule 46 of the Utah Rules of Appellate Procedure, because of the importance that section 78-12-31.1 has in habeas corpus actions. Smith sets bad precedent in civil cases and allows inmates, who are or have been incarcerated at the Utah State Prison, to indefinitely file habeas corpus petitions without any limitation period what-so-ever.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of December, 1991.

PAUL VAN DAM  
Attorney General

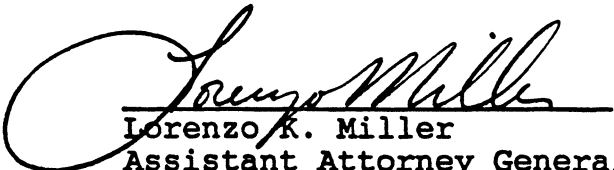
  
LORENZO K. MILLER  
Assistant Attorney General  
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CERTIFICATE OF MAILING

I certify that on the 3<sup>rd</sup> day of December 1991, I caused to be mailed four exact copies of the forgoing Petition for Certiorari to:

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P.O. Box 550  
Gunnison, Utah 84634

  
Lorenzo K. Miller  
Assistant Attorney General

## **ADDENDA**

## **ADDENDUM A**

FILED

NOV 20 1991

*Mary Thomas*  
Mary Thomas  
Clerk of the Court  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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Allen Tim Hefner,	)	
	)	
Petitioner and Appellant,	)	MEMORANDUM DECISION
	)	(Not For Publication)
v.	)	
	)	Case No. 910338-CA
	)	
Department of Corrections;	)	
Victoria Palacios; and Board	)	F I L E D
of Pardons,	)	(November 20, 1991)
	)	
Respondents and Appellees.	)	
	)	

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Sixth District, Sanpete County  
The Honorable Don V. Tibbs

Attorneys: Allen Tim Hefner, Gunnison, Appellant Pro Se  
R. Paul Van Dam and Lorenzo K. Miller, Salt Lake  
City, for Appellee

Before Judges Russon, Bench, and Greenwood (Law & Motion).

PER CURIAM:

This matter is before the court on its own motion for summary reversal based on manifest error. We reverse and remand for further proceedings.

In 1984, appellant was convicted of arson and sentenced to serve 0-5 years in the Utah State Prison. In 1985, appellant was placed on parole. On June 16, 1986, appellant was convicted of burglary, arson and aggravated arson. In August 1986, the Board of Pardons held a parole hearing and subsequently revoked appellant's parole on September 8, 1986.


On April 9, 1991, appellant filed a petition for a writ of habeas corpus, claiming he was not afforded due process at the revocation hearing and alleging deviations from the sentencing guidelines. Respondents moved to dismiss the petition, claiming the petition was barred by the three-month statute of limitation contained in Utah Code Ann. § 78-12-31.1 (1987). The court dismissed the petition, and this appeal followed.

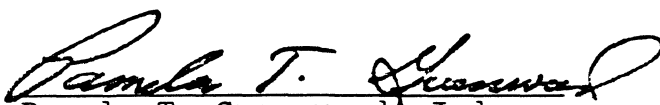
The dispositive issue is whether the trial court erred in ruling that the statute of limitation barred the petition. Utah Code Ann. § 78-12-31.1 (1987) provides that that a writ of habeas corpus must be brought within three months. However, in Smith v. Cook, 803 P.2d 788, 790 (Utah 1990), the Utah Supreme Court held that the statute of limitation contained in section 78-12-31.1 does not run against a person who "is at the time the cause of action accrued either . . . imprisoned on a criminal charge, or in execution under the sentence of a criminal court."

In this case, shortly after appellant's cause of action accrued, appellant was imprisoned on a criminal charge. Therefore, the statute of limitation did not run during his period of imprisonment. In addition, the State now concedes that the trial court erred in granting its motion to dismiss based on the three-month statute of limitation. We therefore conclude that the trial court erred in ruling that appellant's petition was barred by the statute of limitation.

Reversed and remanded for further proceedings.

