COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-139703

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Gentlemen:

Reference is made to letter and petition of October 1, 1974, from Peter W. Tredick, Esquire, of your firm, transmitting a brief on behalf of the Vermont Legal Aid, which you represent. The petitioner requests that we reconsider and reverse our decision of February 28, 1974, B-139703, 53 Comp. Gen. 638, insofar as we found:

> "* * * no legal basis which would authorize either the Department [of Justice] or the AO [Administrative Office of the United States Courts] to pay expenses incurred in obtaining counsel or fact or expert witnesses on behalf of an indigent prisoner who is bringing a civil rights action under 42 U.S.C. § 1983 * * *." Id., at 645.

This request arises in the factual context of an action seeking damages and injunctive relief under 42 U.S.C. § 1983 by one Robert Dragon, an inmate of the Vermont State Prison at Windsor, Vermont. Pursuant to court direction the plaintiff was represented by Vermont Legal Aid, Inc., who obtained leave to proceed in forma pauperis. In addition, an order of court for "all expenses for the taking of depositions * * * not to exceed Three Hundred Dollars * * *" was procured. Acting under authority of this order, stenographic expenses in connection with the taking of fourteen depositions of fact were incurred in the amount of $300. Vermont Legal Aid has paid the stenographer for her services, and now seeks reimbursement from the Government.

In support of the petition to reverse, the brief draws an analogy between habeas corpus actions by indigent prisoners which challenge the legality and/or condition of confinement, the expenses of which are compensible under the authority of 28 U.S.C. § 1825 (1970); 18 U.S.C. § 3006A(g), (1970), and a § 1983 civil rights action by an indigent prisoner which challenges the action of the prisoner's jailers, the expenses of which are not presently compensible. In essence, it

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is contended that since a writ of habeas corpus and a civil rights action are alternative remedies, justification for the payment of expenses involving fact or expert witnesses incident to an action brought under 42 U.S.C. § 1983 may be said to lie in the legislation enabling payment of these expenses in habeas corpus actions, viz., 28 U.S.C. § 1825. In addition, we are urged to reverse our prior decision on the constitutional grounds that to deny an indigent reimbursement for discovery and other costs in § 1983 actions to challenge unconstitutional prison conditions is to foreclose effective access to the courts by reason of his indigency, thus violating the indigent prisioner's rights to equal protection and due process under the law.

In Preiser v. Rodriguez, 411 U.S. 475, 500 (1973), the United States Supreme Court held that where the thrust of the prisoner's complaint goes to the constitutionality of confinement, the sole Federal remedy is a writ of habeas corpus. Similarly, where the inmate seeks damages for the deprivation of his civil rights resulting from the use of unconstitutional procedures or regulations, an action under 42 U.S.C. § 1983 is appropriate. Wolff v. McDonnell, 42 L.W. 5190, 41 L. Ed. 2d. 935 (June 26, 1974); Annotation, "Relief under Federal Civil Rights Acts to state prisoners complaining of conditions relating to corporal punishment, punitive segregation, or other similar physical disciplinary measures," 18 A.L.R. Fed. 7 (1974). Nonetheless, some courts have in some instances been willing to entertain either a § 1983 suit or a habeas corpus action to hear cases based on infringement of prisoners' constitutional and civil rights by prison officials. Petitioners' pleading based on habeas corpus are sometimes read to plead causes of action under the Civil Rights Act and of deprivation of constitutional rights. Preiser v. Rodriguez, supra; Wilwording v. Swenson, 404 U.S. 249 (1971); Roberts v. Pegelow, 313 F. 2d. 548 (4th Cir. 1968) (disciplinary confinement within prison), noted in 12 A.L.R. 3d. 1276, 1294; Hartmann v. Scott, 488 F.2d. 1215 (8th Cir. 1973) (confinement in mental institution); and Tijerina v. Ciccone, 324 F. Supp. 1265 (W.D. Mo., 1971) (disciplinary confinement within prison).

