

1950

# In the Matter of the Application of Robert Follette for Writ of Habeas Corpus : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Clinton D. Vernon; Qvention L. R. Alston; Attorneys for Appellant;

---

## Recommended Citation

Brief of Appellant, *Follette*, No. 7436 (Utah Supreme Court, 1950).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/1248](https://digitalcommons.law.byu.edu/uofu_sc1/1248)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

# In the Supreme Court of the State of Utah

---

In the Matter of the Application

of

ROBERT FOLLETTE  
For Writ of Habeas Corpus

} Case No. 7436

---

## APPELLANT'S BRIEF

---

**FILED**

JAN 25 1950

CLINTON D. VERNON,  
*Attorney General*

QUENTIN L. R. ALSTON

-----  
Clerk, Supreme Court, Utah *Assistant Attorney General*

ATTORNEYS FOR APPELLANT

---

---

## TABLE OF CONTENTS

	Page
STATEMENT OF FACTS .....	3
STATEMENT OF POINTS .....	5, 6
ARGUMENT (Points consolidated)	
1. The court erred in concluding as a matter of law that the said Robert Follette should have been served with a summons and/or citation advising him of the time and place when the question of his violation of probation would be considered by an agency having authority to make investigation and determination thereof. ....	6
2. The court erred in concluding as a matter of law that the said Robert Follette should have had an opportunity to secure witnesses by compulsory process and to cross-examine such witnesses as might testify to his violation of probation in behalf of the state, or to make any defense of his position or to make any such explanation as might be necessary .....	6
3. The court erred in concluding as a matter of law that the deprivation of the privileges set forth above in points 1 and 2 was contrary to the procedural due process guaranteed under Article 1, Section 7 of the Constitution of the State of Utah.....	6
4. The court erred in granting the said Robert Follette's petition for writ of habeas corpus.....	6
CONCLUSION .....	12

## AUTHORITIES CITED

	Page
25 Am. Jur. 159, Habeas Corpus Sec. 26 .....	6
15 Am. Jur. 147, Criminal Law Sec. 496 .....	7
3 A. L. R. 1017 .....	8
97 A. L. R. 811 .....	8

## CASES CITED

Christiansen vs. Harris, 109 Utah 1; 163 P. (2d) 314.....	9
Demmick vs. Harris, 106 Utah 32, 144 P. (2d) 761 .....	9-10
McCoy vs. Harris, 108 Utah 407; 160 P. (2d) 721 .....	10-11
Sichofsky, Ex Parte, D. C. Cal., 273 F. 694, Affirmed C. C. A. ....	11
Sichofsky vs. U. S., 277 F. 762 .....	11
State vs. Bonza, 106 Utah 553, 150 P. (2d) 970 .....	9
State vs. Zolantakis, 70 Utah 296, 259 P. 1044; 54 A.L.R. 1463 .....	8
Williams vs. Harris, 106 Utah 386, 149 P. (2d) 640 .....	8

# In the Supreme Court of the State of Utah

---

In the Matter of the Application

of

ROBERT FOLLETTE  
For Writ of Habeas Corpus

} Case No. 7436

---

## APPELLANT'S BRIEF

---

### STATEMENT OF FACTS

This is an appeal from a judgment made and entered in favor of the petitioner, Robert Follette, in the District Court of Salt Lake County, State of Utah, on the 8th day of November, 1949, wherein the Honorable J. Allen Crockett granted petitioner's writ of habeas corpus releasing him from the custody of Alvin O. Severson, Warden of the Utah State Prison.

The petitioner, Robert Follette, had plead guilty to the crime of second degree burglary in the District Court of Salt Lake County, State of Utah, on or about the 17th day of August, 1940, (Amended Findings of Fact No. 1), and on or about the 24th day of August, 1940, was sentenced to an

indeterminate term in the Utah State Prison of from one to twenty years. (Amended Findings of Fact No. 2). However, he was granted a stay of execution of said sentence until November 21, 1940, and placed in the custody of the Chief Agent of the Adult Parole and Probation Department of the State of Utah. (Amended Findings of Fact No. 2).

