

1986

# Louis Malek v. Ken Shulsen and Gary Webster : Brief of Appellant

Utah Supreme Court

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1986 21052

IN THE SUPREME COURT OF THE STATE OF UTAH

LOUIS MALEK,

Plaintiff/Appellant,

District Court No. C 85 2596

-vs-

Supreme Court No. 21052

KEN SCHULSEN and GARY WEBSTER,

Respondents/Respondents.

Category No. 3

BRIEF OF APPELLANT

AN APPEAL FROM THE ORDER DENYING PETITIONER'S  
PETITION FOR A WRIT OF HABEUS CORPUS IN THE THIRD  
JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE  
COUNTY, STATE OF UTAH, THE HONORABLE HOMER F.  
WILKINSON, JUDGE PRESIDING.

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-vs-

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Respondents/Respondents.

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District Court No. C 85 2596

Supreme Court No. 21052

Category No. 3

BRIEF OF APPELLANT

I

NATURE OF THE CASE

This action involves a Petition for Writ of Habeus Corpus filed in the Third District Court of Salt Lake County. Appellant's petition was filed on or about April 24, 1985. The lower court entered an order denying appellant's petition on or about November 6, 1985. The appellant appeals from that order of the lower court.

II

DISPOSITION IN LOWER COURT

The appellant's Petition for Writ of Habeus Corpus came on for disposition before the lower court pursuant to stipulated facts of the parties, and their cross-briefs to the lower court as to the issues of law. After the court had reviewed the stipulated facts and the parties' memorandums as to the law, the court below denied petitioner's Petition for Writ of Habeus

Corpus, and entered an amended order to that effect on or about November 6, 1985. This judgment was timely appealed by petitioner.

### III

#### RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment and order below and a determination of this Court that appellant is entitled to a Writ of Habeus Corpus.

Appellant further seeks a determination of this Court that the lower court erred in ruling that appellant's Petition for a Writ of Habeus Corpus was not timely filed, and was time barred pursuant to the terms and conditions of Utah Code Annotated, Section 78-12-31.1 (1979) and a determination that the lower court erred in ruling that appellant's application should be denied for reason that he was not prejudiced by the delay in having his parole revocation heard.

### IV

#### STATEMENT OF THE CASE/STATEMENT OF FACTS

The following statement of facts is taken from the parties' stipulation as to the relevant facts which was filed with the lower court on or about August 23, 1985:

Appellant, Louis Malek, is presently incarcerated at the Utah State Prison. He was previously committed to the Utah State Prison on May 18, 1977, after entering a plea of guilty to the charge of manslaughter in the Third Judicial District Court in

Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge presiding. Appellant was conditionally released by the Board of Pardons of the State of Utah on parole on May 11, 1982. On or about February 28, 1983, appellant was arrested and incarcerated in the Utah County Jail upon charges that he had committed the crimes of aggravated robbery and attempted murder. On March 18, 1985, an order and warrant of arrest was issued by the Board of Pardons of the State of Utah upon a Complaint made to the Board of Pardons that appellant had violated the terms and conditions of his parole, and appellant was served with this warrant. Appellant requested a pre-revocation hearing before the Board of Pardons which was scheduled for March 18, 1983. Directly prior to the pre-revocation hearing, appellant elected to waive his pre-revocation hearing and he signed a waiver of his pre-revocation hearing on March 18, 1983. Appellant was found guilty of the charges of aggravated robbery and attempted murder in the Fourth District Court on July 8, 1983, and on this date, appellant was remanded to the custody of the Utah State Prison to serve a prison sentence which had been imposed by the Fourth District Court. The State of Utah Board of Pardons scheduled appellant to appear before the Board of Pardons for a parole violation hearing on May 23, 1984. Notice of this hearing was mailed to appellant at the Utah State Prison by the Board of Pardons on May 17, 1984. Between July 8, 1983 and May 23, 1984, the State of Utah Board of Pardons took no action to schedule the



appellant's parole revocation hearing before the State of Utah Board of Pardons, and took no action to adjudicate the issue of the appellant's alleged parole violation before the State of Utah Board of Pardons. Appellant objected to the Board of Pardons hearing scheduled for May 23, 1984, alleging that he did not have adequate notice of this parole violation hearing. He requested a continuance of this hearing and the matter of his parole violation was continued to July 25, 1984. The State of Utah Board of Pardons entered Findings of Fact, Conclusions of Law and an Order on January 8, 1985, finding that appellant did, in fact, violate his parole, and revoking appellant's parole which had been granted in 1982. A re-hearing on the matter of appellant's parole was scheduled for July of 1988.

