

2009

# Gary L. Welborn v. Utah Board of Pardons : Reply Brief

Utah Court of Appeals

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Gary L. Welborn; Petitioner/ Appellant.

Brent A. Burnett; Assistant Attorney General; Attorney for Respondents.

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## Recommended Citation

Reply Brief, *Welborn v. Utah Board of Pardons*, No. 20090720 (Utah Court of Appeals, 2009).  
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In The Utah Court of Appeals

Gary L. Welborn  
Appellant

-v-

Utah Board of Pardons  
and Pardon et. AL.  
Appellees

Case # 20090720-CA

Reply Brief

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## In The Utah Court of Appeals

Gary L. Welborn  
Appellant

Reply Brief

Utah Board of Pardons and  
Parole Et. AL  
Appellees

Case# 20090720-CA

### Arguments (in order of States Brief)

~~1.~~ Appellees Argument 1 in their brief at 7-8 is subsumed in its other arguments which show unusual circumstances that makes the board's decision arbitrary and capricious.

The appeal clearly shows that the Appellant was denied procedural due process and that the board abused its discretion. It clearly challenges the fairness of the process by which the board undertook its sentencing function which necessarily implicates the result being questioned.

The Judicial process itself cannot be fair if a decision of the board cannot be modified if it is clearly shown that the fairness of the process was flawed.

If this is the case, as the state posits, then there is a denial of Article 1§11 open courts clause provision and § 77-27-5(3) as far as it precludes Judicial review of a board decision but § 77-27-5(3) by its language does not specifically preclude Judicial review of the decision to give a Rehearing.

The Language of the Statute omits Rehearings because the Statute deals only with "Final RELEASE decisions" which has not happened in this case yet because that decision was put off to a different time based on erroneous conclusions of the facts in this case.

Therefore no final decision has been made yet, walker v State

902 P2d 148 (Ut app 1995) and the number of years Appellant has to serve has not been determined yet Preece v House 886 P2d 508 (Ut 1994)

Observe the Language of §77-27-5(3); (in pertinent part);

"Decisions of the board in cases involving paroles, pardons, commutations, or termination of sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review." (emphasis added)

When interpreting Statutes you look to the plain Language of the Statute. The Court will then;

"presume that the Legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning. . . Furthermore courts are not to infer substantive terms into the text that are not already there. Rather, interpretation must be based on the Language used, and the court has no power to rewrite the statute to conform to an intention not expressed." (Citations omitted). St. Ex. Rel. Taylor v Johnson 977 P2d 479, 481 (Ut 1999).

Therefore if the Law is what the courts have said in their opinions and as the State has said, and, Not as the statute reads on its face using the laws of the statutory interpretation, then one or the other is wrong and is unconstitutional.

Either the Courts and the State have been denying due process and access to the Courts under Art 1 §11 by a wrong interpretation of the Statute, or;

If that interpretation is correct, Then the statute violates the open Courts provision and denies the offender due process by precluding Judicial Review and denying the offender a remedy by due course of Law and promotes unreviewable abuse by an arm of the government not checked or balanced in the first place.

This just shows how much governmental misconduct a criminal defendant receives in Utahs Just-us system and its Ashame because the government demands its citizens conform to the Law but the government believes its exempt.

~~2~~ With Regards to Appellees Argument 2 at pg 9 of their brief They claim there was no question of material fact with Appellants claim that the Board made a mistake of fact as to the number of convictions Appellant had.

The Law Requires that a defendant be given the record that the board will be relying on in its decision making process then they had the same record as the hearing officer had, regardless of whether they based their decision on what the hearing officer had to say or not.

If they disregarded what Sullivan had to say then they did disregard my testimony also. The Fact I did not see the board in person effectively denied my due process right to a personal Appearance. See § 77-27-9(i)(b)(c).

By the States own Admittance "the board reached its own decision" R 202-03 and brief at 9 ¶ 3. If the board ignored the hearing officers recommendation, how much more would it ignore the statements of a defendant who is not one of its own.

This establishes a "fact controverting a fact" SLC Corp v Times Const Co 761 P2d 42 (Ut CA 1988) because the State never proved by transcript See § 77-27-9(i)(b)(c) that the boards final decision did not, in fact, Rely on the Record which did wrongly indicate the number of crimes Appellant was incarcerated on and Admitted by the State in their Brief pg 9 ¶ 1, and, pg 4 ¶ 2 see also R 202-3.

Testimony that something didn't happen is not sufficient where the Law Requires that it be Recorded and that recording should be submitted as prima facie proof. The state did not provide this therefore the grant of Summary Judgement was error. Wilkinson v Union Pacific R.R. 975 P2d 404 (Ut 1998) therefore the attested statement would not be supportable or admissable in evidence See U.R.C.P. Rule 56(c), when indisputable evidence is suppose to be available.

This Court on appeal is free to Reappraise the trial Courts legal Conclusions Barber v Farmers Ins. Exch. 751 P2d 248 (Ut. CA, 1988). Plaintiffs was based on sworn statements Holbrook Co v Adams 542 P2d 191 (Ut 1975) and its obvious this case has more than one genuine issue of fact Jackson v Deloney 645 P2d 613 (Ut 1982). Granting Summary Judgement was error.

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Conversely, Appellant presented sufficient sworn statements and evidence that this was a genuine issue of material fact or fact controverting fact. The Appellees presented no evidence, contrary to their statement see Appellee brief 10, that the board's decision wasn't based on the hearing officer's mistake even though the board had the same record the officer had (and if not so then there's a disclosure issue) except for a self-serving affidavit of Curtis Garner.

