

2011

# Lary W. Nicolds v. Utah Board of Pardons and Parole; the State of Utah; Dennis Sorensen, Warden, CUCF : Brief of Appellant

Utah Court of Appeals

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Office of the Utah Attorney General; Attorneys for Defendants/Appellees.

Lary W. Nicolds; Central Utah Correctional Facility; Pro se.

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IN THE UTAH COURT OF APPEALS

NOV 29 2011

Lary W. Nicolds,  
Plaintiff/Appellant, *pro se*

v.

Utah Board of Pardons and Parole; the  
State of Utah; Dennis Sorensen,  
Warden, CUCF; et al,  
Defendants/Appellees

Case No. 20110150-CA

Appeal from Sixth Judicial District  
Court, Sanpete County, the  
Honorable Marvin D. Bagley  
presiding, District Court case  
No. 100600332

OPENING BRIEF OF APPELLANT

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*In Propria Persona*

FILED  
UTAH APPELLATE COURTS

NOV 29 2011

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## **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction pursuant Utah Code Annotated § 78A-4-103.

## **STATEMENT OF THE ISSUES**

This appeal centers around four questions: (1) whether the district court misapplied § 78B-9-107 in dismissing appellant's 65B petition; (2) whether the district court misapplied the doctrine of laches in dismissing appellant's 65B petition; (3) whether the district court abused its discretion in dismissing appellant's 65B petition solely on the basis of time without addressing the claims he made; and (4) whether there is a statute of limitations for 65B petitions. The answer to questions 1-3 is yes. The answer to question 4 is no. This court should rule in favor of the appellant and remand this case back to the district court so the issues may be raised and litigated properly.

## **STATEMENT OF THE CASE AND THE FACTS**

Appellant Nicolds had an original parole grant hearing with the Utah Board of Pardons and Parole (hereinafter Board) on October 3, 2006, following which the Board gave appellant a parole release date of August 26, 2014. After the hearing, appellant began researching what could be done to remedy what he believed were due process and other constitutional violations made by the Board. The contract attorneys which the Department of Corrections employs advised appellant that the proper avenue to seek

remedy from Board actions was to file a Petition for Extraordinary Relief pursuant to Rule 65B of Utah Rules of Civil Procedure (hereinafter 65B petition). The contract attorneys emphasized that pursuant to § 78B-2-307(3), there was a 4-year statute of limitations for filing 65B petitions arising out of Board release determinations. The 65B petition filing packet the contract attorneys provided appellant also enumerated in two different places that this 4-year statute of limitations was applicable for 65B petitions.

On October 1, 2010, appellant filed a 65B petition *pro se* in the Sixth Judicial District Court, the Honorable Marvin Bagley presiding. This filing was timely according the 4-year statute of limitations the contract attorneys advised appellant was applicable. On October 28, 2010, the district court issued a Notice on Petition for Extraordinary Relief instructing appellant to file an amended petition with the court within 60 days.

Appellant filed a modified petition on December 21, 2010. On January 14, 2011, the district court entered an Order of Dismissal against appellant. In the order, the court held that the petition was filed untimely; therefore, it was being dismissed. In so ordering, the court made two findings in support of its dismissal. Firstly, the court held that even though appellant had filed a Petition for Extraordinary Relief pursuant to Rule 65B of Utah Rules of Civil Procedure, the court was interpreting the petition to be a Petition for Post-Conviction Relief consistent with Rule 65C of Utah Rules of Civil Procedure (hereinafter 65C petition). In doing so, the court cited the Post-Conviction

Remedies Act, Section 78B-9-107, which establishes a 1-year statute of limitations for filing a 65C petition. Secondly, the court relied on the doctrine of laches to deny the petition, holding that filing the 65B petition almost four years after appellant's original parole grant hearing was an unreasonable delay. On February 10, 2011, appellant filed a notice of appeal. On March 29, 2011, the Utah Court of Appeals issued a Sua Sponte Motion for Summary Disposition. On April 14, 2011, appellant's newly retained counsel, Thomas M. Burton, filed a Memorandum Response to the Sua Sponte Motion for Summary Disposition. On April 20, 2011, the Utah Court of Appeals issued an order that the motion for summary disposition was withdrawn and a ruling on the issues raised therein was deferred pending plenary presentation and consideration of the appeal, with the Opening Brief due June 7, 2011. On June 6, 2011, appellant's counsel filed a Motion to Stay Appeal Pending Joinder of Related Rule 65B Petitions, asking for an enlargement of not less than 90 days. The Court of Appeals issued an Order on June 9, 2011 denying the motion, but did grant a thirty-day time extension, causing the opening brief to be due July 11, 2011. Sometime between the Court's order of June 9, 2011 and October 19, 2011, appellant believes counsel requested and received another extension, changing the date the Opening Brief was due to October 19, 2011.<sup>1</sup> Counsel filed an Opening Brief on October 19, 2011. Appellant received a copy of the brief on November 3, 2011. Upon examining the brief filed by counsel, appellant found that counsel had

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<sup>1</sup> This assumption is made in a void because counsel never informed appellant that an extension had been granted, nor has appellant seen a court order granting an extension.

briefed the wrong issues, briefing the constitutional issues appellant had alleged in his 65B petition rather than briefing the issues surrounding the district court's dismissal of appellant's 65B petition. Appellant subsequently notified the court via fax on November 4, 2011 that he had dismissed his attorney and requested a stay of review of the Opening Brief submitted by appellant's former counsel, and moved the court give him an extension of 60-days within which to file an amended Opening Brief. A full copy of the motions complete with affidavits and points and authorities was mailed to the Court of Appeals on November 7, 2011. Appellant now presents plenary presentation and consideration of the appeal.

