

2008

Jeff Tucker v. State of Utah : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JEFF TUCKER,	:	
Petitioner/Appellant,	:	
v.	:	Case No. 20080748-CA
STATE OF UTAH et al.,	:	
Respondents/Appellees.	:	

Appeal from an Order of the Third Judicial District Court in and for
Salt Lake County, State of Utah, Honorable Robert K. Hilder, Presiding

BRIEF OF APPELLEES

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ORAL ARGUMENT NOT REQUESTED BY RESPONDENTS/APPELLEES

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PRIOR OR RELATED APPEALS

In *Tucker v. State*, 2003 UT App 213, 2003 WL 21469154, petitioner argued, as in the present appeal, that the Board of Pardons lacked authority to toll his Utah sentence while he was serving time in federal custody. The Court held that the argument was entirely without merit, but declined to address his challenge alleging ex post facto application of Utah Code Ann. § 76-3-202(8)–the same statute challenged in the present appeal–because it was raised for the first time on appeal. 2003 UT App 213 at *1 and *1 n.1.

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BRIEF OF APPELLEES

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is taken from a final order entered by the Third Judicial District Court on August 21, 2008, R. 304-11 (Add. A), dismissing with prejudice petitioner's Amended Petition for Extraordinary Relief, brought under Utah R. Civ. P. 65B. R. 2-6. Petitioner, a sex offender confined to the Utah State Prison, alleged that respondents were wrongfully restraining him in violation of his rights under the federal and state constitutions and state statutes. Following entry of the court's order of dismissal, petitioner filed a timely notice of appeal on August 27, 2008. R. 315-17. Utah Code Ann. § 78A-4-103(2)(f) (West Supp. 2008) gives this Court jurisdiction over the appeal from the district court's order on the petition for extraordinary writ.

ISSUES PRESENTED UPON APPEAL

1. Because petitioner challenged the actions of the Board of Pardons, the district court correctly considered the petition under Utah R. Civ. P. 654B(d)(2)(D).
2. The district court correctly ruled that, as a matter of law, the undisputed facts failed to state a claim upon which relief can be granted under Utah R. Civ. P. 12(b)(6).
3. The district court correctly concluded that the tolling of petitioner's sentence during his incarceration on federal charges did not violate the prohibition against ex post facto laws or other constitutional provisions.
4. The district court correctly ruled that the Board of Pardons' issuance of a retaking warrant did not exceed its constitutional authority and that the signed warrant request was appropriately certified under Utah Code Ann. § 77-27-11(3) (West 2004).
5. The order prepared by respondents' attorney and issued by the district court judge correctly stated the district court's rulings.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant text of constitutional provisions, statutes, and rules pertinent to the issues before the Court is contained in the body of this brief.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

The petition in this case was filed on October 16, 2007. R. 2-6 (petition), 7-29 (supporting memorandum). In a Memorandum Decision and Order entered October 22, 2007, the district court judge dismissed the petition without prejudice. R. 39-40.

Following three motions to extend time, R. 46-49, 63-65, and 74-76, petitioner filed an amended petition, R. 83-113, alleging that the Board of Pardons (Board) had violated his constitutional rights by (1) extending his sentence through tolling during the time he was paroled to federal custody, (2) seizing him on his release from parole to federal custody, (3) issuing a retaking warrant on the basis of an uncertified warrant request, and (4) incarcerating him beyond the time calculated from the Utah Sentencing Guidelines matrix. Respondents filed a motion to dismiss, R. 217-18, supported by a memorandum, R. 140-216. The district court granted the motion from the bench on July 30, 2008, and ordered counsel for respondents to prepare an order. R. 297. Over petitioner's objections, R. 300-03, the judge signed respondents' proposed order on August 21, 2008, R. 304-10, noting and overruling the objections. R. 310. Five days later, petitioner filed a timely notice of appeal. R. 315-16.

B. Statement of Relevant Facts

On or about May 18, 1990, petitioner entered a plea of guilty to sexual abuse of a child, a second degree felony, and was sentenced to a term of not less than one year nor more than fifteen years. R. 141, 155, 305. He was paroled effective March 28, 1995, R. 141, 157, 305, but was returned to prison as the result of a Board warrant dated December 4, 1995. R. 141, 161, 305. He was paroled a second time on May 14, 1996, R. 141, 163, 305, and was again returned to prison on a Board warrant dated June 12, 1998. R. 141, 167, 305. On July 27, 2001, a federal detainer was lodged against

petitioner. R. 141, 305.¹ Petitioner was paroled to federal authorities for disposition of the detainer effective April 2, 2002. R. 141, 171, 305. In reporting the results of the Special Attention Review establishing this parole date, the Board explicitly noted that "[t]ime on Utah's sentence will toll while Mr. Tucker is in Federal custody." R. 171; *see also* R. 141, 305. On July 20, 2001, judgment was entered against petitioner on a federal criminal charge of possession of child pornography, and he was sentenced to five years of confinement followed by three years of supervised release. R. 141, 173, 305.