Appellant presented a certified Petition with myriads of exhibits proving that the board had the same record the officer had therefore had to come to the same conclusion unless it illegally had a different record.

Because of this disputed controversy it was error not to have an evidentiary hearing and was error to grant summary judgment.

~~Be~~ This issue Appellant still contests that the board may have the legal right to consider the Appellant's conviction crime and past convictions but because the board performs a function "analogous to that of a Sentencing Judge" it cannot consider crimes pled away in a plea bargain.

A sentence must be based on accurate and reliable information. It violates due process to allow the board to consider these dismissed charges when the Appellant is not allowed the ability to adequately refute the charges with evidence and the assistance of counsel.

These charges were never processed by the Court past the plea hearing and were therefore not considered at sentencing, nor was there ever a complete record established of the actual facts of the crimes because medical records proved they couldn't have happened as alleged - They were legal impossibilities.

Forte v. BOP 808 P2d 734 (Ut. 1991) established procedural due process protections at board sentencing hearings and Forte made it clear that these protections would have to be developed and fleshed out in later cases.

The State devises a new defense tactic issue trying to defend their position using parole violation hearings where defendants were acquitted as justification to the board's actions in the present case.

The situations are distinguishable but assuming arguendo that the rational the state asserts could apply, citing John v. Shulsen 717 P2d 1336, 1337, 38 (Ut 1986), See states brief at 11, procedural due process would still be denied because, the defendant, at a original hearing, who has more due process rights or at least equal rights to that of a parole violator like John, is denied the benefit of Utah Administrative Rule R-671-519 and R-671-519(2) "Proceedings when criminal charges result in Acquittal" (because charges dismissed in a plea bargain is a situation similar to an acquittal) on the reasoning of the process of the rule, because essentially the same situation is created before the Board and the person in Appellants situation is without remedy of any type.

Admin. Rule R-671-519(2) provides that:

"Both parties may file memoranda explaining how the evidence provided at trial did, or did not, provide sufficient evidence, under a preponderance standard for finding a parole violation. ...." (in pertinent part).

This rule provides a way to challenge a acquitted offense, which is the same essentially as a dismissed charge, for a parole violator who has less protection, constitutional protection, than a party on an original hearing under Foote.

In this case it wasn't a casual discussion about a plea bargain, Sullivan demanded that I enter a plea to the dismissed charges. See Board Transcripts Appellant brief Ex. 5 pgs 4-14, 27.

The above fact shows the need for due process protection in an original proceeding or one such as this that is equivalent to that provided in R-671-519 and the Admin Rule that deals with how the board deals with "dismissed" new charges in a Parole violation setting.

This further shows the need for assistance of counsel in the original when a board officer pulls nonsense as they have done in the instant matter.

Appellant incorporates into this brief and fully reassures his response filed on 2/15/09 answering the States motion For Summary Judgment as pages 50-116 herein Resupporting his position.

Petitioner, because he states a valid defense, Summary Judgment may not be taken against him. Disabled Am Veterans v Hendrixson 9 ut. 2d 153, 340 P2d 416 (1959).

A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds would differ on whether the defendants conduct measures up to the required standard Jackson v Abbey 645 P2d 613 (Ut 1982) and "In order for nonmoving party to oppose successfully a motion for summary judgment and send the issue to a fact finder, It is not necessary for the party to prove its legal theory, it is only necessary for the nonmoving party to show "facts" contravening facts," stated in the moving party's affidavit. Salt Lake City Corp. v James Constructors Inc. 761 P2d 42 (Ut App. 1988).

Since this case is a writ of Mandamus, Petitioner, "to be entitled to the issuance of a writ of mandamus against a state agency, Petitioner has to prove that the agency had a clear statutory duty to perform the acts and refused to do so" Garcia v Jones 29 ut. 2d 409, 510 P2d 1099, Cert denied, 414 U.S. 875, 94 Sct 76, 38 LEd. 2d. 120 (1973).

### Argument

"Because Petitioner states a valid defense that Defendants conduct fails to measure up to the required standards he has established "Facts contravening facts" which precludes Summary Judgment."

The genuine issues of material Fact in this case are proven by evidence of certified record that the defendant have most emphatically failed in their administrative and statutory duty to perform acts which they refused to do.

The origin and distinction between administrative or statutory origins lacks constitutional significance. U.S. v Booker 125 Sct. 738, 750, 752 (2005).



Administrative Rules and State Statutes govern Board operations.

Petitioner again assaults genuine issues of material Facts. Before he does he needs to express defense to the states harping about that because a board hearing officer conducted the hearing and the board made the final decision essentially being fatal to his claims, State Law under §77-27-7(2) clearly shows that either the Board or its officer is responsible to determine his fitness for release and to verify as far as possible information from other sources during the inmates personal interview with the officer.

This necessarily impliments Utah Admin Rule R-671-301-2 (2008) that requires the board to allow Petitioner to submit documents and proof which necessarily includes the "From other sources" provision mandating the "verify as far as possible" the information from other sources viz - a - viz the medical reports etc. the Petitioner tried to submit under R-671-301-2 and §77-27-7(2) and was ~~flatly~~ flatly told by MR. Sullivan, the hearing officer that Petitioner couldn't submit them and he couldn't accept them. See Complaint Exhibit 1 hearing transcripts page 12-17 lines several. See pg 7 of this document.