On or about the 23rd day of November, 1940, the said Robert Follette appeared before the above-entitled court at which time he was granted a further stay and ordered to appear before the said court on the 15th day of March, 1941. (Amended Findings of Fact No. 3).

The said Robert Follette failed to appear before the above-entitled court on March 15, 1941, as ordered. (Amended Findings of Fact No. 6). Furthermore, the Adult Parole and Probation Department did not know his whereabouts because he had not reported to them since November 4, 1940, (Amended Findings of Fact No. 5), even though he had entered into an agreement with that department to make monthly reports to them concerning his doings and whereabouts. (Amended Findings of Fact No. 5). On March 15, 1941, therefore, the date when the said Robert Follette was ordered to appear before the above-entitled court, the court, upon the recommendation of the Adult Parole and Probation Department entered its order refusing to grant a further stay to the said Robert Follette, and, at the same time, entered its order that a commitment issue. Thereupon, on March 17, 1941, a commitment did issue. (Amended Findings of Fact No. 6).

Subsequently, and on or about the 7th day of August, 1949, the said Robert Follette was seized and apprehended in

Logan, Utah, (Amended Findings of Fact No. 7), and on or about the 10th day of August, 1949, (Return to Writ of Habeas Corpus), was placed in the Utah State Prison under the custody of Alvin O. Severson, Warden, the appellant in this proceeding, pursuant to the order of commitment which had been duly issued by the District Court of Salt Lake County on March 17, 1941.

On November 8, 1949, the petitioner, Robert Follette, was released from the custody of Alvin O. Severson, Warden of the Utah State Prison, by an order of the Honorable J. Allen Crockett, one of the Judges of the District Court of Salt Lake County, State of Utah, granting petitioner's writ of habeas corpus. It is from the order granting petitioner's writ of habeas corpus that appellant prosecutes this appeal.

## STATEMENT OF POINTS

1. The court erred in concluding as a matter of law that the said Robert Follette should have been served with a summons and/or citation advising him of the time and place when the question of his violation of probation would be considered by an agency having authority to make investigation and determination thereof.

2. The court erred in concluding as a matter of law that the said Robert Follette should have had an opportunity to secure witnesses by compulsory process and to cross-examine such witnesses as might testify to his violation of probation in behalf of the state, or to make any defense of his position or to make any such explanation as might be necessary.

3. The court erred in concluding as a matter of law that the deprivation of the privileges set forth above in points 1 and 2 was contrary to the procedural due process guaranteed under Article 1, Section 7 of the Constitution of the State of Utah.

4. The court erred in granting the said Robert Follette's petition for writ of habeas corpus.

## ARGUMENT

In view of the fact that all of the aforesaid points involve substantially the same principles of law, they are consolidated herein for purpose of argument.

It is the contention of appellant in this appeal that essentially the only question involved in a habeas corpus proceeding is one of jurisdiction; namely, whether the order, judgment or process under attack came within the lawful authority of the court or officer issuing it. In 25 Am. Jur. 159, Habeas Corpus, Section 26, it is stated that:

The primary and, ordinarily, the only question involved in habeas corpus proceedings is one of jurisdiction—namely, whether the particular order, judgment or process whose validity is attacked is one coming within the lawful authority of the court or officer making or issuing it. As it may otherwise be stated, in the absence of statutory provision to the contrary, the scope of inquiry, where restraint is had by virtue of legal process, is ordinarily limited to the validity of the process on its face and the jurisdiction of the court by which it was issued. The writ does not lie to correct errors and irregularities committed in the exercise of jurisdiction; but cognizance is taken only of such defects



as render absolutely void the proceedings under which the petitioner is imprisoned. In short, the writ reaches jurisdictional error only; it cannot properly be used to serve the mere purpose of an appeal or writ of error.