  
Leonard H. Russon, Judge

  
Russell W. Bench, Judge

  
Pamela T. Greenwood, Judge

## **ADDENDUM B**

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SEP 18 1991

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Clerk  
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IN THE UTAH COURT OF APPEALS

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ALLEN TIM HEFNER,	:	MEMORANDUM IN OPPOSITION
	:	TO SUMMARY REVERSAL AND
Petitioner/Appellant,	:	IN SUPPORT OF SUMMARY
	:	DISPOSITION PURSUANT TO
v.	:	RULE 10(A)(2).
	:	
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 opposition to summary reversal of the district court's final judgment and in support of their motion for summary disposition of this appeal.

**MATERIAL FACTS**

1. On February 16, 1984, Allen Tim Hefner (Petitioner) was found guilty by the Second Judicial District Court of Arson and was sentenced to serve 0-5 years in the Utah State Prison. Resp's Memo. in Supp. of Motion to Dismiss, Ex. No. 1 (for the Court's

convenience, this memorandum and its accompanying exhibits have been attached).

2. Hefner paroled from the Utah State Prison in 1985. Id., Ex. No. 2, 4 & 5.

3. On June 16, 1986, Hefner was convicted by jury of Burglary, Arson and Aggravated Arson. Id., Ex. Nos. 6-8.

4. On August 20, 1986, the Board of Pardons convened a parole revocation hearing based on Hefner's new felony convictions. Id., Ex. No. 13. Hefner was given adequate notice of the hearing date, place and time. Id., Ex. No. 9. He was also informed of the charges against him and his rights before the Board. Id., Ex. Nos. 9, 10, 11 & 12.

5. At the hearing, Hefner was represented by counsel and was given the opportunity to speak in his own behalf. Id., Ex. No. 13.

6. The Board of Pardons made written findings of fact and conclusions of law and revoked Hefner's parole of October 8, 1985. Id., Ex. Nos. 14 & 15. The Board then set June 1992 as a tentative rehearing date. Ex. No. 14 & 15.

7. The Board of Pardons has taken no action against Hefner since his 1986 parole revocation hearings. Id. at 3, ¶ 13.

8. 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.



9. Hefner challenged the due process he was afforded at the 1986 revocation hearing and alleged deviations from the sentencing guidelines. Petition, ¶¶ 5-10. However, Hefner provided the district court with no evidence of either claim. Petition; Resp's Memo. in Supp. of Motion to Dismiss at 3, ¶ 16.<sup>1</sup>

10. Respondents moved for dismissal of the petition base on the 3-month statute of limitations of U.C.A. § 78-12-31.1. Motion to Dismiss; Resp's Memo. in Supp. of Motion to Dismiss at 3, ¶ 16; Petition at 1, ¶ 1 (petition gives last date of Board's actions).

11. Hefner failed respond to the Respondents' motion to dismiss, and Judge Don V. Tibbs of the Sixth Judicial District Court dismissed the petition based on the statute of limitations.

12. No other issues were addressed by the court because the time for filing the action had elapsed. Petitioner then appealed the court's decision.

### **ARGUMENT**

#### **1. SUMMARY REVERSAL OF A DISTRICT COURT'S DECISION IS INAPPROPRIATE UNLESS "MANIFEST ERROR" IS APPARENT.**

According to Rule 10(e) of the Utah Rule of Appellate Procedure, the Court of Appeals should only summarily reverse a

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<sup>1</sup>. Throughout the proceeding before the Third District Court, Petitioner never contested the facts as stated by Respondents in their Memorandum in Support of the Motion to Dismiss the Petition for Writ of Habeas Corpus.

district court's decision in cases of "manifest error." For the reasons stated below, no manifest error exists in this appeal. The record of this case reflects only that the district court was correct in dismissing Hefner's petition. Therefore, this Court should not summarily reversed the district court's decision but should summarily affirm it because no "substantial question is presented." See Rule 10(e).

2. **FOOTE IS INAPPLICABLE TO THIS APPEAL BECAUSE THE STATUTE OF LIMITATION WAS NOT AT ISSUE IN THAT CASE.**

The only issue presented in this present appeal is whether Judge Tibbs properly applied the 3-month statute of limitations contained in U.C.A. § 78-12-31.1 (1953 as amended). No other issues have been offered by Hefner nor raised on appeal. See Appeal of Decision; Docketing Statement, filed July 29, 1991.