Petitioner was returned to state custody on August 9, 2006, and was placed in the Bonneville Community Correctional Center (BCCC) for completion of a sex offender program. R. 142, 180, 305. On September 12, 2006, he admitted to BCCC staff that he had accessed child pornography while in federal custody and had brought cartoon-like "anime" images of young girls in the nude to BCCC. R. 142, 187, 306. Investigators conducted a search of his former room at the federal halfway house and discovered three computer disks containing pornographic cartoon images and photographs of female children in provocative poses. R. 142, 180, 186, 306. Based on the disks and on petitioner's failure to complete the sex offender program, the Board issued a retaking warrant on September 15, 2008. R. 142, 190, 306. Petitioner initially pled not guilty to violating his parole agreement, but, in a subsequent letter to the Board, withdrew his

¹By clerical error, Exhibit #6 (R. 169) to respondents' memorandum supporting the motion to dismiss is a 1998 federal detainer. Plaintiff has not disputed the fact of his parole to federal authorities under the 2001 detainer.

denial of and accepted responsibility for the charged violations; he also waived his right to an evidentiary hearing before the Board. R. 142, 192, 306.

Petitioner's sentence will expire on May 29, 2009. Hrg. DVD at 9:24:13-23.

SUMMARY OF ARGUMENT

The petition in this case challenges the actions of the Board of Pardons as exceeding the Board's jurisdiction or conflicting with constitutional and statutory law. Such claims are expressly governed by Utah R. Civ. P. 65B(d)(2)(D). Petitioner admits that his petition is based on an alleged misapplication of Utah Code Ann. § 76-3-202—a provision that explicitly addresses the discretion of the Board of Pardons.² See *Aplt. Brief* at 7a. He provides no authority to support his contention that his case should be decided under subsection (b) of the rule, as a wrongful restraint on personal liberty. His preference for the remedies provided in subsection (b) is an insufficient basis on which to recharacterize his claims. Moreover, his four-sentence argument on this point, lacking any citation to relevant case law, is inadequate briefing of the issue under Utah R. App. P. 24(a)(9).

In ruling on the amended petition, the district court applied the correct test for a motion to dismiss under Utah R. Civ. P. 12(b)(6): whether, accepting the facts alleged,

²This Court decided the same claim against petitioner in a prior case, *Tucker v. State*, 2003 UT App 213, 2003 WL 21469154. Petitioner did not argue ex post facto application of the relevant statute until that case was on appeal, and the Court declined to consider the issue as untimely raised. Because he could and should have raised the issue for timely consideration in the prior case, claim preclusion can be applied to bar its consideration here, as respondents argued in the district court. See R. 142-44.

petitioner has a right to relief based on those facts. Petitioner has identified no fact that the district court failed to accept as alleged. Instead, he argues that the court improperly entertained questions of law in considering the petition. *See* Aplt. Brief at 8. But precedent makes clear that the court need not accept petitioner's view of the law in making that assessment.

Applying the law to the facts as alleged, the district court correctly concluded that the tolling of petitioner's sentence during his confinement on federal charges did not violate his constitutional rights and was within the Board's authority. Rather than showing error in the district court's analysis, petitioner simply repeats the arguments the court rejected. He presents no authority contradicting the court's conclusions that (1) the Board was within its authority to toll the sentence, and (2) the tolling did not increase petitioner's punishment in violation of the prohibition against ex post facto laws.

Petitioner's representation that the district court did not conclude, in the July 30, 2008 hearing, that the signatures on the warrant request met the statutory certification requirement (*see* Aplt. Brief at 2-3) is belied by the recording of the hearing that petitioner moved this Court to admit as a part of the record on appeal. Moreover, as petitioner concedes, he pleaded "no contest" to the Board's revocation allegations. Aplt. Brief at 6. By doing so, he waived any nonjurisdictional irregularities in the revocation process, as the district court judge agreed. *See* Hrg. DVD at 9:21:54 - 9:22:08.

Finally, the district court did not err in signing the order prepared at the court's request by counsel for the Board. The court ordered counsel to prepare an order setting

forth the court's ruling. *See* Hrg. DVD at 9:25:29-36; R. 297. Once the order was submitted to the court, petitioner filed his objections to it. R. 300-03. As signed by the court on August 21, 2008, the order notes and overrules petitioner's objections, R. 310, and clarifies that the facts provided in the order are not findings, but the factual history of the case. R. 305. Petitioner has cited no authority for his contention that the practice of ordering the prevailing party to prepare an order reflecting the court's ruling is in any way improper.

Because petitioner has failed to demonstrate error in the district court's order, there are no grounds to disturb it.

ARGUMENT

Standard of Review: A motion to dismiss "presents a question of law that we review for correctness. Moreover, the district court's interpretation of prior precedent, statutes, and the common law are questions of law that we review for correctness." *Ellis v. Estate of Ellis*, 2007 UT 77, ¶ 6, 169 P.3d 441.

I. THE DISTRICT COURT CORRECTLY CONSIDERED THE PETITION UNDER RULE 65B(d)(2)(D) OF THE UTAH RULES OF CIVIL PROCEDURE

Petitioner asserts that the district court erroneously failed to consider his petition under Utah R. Civ. P. 65B(b). Subsection (b) of the rule governs wrongful restraints on personal liberty. After reviewing the amended petition, the district court ruled that, because the petition alleged improprieties by the Board of Pardons, it would consider the petition under subsection (d)(2)(D) of the rule, which explicitly governs claims that "the

Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law." In so ruling, the court observed that the application of subsection (d)(2)(D) was warranted because "the gravamen of Mr. Tucker's petition seems to be that the Board of Pardons denied him due process by exceeding its powers under the Constitution and by illegally extending his sentence beyond the stated expiration date." R. 126.