#1) Genuine issue of material Facts: The Board officer told Petitioner that he was not allowed to and the Board officer said he could not accept any documents etc from him. The state disputes any wrong. The Law clearly shows right to submit evidence or documents. Petitioner was clearly denied. The Board had a statutory duty to perform the act and refused to do so. Garcia supra.

The evidence, documents, that needed to be submitted did not deal with evidence of innocence on the charges



that I came to prison on, it was evidence disputing the board's misconception about the number of charges I came to prison on, the board saying I had 2-5 to life and I only had one (and the board said the number of charges would make a difference in my sentences) and that the legal reasons the other charges were pled away was because of inconsistency in stories and medical evidence and other reasons not related to the charges I pled to. Read the Pleadings + Exhibits.

2) Petitioners plea deal in court were to those offenses only. For the board to base a sentence on accurate information, the information has to be relevant to the Judicially imposed sentences on the Judicially sentenced crimes. Otherwise the sentences before the board and term I'm given ~~are~~ based on inaccurate information if none of the information the board relies on is relevant to them. The state says the board basically do what they want. Due Process states they can't.

3) Petitioner, contrary to the state, asserts that because of repeated use of or like phrases of "persons committed to serve sentences" presupposes the fact that the board may only consider sentences based on commitment orders. See § 77-27-5 (i) (Board of Pardons and Parole Authority); § 77-27-7 (i) (Serving a sentence upon conviction); § 77-27-9 (i) (a) ("The Sentence"); Art 7 § 12 just to name a few, and that the board may not compensate for plea bargaining. See states motion pgs 5-7

4) The state on pg 5 of its motion admits Sentencing is unclear but states the Board relies on accurate information. Petitioner asserts that if something is unclear it is Not accurate. Read the Pleadings.

5) The state asserts a number of contested issues on pgs 7-9 of its motion. Petitioner asserts that the States assertions are factually and legally inaccurate;

- A The state claims the board can consider non-adjudicated cases, cases that were dismissed etc. when determining the sentence Petitioner will serve. Petitioner asserts Due Process and Case law says otherwise. Since with Courts have said that Board determinations are inherently a sentencing function he is equally entitled to the same protections he receives before a court on sentencing matters.
- B The state claims I'm challenging my PSI. Petitioner *per se* is not but because the Supreme Court in Lohrman v BOP 870 P.2d 902 (Ut 1993) gave an inmate a due process right to contest inaccuracies in their board files, and a PSI, is part of that file, if there are inaccuracies in it, they can be challenged in that hearing, period, without consequences.
- C The state claimed that I admitted to having intercourse. I never admitted to this in my statement in the PSI. Detective Boran claims I admitted to him in his statement in the PSI so the states beliefs are flawed, and the evidence of the case, which under R 671-301-2 (2008) Petitioner has the right to prove and contest. If the board believes they have the right to bring dismissed charges up, try to force me to admit guilt to them, I have the right under due process to contest them without threat of consequences.
- D Since the board hearing is inherently a sentencing function Petitioner has the right to contest the accuracy of information used and to hold the Board to relatively to the same type of Judicial Conduct that you expect from a Judge. The state rejects this. The Law requires it.
- E Petitioner contends that he has the right to ~~submit~~ <sup>Rebut</sup> to inaccuracies, submit evidence in the Rebut against any inaccuracy and that the states definition of due process is inconsistent with the Law as

their definition is the process due to them only. This is a dispute of material fact proven in the pleadings themselves.

F. The state contends that the Petitioner is contesting that the Guidelines don't have full force of law. See State's motion at 9. The state contends that it seemingly believes that Petitioner is arguing that the board is bound to his matrix. Petitioner makes no comment either way as this case does not deal specifically with that issue.

The case deals with the same issue your Honor saw. Petitioner contests that the method employed by the Board to determine a rehearing substantially beyond the matrix and contrary to Petitioner's Rehabilitative needs and against his prison record reflections runs contrary to the dictates of 376-1-104(2)(3) and (4). This is what violates due process.

G. The state claims in its motion at 10, that Petitioner's Procedural due process rights were not violated, not only under State but Federal Constitution provisions also. Petitioner contends they were and that proof was attached to the petition and is again hereto as exhibits 1 - 3 and the facts explaining such are explained herein and in the petition. The same with Substantive Due Process (cont. - )

H. Dealing with the Garner Affidavit #77 12 and 13, Garner claims at #12 that he and the board reviewed documents and submissions from the Petitioner. Petitioner never submitted, before his hearing, any documents other than letters. It's impossible for him to know what to submit before his hearing because he does not know what the board is going to question him on or what he will have to rebut. That is the fundamental purpose of UAC Rule 671-301-2 (2008).

H. (cont), to allow an inmate to submit documents at his hearing, but Sullivan refused to allow Petitioner submit documents to prove Mr. Sullivan wrong. The documents were not documents pertaining to commitment crimes, they dealt with the <sup>non</sup> commitment crimes that Sullivan tried to force me to admit to. See Board transcripts Ex. 1 pages 12 Lines 15-25 and pg 13 Lines 1-25 and ~~pg 14~~ Lines 18-25 and page 15 Lines 24 and 25; pg 17 Lines 1-5 and Lines 16-24; and it is apparent Sullivan misunderstood that the documents I was trying to submit did not relate to commitment crimes, the documents were to refute the NON Commitment crimes he tried to get me to admit to.