After receiving the Court's order to address this case in light of Foote v. Board of Pardons, 808 P.2d 734 (Utah 1991), Counsel for Respondents has thoroughly examined both cases and is convinced that the Foote decision has no bearing on the issue presented here. In his capacity as an assistant attorney general for the State of Utah, Counsel currently represents both the State of Utah and the Board of Pardons in Foote v. Board of Pardons, Case No. 910903311 HC (3rd Dist. Ct.) and the present case. In this capacity, Counsel has become very familiar with the entire proceed-

ings of the Foote case before the Utah Supreme Court and district court. Counsel also represented the same parties throughout all proceedings of the present case before the district Court.<sup>2</sup>

**A. Foote v. Board of Pardons, 808 P.2d 734 (Utah 1991).**

In Foote, the petitioner filed an original petition for habeas corpus relief with the Utah Supreme Court claiming that the Board of Pardons denied him due process because it was biased against him and had denied him access to the Board's files. See Foote Petition, Ex. No. 8 at 2 & 11-19 (attached). Subsequently, Foote's petition was heard by the Utah Supreme Court which remanded the case to the district court for further consideration of Mr. Foote's due process claims. See Foote, 808 P.2d at 734-35.

At no time during the proceedings before the Utah Supreme Court did the Board of Pardons or the State of Utah raise the statute of limitations defense of U.C.A. § 78-12-31.1. Nor was the statute of limitations defense address by the justices in their final opinion. See Foote, 808 P.2d at 734-35. Finally, no evidence was presented by either party to sufficiently substantiate or directly refute the petitioner's factual claims that the Board was biased against him.

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<sup>2</sup>.Counsel has filed all motions and memoranda on behalf of Respondents in this matter before the Third and Sixth Judicial District Courts.

**B. The Present Case.**

In this case, Hefner filed a an original petition with the district court. Judge Tibbs, after having been informed of the State's statute of limitation defense and not having received any response from Hefner, dismissed the petition based on U.C.A. § 78-12-31.1. Judge Tibbs stated in his final order that the petition was being dismissed because the last act by the Respondents (Board of Pardons) was on September 8, 1986, four years prior to the filing of this action. Judge Tibbs specifically concluded that Hefner's cause of action was barred by law. See Order Dismissing Petition, dated May 21, 1991.

The record in this case shows that the merits of Hefner's petition were reached by the court, nor were the merits of Hefner's claims actually argued by Respondents prior to dismissal. Id.; see also Motion to Dismiss; Memo. in Supp. of Motion to Dismiss. Therefore, any applicability that Foote might have had to the merits of Hefner's claims do not apply to this appeal since the statute of limitations bars the determination of such issues by the lower court. Accordingly, summary reversal of the district court's decision is inappropriate.

**2. THE ORDER OF DISMISSAL WAS PROPER BECAUSE  
PETITIONER'S PETITION IS UNTIMELY AND BARRED  
BY THE THREE-MONTH STATUTE OF LIMITATIONS**

As noted, Hefner did not bring the petition for writ of habeas

corpus until four years after the last act by the Board of Pardons. The Utah Code Annotated, explicitly states that the statute of limitations for habeas corpus relief is three months. 78-12-31.1. Section 78-12-31.1 further states this limitation applies "not only as to grounds known to petitioner but also to grounds which in the exercise of reasonable diligence should have been known by petitioner or counsel for petitioner."

Petitioner was present at the last Board of Pardons hearing that affected his parole status, and he was informed of the Board's decision on September 3, 1986. Thus, the statute of limitations began to run on that date, and the time to file a petition expired on December 3, 1989. U.C.A. § 78-12-31.1; see Becton Dickinson and Co. v. Reese, 668 P.2d 1254 (Utah 1983) (the general rule is that a cause of action accrues on the happening of the last event necessary to complete the cause of action).

The last event necessary to complete Hefner's cause of action would have, if at all, taken place on or about September 3, 1986, four years and seven months prior to Hefner's filing of the petition. See Memo. in Supp. of Motion to Dismiss at 3, ¶ 15; Petition at 1, ¶ 1. Contrary to what Hefner may be asserting, the Foote decision has no bearing upon the last act taken by the Board of Pardons, nor does the decision create a new cause of action as Hefner advocates to the Court.