### **SUMMARY OF THE ARGUMENTS**

Argument I: Appellant claims the district court misapplied § 78B-9-107 in dismissing appellant's 65B petition.

Argument II: Appellant asserts that the district court misapplied the doctrine of laches in dismissing appellant's 65B petition.

Argument III: Appellant argues that the district court abused its discretion in dismissing appellant's 65B petition solely on the basis of time without addressing the claims he made.

Argument IV: Appellant contends that there is not a statute of limitations for filing 65B petitions in Utah.

## ARGUMENTS

### I. THE DISTRICT COURT MISAPPLIED § 78B-9-107 IN DENYING APPELLANT'S 65B PETITION.

The district court cited § 78B-9-107 in denying appellant's 65B petition.

In the Post-Conviction Remedies Act, Section 78B-9-107, Utah Code Annotated, it states in part, "A petitioner is entitled to relief only if the petition is *filed within one year* after the cause of action has accrued." (Emphasis added). Thi [sic] court interprets 78B-9-107, Utah Code Annotated, to be applicable to petitions for extraordinary relief filed by inmates.

(District Court Order of Dismissal, Addendum A, page 1-2). The district court misapplied the statute which emphasizes that § 78B does not apply to actions arising out of Board release determinations. § 78B-9-107 emphasizes

- (2) This chapter does not apply to: . . .
- (c) actions taken by the Board of Pardons and Parole

As a 65B filing is the only avenue for litigating issues involving the Board, it goes without question that § 78B—which deals specifically with 65C petitions—may not be arbitrarily applied to bar 65B petitions which arise from Board release determinations. In making this arbitrary determination, the district court abused its discretion.

### II. THE DISTRICT COURT MISAPPLIED THE DOCTRINE OF LACHES IN DISMISSING APPELLANT'S 65B PETITION.

The district court judge cited the doctrine of laches in dismissing appellant's 65B petition.

In addition, to the one year statute of limitations, the Utah Supreme Court in *Renn v. Utah St. Board of Pardons*, 904 P.2d 677, 684 (Utah 1995) held that

While petition's filed under 65B(e) . . . for a writ of certiorari or mandamus . . . should be filed within a reasonable time after the act complained of has been done or refused, there is no fixed limitation period governing the time for filing them. Nevertheless, the equitable doctrine of laches is available to dismiss untimely writs. (Citations omitted).

\* \* \* \*

Accordingly, the petition should also be dismissed as untimely under the doctrine of laches.

(Addendum A, page 2-3). The district court misapplied the doctrine of laches.

Laches is not mere delay, but delay that works a disadvantage to another. To constitute laches, two elements must be established: (1) The lack of diligence on the part of plaintiff; (2) An injury to the defendant owing to such a lack of diligence. Although the lapse of time is an essential part of laches, the length of time must depend on the circumstances of each case, for the propriety of refusing a claim is equally predicated upon the gravity of the prejudice suffered by defendant and the length of the plaintiff's delay.

The existence of laches is one to be determined primarily by the trial court; and reviewing courts will not interfere with the exercise of the trial court's discretion in the matter, unless it appears a manifest injustice has been done, or the decision cannot reasonably be found to be supported by the evidence. In addition, a reasonable delay caused by an effort to settle a dispute does not invoke the doctrine of laches.

In addition to delay, factors considered by the courts in determining the existence or nonexistence of laches are the relative harm to defendant, in

view of plaintiff's delay . . . the relative harm to the plaintiff . . . and the defendant's good faith, or absence thereof. . . .

The language of *Archambault v. Sprouse* seems appropriate when applied to the facts in the instant matter.

. . . one who openly defies known rights, in the absence of anything to mislead him or to indicate assent or abandonment of intent to oppose on the part of others, is not in a position to urge as a bar to take the most instant conceivable resort to the courts. After the right has been invaded under circumstances which would not defeat a plaintiff in seeking relief, and no substantial harm is shown to have accrued to the wrongdoer from delay, there is not the same imminent necessity for the early enforcement of demands as exists before conditions have become fixed. Mere lapse of time, although an important, is not necessarily a decisive, consideration.

*Papanikolas Bros. Enterprises v. Sugarhouse Shopping Center Associates*, 535 P.2d 1256, 1260-61 (Utah 1975) (footnotes omitted). In the instant case, a manifest injustice has resulted from the district court's denial of appellant's petition—which is his only hope of showing the Board is violating his constitutional rights. Further, the decision cannot be reasonably supported by the evidence of the case because the judge did not allow the evidence to be presented—the case was dismissed based solely on the mere passage of time.

The doctrine of laches does not apply in the instant case for the following reasons:

i) There was no lack of diligence on the part of appellant, who acted in good faith and did not openly defy known rights regarding the filing deadline. The contract attorneys employed by the Department of Corrections repeatedly told appellant that the statute of limitations for a 65B petition was 4 years pursuant to § 78B-2-307(3).<sup>2</sup> The packet the contract attorneys provided appellant for filing a 65B petition contains two references to this 4-year filing period (Addendum B, page 1 and 7). Thus, if this advice is found to be legally deficient, appellant was “mislead.” *Papanikolas*, 535 P.2d at 1261.

Appellant, who filed his 65B petition *pro se*, worked diligently in good faith to meet the deadline he reasonably believed was applicable. He met this deadline. Considering appellant’s lack of legal training and knowledge, coupled with the fact that appellant did not have access to a law library, this timely filing is, to say the least, admirable.