That's not hard to understand. It is apparent he caused his own confusion in his desperation to try to manipulate me ~~into~~ admitting to crimes I was not convicted of.

This is not only illegal but this is a genuine issue of material fact, on the basis of the facts in the record, reasonable minds would differ on whether the defendants conduct measures up to the required standard, ~~Jackson~~ <sup>Jackson</sup> supra, and this is definitely "a facts controverting Facts" Salt Lake City Corp Supra, and Petitioner states valid claims of defense precluding Summary Judgement Disabled Am. Veterans Supra at 2.

Now for Garner paragraph 13, Garner claims that the didn't base any part of their decision on the assumption Petitioner had 2-5 to Lifes and 1-15.

\* Petitioner rebuts, what did they base it on then?

Sullivan said the record indicated I had 2-5 to Lifes and 1, 1-15. See Board transcripts Ex. 1 pg 4 Lines 18-25; pg 5 Lines 6-25; pg 6 Lines 1-25; page 8 Lines 11-23. The Record indicates different.

Further the boards calculation that the 1-15 runs consecutively is wrong. The Commitment order Ex 2 shows concurrent sentencing. This to can make A big difference in my sentence with the board and it shows their carelessness.

H (cont) Petitioner knows that he pled only to 1 5 to Life term and 1 - 1 to 15 year term.

If the board was that confused they should have stayed the hearing and sought clarification from the court. This issue precludes Summary Judgement and shows that the term given by the board was based on inaccurate information because Confusion cannot be accurate.

Since Sullivan's belief was submitted to the board, in Garner, twice, one on the original hearing and once on the Special Attention, 2 Judgements were based on a confused theory so since they believed I had 2 5 to Life and 1 - 1 to 15 and the 1-15 was running consecutive, they based my sentence on wrong information and the ways they came up with the term or the methods they used to determine the sentence were wrong and unconstitutional period. Garner testified Sullivan's decisions and information was correct.

As the board said on pg 11 of their motion citing Prece v. House that "Absent some other circumstances", the issues discussed above certainly is not the process due to the Petitioner. The defendant is not entitled to Summary Judgement. Ex 3.

The board used the excuse that the hearing is not a "mini trial", it wouldn't take evidence from the Petitioner nor let Petitioner have counsel, have his witnesses testify etc but it let the victim give testimonial evidence etc. This denies Equal Protection, Due Process and compulsory process to obtain witnesses etc of both Constitutions.

The cases the state cites are inapposite and do not deal with Utah's unique board set up. The state misquotes Greenholtz. The Board can only Judge from the record of the crimes I stand convicted of. Any other consideration violates due process. Since the Board performs a function analogous to that of a trial Judge, Judges can only consider facts pertinent to the factual basis of the crimes I stand convicted of.

The board cannot consider what ever it wants and more legislation is needed to prevent this arbitrary systematic Abuse that violates Art 1 § 9 equal and unusual punishment and treatment with unnecessary rigor.

Greenholtz due process Analysis can only apply to Judicially imposed minimum-maximum sentences. See Forte v Board of Pardons 108 P2d 734 (Ut 1991) (FN 5). Since the Board is not a Judicial entity and cannot be because it belongs to the Executive Branch, since Judges sentence an individual to an indeterminate term in Utah, under which the defendant is convicted, the Board cannot exceed its Review beyond the crime to which the defendant is committed. § 22-18-4 presupposes this philosophy also as does the discussion. Supra at 4.

Since the board is not a "mini trial" by its own admission nor does it accept evidence within the scope discussed by the state, the board cannot, under due process, extend its scope of review past the commitment crimes or its conducting a mini trial, something it states it wont do.

Forte states clearly that "Greenholtz has little persuasive force when addressing a due process claim under Utahs Constitution in the context of our Indeterminate sentencing scheme".

Forte Further states that "Precisely what due process requires of the board of pardons cannot be determined in the abstract, but must be determined only after the facts concerning the procedures followed by the board are flushed out." Thats pretty clear.

Forte made clear that "the Utah constitution certainly requires that equivalent due process protection be afforded when the board of pardons determines the actual number of years a defendant is to serve.

A question of Due Process would then create a dispute as to certain material facts precluding summary Judgment. See Holbrook Co.; Sandberg; Billings; Disabled Am. Veterans; Jackson; Salt Lake City Corp., The Court would Abuse its discretion granting summary Judgment. Sandberg Supra 1 + 2.

If the board adopts or creates Rules they must be consistent with the Laws of its government. See 27-27-9(4). This state needs to ~~feel~~ feel the Obama effect, "change", a change back to Law and justice instead of the current practice of Just us.

In closing, a plaintiffs verified pleading that meets the requirements for affidavits can be considered the equivalent of an affidavit for the purpose of a motion for summary judgment. Pentecost v Harvard 699 Fed 696 (1st 1985). Such is the same for virtually any verified or Declaration as long as it is sworn under the penalty of perjury.

This document qualifies as an affidavit, a Response, and declaration as well as the motion to strike.

#### - Motion to strike Defense -

Petitioner also moves to strike Defendants motion for Summary Judgment for it being filed late under U.R.C.P. Rule 12 (E). The motion was due on June 1 2009. The Court served the Petition on the state on April 28 2009. The state did not mail their motion until 6/8/09, 8 days after the deadline.