Petitioner's argument on this point, contained in its entirety on the unnumbered page between pages 7 and 8 of his brief, demonstrates the correctness of the district court's decision. Petitioner asserts that the Board's application of Utah Code Ann. § 76-3-202(8) illegally lengthened his sentence, making his arrest on a Board warrant during the allegedly illegal extension a wrongful restraint on his personal liberty. Absent the Board's allegedly illegal actions, petitioner would not have a claim. Because, as the court correctly determined, petitioner's claims are based on actions of the Board that allegedly violated its constitutional and statutory powers, consideration of the petition under subsection (d)(2)(D) was not only proper, but required by precedent. In a similar case, an inmate sought post-conviction relief under two subsections of Utah R. Civ. P. 65B as well as Rule 65C. This Court observed that despite the petitioner's argument that the district court had applied the wrong provision, "the district court appropriately analyzed the petition for its substance, rather than its caption." *Glasscock v. State*, 2005 UT App 12, 2005 WL 67583 at *1 n.2. *See also Renn v. Utah State Board of Pardons*, 904 P.2d 677, 683 (Utah 1995) ("Petitions for writs of habeas corpus under [former] Rule

65B(c)[governing "[o]ther wrongful restraints on personal liberty"] cannot be used to challenge Board actions that might be challenged under [former] Rule 65B(e) [now Rule 65B(d)(2)(D)].);" *Padilla v. Utah Board of Pardons and Parole*, 947 P.2d 664, 667 (Utah 1997) (quoting *Renn*); *Manning v. State*, 2004 UT App 87, ¶ 20 n.5, 89 P.3d 196 (citing *Padilla*).

Because petitioner has failed to show that the district court's application of subsection (d)(2)(D) was erroneous, there is no reason to disturb its ruling on this issue.

II. THE DISTRICT COURT APPLIED THE CORRECT LEGAL STANDARD IN RULING THAT THE PETITION FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Petitioner argues that the district court erred by failing to conclude that the petition alleged sufficient facts to avoid dismissal for failure to state a claim. However, many of the "facts" he asserts the court disregarded are not facts at all, but petitioner's legal conclusions. On appeal, "a court need not accept conclusory allegations made in the complaint as true," including conclusions of law. *Cline v. Brown*, 2008 UT App 319, ¶ 2, 2008 WL 3975624.

As "facts" that the district court declined to accept, petitioner lists issues of law: that the Utah Constitution places limitations on the Board's powers; that the legislature unconstitutionally gave the Board powers properly belonging to Article VIII courts, in violation of Article V's separation of powers; and that applying the Board's legislatively derived powers to petitioner violated petitioner's due process rights because the powers

themselves are unconstitutional. *See* Aplt. Brief at 3.³ To the extent that he makes any challenge to the factual history contained in the district court's order elsewhere in his brief, he does not show how any challenged fact contradicts the facts as alleged in his petition or affects the court's analysis. Instead, he seeks only to provide an explanatory context for certain facts to fit his legal theory that the Board acted in violation of his rights. *See* Aplt. Brief at 19-22.

Forcing the district court to accept petitioner's conclusions of law would deprive it of its rightful role in assessing the sufficiency of the petition. The court must "first examine the applicable law" to determine whether the facts alleged meet the elements of a claim under the provisions of law invoked. *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218, 1220 (Utah 1996). As petitioner acknowledges, "he is just a layman at law" who "has not had the benefit of years of training and practice" in legal tasks. Aplt. Brief at 16. As such, he is not in the court's advantaged position to interpret the law. Consequently, leaving interpretation of the law to the court in the context of a motion to dismiss satisfies both common sense and precedent. Moreover, petitioner has provided no authority for his proposition that, in a motion to dismiss, the court must accept his interpretation of the law. The lack of support for his position gives no ground for reversal.

³Petitioner's more specific contentions (e.g., that the Board improperly applied Utah Code Ann. § 76-3-202(8)) fall into these general categories.

An examination of the historic facts petitioner purports to challenge shows that the district court did not fail to consider them as alleged in the petition. In addressing the fact numbered 6 in the district court's decision, R. 305, petitioner correctly points out that the federal detainer at R. 169 is dated September 15, 1998, not July 27, 2001. However, as explained above in n.1, the 1998 detainer was attached by mistake to the memorandum supporting respondents' motion to dismiss instead of the 2001 detainer. Despite this error, petitioner affirmatively represented in the memorandum supporting his petition that "[e]arly 2001, petitioner's federal trial was held, & he was sentenced on July 21, 2001[.]" and that on August 7, 2001, the Board granted him a parole to federal custody, effective April 2, 2002, for service of his federal sentence. R. 8-9, ¶ 7.⁴ From these admissions, the court could reasonably infer that a federal detainer had issued, and petitioner does not deny that it did. Moreover, at no point has petitioner maintained that the Board improperly turned him over to federal authorities for service of his federal sentence. Because the clerical error is inconsequential and does not affect the substance of petitioner's claims, it cannot serve as the basis for reversal of the district court's decision.