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<sup>2</sup> In lieu of a law library, Utah has chosen to provide inmates with the services of state provided contract attorneys. If the advice the contract attorneys gave appellant caused him to miss the filing deadline, that advice constitutes ineffective assistance of counsel. Appellant should not be held any more responsible for the contract attorneys ineffective assistance anymore so than he would be for a criminal defense attorney providing ineffective assistance. As such, appellant’s right to file a 65B petition should be restored in a manner consistent with the *Manning* remedy, which allows a criminal defendant to move the court to reinstate his right to appeal because, among many reasons, his attorney failed to file a timely appeal or gave the defendant inaccurate information regarding the time within which an appeal must be perfected. *Manning v. State*, 122 P.3d 628 (Utah 2005). While a 65B petition is a civil filing and *Manning* involved a criminal case, the principle is the same: if advice is given that causes a defendant/petitioner to miss a statutorily defined filing deadline, the right should be restored.

In weighing the interests of litigants on either side of a habeas corpus action, we note a petitioner trying to ascertain his or her rights and to file all reasonably known claims in the original petition . . . must make these complex legal decisions with limited knowledge of the law, limited access to legal assistance and often no access to a law library. As Justice Murphy of the U.S. Supreme Court said, "Prisoners are often unlearned in the law and unfamiliar with the complicated rules of pleadings. Since they often act as their own counsel in habeas proceedings, we cannot impose on them the same high standards of the legal art which we might place on the members of the legal profession."

*Currier v. Holden*, 862 P.2d 1357, 1370 (Utah App. 1993) (Citing *Price v. Johnston*, 334 U.S. 266, 292, 68 S.Ct. 1049, 1063 (1948).

Additionally, the doctrine of laches does not apply if the delay was in part a result of efforts to settle the dispute. "In addition, a reasonable delay caused by an effort to settle a dispute does not invoke the doctrine of laches." *Papanikolas*, 535 P.2d at 1260. In the instant case, part of the delay in filing the 65B petition was due to the fact that appellant was seeking an alternative resolution with the Board. Beginning in 2005, appellant was involved in actions relating to the restitution he owed his victims in the underlying criminal case. In November 2009 and April 2010, the First Judicial District Court ordered the discharge of \$57,789.42 and \$25,000.00 respectively in court-ordered restitution. (Addendum C). After the court ordered the discharge of the restitution, appellant, through his Department of Corrections case management team, submitted a request for a Special Attention hearing in June 2010. Appellant's belief was that the

Board would grant him a release due to his efforts to satisfy this restitution. After reviewing appellant's case, the Board declined to modify appellant's release date or the conditions of his release. (Addendum D). It was approximately 4 months later that appellant filed his 65B petition. This was not an unreasonable delay.

ii) No substantial harm, prejudice or injury was shown to have accrued to the Board from the delay. The Board, unlike a district court after sentencing a defendant, has continued jurisdiction over offenders. The Board retains all material relevant to appellant and his offense, as well as having access to the Department of Corrections files relevant to appellant's behavior and rehabilitation while incarcerated. This continued jurisdiction remains even after a conditional release (such as parole) and continues until the offender terminates or expires his sentence. This allows the Board to review an offender's case at any time during his term of incarceration or conditional release (Utah Administrative Code R671-310-1). As such, appellant's case under the Board's jurisdiction is not static, but fluid. This is evidenced by the fact that after satisfying \$82,798.42 in restitution, appellant submitted to the Board a request for a Special Attention hearing in June 2010, and the Board reviewed appellant's case. After reviewing his case, the Board declined to modify appellant's release date or the conditions of his release. They did, however, eventually modify the amount of restitution appellant owed. (Addendum E). If the Board had been unable to review and

modify appellant's case at this time because they had suffered injury due to the passage of time, they would have asserted so at that time. However, they did not make this claim, and proceeded to review appellant's case. Subsequent to the Board's June 2011 Special Attention Review, appellant filed his 65B petition. It seems improbable that the Board would have been capable of reviewing appellant's case in June of 2010, but unable to litigate the same case a mere four months later due to injury. Further, the petition primarily involves questions of statutory and constitutional law, not questions of fact. It seems axiomatic that questions of law are not harmed by the mere passage of time.

### **III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DISMISSED APPELLANT'S 65B PETITION SOLELY ON THE BASIS OF TIME.**

The district court dismissed appellant's case without allowing him the opportunity to present his claims. Because the merits of the claims were never presented, the court was unable to determine whether the claims involved due process or substantive discretionary issues or had merit. Rather, the court simply dismissed the 65B petition based on the basis of time. By failing to review the issues appellant raised in his 65B petition and merely dismissing the petition solely on the basis of missing a statute of limitations, the court abused its discretion.

[D]espite the fact that we agree with the State's general premise that an appellate court may affirm a district court's dismissal of a habeas corpus petition on alternative grounds, we cannot apply that premise here. Our

review of the record reveals no discussion relevant to the nature of Renn's challenges. . . . The district court . . . dismissed the case based solely on the basis of the statute of limitations, having had no occasion to determine whether these claims involved procedural due process or substantive discretionary issues. The record, therefore, provides us no reasonable alternative basis by which to uphold the district court's dismissal of Renn's petition.

*Renn*, 904 P.2d at 685, citing *Renn v. Utah State Board of Pardons*, 682, P.2d 1378, 1381-82 (Utah Ct. App. 1993).

Even in the event that appellant missed a statutorily imposed filing deadline, this is not sufficient reason to deny the petition. "Because a petitioner's failure to comply with a statute of limitations may never be a proper ground upon which to dismiss a habeas petition, we hold that the district court erred in dismissing Frausto's petition." *Frausto v. State*, 966 P.2d 849, 851 (Utah 1998). "Therefore, if the proper showing is made, the mere passage of time can *never* justify continued imprisonment. . . ." *Julian v. State*, 966 P.2d 249, 254 (Utah 1998). In the instant case, the district court dismissed the petition based solely on time related issues (including the doctrine of laches), and failed to address the merits of the case.