On April 24, 1985, appellant petitioned the Third Judicial District Court in and for Salt Lake County for issuance of a Writ of Habeus Corpus, alleging that appellant was illegally restrained in violation of Utah Code Annotated, Section 77-27-11 and in violation of his rights to due process and equal protection and his rights to be free from cruel and unusual punishment.

Appellant's Petition for a Writ of Habeus Corpus was denied, and a final order denying his Petition for a Writ of Habeus Corpus was signed and entered by the lower court on November 6, 1985. From that final order, appellant has filed a timely notice of appeal.

V

ARGUMENT

POINT I: THE STATE OF UTAH BOARD OF PARDONS HAS  
VIOLATED THE PROVISIONS OF UTAH CODE  
ANNOTATED, SECTION 77-27-7.

The portion of Utah Code Annotated, Section 77-27-7 which is applicable to the instant case reads as follows:

(1) The Board of Pardons shall determine within six months after the date of an offender's commitment for a felony offense, a date upon which the offender shall be afforded a hearing to establish a date of release or a date for rehearing, and shall promptly notify the offender of the date.

Louis Malek is clearly an "offender" within the meaning of Section 77-27-7. He was committed to the Utah State Prison for a felony offense on or about July 8, 1983. Pursuant to the terms and conditions of this statute, appellant was entitled to a date from the Board of Pardons upon which the appellant would be afforded a hearing to establish a release date or a date for a hearing, and he was entitled to receive this date no later than January 8, 1984. Appellant was not notified of any hearing date until May of 1984, and he was not actually given a hearing until July of 1984, over six months after he was entitled to such a hearing. He was not given a date of release or a date for rehearing until January, 1985, almost 18 months after he was entitled to receive such a release date or re-hearing date.

Moreover, appellant was entitled to be notified promptly of the decision of the Board regarding his release date or

re-hearing date. Even though he went before the Board in July of 1984, he ~~was~~ not notified of the decision of the Board until January of 1985, six month after his hearing date.

Clearly, the Board has violated both the six month hearing and the prompt notification requirements of Section 77-27-7.

POINT II: RESPONDENTS HAVE VIOLATED APPELLANT'S RIGHTS IN THAT RESPONDENTS HAVE VIOLATED APPELLANT'S RIGHT TO HAVE A HEARING ON THE MATTER OF HIS PAROLE REVOCATION WITHIN A REASONABLE PERIOD OF TIME, AND HAVE FAILED TO NOTIFY APPELLANT PROPERLY OF THE DECISION REGARDING HIS PAROLE REVOCATION.

The section of the Utah Code Annotated which deals with the matter of parole revocation is Utah Code Annotated, Section 77-27-11. (See Appendix "A" to this brief for a full text of the statute.) This statute sets forth the procedure which must be followed by the Board in order to revoke the parole of a parolee. The statute does not provide a time limit during which the Board must conduct a hearing regarding the parolee's revocation of parole. However, it does state in subsection (5) that "the parolee shall be promptly notified in writing of the Board's findings and decision [regarding parole revocation]."

Since the Utah Code does not provide a time limit during which a final parole revocation hearing must be held, then common law regarding the rights of due process which must be afforded to parolees will govern.