The state did not request an extension. Had they ask for more time they probably would have had a more reputable argument as their motion has no merit.

#### Conclusion

The motion should be stricken. If the court dont strike the motion, the motion must be denied because the case is not proper for Summary Judgment.

Dated this 25<sup>th</sup> day of June 2009.

151 Ray Wells  
Clerk of Court



Notary

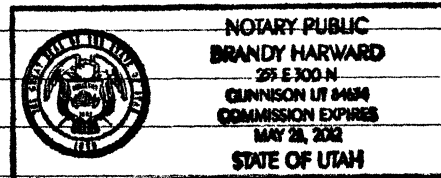
This document, Motion in opposition to Defendants Motion For summary Judgement and motion to strike is sworn and subscribed to before me on this day of June 2009,

(Identification verified by Prison Identification card).

1st Gary Welborn  
Gary Welborn

STATE OF UTAH  
COUNTY OF Saratte  
SUBSCRIBED AND SWORN/AFFIRMED TO  
BEFORE ME ON THIS 29th DAY OF June  
2009 BY  
Brandy Harvard  
NOTARY PUBLIC

1st Brandy Harvard  
Notary Public





The following was offered to the Court and fully reassured again that the board is over stepping legal boundaries.

In the states new position that because board hearings are civil in nature, they may consider acquitted charges. That may be so in a parole violation proceeding but Appellant asserts because of the boards unique role in "sentencing" they are not allowed to rehash matters already decided by a Title 8 Judge, because by Sullivan's own words "Board hearings are not a place to relitigate, argue, cross-examine etc" see Board transcripts Appellant Brief Ex. 5 pg 14, L 12-17.

There is a distinguishable difference between an original hearing and a Parole violation hearing. The original hearing, by nature, should offer more protections than a Parole violation. This was Footes and Labrum's position also but "what due process requires has to be determined on a case by case basis" and such a case is before this court.

The Appellant would like to point out to the Court that contrary to the states new assertion in its brief at 11, the state claims that "the board was entitled to rely upon this information AND WAS NOT required to permit Welborn to challenge the PSI where he had waived any such right and failed to preserve the claim at his sentencing hearing".

Appellant asserts under Labrum at 911-12, Labrum made it clear that at original hearings due process applies, period. Part of Due process is reviewing copies of what the Board will rely on in sentencing me has to be provided.

R 671-201 provides the Board will only consider information available to the Court at the time of sentencing" (emphasis added). See also R 671-303<sup>74</sup> ex 1 of this brief.

Rule 671-303 also gives an inmate a right to respond to the correctness of the information in his file just as due process does. Str-McCovey 803 P2d 1234, 1235 (ut 1990).

So, contrary to the states assertion and the Courts holding, R 347, By law, I can contest anything in my file including a PSI.

Therefore the district erred and abused its discretion in granting the States motion for Summary Judgement and by not allowing the case to proceed to evidentiary hearing and trial.

- #1V see supra 10-13 for additional discussion of States Argument and Appellants Counter.

The States Assumption with monson v. Carver (in passion) is misplaced and is not dispositive to Appellants Claim. In Fact the State has created a new claim Appellant didn't make.

Appellant does have a due process right for a proper determination to be made on his case concerning the amount of time he will have to do.

He Further, under § 76-1-~~104~~(3)(4) has a due process and statutory right to be issued a sentence proportionate to the Real seriousness of the offense

He also has the Right to contest the method employed by the board in determining a sentence or rehearing substantially beyond the motion that was the basis for the plea bargain in the first place, and that is contrary to his Rehabilitative needs, see exhibits on original petition when his Record and institutional Record does not reflect the need for continued incarceration and where the Appellant can pay for his own therapy, when released.

Further all of Appellants doctors all recommended that he be placed on probation in the first place where he could remain in therapy.

The Reason the board is not bound by any limitations is because the State ~~intentionally fails~~ to legislate and regulate this arm of the government and until thats done the Utah Justice system will continue to bottle neck.

The Treatment Appellant has received amounts to a violation of Act 139 and its prohibition of Treatment with unnecessary rigor which is defined in Bott v. Deland 922 P2d (ut 1996) as being needlessly harsh; unjustified etc. treatment and based on the unconstitutional § 72-18-4 Appellant can unjustifiably remain in a perpetual state of Limbo because of Lack of Regulation.

#5: The State raises U.R.C.P. Rules 61 and 55(e) now to justify its position that there was no basis for Appellants motion to strike.

Appellant asserts that Rule 61 does not cover the intentional alterations of the docket. Appellant does not believe that this was simply an error in the Court docket for a number of reasons. In any event this issue warranted an evidentiary hearing.

The differences are drastic. On the docket printed 4/28/09 in Exhibit 2 of this brief specifies that on 4/28/09 the Court:

"Note: Copy of contents of entire file mailed to AG's office."

now on the docket printed on 2/17/10 states something totally different. On 4/28/09, it states that:

"Filed - Motion For Appointment of Counsel" (Then on 5/11/09)

"Note - Copy of contents of entire filed mailed to AG's office".

Now this raises a couple questions;

1. why the change?

2. why wasn't I notified of the change?

3. why did it take from 4/21/09, when the Judge entered the order for the State to respond, until 5-11-09 to mail the file to the AG? That's 20 days to go 2 blocks. No.

The answer is it didn't. What's going on is some scandalous nonsense because what changed was Relevant subject matter central to part of this litigation.