Petitioner next argues that the facts numbered 7, 8, and 9 in the district court's decision establish a false chronology. There is no substance to this claim. In his petition,

⁴Although the district court dismissed the original petition without prejudice by order of October 22, 2007, R. 39, petitioner moved the court to attach the memorandum submitted with the original petition, R. 7-32, to the amended petition. R. 77-79. When a response was ordered, the memorandum was forwarded to respondents with the amended petition and is, therefore, a part of the amended petition.

petitioner affirmatively represented that he was paroled to federal authorities "as a 'release' to federal detainer" effective April 2, 2002, as stated in fact no. 7. R. 9, ¶ 8; 305, ¶ 7. Likewise, the petition states that when the Board granted the April 2, 2002, parole date, it "announced its intent to 'toll' petitioner's time while in federal custody[.]" just as fact no. 8 states. R. 9, ¶ 7; 305, ¶ 8. As to fact no. 9, which states that "Petitioner was federally tried and convicted of Possession of Child Pornography[.]" R. 305, ¶ 9, petitioner admits as much in his brief. Aplt. Brief at 4, ¶ 2. He also refers to the federal court judgment imposing the federal sentence "signed by Judge Campbell 7/19/2001[.]" Aplt. Brief at 19, which shows a 60-month term of incarceration followed by 36 months of supervised release, as fact no. 9 reflects. R. 173, 305 ¶ 9.

Petitioner's attack on the facts numbered 11 and 12 is equally unavailing. Although he contends that, contrary to fact no. 11, he did not admit to accessing child pornography while detained at the federal halfway house, he affirmatively states in the memorandum supporting his petition that the halfway house staff found three computer disks, one that included his resume, "containing 9 photographs of female children wearing swimsuits, and 29 'cartoon' images of children of a pornographic nature[.]" consistent with facts no. 11 and 12. R. 10, ¶ 11. In his brief, he also acknowledges talking to the Bonneville Community Correctional Center's treatment team about accessing child pornography. Aplt. Brief at 21. Whether the disks were found before or after he spoke with the treatment team is irrelevant to the issues on appeal and has no bearing on the correctness of the district court's rulings.

In short, the district court applied the correct analysis to petitioner's claims. It accepted the facts as pleaded, independently analyzed the applicable law, and determined that the facts failed to state a claim for relief under the law. Because petitioner has failed to show that the court's rulings were dependent on any fact contradicted by the petition, he is not entitled to relief on this issue.

III. THE DISTRICT COURT CORRECTLY RULED THAT TOLLING PETITIONER'S STATE SENTENCE DURING HIS FEDERAL INCARCERATION WAS BOTH CONSTITUTIONAL AND WITHIN THE BOARD'S AUTHORITY

Petitioner maintains that the Board lacked authority to toll his Utah sentence during service of the sentence on his federal conviction. He bases his claim on the fact that Utah Code Ann. § 76-3-202(8) (West Supp. 2008), which prohibits crediting an offender for time spent in confinement outside the state, was enacted after his conviction in 1998, and argues that it cannot be applied retroactively. Petitioner's argument is without merit.

This Court has previously considered whether the Board has the authority to toll a Utah sentence during an offender's incarceration by another jurisdiction. In *Ontiveros v. Utah Board of Pardons*, 897 P.2d 1222 (Utah App. 1995), an offender sentenced in 1979 to an indeterminate term of not less than one nor more than fifteen years was paroled in 1987. While on parole, he was arrested for robbery in California and sentenced to four years of incarceration. Based on the California offense, the Board found him in violation of his parole and required him to serve the balance of his Utah sentence, without credit

for time served on the California conviction. The Court concluded that "Appellant's imprisonment in California on a different conviction effectively suspended the time for the running of his sentence in Utah. Appellant is not entitled to credit for time served in California on a new and different conviction." *Ontiveros*, 897 P.2d at 1224.

Petitioner's attempt to distinguish *Ontiveros* is unavailing. First, he asserts that the *Ontiveros* decision is inapplicable because it postdates his conviction by five years. He fails to recognize that it applied to a 1979 conviction that, like petitioner's, predated the addition of subsection (8) to the statute. The decision was based on the Board's "extremely broad amount of discretion 'to determine the period of time that will actually be served.'" *Ontiveros*, 897 P.2d at 1223 (quoting *Rawlings v. Holden*, 869 P.2d 958, 961 (Utah App. 1994) (quoting *State v. Schreuder*, 712 P.2d 264, 277 (Utah 1985))). Thus, the Court recognized the Board's authority to toll an offender's sentence during service of a sentence in another jurisdiction even before that authority was codified in statute. Second, petitioner observes that he was already incarcerated on a parole violation when he was released to federal authorities, while *Ontiveros* was not incarcerated, but on parole when he was released pursuant to an interstate compact. He does not explain why this fact should produce a different outcome. The relevant fact is that petitioner, like *Ontiveros*, was fulfilling a state criminal sentence at the time he was turned over to another jurisdiction for service of a sentence imposed by that jurisdiction. It is the confinement by a different jurisdiction and on a different crime that "effectively

suspended the time for the running of" the Utah sentence. *Id.* at 1224. *Ontiveros* controls here.

This Court has previously held that petitioner himself is not entitled to credit toward his Utah sentence for the time served on his federal crime—and that section 76-3-202(8) applies to him. In *Tucker v. State*, 2003 UT App 213, 2003 WL 21469154 ("*Tucker I*"), the Court held that "Petitioner's argument—that time spent incarcerated on his federal convictions should simultaneously count towards service of his Utah sentence—is entirely without merit." 2003 UT App 213 at *1. The Court also noted that, "[c]ontrary to Petitioner's assertions, the language of section 76-3-202(8) does not require that Petitioner be 'convicted while on parole' [like *Ontiveros*] for the provision to apply." *Id.* Although the district court did not rely on this Court's prior decision, it constitutes res judicata as to the applicability of the statute, as respondents argued below. *See* R. 142-44.