#### **IV. THERE IS NO STATUTE OF LIMITATIONS FOR FILING 65B PETITIONS IN UTAH.**

Appellant filed a 65B petition in the district court, not a 65C petition. Unlike § 78B-9-107, which sets a statute of limitations for filing a 65C petition, there is no statute of

limitations for filing a 65B petition, which is commonly referred to as a habeas corpus filing.

Utah case law is flush with 65B filings which are referred to as habeas corpus filings. For example, *Julian v. State* involved a 65B petition, but the court referred to it as a habeas corpus petition. “We note that while our rules of civil procedure set forth the requirements for asserting a petition for extraordinary relief, an extraordinary relief proceeding such as the one in this case is substantively a form of the petition for a writ of habeas and has been referred to as such in many past cases. See *Tillman v. Cook*, 855 P.2d 211, 225 n. 1 (Utah 1993).” *Julian*, 966 P.2d at 250 n. 1.<sup>3</sup>

Further, when offenders housed in the Utah State Prison request from the contract attorneys a packet for filing a habeas corpus petition, the contract attorneys provide offenders with a packet for filing a 65B petition. (Addendum B). The contract attorneys also advise offenders that a 65B petition and a habeas corpus action are one in the same. (Addendum F, page 2).

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<sup>3</sup> *Julian v. State* is referenced in Utah Court Rules Annotated, 2010, volume 1, Rules of Civil Procedure, Rule 65B, p. 810, Note 11. *Frausto v. State*, 966 P.2d 849, 851 (Utah 1998) also involved a 65B petition, but the court referred to it as a habeas corpus petition. *Frausto v. State* is also referenced in Utah Court Rules Annotated, 2010, volume 1, Rules of Civil Procedure, Rule 65B, p. 810, Note 11. Further, Utah Court Rules Annotated, 2010, volume 1, Rules of Civil Procedure, Rule 65B, p. 874, Note 183 addresses habeas corpus actions arising out of Board release dispositions.

According to the Utah Constitution, there is no statute of limitations for filing habeas corpus actions. "The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety requires it." Utah Constitution, Article I, Section 5. The Utah Supreme Court has affirmed this position. "The writ of habeas corpus is considered so important in Utah that Article I, Section 5 of the Utah Constitution expressly prohibits its restriction unless public safety requires it." *Hurst v. Cook*, 777 P.2d 1029, 1033 (Utah 1989).

Additionally, the courts have repeatedly found that there is no applicable statute of limitations for 65B petitions. In *Currier v. Holden*, the court found § 78-12-31.1, which placed a 3-month statute of limitations on habeas corpus filings, unconstitutional. *Currier v. Holden*, 862 P.2d 1357, 1372 (Utah App. 1993). In *Renn v. Utah State Board of Pardons*, 904 P.2d 677 (Utah 1995) *Currier's* holding was extended to habeas corpus proceedings growing out of Board of Pardons dispositions. In *Julian v. State*, the state's high court held that a four year statute of limitations could not bar habeas corpus petitions. "We therefore hold that . . . the four-year statute of limitations provision . . . may not be constitutionally applied to bar a habeas corpus petition. . . . Applying the catchall statute to bar habeas petitions not only violates the Utah Constitution's open courts provision in article V, section 11, but also violates the separation of powers

provision in article V, section 1.” *Julian v. State*, 966 P.2d 249, 253 (Utah 1998). It seems axiomatic that if a four year statute of limitations may not be applied to bar a habeas petition, a one year statute that is not even relevant to the action may not be applied.

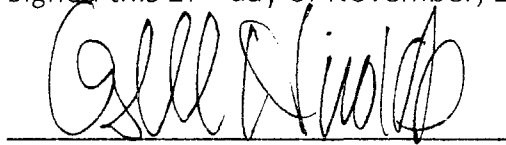
If there is actually a difference between a 65B petition for extraordinary relief and a habeas corpus action, the distinction between the two is so blurred as to be indistinguishable. In light of case law, Utah Code, and the advice provided to appellant by the contract attorneys, the question as to whether there is a statute of limitations for 65B habeas corpus petitions in Utah is beyond cavil—there is not a statute of limitations applicable to 65B petitions.

### **CONCLUSION AND RELIEF SOUGHT**

The district court erred in dismissing appellant’s 65B Petition for Extraordinary Relief based on the one-year statute of limitations set forth in § 78B-9-107 and the doctrine of laches. The district court also abused it’s discretion in dismissing appellant’s 65B petition solely on the basis of time without addressing the claims he asserted. Additionally, as there is not a statute of limitations for filing 65B habeas corpus petitions, the court abused its discretion by dismissing appellant’s 65B claim based on time issues.

The district court's dismissal should be overturned and the case remanded back to the district court to be properly litigated. If, however, the court finds that appellant's 65B petition was filed untimely, the court should reinstate appellant's right to file consistent with the *Manning* remedy due to ineffective assistance rendered by the contract attorneys employed at the State prison, which assistance caused appellant to file his 65B petition untimely.

Signed this 27<sup>th</sup> day of November, 2011.

A handwritten signature in black ink, appearing to read "Larry W. Nicolds", written over a horizontal line.