There has been no Court order issued for the change; no date submitted of when the change occurred because had it occurred after the motion to strike was filed then we have a conspiracy and governmental interference in the litigation especially where the changed date is central to the subject matter of the argument - was the States response timely or not.

Upon entry of the Courts order to respond to the petition responsibility shifted to the State to comply.

Contrary to the States position with regards to Rule 55(e)

default judgement could have been issued against the State for Failure to timely comply with the court order and governing rules because that failure would be sufficient to invoke the Rules "unless the claimant establishes his claim or right to relief by evidence satisfactory to the Court".

Its hard though, to meet that standard when you have the government illegally changing the part of the record that is the subject matter of the litigation, and, the claimant was never given the opportunity "to establish his claim or right to relief by evidence satisfactory to the Court" because he was never granted a hearing and he was never told the record was illegally being altered so he could object to it or appeal the matter and motion to strike on interlocutory appeal.

Then the state, on pg. 14 of their brief has the gall to state "I could not have established the claim satisfactory of the Court" well if there wasn't collusion Appellant could have established the entire case including relief on the strike motion. Its obvious.

The state claims these issues does not affect Appellants substantial rights. This was not an "Error or defect".

This was an illegal alteration of the record that was the subject matter of litigation that affects Appellants statutory, procedural and constitutional rights so it was abuse of discretion and Plain Error to ignore and not remedy the situation as Appellant requested.

Further Rule 60(a) U.R.C.P. cited by the state presupposes notification of the correction of mistakes especially those that are subject matter of litigation and to make nunc pro tunc orders and these changes necessarily involve notification of the parties Lindsay v Atkin 680 P2d 401 (Ut 1984); East v District Court ex rel. Box Elder Co. 83 P2d 737 (Ut 1938).

Had the Court conducted a hearing and handled the matter properly it would have either seen the Appellants position valid and would have seen the error was substantial and prejudicial Kesler v Rogers 542 P2d 354 (Ut 1975), OR, The Court would

have informed and proved to the Appellant that the change of dates was legitimate and allowed Appellant a chance to Revamp his defense against summary Judgement.

Appellant was not on equal footing nor was he protected by the very Laws that supposedly was enacted to protect him thus denying him due process and effectively closing the Courts doors, an action prohibited under Act 1 § 11.

The grant of Summary Judgement and denial of the motion to strike was error as was failure to conduct an evidentiary hearing and hearing on the motion to strike.

### Conclusion

Just as the Supreme Court said in Monson v. Lauer 928 P2d 1017 (Ut 1996) that the board must follow the substantive standards of § 76-3-201 and its procedural requirements when determining restitution, under other statutes, Rules, constitutional provisions and case law, the board is bound by that also in an original parole grant hearing. The Board cannot ignore what happens at a hearing conducted by its officer under § 77-27-2(2)(F) and go behind closed doors in order to sidestep Appellants rights.

For the Court to allow such a blatant circumvention of Law places the Court in a lower position than the board because its the Courts Constitutional obligation and Act 1 § 11 mandate that an aggrieved party have remedy by due course of law.

It seems that in Utah, there is a circle of abdication of duty by state entities but those same entities expects its citizens to abide by the letter of the Law, or else. Thats not Acceptable.

This Court must reverse the grant of Summary Judgement and denial of the motion to strike and Remand for further proceedings or outright, order a new board hearing, and Retain jurisdiction of this case.

Dated this \_\_\_\_ day of April 2010.

131 / Vary will

## Certificate of Service

I certify that I have mailed a copy of this brief or handdelivered such to the party listed below, postage prepaid, on this 21 day of April 2010.

14 David W. Glasscock

Brent A. Burnett

Asst. Attorney General

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PO Box 140858

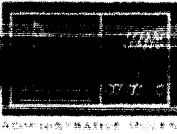
Salt Lake City UT.

84114-0858

Telephone: (801) 366-0533

## Exhibit 1

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## Rule R671-201. Original Parole Grant Hearing Schedule and Notice.

As in effect on July 1, 2008

### Table of Contents

- R671-201-1. Schedule and Notice.
- KEY
- Date of Enactment or Last Substantive Amendment
- Notice of Continuation
- Authorizing, Implemented, or Interpreted Law

#### R671-201-1. Schedule and Notice.

Within six months of an offender's commitment to prison the Board will give notice of the month and year in which the inmate's original hearing will be conducted. A minimum of one week (7 calendar days) prior notice should be given regarding the specific day and approximate time of such hearing.

All felonies, where a life has been taken, will be routed to the Board as soon as practicable for the determination of the month and year for their original hearing date. The Board will only consider information available to the court at the time of sentencing. All first degree felonies, where death is not involved, will be eligible for a hearing after the service of three years. All second degree felonies, where death is not involved, will be eligible for a hearing after the service of six months unless the second degree is a sex offense and in those cases will be eligible for a hearing after the service of eighteen months.

All third degree felonies, where a death is not involved, and all class A misdemeanors, will be eligible for a hearing after the service of three months unless the third degree felony is a sex offense and in those cases will be eligible for a hearing after the service of twelve months.

Excluded from the above provisions are inmates who are sentenced to death or life without parole.

An inmate may petition the Board to calendar him/her at a time other than the usual times designated above or the Board may do so on its own motion. A petition by the inmate shall set out the special reasons which give rise to the request. The Board will notify the petitioner of its decision in writing as soon as possible.