Res judicata comprises two branches, claim preclusion and issue preclusion. *Nebeker v. Utah State Tax Comm'n*, 2001 UT 74, ¶ 22, 34 P.3d 180 (quoting *Macris & Assocs. v. Neways, Inc.*, 2000 UT 93, ¶ 19, 16 P.3d 1214). The former "involves the same parties and their privies and also the same cause of action, 'and thus precludes the relitigation of all issues that could have been raised as well as those that were, in fact, litigated in the prior action.'" *Id.* (quoting *Macris*, 2000 UT 93 at ¶ 19). Issue preclusion "'arises from a different cause of action and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit.'" *Id.* (quoting *Macris*, 2000 UT 93 at ¶ 19). As pointed out in the memorandum supporting

respondents' motion to dismiss, both branches are implicated in the present case. *Tucker I* involved the identical parties as in the present case: petitioner and the State. The claims regarding the Board's authority under the statute are identical to those made in *Tucker I*, which was decided in a final judgment on the merits after being fully and fairly litigated. And petitioner could and should have raised his ex post facto argument in *Tucker I*, but failed to do so. As the Court noted in declining to reach that issue, petitioner's challenge to ex post facto application of the statute "w[as] not raised in his petition below, and Petitioner has not argued plain error or exceptional circumstances on appeal. Therefore, we do not address these arguments." 2003 UT App 213 at *1 n.1.

Even though the district court chose not to grant respondents' motion to dismiss on res judicata grounds, "[i]t is well established that an appellate court may affirm a judgment, order, or decree appealed from if it is sustainable on any legal ground or theory apparent on the record,' even though that ground or theory was not identified by the lower court as the basis of its ruling." *Orton v. Carter*, 970 P.2d 1254, 1260 (Utah 1998) (quoting *Limb v. Federated Milk Producers Ass'n*, 23 Utah 2d 222, 225 n.2, 461 P.2d 290, 293 n.2 (1969)). Because *Tucker I* established that (1) the Board acted within its power in applying section 76-3-202(8) to petitioner, and (2) petitioner could and should have raised his ex post facto argument in that case, claim and issue preclusion bar him from raising those issues again. The Court may affirm the district court's judgment on these record-supported, alternative grounds.

As the district court judge took great pains to explain to petitioner, petitioner had not completed his Utah sentence when he was paroled to federal custody. *See* Hrg. DVD at 9:16:06 - 9:19:56, 9:23:33 - 9:25:28. While the tolling of his Utah sentence during federal custody did delay petitioner's ultimate release date as estimated at the time of sentencing, it did not increase the total length of time served over the fifteen-year maximum ordered by the sentencing court. Under *Ontiveros*, as subsequently codified in statute, his Utah sentence was suspended by virtue of his confinement in another jurisdiction. Because he still "owe[d] a debt of service time" in Utah once his federal sentence was completed, R. 307, the district court correctly dismissed this claim, and petitioner has failed to show error in that decision.

IV. THE DISTRICT COURT CORRECTLY RULED THAT A SIGNED WARRANT REQUEST WAS APPROPRIATELY CERTIFIED UNDER UTAH CODE ANN. § 77-27-11(3)

Utah Code Ann. § 77-27-11 governs revocation of parole. Under the statute,

(3) Any member of the board may issue a warrant based upon a certified warrant request to a peace officer or other persons authorized to arrest, detain, and return to actual custody a parolee, and may upon arrest or otherwise direct the Department of Corrections to determine if there is probable cause to believe that the parolee has violated the conditions of his parole.

Utah Code Ann. § 77-27-11(3) (West 2004). The word "certified" is defined neither in the statute nor in section 77-27-1, which contains the definitions applicable to Chapter 27 of Title 77. The warrant request in this case was signed by both the agent and his supervisor. R. 184.

Petitioner's argument on this point attacks the validity of two documents: first, the signed request submitted to the Board for a retaking warrant, and second, the district court's signed order granting respondents' motion to dismiss. Contrary to petitioner's contentions, both documents are validated by the signatures they contain. In addition, petitioner's ultimate acceptance of the Board charges, waiver of personal appearance, and withdrawal of his request for an evidentiary hearing on the charges acted as a waiver of all nonjurisdictional defects, including any irregularity in the warrant request. *See* R. 192; *see also Alvillar v. Board of Pardons*, 2005 UT App 356, 2005 WL 2373919 at *2; *Bacon v. Jorgensen*, 2006 UT App 25, 2006 WL 181523 at *1.

In the July 30, 2008 hearing on respondents' motion to dismiss, the district court agreed with respondents' counsel that the signatures of the agent and supervisor on the warrant request submitted to the Board fulfilled the certification requirement contained in Utah Code Ann. § 77-27-11(3) (West 2004). Petitioner argues that the court's conclusion to this effect in its order is "a product wholly of the attorney general's imagination and did not issue from the court." Aplt. Brief at 3, The order was signed by the judge and contains his handwritten, initialed modifications. In light of these facts, petitioner's representation is not merely unconvincing, but unsupportable. Moreover, it is contradicted by the DVD of the hearing that petitioner successfully moved to have this Court incorporate as a part of the record.

The judge had an extensive exchange with petitioner on the issue of the certification requirement after petitioner presented his argument on the point. *See* Hrg.