Larry W. Nicolds

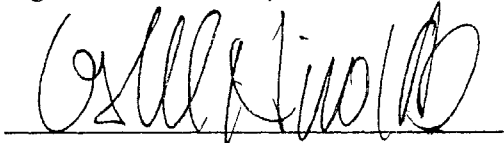
Appellant, *pro se*

CERTIFICATE OF SERVICE

I hereby certify that on this 27<sup>th</sup> day of November, 2011, a true and correct copy of the foregoing OPENING BRIEF OF APPELLANT was mailed, postage prepaid, to the following parties:

Utah Attorney General's Office  
PO Box 140812  
160 East 300 South  
Salt Lake City, UT 84114-0812

Signed this 27<sup>th</sup> day of November, 2011.

A handwritten signature in black ink, appearing to read "Larry W. Nicolds", is written over a horizontal line.

Larry W. Nicolds

Appellant, *pro se*

# Addendum A

STATE OF UTAH COUNTY

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**DISTRICT COURT, STATE OF UTAH**  
**COUNTY OF SANPETE**  
160 North Main, P.O. Box 100  
Manti, Utah 84642  
Telephone (435) 835-2131 Facsimile (435) 835-2135

<b>LARY W. NICOLDS,</b>  Petitioner,  vs.  <b>UTAH BOARD OF PARDONS AND PAROLE; STATE OF UTAH; DENNIS SORENSEN, WARDEN AT CENTRAL UTAH CORRECTIONAL FACILITY,</b>  Respondents.	<b>ORDER OF DISMISSAL</b>   Case No. 100600332  Assigned Judge: <b>Marvin D. Bagley</b>
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On October 1, 2010, petitioner, Lary W. Nicolds, filed a Petition for Extraordinary Relief Utah Rules of Civil Procedure Rule 65B (hereinafter referred to as "Petition for Extraordinary Relief"). The Court sent the Petition back with instructions to amend it. On December 22, 2010, Petitioner filed an amended petition.

The Court has reviewed Petitioner's Amended Petition for Extraordinary Relief. The petition states: "Petitioner is challenging the actions of the Utah Board of Pardons and Parole at petitioner's original parole grant hearing, which took place on October 3, 2006[.]"

In the Post-Conviction Remedies Act, Section 78B-9-107, Utah Code Annotated, it states in part, "A petitioner is entitled to relief only if the petition is *filed within one year* after the cause

of action has accrued.” (Emphasis added). Thi Court interprets Section 78B-9-107, Utah Code Annotated, to be applicable to petitions for extraordinary relief filed by inmates.

Because the Petition challenges actions taken by the Utah Board of Pardons on October 3, 2006, the petition should have been filed no later than October 3, 2007. The petition, however, was not filed until October 1, 2010, almost four years after the cause of action accrued. Therefore, Petitioner’s Petition for Extraordinary Relief is untimely and should be dismissed.

In addition, to the one year statute of limitations, the Utah Supreme Court in *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 684 (Utah 1995) held that

While petitions under 65B(e)[<sup>1</sup>] for a writ of certiorari or mandamus[<sup>2</sup>] should be filed within a reasonable time after the act complained of has been done or refused, there is no fixed limitation period governing the time for filing them. Nevertheless, the equitable doctrine of laches is available to dismiss untimely writs. (Citations omitted.)

In this case Petitioner complains about action taken by the Board at the October 3, 2006 hearing. The Petition for Extraordinary relief was filed four years later on October 1, 2010. In

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<sup>1</sup>Rule 65B(e) of the Utah Rules of Civil Procedure was renumbered to Rule 65B(d), effective July 1, 1996.

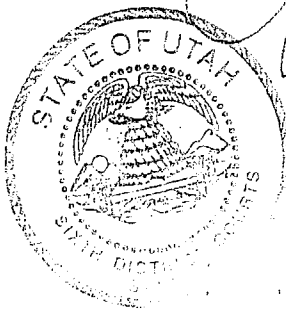
<sup>2</sup> As the Court noted in *Renn*: “The common law writ of certiorari was used when there was no adequate remedy at law, such as a direct statutory appeal, to bring the record of the proceedings of an inferior tribunal before a superior court to determine from the record whether the inferior tribunal exceeded its jurisdiction or failed to proceed in accordance with law. . . The common law writ of mandamus was designed to compel a person to perform a legal duty incumbent on him by virtue of his office or as required by law. . . With the promulgation of Rule 65B of the Utah Rules of Civil Procedure, the common law forms and procedures for extraordinary writs were abolished in keeping with modern concepts of pleading and practice, but the remedies continue to be available.”(citations omitted) *Id.* at 677-682.

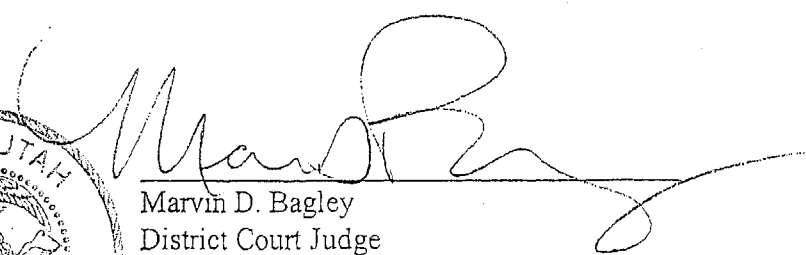
addition to being beyond the statute of limitations this Court finds that almost four years is an unreasonable delay in which to file the petition. Accordingly, the petition should also be dismissed as untimely under the doctrine of laches.

**ORDER**

Petitioner's Petition for Extraordinary Relief, brought pursuant to Rule 65B(d), Utah Rules of Civil Procedure, is untimely and is DISMISSED with prejudice.