In resolving this issue, our earlier decision did not dispute the existence of substantial similarities between habeas corpus actions and civil rights actions. We felt that there was a significant distinction between the civil nature of an action brought by an indigent prisoner under 42 U.S.C. § 1983 and the essentially criminal nature of writs of habeas corpus, namely, that the former deals with the condition of confinement while the latter tests the legality thereof. 53 Comp. Gen. 638, 644 (1974). See 39 Comp. Gen. 133, 139 (1959). Consequently, we disagreed with the opinion in McClain v. Manson, 343 F. Supp. 382 (D.C. Conn. 1972), holding that, pursuant to subsection (g) of the Criminal Justice Act of 1964 (CJA), as amended, 18 U.S.C. § 3006A, civil rights and habeas corpus actions should be equated for purposes of providing minimal compensation to attorneys in § 1983 actions brought to protect the rights of prisoners. Moreover, we expressed concern over the

possible adverse administrative and financial effects upon the Federal judicial system of authorizing the payment of expenses incident to obtaining counsel or fact or expert witnesses in prisoners' civil rights actions and further suggested that the question is one of policy more appropriately considered by Congress than the GAO.

Congress, by amending 28 U.S.C. § 1825, through the enactment of Pub. L. No. 89-162, 79 Stat. 618 (1965), authorized the payment of witness' fees incurred by indigent prisoners in habeas corpus proceedings. This Act thus gave legislative approval to our decision in 39 Comp. Gen. 133, supra, based on the rationale discussed in that decision: the essentially criminal character of the habeas corpus action. See S. Rep. No. 615, 89th Cong., 1st Sess. 1 (1965). Similarly, in extending the provisions of the CJA to cover individuals subject to revocation of parole or probation or prosecuting a writ of habeas corpus, Congress again relied on the essentially criminal character of these proceedings:

> "Inasmuch as these proceedings have traditionally been regarded as technically civil in nature rather than criminal, no right to appointed counsel has yet been recognized under the sixth amendment. The distinction between civil and criminal matters, however, has become increasingly obscure where deprivation of personal liberty is involved. See In re Gault, 87 S. Ct. 1428, 387 U.S. 1, 18 L. Ed. 2d. 527 (1967); and Johnson v. Avery, 89 S. Ct. 747, 393 U.S. 483, 21 L. Ed. 2d. 718 (1969). The proceedings listed in subsection 1(a)(3) and 1(g) are intimately related to the criminal process." H.R. Rep. No. 1546, 91st Cong., 2d. Sess. 8 (1970). (Emphasis added.)

Also note the following discussion of the provision concerning the payment of an indigent's attorney's fees in parole and probation revocation hearings:

> "* * * While there is no present constitutional or statutory right to appointed counsel in such proceedings, the result of parole revocation is the abrupt loss of personal liberty. Allowing appointment of counsel in a proceeding with such a serious potential consequence is wholly consistent with the underlying philosophy of the Criminal Justice Act to assure representation for those threatened with deprivation of personal liberty who are financially unable to obtain counsel. A parole revocation proceeding has traditionally been considered a civil, administrative matter rather than a criminal, judicial matter. Probation revocation proceedings were once also deemed civil, but the right to counsel in

> probation revocation proceedings has recently been recognized by the U.S. Supreme Court in Mempa v. Rhay, 88 S. Ct. 254, 389 U.S. 128, 19 L. Ed. 2d. 336 (1967). The Court considered the consequences to the individual more significant than the characterization of the proceedings."

Id., at 12. See also 50 Comp. Gen. 128, 134-137 (1970). Thus, it is apparent that the determining factor is the "loss of personal liberty" and it is this ingredient in the otherwise technically civil proceedings which has blurred the distinction between habeas corpus and criminal proceedings. Since it is clear that personal liberty is not at stake in indigent prisoners civil rights actions but rather what is at stake is the condition of an otherwise lawful confinement, the legislative history of these Acts does not justify a further extension of 18 U.S.C. § 3006A and 28 U.S.C. § 1825 to the situation sub judice.

Nor do we find, as asserted by Vermont Legal Aid, Inc., a constitutional imperative requiring the payment of the expenses of counsel or fact or expert witnesses. The Constitution does not, of course, address this issue. Neither is there any law or authoritative court decision establishing such a right. The responsibility of the General Accounting Office in this regard is to interpret congressionally enacted statutes, taking into account related court decisions, and it would be improper for this Office to, in effect, establish a new constitutional right where the courts have failed to do so.

In light of the foregoing discussion, we are of the view that there is no constitutional imperative either under the Due Process Clause or the Equal Protection Clause requiring that the deposition costs incurred by indigent prisoners be reimbursed from funds appropriated to either the Department of Justice or the Administrative Office of the United States Court.

Sincerely yours,

R.F. KELLER

Deputy Comptroller General
of the United States