#### KEY

parole, inmates



Date of Enactment or Last Substantive Amendment

May 16, 2003

Notice of Continuation

July 25, 2007

Authorizing, Implemented, or Interpreted Law

77-27-7

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## Rule R671-301. Personal Appearance.

As in effect on July 1, 2008

### Table of Contents

- R671-301-1. Personal Appearance.
- KEY
- Date of Enactment or Last Substantive Amendment
- Notice of Continuation
- Authorizing, Implemented, or Interpreted Law

#### R671-301-1. Personal Appearance.

By statute, the Board or its designee is required to convene at least one public hearing for all offenders except those serving life without parole or death. In rehearings, the offender is afforded all the rights and considerations afforded in the initial hearing except as provided by other Board rules because the setting of a parole date is still at issue.

An offender has the right to be present at a parole grant, rehearing, or parole violation hearing if in the state (UCA 77-27-7). The offender may speak present documents, ask, and answer questions. In the event an offender waives this right, or refuses to personally attend the hearing the Board may proceed with the hearing and issuance of a decision.

If an offender is housed out of state the Board may elect one of the following procedures:

1. The offender may waive the right to be present.
2. Request the Warden to return the offender to the state for the hearing.
3. A courtesy hearing may be conducted by the appropriate paroling authority of the custodial state. A request along with a complete copy of Utah's record shall be forwarded for the hearing. All reports, a record of the hearing, and a recommendation shall be returned to the Utah Board for final action.
4. An individual Board member or designee may travel to the custodial facility and conduct the hearing, record the proceeding, and make a recommendation for the Board's final decision.
5. A hearing may be conducted by way of conference telephone call.

KEY

inmates, parole

Date of Enactment or Last Substantive Amendment

November 21, 2002

Notice of Continuation

July 25, 2007

Authorizing, Implemented, or Interpreted Law

77-27-2; 77-27-7; 77-27-9; 77-27-29

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## Rule R671-303. Offender Access to Information.

As in effect on July 1, 2008

### Table of Contents

- R671-303-1. Offender Access to Information.
- KEY
- Date of Enactment or Last Substantive Amendment
- Notice of Continuation
- Authorizing, Implemented, or Interpreted Law

#### R671-303-1. Offender Access to Information.

Absent a legitimate security or safety concern, an offender will be provided access to the information being considered by the Board and given an opportunity to respond whenever the Board fixes or extends the offender's parole or release date. If a security or safety concern is an issue, the offender will be provided a written summary of the material information being considered.

The Board, upon request or upon its own motion, may continue a hearing to allow submission of additional documentation or information. The Board will consider any relevant facts obtained at the hearing or later submitted by the offender.

The Board will also provide an offender with a copy of the records contained in the offender's file at least three days prior to any personal appearance hearing in which parole or an early-release date may be fixed or extended by the Board. (Any additional information obtained by the Board after this initial disclosure will be provided to the offender at the beginning of the hearing.) In such event, the offender will be given an opportunity to review the supplemental information before proceeding. If no additional time is requested by the offender, the hearing will proceed as scheduled.

For administrative routings to fix an original hearing date, the board will only consider information available to the court at the time of sentencing. This information will not be disclosed to the offender until the time of his/her original hearing, as it has already been disclosed in court.

KEY

Then should only receive that info and 877-185 runs 671-13

inmates' rights, inmates, parole, records

Date of Enactment or Last Substantive Amendment

November 22, 2002

Notice of Continuation

July 25, 2007

Authorizing, Implemented, or Interpreted Law

63-2

Rule converted into HTML by the Division of Administrative Rules.

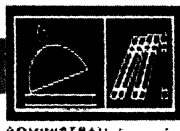
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## Rule R671-309. Impartial Hearings.

As in effect on July 1, 2008

### Table of Contents

- R671-309-1 Impartial Hearings.
- KEY
- Date of Enactment or Last Substantive Amendment
- Notice of Continuation
- Authorizing, Implemented, or Interpreted Law

#### R671-309-1 Impartial Hearings.

Offenders are entitled to an impartial hearing before the Board. The Board discourages any direct outside contact with individual Board Members regarding specific cases. This also applies to Hearing Officers designated to conduct the hearing. Any such contact should be made with the Board's designated staff member.

All contacts by offenders, victims of crime, their family members or any other person outside the staff of the Board regarding a specific case shall be referred, whenever possible, to the staff member designated by the Board who may not be directly involved in hearing the case. If circumstances dictate, the designated Board staff member shall prepare a memorandum for the file containing the substance of the contact. If the contact is by a victim wishing to make a statement for the Board's consideration, the Board's rule on Victim Input and Notification shall apply.

\* If a contact, or prior knowledge of a case or individuals involved, is such that it may affect the ability of a Board Member or designated Hearing Officer to make a fair and impartial decision in a case, the Board Member or designated Hearing Officer shall decide whether to participate in the hearing. Should the offender request that a board member or hearing officer not participate, such a request is not binding in any way, but shall be weighed along with all other factors in making a final decision regarding participation in the hearing.

This rule shall not preclude contact regarding procedural matters so long as such contact is not for the purpose of influencing the decision of an individual Board Member on any particular case or hearing.

#### KEY

parole, inmates

Date of Enactment or Last Substantive Amendment

November 22, 2002

Notice of Continuation

July 25, 2007

Authorizing, Implemented, or Interpreted Law

77-27-7; 77-27-9

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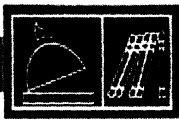
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## Rule R671-519. Proceedings When Criminal Charges Result in Acquittal.

