The Burger Court Opinion Writing Database

Murel v. Baltimore City Criminal Court

407 U.S. 355 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 3, 1971

MEMORANDUM TO THE CONFERENCE:

Re: No. 70-5308 -- Wilwording v. Swenson

Enclosed is my dissenting opinion in this case.

WEB

W. E. B.

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: The Chief Justice

Circulated: DEC 3 1971

Recirculated: _____

Dec 3, 1971

No. 70-5308 -- Wilwording v. Swenson

MR. CHIEF JUSTICE BURGER, dissenting.

This case is singularly inappropriate for summary reversal without an adequate record, and without briefs or argument. The Court assumes without citation of authority that further resort to state remedie would be futile; the District Judge, far more familiar than we with the local situation, thought otherwise. The Court blandly treats petitioners' habeas corpus petitions as complaints under 42 U.S.C. § 1983, an approach which petitioners' able counsel has studiously and appropriately avoided. Petitioners had previously filed complaints expressly under § 1983, which were denied after full hearing. It is conceded in the petition for certiorari that almost all of the claims involved in those actions are raised in the instant habeas corpus proceeding; but petitioners' counsel notes that the doctrine of res judicata has no application in habeas corpus. The Court does not explain why that argument is not lost if the habeas corpus petitions are treated as complaints under § 1983.

Wm Brennan
Dec 11

changes as indicated

To: ~~Mr. Justice Black~~
Mr. Justice Douglas
~~Mr. Justice Harlan~~
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2d DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: DEC 7 19[illegible]

Recirculated:

WILWORDING ET AL. *v.* SWENSON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 70-5308. Decided December —, 1971

MR. CHIEF JUSTICE BURGER, dissenting.

This case is singularly inappropriate for summary reversal without an adequate record, and without briefs or argument. The Court assumes without citation of authority that further resort to state remedies would be futile; the District Judge, far more familiar than we with the local situation, thought otherwise. The Court does not rest its reversal on this ground, however, for it blandly treats petitioners' habeas corpus petitions as complaints under 42 U. S. C. § 1983, an approach which petitioners' experienced counsel has studiously and appropriately avoided. Petitioners had previously filed complaints expressly under § 1983, which were denied after full hearing. It is conceded in the petition for certiorari that almost all of the claims involved in those actions are raised in the instant habeas corpus proceeding; but petitioners' counsel argues that the doctrine of *res judicata* has no application in habeas corpus. The Court does not explain why this argument is not lost if the habeas corpus petitions are treated as complaints under § 1983.

I had previously thought that summary reversal was limited to cases where the error was manifest. Here, however, the Court has challenged the conclusion of the Court of Appeals largely on the basis of surmise and has gone on to reverse on a theory which the Court of Appeals was not asked to consider and presumably could not have considered.

Wm. Burger

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 12, 1971

Dear Bill:

In No. 70-5308 - Wilwording v. Swenson, I agree with your proposed per curiam. Don't you want to cite Johnson v. Avery, 393 U.S. 483?

Bill
William O. Douglas

Mr. Justice Brennan

Wm. Brennan 11/71

To: [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
✓ Mr. Justice [illegible]
Mr. Justice [illegible]

1st DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 11-11-71

Recirculated: _____

WILWORDING ET AL. *v.* SWENSON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 70–5308. Decided November —, 1971

PER CURIAM.

On the ground that relief from their detention was not sought, state habeas corpus petitions challenging petitioners' living conditions and disciplinary measures against them while confined in maximum security at Missouri State Penitentiary were dismissed. The Missouri Supreme Court affirmed. —— Mo. ——. Petitioners then sought federal habeas corpus in the District Court for the Western District of Missouri. The District Court dismissed the petitions and the Court of Appeals of the Eighth Circuit affirmed, 439 F. 2d 1331, on the ground that although state habeas relief was not available, the requirements of 28 U. S. C. § 2254 had not been satisfied because petitioners had not invoked any of a number of possible alternatives including "a suit for injunction, a writ of prohibition, or mandamus, or a declaratory judgment in the state courts," or perhaps other relief under the "State Administrative Procedure Act." *Id.*, at 1336.

Section 2254 does not erect insuperable or successive barriers to the invocation of federal habeas corpus. The exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial "opportunity to pass upon and correct" alleged violations of its prisoners' federal rights. *Fay* v. *Noia*, 372 U. S. 391, 437–438 (1963). Petitioners are not required to file "repetitious applications" in the state courts. *Brown* v. *Allen*, 344 U. S. 433, 448 n. 3 (1953). Nor does the mere possibility of success in additional proceedings bar federal relief. *Roberts* v. *LaVallee*, 389 U. S. 40, 43 (1967);

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
✓Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Harlan, J.

Circulated:

Recirculated: 11-15-71

SUPREME COURT OF THE UNITED STATES

WILWORDING ET AL. *v.* SWENSON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 70–5308. Decided November —, 1971

PER CURIAM.

On the ground that they did not ask for their release, but challenged only their living conditions and disciplinary measures against them while confined in maximum security at Missouri State Penitentiary, petitioners' state habeas corpus petitions were dismissed. The Missouri Supreme Court affirmed. Petitioners then sought federal habeas corpus in the District Court for the Western District of Missouri. The District Court dismissed the petitions and the Court of Appeals of the Eighth Circuit affirmed, 439 F. 2d 1331. Although petitioners had exhausted state habeas relief the Court of Appeals agreed with the District Court that the requirements of 28 U. S. C. § 2254 had not been satisfied because petitioners had not invoked any of a number of possible alternatives to state habeas including "a suit for injunction, a writ of prohibition, or mandamus, or a declaratory judgment in the state courts," or perhaps other relief under the "State Administrative Procedure Act." *Id.*, at 1336.