Date Jan. 14, 2011



  
Marvin D. Bagley  
District Court Judge

Certificate of Notification

On January 14, 2011, a copy of the above was sent to:

Lary W. Nicolds  
CUCF 168966  
Petitioner  
PO Box 550  
Gunnison, UT 84634

Utah Attorney General  
P.O. Box 140812  
160 East 300 South  
Salt Lake City, Utah 84114-0812

Melissa Lund

# Addendum B

## PACKET 65B

### INSTRUCTIONS FOR COMPLETING AND FILING

#### A PETITION FOR WRIT OF EXTRAORDINARY RELIEF

1. Your packet contains the following: an Motion for Appointment of Counsel; Order for Appointment of Counsel; Affidavit and Application for Waiver of Court Fees, (former: "Affidavit of Impecuniosity") Petition for Writ of Extraordinary Relief.
2. On all court documents, fill out your full name and address on the top left (the address where you are currently housed.) If this action concerns a disciplinary hearing or conditions of confinement, fill in the number of the District Court and the County where the action took place. If this action concerns a Board of Pardons matter fill in the THIRD DISTRICT COURT, SALT LAKE COUNTY. Also, print your name everywhere there is a blank followed by (name) or (Print name). Where there is a blank space for the Respondent, please print the name of the Warden of your facility. If the matter concerns the Board of Pardons then also name the Board of Pardons as Respondents.
3. DO NOT fill in the Case No. Or Judge. These will be completed by the Court.
4. Any other person who has personal knowledge of facts that support your petition may fill out an Affidavit and sign it before a notary.
5. Complete the information on the In Foram Pauperis application and submit it to the Business office for certification. We have provided the Informa Pauperis Application for your convenience. The filing fee for the Petition for Writ of Extraordinary Relief is \$360.00. Even if you do not have sufficient funds to cover the filing fee at this time, the Court may deny your Application for Wavier of Fees if your indigence is due to expenditures for non-essential items.
6. The Statute of limitations for filing a Petition for Extraordinary Relief (Rule 65B(d) is four years. (Extraordinary Relief includes Board of Pardons, disciplinary challenges and conditions of confinement.)

Revised 05/09

7. Check Rule 65B(b) if you are challenging conditions of confinement. Check Rule 65B(d) if your petition concerns a commitment for violation of parole or a disciplinary hearing. Fill in the blanks of the Petition for Writ of Extraordinary Relief, taking special care to answer paragraph 3 clearly and legibly. You must specifically allege and state which of your constitutional rights were violated and give detailed facts in support of your allegations.
8. You may NOT FILE successive petitions on the same issue or file a Petition on an issue which has been adjudicated by the courts on direct appeal. You must attach any prior Writs of Extraordinary Relief to this petition.
9. Every part of the petition is necessary. Be sure to complete all parts of the petition and attach exhibits or at least a good explanation as to why you could not obtain the attachments or the Attorney General may make a motion to dismiss for failure to comply with Rule 65B.
10. If you are challenging the outcome of a Board of Pardons parole grant hearing, then be sure to allege violation of due process, state whether or not you had a opportunity to review and rebut evidence which they considered, state the ruling of the Board of Pardons and any other relevant information and state why you did not get a fair and impartial hearing.
11. Sign and date the Petition and Motion and have the appropriate forms notarized. .
12. Make three copies of everything, two for the Court and one for yourself. You can send the papers to the Contract Attorneys for copying. Include a money transfer slip to cover the copying at 10 cents per page or include a signed, handwritten paper stating that you are indigent and cannot afford the copy costs. (You need not be on the indigent list but must, in fact, be indigent to claim this).
13. File the original and one copy with the District Court you have named in your petition. Keep a copy for yourself.

Revised 05/09

Attorney Pro Se

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IN THE

DISTRICT COURT,

COUNTY

STATE OF UTAH

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	Petitioner,	*	PETITION FOR EXTRAORDINARY
		*	RELIEF
vs.		*	URCP Rule 65B
		*	
		*	Judge:
		*	
	Respondent.	*	
		*	

---

COMES NOW the Petitioner , pursuant to the following Rule of Civil Procedure:

\_\_\_\_\_ Rule 65B(b) claim is based on wrongful restraint on personal liberty (including conditions of confinement).

\_\_\_\_\_ Rule 65B(d) claim is based on an wrongful use of judicial authority or failure to comply with a duty; actions by the board of pardons and parole or disciplinary hearings.

and for cause of action alleges as follows:

1. The Respondent is \_\_\_\_\_.
2. Petitioner is being restrained at the following location: \_\_\_\_\_.
3. Cause or pretense of the restraint: Petitioner is challenging the following (check one and give date of action).
  - \_\_\_\_ Board of Pardons hearing, which took place on \_\_\_\_\_.
  - \_\_\_\_ Disciplinary Hearing, which took place on \_\_\_\_\_.
  - \_\_\_\_ Condition of confinement, which took place on \_\_\_\_\_.

## PETITION FOR WRIT OF EXTRAORDINARY RELIEF

4. No other plain, speedy and adequate remedy is available regarding this matter.
5. A short, plain statement of the facts on the basis of which Petitioner seeks relief:

PETITION FOR WRIT OF EXTRAORDINARY RELIEF

PETITION FOR WRIT OF EXTRAORDINARY RELIEF

6. The legality of the restraint has already been adjudicated in a prior proceeding:

\_\_\_\_ Yes. See attached copy of the pleadings filed by the petitioner in any prior proceeding that adjudicated the legality of the restraint. The reasons for denial are as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_ No.