DVD at 9:08:56 - 9:15:00. In the course of that discussion, the judge referred to respondents' argument that the signatures rendered the warrant request compliant with statute, indicating his agreement with it, *See* Hrg. DVD at 9:11:36 - 9:12:00. Because the term "certified" is undefined in statute, the judge declined to impose a technical meaning on it, instead construing it in harmony with its ordinary meaning of something given with written assurance. He concluded that, as respondents argued, the signatures of the agent and supervisor did act as a certification under the statutory language, and that no additional formalities, such as notarization, were necessary.

Petitioner attempts to invoke a Fourth Amendment standard of requiring an oath or affirmation with regard to warrant requests. He claims that under *Jones v. Utah Board of Pardons & Parole*, 2004 UT 53, 94 P.3d 283, an oath or affirmation is essential to the validity of the warrant request, and its absence renders the revocation process unconstitutionally defective. Petitioner misreads *Jones*. In *Jones*, the Utah Supreme Court considered "whether section 77-27-11(3) violates the Fourth Amendment of the United States Constitution and article I, section 14 of the Utah Constitution, both of which prohibit unreasonable searches and seizures, because it allows for a retaking arrest without probable cause." 2004 UT 53 at ¶ 8. The court held that it did not, stating that demanding a finding of probable cause before a retaking "would impose requirements on section 77-27-11(3) that are not required by either the United States Constitution or the Utah Constitution." *Id.* at ¶ 43. As the court observed, "It is well established that a parolee has a more limited right to due process than other citizens," *id.* at ¶ 45, it

concluded that where the Board "may ask the Department of Corrections to determine if there is probable cause to detain a parolee, and probable cause must be found in order to further detain the parolee, the 'minimal inquiry' requirements of due process of both the Utah and the United States Constitutions are met." *Id.* at ¶ 46.

Even if petitioner were entitled to a warrant request certified by something more than the signatures of the agent and supervisor, the district court correctly ruled that the claim was waived. In a handwritten letter dated November 16, 2006, petitioner stated::

Because I was incorrectly informed as to policy, I mistakenly requested on Nov.1 an evidentiary hearing before the Board of Pardons.

Please withdraw that request, and consider this notice as a waiver of personal appearance and withdrawal of my denial of violation allegations. As stated, I accept the charge of violation, waive personal appearance for revocation, and await your decision.

I am sincerely sorry for any inconvenience this may have caused.
Thank you.

R. 192. In a similar case, this Court denied extraordinary relief to a parolee who challenged procedural aspects of his revocation but entered an unconditional no contest plea to the underlying parole violations. The Court held that "[b]y pleading no contest to each violation, [the parolee] waived any claim that he was denied procedural due process in the parole revocation proceedings." *Alvillar*, 2005 UT App 356 at *2; *see also Bacon*, 2006 UT App 25 at *1 ("Thus, by pleading guilty to the parole violations, [the parolee] waived all nonjurisdictional defects that arose prior to his plea."). The district court judge agreed that the claim had been waived both in the hearing and in the subsequent order. Hrg. DVD at 9:21:54 - 9:22:07; R. 308. Petitioner has not addressed this conclusion in

his brief, but it forms an additional ground for affirmance of the district court's decision as to certification of the warrant request.

V. THE ORDER PREPARED BY RESPONDENTS' COUNSEL AND
ISSUED BY THE DISTRICT COURT JUDGE CORRECTLY STATED
THE DISTRICT COURT'S RULINGS

Petitioner argues that the drafting of the district court's order by respondents' counsel "defies every judicial principle of 'due process'" and "creates a gross violation of Tucker's due process rights *over and above those complained of in his petition.*" Aplt. Brief at 9. Nowhere in his brief does petitioner cite any authority for this novel proposition. Moreover, it flies in the face of Rule 7(f)(2) of the Utah Rules of Civil Procedure, which explicitly requires a prevailing party to prepare a proposed order unless directed otherwise by the court.

Rule 7(f)(2) states:

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

An examination of the record shows respondents' full compliance with Rule 7. Eight days after the July 30, 2008 hearing, respondents' attorney served a proposed order on petitioner. R. 311, mailing certificate. In turn, petitioner filed his objections to the order on August 14, 2008. R. 300-03. On August 21, 2008, the district court judge made an

initialed modification to the order, recaptioning the "Findings of Fact" as "Factual History." R. 305. He then signed the order as modified, adding under his signature, "Objections noted and overruled." R. 310. Had the order not complied with the judge's rulings, he had both the opportunity and the obligation to reject or modify it. His signature of the modified order adopts it as the order of the court in all respects. As to petitioner's contention that the court did not order dismissal with prejudice, Aplt. Brief at 2, petitioner raised that issue in his objections, R. 302, which were considered and rejected by the court. R. 310. Nothing in petitioner's argument on this issue demonstrates any deviation from the obligations of Rule 7, and the drafting of the order by respondents' counsel consequently provides no basis for relief from the order as signed.