It will be noted that the record in this case shows conclusively that Robert Follette appeared before the court on or about November 23, 1940, at which time he was granted a further stay of execution and ordered to appear again before the court on March 15, 1941. On the latter date he failed to appear and the court thereupon refused to grant a further stay of execution and issued an order of commitment pursuant to which he was subsequently confined in the Utah State Prison. There can be no question, therefore, that on the expiration of the stay of execution on March 15, 1941, the court had jurisdiction to refuse to grant a further stay of execution and thereupon to issue an order of commitment. On this jurisdictional question no hearing was necessary. In 15 Am. Jur. 147, Criminal Law, Section 496, it is stated that:

When the execution of a sentence is properly stayed, the court does not thereby lose power thereafter to enforce the sentence. It may enforce it at any subsequent time, even after the original period of the sentence has passed. \* \* \*

The fact that a defendant who is granted a stay of execution for a specified time leaves the jurisdiction of the court and remains away until the expiration of his term does not prevent the court from enforcing the sentence after his return.

So in this case, the fact that the order of commitment was issued on March 17, 1941, and that Robert Follette was not

thereafter seized and apprehended until on or about August 7, 1949, and was thereupon confined in the Utah State Prison on or about August 10, 1949, pursuant to that order of commitment, the court was not deprived of its power or jurisdiction to enforce the sentence previously imposed. See also the annotations in 3 A. L. R. 1017 and 97 A. L. R. 811.

In *State vs. Zolantakis*, 70 Utah 296, 259 P. 1044, 54 A. L. R. 1463, a case decided not on habeas corpus proceedings but on appeal from an order of revocation of a suspended sentence, it is said:

A person who has a sentence suspended during good behavior, without any limitations, is entitled to a hearing upon the question of whether or not he has complied with the conditions imposed; that such hearing must be according to some well recognized and established rules of judicial procedure; that defendant is entitled to have filed either an affidavit, motion, or other written pleading, setting forth the facts relied upon for a revocation of the suspension of sentence; that defendant should be given an opportunity to answer or plead to the charge made; that a hearing should be had upon the issue joined; and that defendant as well as the state be given the right of cross-examination.

While this Honorable Court in subsequent cases dealing with the revocation of a suspended sentence reiterated, with certain marked limitations, the broad general rule announced in the *Zolantakis* case, *supra*, it nevertheless criticized the rule therein stated, and, by inference at least, indicated that it might hold otherwise if it presently had to decide a case involving a similar set of facts. See *Williams vs. Harris*, 106 Utah 387, 149 P.

(2d) 640; *State vs. Bonza*, 106 Utah 553, 150 P. (2d) 970; and *Christiansen vs. Harris*, 109 Utah 1; 163 P. (2d) 314. It is to be noted, too, that in all of the aforesaid cases involving the matter of revocation of a suspended sentence, the question as to whether or not the terms or conditions upon which the suspension of sentence was granted had or had not been violated, was one upon which reasonable men could honestly differ and therefore required a hearing for the determination of that very issue. In the present case, however, there was no such question. Robert Follette failed to appear before the court on March 15, 1941, as he was ordered to do on or about November 23, 1940. The court thereupon refused to grant him a further stay of execution and entered its order that a commitment issue. Pursuant to that commitment which was issued on March 17, 1941, Robert Follette was subsequently committed to the Utah State Prison. Appellant contends Robert Follette was rightfully committed.

It is respectfully submitted that it matters not why Robert Follette failed to appear before the court on March 15, 1941. His stay expired at that time and the court then had jurisdiction to see that the lawful sentence previously imposed was duly executed. In exercising its jurisdiction the court issued an order of commitment, and when Robert Follette was finally seized and apprehended, he was lawfully committed in the Utah State Prison. There was no necessity for a hearing on such commitment.

In *Demmick vs. Harris*, 106 Utah 32, 144 P. (2d) 761, a case involving, as does the present case, the legality of an order of commitment issued after the expiration of a stay of

execution of a sentence and not upon the revocation of a suspended sentence, this Honorable Court held that:

The case \* \* \* does not clearly come within the holding of the Zolantakis case. That case involved a suspension of a sentence during good behavior without any limitation as to time. The stay order here was for a definite length of time. It was not revoked—it expired. Upon its expiration the defendant was committed in accordance with the judgment and sentence previously imposed. The petitioner has failed to carry his burden of proving that he was unlawfully committed.