In Hatch v. DeLand, this Court held that inmates can petition for judicial review of the Board of Pardons actions if such actions violate substantial constitutional rights. 790 P.2d 49 (Utah App. 1990). Accordingly, Hefner could have and should have known that he could challenge the Board's alleged constitutional violations as early as March of 1990 when Hatch was decided.

Furthermore, Hefner had the same judicial routes available to him, as both Mr. Hatch and Mr. Foote, to change the state of the law as it existed in 1986. But instead of acting on his belief that his constitutional rights may have been violated, Hefner sat back and waited for the law to become more favorable to his own position. Thus, Hefner voluntarily waived his right to petition the courts for relief. The Utah Supreme Court addressed this same issue in Lord v. Shaw, 665 P.2d 1288 (Utah 1983).

In Lord, the appellant attempted to sue her husband after a judicial decision overruled the doctrine of interspousal tort immunity. In dismissing her suit as time barred, the Court held that where the wife at all times had access to the courts to seek lifting of the doctrine of interspousal tort immunity, the statute of limitations was not tolled during the time prior to the abolition of the doctrine. The court stated that "the wife was not entitled to wait for others to seek such changes in the law." Id. at 1290. See also Andrews v. Schulsen, 773 P.2d 832, 833 (Utah

1988) (changes in law do not constitute "good cause" for filing successive petitions for writ of habeas corpus).

The basis for decisions such as Shaw is obvious: the rules of finality and judicial economy require that claimants not be allowed to wait indefinitely for more favorable judicial interpretation of the law before filing claims. If every claimant were allowed to toll the applicable limitations periods while awaiting judicial abolition of controlling precedent, parties to the potential lawsuit would never be able to assess potential liability. Every time that a high-court reversed, in whole or in part, a prior decision, a new round of litigation would pursue on claims that are literally decades old.<sup>3</sup>

### CONCLUSION

For the reasons stated, the court should not summarily reverse the final order of the Sixth Judicial District Court. Hefner's petition was untimely brought and barred by the 3-month statute of limitations contained in Utah Code Ann. § 78-12-31.1. Because Foote v. Board of Pardons, 808 P.2d 735 (Utah 1991) did not address

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<sup>3</sup>. Roe v. Wade, 410 U.S. 113 (1973), creates a prime example of the need for judicial finality and statutes of limitations. Can the Court imagine the types of claims that can be brought under the tolling argument proposed by Hefner if Roe is eventually overturned by the United States Supreme Court? Claims could be made on events taking place in 1974 because the privacy of the mother prevented such claims until Roe's reversal by the Court.

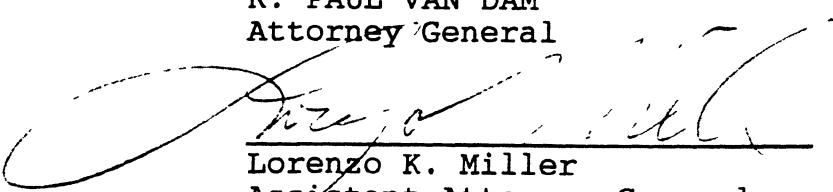
the only issue presented in this appeal, it should not affect the outcome of this case. However, as shown in this memorandum, it plainly appears that the issue that is presented in this appeal does not present a substantial question for this court to decide.

WHEREFORE, Respondents oppose summary reversal of the district court's decision in this case and request that the Court summarily affirm Judge Tibbs' final order dismissing Hefner's petition for writ of habeas corpus as being untimely.

In the alternative, if this Court believes that Foote somehow applies to the instant appeal and has not been properly addressed in this memorandum, Respondents move this court for a more definite statement as the issues this Court would have Respondents address. And in case of that event, Respondents would need an additional 30 days from the date of the Court's decision to fully brief the issues presented by the Court.

Dated this 13<sup>th</sup> day of September, 1991.