CONCLUSION

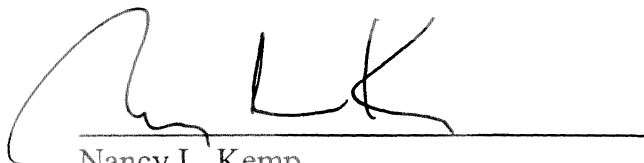
The substance of petitioner's claim—that the Board of Pardons exceeded its authority in tolling petitioner's sentence while he was in federal custody—has previously been decided against him by this Court. Although the Court declined to consider the ex post facto argument as belatedly raised for the first time on appeal, petitioner could and should have raised it at the district court level in that action, and it is barred in the present case by res judicata. But even if the Court now chooses to review the claim on the merits, petitioner has identified no error in the district court's rulings. Applying the appropriate subsection of Utah R. Civ. P. 65B, the district court correctly concluded that the Board's actions complied with relevant constitutional and statutory provisions, as reflected in its order. Accepting the facts as alleged in the amended petition, the court applied the proper

standard to determine that those facts failed to state a claim upon which relief can be granted. For these reasons, as explained above, respondents respectfully request the Court to affirm the district court's decision.

STATEMENT REGARDING ORAL ARGUMENT

Because the issues for decision can be resolved under existing precedent, **respondents** do not seek oral argument.

Dated this 14th day of April, 2009.


A handwritten signature in black ink, appearing to be 'N. Kemp', written over a horizontal line.

Nancy L. Kemp
Assistant Attorney General
Attorney for Respondents/Appellees

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of April, 2009, I caused to be mailed, **postage** prepaid, two true and correct copies of the foregoing BRIEF OF APPELLEES to the following:

Jeff Tucker #20070
Utah State Prison
P. O. Box 250
Draper, Utah 84020



ADDENDUM A

FILED DISTRICT COURT
Third Judicial District

AUG 21 2008

SALT LAKE COUNTY

By _____ *MM*
Deputy Clerk

MICHELLE M. YOUNG (#10685)

Assistant Attorney General

MARK SHURTLEFF (#4666)

Attorney General

Attorneys for Respondents

PO Box 140812

160 East 300 South

Salt Lake City, Utah **84114-0812**

Telephone: (801) 366-0216

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

JEFF TUCKER,

Petitioner,

vs.

**UTAH BOARD OF PARDONS, UTAH
DEPARTMENT OF CORRECTIONS, et
al.**

Respondents.

: **FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER OF THE
COURT**

: **Case No. 070914853**

: **Judge ROBERT K. HILDER**

This matter was heard July 30, 2008. Petitioner was present, representing himself. Respondents were represented by Michelle M. Young from the Utah Attorney General's Office. After oral hearing, having carefully reviewed the pleadings submitted by both parties, being fully advised in the premises, and good cause appearing, the Court hereby enters the following Order.

FACTUAL HISTORY *RET.*
~~FINDINGS OF FACT~~

1. On or about May 18, 1990, Petitioner was convicted of Sexual Abuse of a Child and sentenced to one to fifteen years in prison.
2. On or about March 28, 1995, Petitioner was paroled.
3. On or about December 4, 1995, the Board issued a retaking warrant for Petitioner, and Petitioner was returned to Prison.
4. On or about May 14, 1996, Petitioner was again released on parole.
5. On or about June 12, 1998, the Board issued another retaking warrant and Petitioner was again returned to Prison.
6. On or about July 27, 2001, a federal detainer was lodged against Petitioner.
7. On or about April 2, 2002, Petitioner was paroled to the federal government for disposition of his detainer.
8. The Board **specifically** noted that Petitioner's Utah **sentence** would be tolled while he was in federal custody.
9. Petitioner was federally tried and convicted of Possession of Child Pornography. He was sentenced to five years in federal prison and three years of supervised release.
10. On or about August 9, 2006, Petitioner was released from federal custody and placed in the Bonneville Community Correctional Center ("BCCC").

11. On or about September 12, 2006, Petitioner admitted to BCCC staff that he had accessed child pornography while at the federal halfway house and that he had brought anime pictures of young girls in the nude to BCCC.

12. Investigators then searched Petitioner's former room at the federal halfway house and discovered computer discs supporting Petitioner's confession.

13. Based on Petitioner's parole officer's report of these events, the Board again issued a retaking warrant.

14. Although Petitioner initially pled not guilty to violating his parole agreement, he later wrote a letter to the Board in which he indicated that he wanted to withdraw his denial of the violation allegations. He also indicated that he accepted responsibility for the violations and waived his right to a parole revocation hearing.

CONCLUSIONS OF LAW

Ex Post Facto Claim

Petitioner alleges the Board's decision to toll his Utah sentence during his incarceration on federal charges increased his punishment beyond what was ordered by the trial court, thereby violating the prohibition against *ex post facto* laws. An *ex post facto* law is one that makes more burdensome the punishment for a crime after its commission. *Monson v. Carver*, 928 P.2d 1017, 1026 (Utah 1996). Both the United States Constitution and the Utah Constitution prohibit *ex post facto* laws. U.S. Const. art I, §10; Utah Const. art. I, §18.

When Petitioner was paroled to federal custody, his Utah sentences had not expired. The Board suspended Petitioner's service of Utah time and paroled him to federal custody, where he served approximately 52 months on his federal sentence. Petitioner owed a debt of service time on his federal crime and he owes a debt of service time in Utah.

Additionally, although the Utah statute codifying tolling of a Utah sentence during an inmate's incarceration in another jurisdiction, Section 76-3-202(8), Utah Code Ann., took effect in 1997, the **Board** had such a policy in place long before then. *See, e.g., Ontiveros v. Bd. of Pardons*, 897 P.2d 1222 (Utah App. 1995)(upholding Board's tolling of Utah sentence during inmate's incarceration in California). When Petitioner was convicted in 1990, the Board had both the authority to toll a Utah sentence during an inmate's incarceration in another jurisdiction and a longstanding policy of doing so. Thus, the codification of such policy did not extend Petitioner's sentence or violate the prohibition against *ex post facto* laws.