Even if it be assumed in the present case, for the purpose of argument, that Robert Follette was given a stay to a day certain with an implied promise that if he complied with the terms and conditions imposed he would be granted a further stay, he failed to comply with the court's order requiring him to appear before it on March 15, 1941, to determine whether or not a further stay should be granted. As to his failure to comply with the court's order to appear before it on March 15, 1941, there could be no difference of opinion. Under such circumstances, certainly the court was not bound to and should not have granted him a further stay. Its only alternative was to issue an order of commitment, which was done.

Finally, in *McCoy vs. Harris*, 108 Utah 407, 160 P. (2d) 721, which involved the revocation of a parole, this Honorable Court held that a parole was merely the granting of a conditional privilege which could be revoked at any time without the necessity of a hearing. In the course of the opinion it was stated:

Both logic and authority impels the holding under our statutes and system that a parolee is not entitled as of right to notice and hearing before revocation of a parole.

Certainly it cannot be successfully argued that a person ordered to appear before the court at the expiration of the stay of execution of his sentence who fails to do so is entitled to greater rights and privileges than a parolee whose parole may be revoked at any time without the necessity of a hearing. Nor can it be successfully argued that at such time the court has lost jurisdiction to carry out the sentence previously imposed. In *Ex Parte Sichofsky*, D.C. Cal., 273 F. 694, affirmed C.C.A., *Sichofsky vs. U. S.*, 277 F. 762, a habeas corpus proceeding, it was contended that the District Court lost all its jurisdiction by granting several stays of execution and by permitting the petitioner to be tried in the state court for the crime of grand larceny. The court said however:

I discover nothing, however, based either upon reason or authority, from which it may now be adjudged that the action of this court, in temporarily staying the execution of the judgment of this court, served to divest this court of jurisdiction to require petitioner to stand for judgment as per the admitted violation of the federal law. It would be a strange and bold assertion, in my judgment, for this court, possessing the amplest jurisdiction as above referred to, to hold that it had completely divested itself of all jurisdiction in the premises merely by an order staying execution.

## CONCLUSION

Appellant contends that on March 15, 1941, the District Court of Salt Lake County did have jurisdiction to issue an order of commitment for Robert Follette in executing the sentence previously imposed upon him, and that the subsequent commitment of Robert Follette pursuant to that order was proper and lawful. Where, as was the fact in this case, a person is sentenced to a prison term but is granted a stay to a day certain and ordered to appear before the court to determine whether or not a further stay should be granted, but fails to appear on the specified date, for whatever reason and without having been previously excused, a fact concerning which reasonable men may not honestly differ, he is not entitled to a hearing on the question as to whether or not a commitment should issue. Furthermore, an order of commitment issued under such circumstances is lawful and does not violate the procedural due process guaranteed by Article 1, Section 7 of the Constitution of the State of Utah.

The court in effect is merely exercising its jurisdiction in carrying out the execution of the sentence previously imposed in accordance with the due process requirements of the Constitution. To hold that on a stay date a court cannot issue an order of commitment to carry out a lawful sentence previously imposed, unless and until the defendant is before the court, would be to vest the defendant with power to deprive the court of jurisdiction by wrongfully refusing to appear before it, as ordered, at the expiration of his stay. Certainly the law does not contemplate such an absurdity.

In conclusion appellant respectfully submits that the

District Court erred in releasing Robert Follette from the custody of the Warden of the Utah State Prison and that its order of November 8, 1949, granting Robert Follette's petition for writ of habeas corpus should therefore be reversed by this Honorable Court.

Respectfully submitted,

CLINTON D. VERNON,

*Attorney General*

QUENTIN L. R. ALSTON

*Assistant Attorney General*

ATTORNEYS FOR APPELLANT