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Page 2

Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

WILWORDING ET AL. *v.* SWENSON, WARDEN

Circulated: _____

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Recirculated: 11/17/71

No. 70-5308. Decided November —, 1971

PER CURIAM.

On the ground that they did not ask for their release, but challenged only their living conditions and disciplinary measures against them while confined in maximum security at Missouri State Penitentiary, petitioners' state habeas corpus petitions were dismissed. The Missouri Supreme Court affirmed. Petitioners then sought federal habeas corpus in the District Court for the Western District of Missouri. The District Court dismissed the petitions and the Court of Appeals of the Eighth Circuit affirmed, 439 F. 2d 1331. Although petitioners had exhausted state habeas relief the Court of Appeals agreed with the District Court that the requirements of 28 U. S. C. § 2254 had not been satisfied because petitioners had not invoked any of a number of possible alternatives to state habeas including "a suit for injunction, a writ of prohibition, or mandamus, or a declaratory judgment in the state courts," or perhaps other relief under the "State Administrative Procedure Act." *Id.*, at 1336.

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Circulate
11-18-71

4th DRAFT

SUPREME COURT OF THE UNITED STATES

WILWORDING ET AL. *v.* SWENSON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 70-5308. Decided November —, 1971

PER CURIAM.

On the ground that they challenged only their living conditions and disciplinary measures while confined in maximum security at Missouri State Penitentiary, and did not seek their release, petitioners' state habeas corpus petitions were dismissed. The Missouri Supreme Court affirmed. Petitioners then sought federal habeas corpus in the District Court for the Western District of Missouri. The District Court dismissed the petitions and the Court of Appeals of the Eighth Circuit affirmed, 439 F. 2d 1331. Although petitioners had exhausted state habeas relief the Court of Appeals agreed with the District Court that the requirements of 28 U. S. C. § 2254 had not been satisfied because petitioners had not invoked any of a number of possible alternatives to state habeas including "a suit for injunction, a writ of prohibition, or mandamus, or a declaratory judgment in the state courts," or perhaps other relief under the "State Administrative Procedure Act." *Id.*, at 1336.

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Corrected
11-30-71

5th DRAFT

SUPREME COURT OF THE UNITED STATES

WILWORDING ET AL. *v.* SWENSON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 70-5308. Decided November —, 1971

PER CURIAM.

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Section 2254 does not erect insuperable or successive barriers to the invocation of federal habeas corpus. The exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial "opportunity to pass upon and correct" alleged violations of its prisoners' federal rights. *Fay* v. *Noia*, 372 U. S.

W. Brennan 11-71

Circulated
12-7-71

6th DRAFT

SUPREME COURT OF THE UNITED STATES

WILWORDING ET AL. *v.* SWENSON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 70-5308. Decided November —, 1971

PER CURIAM.

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Wm Brennan
12-7-71

Circulated
12-9-71

7th DRAFT

SUPREME COURT OF THE UNITED STATES

WILWORDING ET AL. *v.* SWENSON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 70-5308. Decided November —, 1971

PER CURIAM.

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Wm. Burger O ??

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 11, 1971

70-5308, Wilwording v. Swenson

Dear Bill,

I am glad to join the Per Curiam you have circulated in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 11, 1971

Re: No. 70-5308 - Wilwording v. Swenson, Warden

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 16, 1971

Re: No. 70-5308 - Wilwording v. Swenson

Dear Bill:

Please join me in your per curiam.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 16, 1971

Re: No. 70-5308 - Wilwording, et al. v. Swenson

Dear Bill:

I may write in this case and, in any event, ask that it go over the conference of November 19.

Sincerely,

HAB.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 29, 1971

Re: No. 70-5308 - Wilwording, et al. v. Swenson, Warden

Dear Bill:

My difficulty with your opinion relates only to one part of it.

The Missouri Supreme Court and Missouri procedure in late years are not so bad as, I think, your opinion may suggest. Certainly, much has been done by both the Missouri court and by the Eighth Circuit to accommodate to a federal-state-court situation that had deteriorated and that has been somewhat aggravated by the presence in the Western District of Missouri of both the Jefferson City Penitentiary and the United States Medical Center at Springfield. The endless stream of prisoner's petitions that originate in these two institutions has greatly burdened the federal judges of the Western District, and some of the federal decisions at the district court level have not been received with open arms on the state side.

In the light of this background, I suspect that the Eighth Circuit opinion here is a sincere and honest endeavor appropriately to bow in the direction of state procedures. Certainly, if any judge of the Eighth Circuit, on either the district or appellate levels, knows the situation and, as well, appreciates the range of Missouri procedures, it is Judge Floyd R. Gibson, who wrote the opinion below.

If you would designate as Part I of your opinion the second paragraph thereof, concluding with the Rutledge

Wm. Burger
ok

quotation, and would designate as Part II all the subsequent material, I would be glad to have you note at the end something to the following effect:

> "Mr. Justice Blackmun concurs in the judgment of the Court and in Part II of the Court's per curiam opinion."

Of course, if you would prefer to eliminate the second paragraph of the opinion and to revise the beginning words of the first full paragraph on page 2, I would be with you all the way.

Sincerely,

H.A.B.

Mr. Justice Brennan

cc: The Conference