Petitioner has been legally sentenced to one to 15 years of incarceration in Utah. The duration of his Utah sentence is not increased or made any more burdensome by the Board's tolling of his Utah sentence during his **federal** incarceration.

Board Warrant

Petitioner challenges the validity of the Board retaking warrant, alleging the Board exceeded its constitutionally granted powers when it issued the warrant, that the warrant was not properly certified, and that probable cause was not established.

First, the Utah Supreme Court has already found the Board's issuance of retaking warrants to be a constitutional exercise of its authority. *Jones v. Utah Bd. of Pardons & Parole*, 2004 UT 53, 94 P.3d 283 (holding Board issuance of retaking warrant upon a preliminary finding of probable cause is constitutional).

Further, there is no requirement that a warrant request be "notarized," only that it be "certified." To certify means "[t]o authenticate or vouch for a thing in writing. To attest as being true or as represented." Black's Law Dictionary 220 (7th ed. 1999). This requirement was fully complied with, as both the agent and the supervisor signed and dated the document, attesting in writing to the truth of what was being represented.

Moreover, probable cause was preliminarily established **by the** "Warrant Request and Parole Violation Report" submitted to the Board by Petitioner's parole officer.

Finally, Petitioner's admission of guilt "waive[d] all non-jurisdictional defects" including any claim of constitutional error regarding probable cause. . . ." *State v. Parson*, 781 P.2d 1275, 1278 (Utah 1989). Accordingly, Petitioner's rights were not violated.

Due Process

Petitioner claims his due process rights were violated by his incarceration beyond the sentence suggested by the Utah Sentencing Guidelines, by his incarceration beyond his alleged "expiration date," and by his seizure under the retaking warrant.

The Fourteenth Amendment of the United States Constitution prohibits any State from depriving a person of life, liberty, or property without due process of law. However, "lawful incarceration brings about the necessary withdrawal or limitation of many privileges **and rights**, a retraction justified by the considerations underlying our penal system." *Sandin v. Conner*, 515 U.S. 472, 485, 115 S.Ct. 2293 (1995) (quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977)). To state a valid due process claim, Petitioner must show (1) a liberty interest was implicated and (2) due **process** was not afforded.

Petitioner asserts that the sentencing guidelines establish **"the** 'statutory maximum' sentence [that] could be 'imposed' by the Board based on [his] guilty plea." The Utah Sentencing Guidelines, however, do not have the force and effect of law, but are merely an "estimate" of the time an inmate will be incarcerated. *Preece v. House*, 886 P.2d 508, 511 (Utah 1994). Petitioner may, in the sole discretion of the Board, be required to serve the entire maximum term of fifteen years of his sentence. He is not entitled to release prior to that time. Accordingly, Petitioner does not have a liberty interest in release according to the sentencing guidelines and, therefore, he is not entitled to due process.

Petitioner also claims his due process rights were violated when his Utah sentence was tolled while he was in federal custody, as he claims a liberty interest in release on the alleged date of his "expiration." Petitioner, however, was not sentenced to incarceration in the Utah State Prison until a specific date, but was sentenced to a period of incarceration - one to 15 years. Until Petitioner has served 15 years in the Utah State Prison, his obligation to the State of Utah has not been fulfilled. Any

potential "expiration date," is, therefore, an estimate only - subject to numerous factors that could change the date. Because Petitioner had no legitimate expectation of release on a specific date, no liberty interest arises and no due process is required.

Petitioner also claims his due process rights were violated when he was seized by the Utah Department of Corrections upon his release from federal custody. As discussed, *supra*, it is well established that the Board has the constitutional authority to retake parolees, to revoke parole, and to toll Petitioner's sentence while he is incarcerated on a federal sentence. Accordingly, he was still on parole when he was seized pursuant to the retaking warrant. As discussed above, Petitioner received all of the due process to which he was entitled.

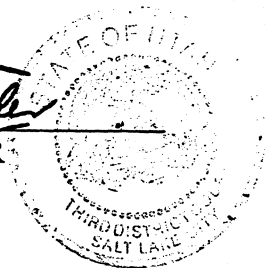
ORDER

THE COURT THEREFORE ORDERS, ADJUDGES AND DECREES **that this action is DISMISSED WITH PREJUDICE.**

ORDERED by the Court this 21st day of August, 2008.

BY THE COURT


ROBERT K. HILDER
District Court Judge

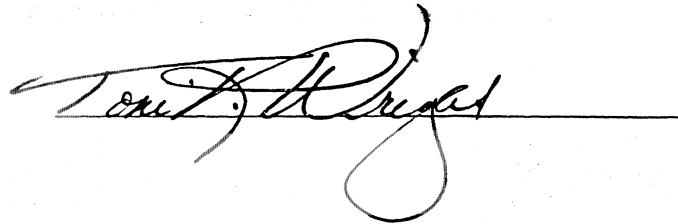


*Objections noted and
overruled. RKH. 8/24/08. ALH.*

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing **FINDINGS OF FACT,**
CONCLUSIONS OF LAW, ORDER OF THE COURT, postage prepaid, on this 7th day of
August, 2008, to the following:

Jeff Tucker
Inmate #20070
Utah State Prison
PO Box 250
Draper, Utah 84020

A handwritten signature in black ink, appearing to read "Toni F. Hughes", is written over a horizontal line.