A parolee's due process rights were established in the United States Supreme Court decision of Morrissey v. Brewer, 408

U.S. 471 (1972). In the Morrissey decision, the Supreme Court stated:

There must also be an opportunity for a hearing if it is desired by the parolee prior to the final decision on revocation by the parole authority. This hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts in consideration of whether the facts as determined warrant revocation. . . . The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months, as respondents suggest occurs in some cases, would not appear to be unreasonable. (emphasis added.) (At pages 487 and 488.)

Subsequent to the Morrissey decision, the Federal courts have established that it is per se reasonable to conduct a parole revocation hearing within 90 days of the date a parolee is taken into custody, and that it is per se unreasonable to have a parole revocation hearing more than 90 days after the parolee is taken into custody. See, for example, Carmel v. U. S. Parole Commission, 489 F. Supp. 113 (So. Dist. of N. Y. 1980); Smith v. U. S., 577 F.2d 1025 (Ct. App. 5 Ga. 1978); Beck v. Wilkes, 589 F.2d 901, cert. denied, 444 U. S. 485 (Ct. App. 5 Ga. 1979).

Where the rights of parolees are concerned, Utah State guarantees of due process should be interpreted identically to the Federal guarantees of due process.

In the instant case, appellant was "taken into custody" with regard to his alleged parole violation when the Board issued its order and warrant of arrest on March 18, 1983. Federal and State due process requirements mandated that appellant have a hearing

on the matter of his parole revocation within three months of that date, or by June 18, 1983.

The Board of Pardons continued the hearing on appellant's parole revocation pending the outcome of the criminal proceedings against appellant in the Fourth District Court of Provo, Utah. Those Utah County proceedings were terminated effective July 8, 1983, when appellant was found guilty of the charges against him and committed to the custody of the Utah State Prison. Even assuming that the 90 day time period did not begin to elapse until appellant was committed to the Utah State Prison by the courts of Utah County, the Board was still under an obligation to have a hearing as to the issue of his parole revocation no later than October 8, 1983. The hearing was not scheduled until May of 1984, and was not actually held until July of 1984, over nine months past the time when the Board was constitutionally required to hold such a hearing.

Furthermore, the Board did not notify appellant of its decision on his parole revocation until January of 1985, six months after the hearing date. This was an unreasonable time to delay in notifying appellant of the Board's decision, and constituted violation of Utah Code Annotated, Section 77-27-11(5).

The respondents have violated both appellant's due process rights at common law, and his right pursuant to Utah statute to be notified within a reasonable time period of a decision of the

Board regarding his parole revocation.

POINT III: THE APPROPRIATE REMEDY FOR THE VIOLATION  
OF APPELLANT'S RIGHTS WHICH HAS OCCURRED  
IS THE RELEASE OF APPELLANT.

The only appropriate remedy appellant is release. To give appellant any less than this remedy is to afford appellant rights without any remedy for breach of those rights. To give appellant any less than this remedy is to render the entire section of the Utah Code Annotated dealing with the Board of Pardons meaningless.

The Seventh Circuit Court of Appeals in the case of United States v. Revis, 525 F.2d 632 (7th Cir. 1975) held that a delay in the revocation hearing for a parolee mandated the release of the parolee pursuant to his Writ of Habeus Corpus. The court in Revis stated as follows:

[T]o order anything less than petitioner's release from the restraint of the violation warrant would be to provide petitioner a right without a remedy, the Federal courts have recognized that unjustified delay in providing a revocation hearing requires the issuance of a Writ of Habeus Corpus. See e.g. United States ex rel Buono v. Kenton, 287 F.2d 534, 536 (2d Cir. 1961); Sutherland v. District of Columbia Board of Parole, 366 F. Supp. 270, 273 (DDC 1974); United States ex rel Hitchcock v. Kenton, 256 F. Supp. 296, 301 (D. Conn. 1966). (At page 639.)