7. Petitioner requests that he be appointed legal counsel based on the attached motion and affidavit of Impecuniosity.

8. The following documents are attached hereto and incorporated herein by reference (check all that apply):

- \_\_\_\_ An affidavit of Impecuniosity and certificate from the Inmate Accounting Office, if you are requesting a waiver of the filing fee.
- \_\_\_\_ Affidavits that support Petitioner's allegations.
- \_\_\_\_ Copies of records that support Petitioner's allegations.
- \_\_\_\_ Any documents available to Petitioner that are associated with the process that caused the illegal restraint (this is a necessary attachment)

PETITION FOR WRIT OF EXTRAORDINARY RELIEF

\_\_\_\_\_ Any documents available to Petitioner that are associated with the process that caused the illegal restraint (**this is a necessary attachment**)

9. \_\_\_\_\_ Petitioner was unable to obtain and attach the following documents because (list the efforts you made to obtain the documents and the results of your efforts).

10. That pursuant to URCP Rules 65B(b)(3) and/or 65B(d)(3) as appropriate, Petitioner requests that this Court order the Respondent to obtain such transcripts of proceedings or records which are relevant and material to this case and requests that the responsible court/administrative agency be directed to pay the costs of the proceeding. (See attached motion and affidavit of Impecuniosity).

11. \_\_\_\_\_ This action has been filed under Rule 65B(b) or Rule 65B(d). Therefore, the four year statute of limitations set forth in UCA Sec. 78B-2-307(3) applies.

\_\_\_\_\_ This action has been filed beyond the applicable statute of limitations because of the following reasons: \_\_\_\_\_

\_\_\_\_\_  
Petitioner asks this court to find that the interest of justice requires the court to excuse Petitioner's failure to file within the time limitations.

Revised 8/08

PETITION FOR WRIT OF EXTRAORDINARY RELIEF

WHEREFORE, Petitioner prays that this Court (check the appropriate relief):

\_\_\_\_\_ Schedule an evidentiary hearing at which time Petitioner may be present and represented by counsel.

\_\_\_\_\_ Permit Petitioner, who remains indigent, to proceed without prepayment of costs, fees or other assessments.

\_\_\_\_\_ Order Respondent to provide transcripts of records of proceedings which are relevant to this cause of action.

\_\_\_\_\_ Grant Petitioner the authority to obtain subpoenas In Forma Pauperis, for witnesses and documents necessary to assist in the proof of the facts alleged in the petition.

\_\_\_\_\_ Issue an Order for Extraordinary Relief to have the Petitioner brought before it, to the end that the illegal activity of the Respondent be terminated.

\_\_\_\_\_ Other relief requested:

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

PETITION FOR WRIT OF EXTRAORDINARY RELIEF

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Attorney Pro Se

# Addendum C

Lary Nicolds 38672  
~~Utah State Prison C.U.C.F.~~  
~~P.O. Box 250 P.O. Box 550~~  
~~Draper, Utah 84020-0250 GUNNISON, UT 84634-0550~~  
Pro Se

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IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR  
CACHE COUNTY, STATE OF UTAH

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STATE OF UTAH  
Plaintiff

vs.

LARY W. NICOLDS  
Defendant

ORDER OF DISCHARGE  
OF ORDERED RESTITUTION

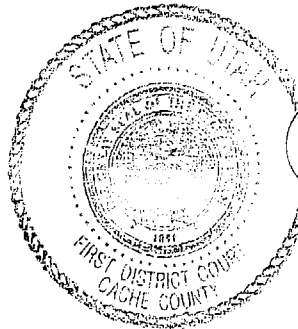
Case # 041100575

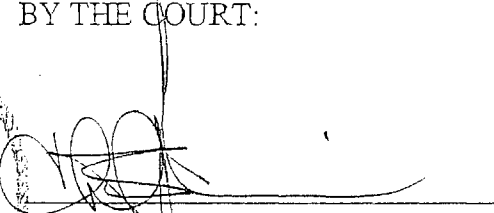
Judge Clint S. Judkins

IT IS HEREBY ORDERED the order of restitution to Zions First National Bank of  
\$57,789.42 is discharged, so ordered with prejudice.

DATED: 11/23, 2009

BY THE COURT:



  
HONORABLE CLINT S. JUDKINS  
District Court Judge

FIRST JUDICIAL DISTRICT COURT  
COUNTY OF CACHE, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

v.

Lary W. Nicolds,

Defendant,

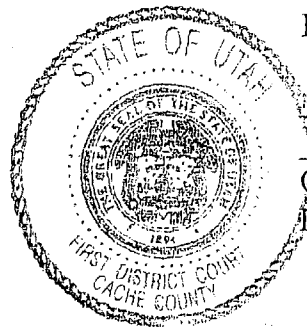
ORDER OF DISCHARGE OF  
RESTITUTION

Case No. 041100575

Judge: Clint S. Judkins

IT IS HEREBY ORDERED pursuant to the Settlement Regarding Discharge of Ordered Restitution signed by Guy Fitzgerald and Defendant, the ordered restitution to Guy Fitzgerald in the above-mentioned case for the amount of \$25,000.00 less the rifle and shotgun, is discharged with prejudice.

Dated this 15 day of April, 2010.