R. PAUL VAN DAM  
Attorney General



Lorenzo K. Miller  
Assistant Attorney General  
Attorneys for Respondents

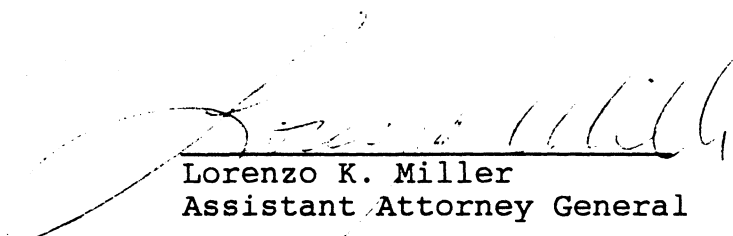


CERTIFICATE OF MAILING

I certify that on the 13<sup>th</sup> day of September 1991, I caused to be mailed an exact copy of RESPONDENTS' MEMORANDUM IN OPPOSITION TO SUMMARY REVERSAL AND IN SUPPORT OF SUMMARY DISPOSITION PURSUANT TO RULE 10(A)(2) to:

Allen Tim Hefner  
P.O. Box 550  
Gunnison, Utah 84634

postage prepaid in the United States Postal Service.



Lorenzo K. Miller  
Assistant Attorney General

## ADDENDUM C

Allen Tim Hefner  
Attorney Pro Se  
P.O. Box 550  
Morrison, Utah 84634

Third Judicial District

APR 03 1991  
*Anta [Signature]*  
By \_\_\_\_\_ Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

---0000000---

Allen Tim Hefner:                   \*                   PETITION  
Petitioner:                       \*                   FOR WRIT OF HABEAS CORPUS  
                                     \*                   FOR CIVIL RIGHTS VIOLATIONS  
VS.                                 \*

Utah Department of               \*                   Case No. 910902292 HC  
Corrections, State of Utah,     \*  
Victoria Palacios, Utah         \*  
Board of Pardons ET. AL.       \*                   JUDGE JAMES S. SAWAYA

Respondant:                   \*                   # 9898

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Comes now the Petitioner, Allen Tim Hefner, and for good  
cause of action alleges as follows:

- (1) In July of 1986 Petitioner recieved a Six (6) year  
hearing from the Utah Board of Pardons.
- (2) Guide lines and recomendations of the Utah Adult  
Probation and Parole both called for Fifty-one (51) months  
incarceration.
- (3) Board used letter from victim, indicating Financial  
loss, and previous criminal acts as reason for exceeding  
recommended guidelines.
- (4) Petitioner was not informed of this action at the  
time of the hearing.
- (5) Petitioner's Civil Rights to Due Process were violated  
to confront and cross examine witnesses, and present evidence  
in own defence.

(6) Had Petitioner been aware of and able to respond, evidence could have been produced to the fact that Petitioner was investigated of alleged previous crime and found to have been over Two-hundred (200) miles away at the time of occurrence.

(7) That victim did not attempt to implicate Petitioner until after, at the insistence of Petitioner's insurance company victim took and failed Two (2) Polygraph tests.

(8) Evidence that victim's lost property was under seizure by the Internal Revenue Service at the time of loss could have been presented, refuting victim's stated Financial Ruin.

(9) Evidence could have been presented that "Victim" did in fact gain Financially from the loss of property i.e. Credit against unpaid With-holding Tax that was the cause of the Internal Revenue Service Seizure.

(10) ~~Since Petitioner's crime was used to establish guidelines it should therefore not also be used to enhance or exceed the same guidelines.~~

WHEREFORE: Petitioner prays that this court:

(1) Schedule a hearing at which time Petitioner may be represented.

(2) Permit Petitioner, who remains indigent, to proceed without pre-payment of cost, Fees or other assessment.

(3) Grant Petitioner the Authority to obtain subpoenas in Forma Pauperis, for witnesses and Documents necessary to assist in the proof of facts alleged in the Petition as stated above.

(4) Issue a ORDER for the Post Conviction Relief to have the Petitioner brought before it, to the end that He may be Discharged from the Illegal and Unconstitutional Confinement and Restraint, or any other relief that the court may deem as just.

Dated this 29 Day of March, 1991.

*[Signature]*

**CERTIFICATE OF MAILING**

I hereby certify that I have mailed Postage pre-paid a true and correct copy of the foregoing Motions, Including Motion for appointment of Counsel, Motion for Production of Documents, and a Writ of Habeas Corpus, along with all Affidavits in support of the Motion to the following:

Utah State Attorney Generals Office  
256 State Capital Building  
Salt Lake City, Utah 84114

Clerk of the Third District Court  
240 East 400 South  
Salt Lake City, Utah 84111

Dated this 2 Day of April, 1991.

  
Allen Tim Heiner  
Attorney Pro Se