Respondents may argue that Moody v. Daggett, 429 U.S. 78 (1976) is controlling in this instance for the proposition that appellant was not constitutionally entitled to a speedy hearing on the matter of his parole revocation. The facts of the Moody are easily distinguishable from the instant case. In Moody, the

appellant had been released on parole and had committed two homicides which were alleged to constitute a violation of his parole and had been convicted of two additional felony counts for the homicides in addition to the underlying charges which had given rise to his parole. In Moody, the parole board elected not to serve the appellant with a warrant of arrest for his alleged parole violation and instead elected to allow the appellant Moody to serve his sentence for the two homicides before the parole board there considered the matter of his parole revocation. The Moody court held that the appellant was not entitled to a hearing on the matter of his parole revocation within a set period of time, and held that the parole board could delay service of the warrant for parole revocation pending completion of the second prison sentence.

In the case at bar, the Utah State Board of Pardons elected to serve the warrant of arrest for the parole revocation upon appellant Malek in March of 1983. Since the Board elected to serve the arrest warrant, they became obligated to afford appellant due process in carrying out the results of issuing and serving that warrant.

It should be noted that the Revis decision, supra, was later reversed by the Seventh Circuit Court of Appeals in reliance upon the Moody decision for reason that the facts of the Revis case were identical to the facts of the Moody v. Daggett case. The Revis court reversed itself on the issue of liability, not on the

question of the appropriate remedy if liability had been found. The Revis holding that release is an appropriate remedy for violation of a parolee's rights to due process still stands.

Respondents have also argued, and the lower court has found, that appellant is obligated to show both a violation of his rights to due process and prejudice because of that violation before the court may grant him the remedy of release. The lower court has erred in imposing this two-fold obligation upon the appellant and has erred in finding that appellant has not been prejudiced by the delay in affording him the hearings to which he was entitled.

It is the position of the Federal courts that a petitioner for a Writ of Habeus Corpus is obligated to show both a violation of his rights to due process and prejudice because of that violation before a court may grant him the remedy of release. This position of the Federal courts has been taken in interpreting 18 United States Code, Section 4214 which was enacted in 1976. This Federal statute sets the "reasonable time" during which a parole revocation hearing must be held to be 90 days. In the Federal system, various courts have considered whether or not release of an inmate is an appropriate remedy for violation of this 90 day period. Numerous Federal courts have held that an inmate must show both violation of Section 4214 and prejudice as a result of that violation before an inmate may be released upon a Writ of Habeus Corpus. However, the Federal



courts, in reaching this decision, have relied upon the legislative history of Section 4214 which reveals that it was not the intention of the United States Congress to authorize the release of inmates for violation of this code section. See, for example, Northington v. United States Parole Commission, 587 F.2d 2 (Ca. 6, 1978).

Appellant Malek's Petition for a Writ of Habeus Corpus is not predicated upon United States statute, but is predicated on federal and state guarantees of due process and upon Utah state statute. Therefore, the legislative history of 18 United States Code, Section 4214 is not applicable to the case of the appellant, and Federal court decisions which held that an inmate whose parole revocation hearing is not held within 90 days of the date of arrest must show actual prejudice in order to gain release are not applicable.

Further, the delay which has occurred in appellant's case is not a delay of a mere week or month or even several months. The delay in this case is in excess of nine months, and this court should find prejudice per se in delaying a revocation hearing for a period of nine months. During such a lengthy delay, it is only reasonable that appellant would be prejudiced by loss of witnesses, fading memories and the disability of incarceration in preparing his hearing before the Board. Further, appellant has suffered prejudice caused by the mental anguish and stress of incarceration without knowing exactly the terms of that

incarceration or the time when that incarceration will end.

POINT IV: APPELLANT'S ACTION HAS BEEN TIMELY FILED.

Respondents have contended that appellant's petition was not timely filed, and the lower court so found. This decision on the part of the lower court was error and should be reversed by this court.

The statute in issue is Utah Code Annotated, Section 78-12-31.1 (1979), which reads as follows:

[W]ithin three months: for relief pursuant to a Writ of Habeus Corpus. This limitation shall apply not only as to grounds known to petitioner, but also to grounds which in the exercise of reasonable diligence should have been known by petitioner or counsel for petitioner.