As in effect on July 1, 2008

### Table of Contents

- R671-519-1 Proceedings When Criminal Charges Result in Acquittal.
- R671-519-2 Evidence Explanation.
- R671-519-3. Personal Appearance.
- KEY
- Date of Enactment or Last Substantive Amendment
- Notice of Continuation
- Authorizing, Implemented, or Interpreted Law

#### R671-519-1. Proceedings When Criminal Charges Result in Acquittal

If the basis for revocation proceeding is a criminal charge in which the parolee was acquitted, the parole agent or representative of the State may submit as its sole evidence the transcript from the criminal trial. If the parolee believes submission on the transcript is insufficient, the parolee shall inform the Board of any objection and provide a rationale for the objection. Nevertheless, a trial at which the parolee was represented by counsel is presumed sufficient for the hearing official to determine by a preponderance of the evidence whether parole was violated.

#### R671-519-2. Evidence Explanation.

Both parties may file memoranda explaining how the evidence provided at the trial either did, or did not, provide sufficient evidence, under a preponderance standard, for finding a parole violation. Such memoranda shall not exceed ten (10), double-spaced, typed pages in length (excluding exhibits), except in cases where the board has granted leave to exceed this limit.

#### R671-519-3. Personal Appearance.

A personal appearance hearing is not required under this rule for purposes of arguing the evidence. However, if, after reviewing the transcripts and memoranda, the hearing official concludes that parole has been violated, a personal appearance hearing may be held for purposes of determining disposition and listening to any victim comments.



## KEY

parole, acquit, hearings

## Date of Enactment or Last Substantive Amendment

October 25, 2007

## Notice of Continuation

September 11, 2003

## Authorizing, Implemented, or Interpreted Law

77-27-5; 77-27-9; 77-27-11

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Exhibit 2

Docket entries

Ex 1

ASE NUMBER 080923667 Post Conv Rel NonCap

---

2-04-08 Filed: Account Statement  
2-30-08 Filed: Determination of Requirement to Pay Filing Fees  
returned. Address corrected and resent to Petitioner.  
-08-09 Filed: Complaint No Amount  
-08-09 Fee Account created Total Due: 155.00  
-08-09 COMPLAINT - NO AMT S Payment Received: 155.00  
Note: Code Description: COMPLAINT - NO AMT S, Mail  
Payment;  
-19-09 Filed: Letter from defendant  
-20-09 Filed: Pro se motion to waive bon on undertaking  
Filed by: WELBORN, GARY L  
-24-09 Filed order: Minute Entry  
Judge SHEILA K. MCCLEVE  
Signed April 21, 2009  
-28-09 Note: Copy of contents of entire filed mailed to AG's office

LOOK

(This says 4/28/09  
NOT 5/11/09)

Ex. 1

Printed: 02/17/10 15:38:49

Page 1

CASE NUMBER 080923667 Post Conv Rel NonCap

---

11-17-08 Filed: Copy of Letter to Inmate Accounting Office requesting plaintiff's accounting.  
12-04-08 Filed: Account Statement  
12-30-08 Filed: Determination of Requirement to Pay Filing Fees returned. Address corrected and resent to Petitioner.  
01-08-09 Filed: Complaint No Amount  
01-08-09 Fee Account created Total Due: 155.00  
01-08-09 COMPLAINT - NO AMT S Payment Received: 155.00  
Note: Code Description: COMPLAINT - NO AMT S, Mail Payment;  
03-19-09 Filed: Letter from defendant  
04-20-09 Filed: Pro se motion to waive bon on undertaking  
Filed by: WELBORN, GARY L  
04-24-09 Filed order: Minute Entry  
Judge SHEILA K MCCLEVE  
Signed April 21, 2009  
04-24-09 Filed: Motion for Appointment of Counsel  
Filed by: WELBORN, GARY L  
04-30-09 Filed: Letter from Petitioner requesting copy of docket. Clerk mailed copy to defendant 4/28/09.  
05-11-09 Filed order: Minute Entry  
Judge SHEILA K MCCLEVE  
Signed May 08, 2009  
05-11-09 Note: Copy of contents of entire filed mailed to AG's office  
06-08-09 Filed: Motion for summary judgment  
06-08-09 Filed: Respondent's memorandum of points and authorities in support of their motion for summary judgment  
06-15-09 Filed: Pro se motion for summary judgement in favor of the petitioner  
06-25-09 Filed: Motion for 20 day Extension of Time  
06-30-09 Filed order: minute entry  
Judge SHEILA K MCCLEVE  
Signed June 30, 2009  
07-15-09 Filed: Motion in Opposition to Defendant's Motion for Summary Judgment and Motion to Strike  
Filed by: WELBORN, GARY L  
07-16-09 Filed: Respondents' reply memorandum  
07-16-09 Filed: memorandum in opposition to petitioner's motion to strike  
07-16-09 Filed: request to submit for decision  
07-16-09 Filed: motion for order allowing petitioner to respond to state response date  
07-29-09 Filed: Motion for order allowing petitioner to respond to states response dated 7-16-2009 and order staying states notice to submit for decision  
07-30-09 Filed: Response to State's Response on Petitioner's Motion to Strike and Request to Stay State's Notice to Submit for Decision  
07-30-09 Filed: Respondents' Objection to Petitioner's Motion to Allow a