Respondents have contended that appellant Malek knew he had not had a parole revocation within 90 days of his being taken into custody by no later than October 8, 1983. They will assert that the statute of limitations thus ran on his petition as to the timeliness of his parole revocation hearing no later than January 8, 1984. Further, they will contend that appellant knew the six month time period for a hearing date on his new felony conviction passed on January 8, 1984, and that his statute of limitations on this issue thus ran out on April 8, 1984.

Respondents' and the lower court's interpretation of Section 78-12-31.1 is in error. First, it fails to account for Utah Code Annotated, Section 78-12-36 (1975), which states as follows:

If a person entitled to bring an action, other than for recovery of real property, is at the time the

cause of action accrued, either:

. . . .

. . . (3) imprisoned on a criminal charge or in execution under the sentence of a criminal court for a term less than for life;--

the time of such disability is not a part of the time limited for the commencement of the action.

Appellant meets all requirements of Section 78-12-36 for tolling of the statute of limitations in question. He has been imprisoned on criminal charges and/or under the sentence of a criminal court continuously since February, 1983, well before his cause of action arose in this case. Since he is incarcerated for indeterminate sentences from the Third and Fourth District Courts, he is serving a sentence for a term less than life. Hence, the statute of limitations had not even begun to run against appellant when he commenced this action.

Second, even ignoring Section 78-12-36, respondents mischaracterized the limitation imposed by Section 78-12-31.1. Appellant has suffered a continuing violation of his rights to due process and a continuing violation of the statutes of the State of Utah each and every day he has been incarcerated since the time he should have been granted a hearing in 1983 or 1984. Because appellant's problem is a continuing one, each day has given rise to a new cause of action and a new period of limitation. For this continuing violation of appellant's rights, the period of limitation has not run.


VI

CONCLUSION

For the foregoing reasons, the decision of the lower court should be reversed, and appellant's Writ of Habeus Corpus should be granted, authorizing the release forthwith of appellant.

DATED THIS 13 day of February, 1986.

CORPORON & WILLIAMS

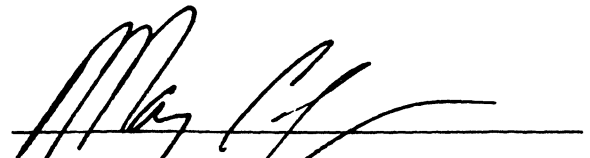
  
\_\_\_\_\_  
MARY C. CORPORON  
Attorney for Appellant

CERTIFICATE OF HAND-DELIVERY

I HEREBY CERTIFY that I caused to be served upon respondents four true and correct copies of the foregoing Appellate Brief, including any attachments, by hand-delivering the same to:

CARLIE CHRISTENSEN  
Attorney for Respondents  
Attorney General's Office  
236 State Capitol  
Salt Lake City, Utah 84114

on the 13 day of February, 1986.

  
\_\_\_\_\_

## APPENDIX "A"

77-27-11.      Revocation of parole. (1) The board may revoke the parole of any person who is found to have violated condition of his parole.

(2) If a parolee is detained by the Department of Corrections or any law enforcement official for a suspected violation of parole, the Department of Corrections shall immediately report the alleged violation to the board, by means of incident report, and make any recommendation regarding the incident. No parolee may be held for a period longer than 72 hours, excluding weekends and holidays without first obtaining a warrant.

(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 the parolee has violated the conditions of his parole.

(4) Upon a finding of probable cause, a parolee may be further detained or imprisoned again pending a hearing by the board.

(5) The board shall conduct a hearing on the alleged violation of parole, and a statement of the evidence against him. The board shall provide the parolee the opportunity to be present, be represented by counsel, to be heard, to present witnesses and documentary evidence, and to confront and cross-examine adverse witnesses, absent a showing of good cause for not allowing the confrontation. Decisions shall be reached by majority vote of the members of the board sitting and the parolee shall be promptly notified in writing of the board's finding and decision.

(6) Parolees found to have violated the conditions of parole may, at the discretion of the board, be returned to parole, have restitution ordered, or be imprisoned again as determined by the board, not to exceed the maximum term, or be subject to any other conditions the board may impose within its discretion.