BY THE COURT:

  
Clint S. Judkins  
DISTRICT COURT JUDGE

ENT'D APR 15 2010

# Addendum D

Gary R. Herbert  
Governor  
Curtis L. Garner  
Chairman



Members  
Jesse Gallegos  
Clark A. Harms  
Robert S. Yeates  
Angela F. Micklos

## BEFORE THE BOARD OF PARDONS AND PAROLE OF THE STATE OF UTAH

Offender # 168966

Consideration of the Status of Larry Wayne Nicolds

USP # 38672

### SPECIAL ATTENTION REVIEW

After a review of the submitted information and good cause appearing, the Board makes the following decision and order:

Results	Effective Date
1. NO CHANGE	6/7/10

#### Hearing Notes

1. No change to the 8/26/2014 parole date or the Special Conditions of parole.

No	Crime	Sent	Case No.	Judge	Expiration
1.	COMMUNICATIONS FRAUD	1-15	041100575	JUDKINS	8/28/20
2.	COMMUNICATIONS FRAUD	1-15	041100576	JUDKINS	7/27/35
3.	ATTEMPTED THEFT BY DECEPTION	0-5	041403199	LAYCOCK	7/17/40
4.	COMMUNICATIONS FRAUD	0-1	051403189	LAYCOCK	11/1/06
5.	RETALIATION AGAINST A WITNESS/VICTIM/INF	0-1	051403189	LAYCOCK	11/1/06

This decision is subject to review and modification by the Board of Pardons at any time until actual release from custody.

By order of the Board of Pardons of the State of Utah, I have this date 7th day of June, 2010, affixed my signature as Chairman for and on behalf of the State of Utah, Board of Pardons.

A handwritten signature in cursive script, appearing to read "Curtis L. Garner".

Curtis L. Garner, Chairman

# Addendum E

Gary R. Herbert  
Governor  
Clark A. Harms  
Chairman



Members  
Curtis L. Garner  
Jesse Gallegos  
Robert S. Yeates  
Angela F. Micklos

## BEFORE THE BOARD OF PARDONS AND PAROLE OF THE STATE OF UTAH

Offender # 168966

Consideration of the Status of Larry Wayne Nicolds

USP # 38672

### HEARING OFFICER RESULTS

After a review of the submitted information and good cause appearing, the Board makes the following decision and order:

Results	Effective Date
1. AMEND PAROLE AGREEMENT	12/27/10
2. NO CHANGE	12/27/10

#### Agreement Conditions

1. STANDARD PAROLE
2. Remit (not pay) fine and surcharge in reference to Case # 04-0576.
3. Pay restitution of \$ 50,000.00 in reference to Case # 04-0575.
4. Pay restitution of \$ 50,000.00 in reference to Case # 04-3199.

#### Hearing Notes

1. ADD: Pay restitution of \$ 50,000.00 on Case# 04-0575 and \$ 50,000.00 on Case # 04-3199.
2. DELETE: Pay restitution of \$ 132,789.42 on Case# 04-0575 and \$ 50,000.00 on Case#'s 04-3199 and 04-0575.
3. No change in the 08/26/2014 parole date.

No	Crime	Sent	Case No.	Judge	Expiration
1.	COMMUNICATIONS FRAUD	1-15	041100575	JUDKINS	8/28/20
2.	COMMUNICATIONS FRAUD	1-15	041100576	JUDKINS	7/27/35
3.	ATTEMPTED THEFT BY DECEPTION	0-5	041403199	LAYCOCK	7/17/40
4.	COMMUNICATIONS FRAUD	0-1	051403189	LAYCOCK	11/1/06
5.	RETALIATION AGAINST A WITNESS/VICTIM/INF	0-1	051403189	LAYCOCK	11/1/06

This decision is subject to review and modification by the Board of Pardons at any time until actual release from custody.

By order of the Board of Pardons of the State of Utah, I have this date 27th day of December, 2010, affixed my signature as Chairman for and on behalf of the State of Utah, Board of Pardons.

Clark A. Harms, Chairman

# Addendum F

WAYNE A. FREESTONE, P.C.  
DAVID J. ANGERHOFER, P.C.  
CONTRACT ATTORNEYS  
Southgate Office Park, #504  
11576 South State Street  
Draper, Utah 84020  
801-999-4557

M E M O R A N D U M

TO: ISSAC JOHNSON #172832

DATE: June 20, 2011

RE: REQUESTED LEGAL SERVICES

In response to your letter:

1. If you are allowed to withdraw your plea in Utah you are restored to the place where you were before entering your plea. If charges were filed against you and they were dismissed as a result of the plea agreement, those charges will be reinstated. There is no question of statute of limitations because the charges had already been filed with the court. New charges or charges would not be allowed to be added. i.e. if you were charged with two counts of robbery and one count of assault. You plead to one of the robberies and the other two charges were dismissed. You were successful in withdrawing your plea. Then the charges against you are two counts of robbery and one count of assault. Enclosed find a copy of
2. The statute of limitations is determined by the crime. Murder or death cases there is no statute of limitations. Felony cases other than murder or death is a four year statute of limitations. Misdemeanor cases is usually two years. However, misdemeanor charges can be enhanced to felony charges in certain cases. i.e. if a firearm or weapon is used, or if it is a third DUI in 10 years it becomes a third degree felony. Sex abuse cases are within four years of when they are reported to law enforcement.

NOTICE REGARDING LEGAL SERVICES

Laws, including statutes of limitations, can and do change. Do not rely upon information or legal materials that you may have received in the past. Before filing any initial pleading in state or federal court regarding post conviction relief or conditions of confinement, always check with the contract attorneys or other competent legal authority to obtain current information concerning the status of the law. Failure to do so may result in your action being dismissed with prejudice


3. A 65B and habeas corpus filing are the same. In fact a 65B Petition for Extraordinary Relief and 65C Petition for Post Conviction Relief have replaced pleading called habeas corpus in the Utah State Courts.

The statute of limitations for a 65B petition is four years from the date you knew or should have known the cause of action. (Enclosed find a copy of Rule 65B)

The statute of limitations for a 65C petition is one year from exhausting all state remedies. If appeals were not taken then it is one year from when an appeal should have been filed. (Enclosed find a copy of Rule 65C)

CONTRACT ATTORNEYS

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A handwritten signature in dark ink, consisting of a series of loops and a long horizontal stroke at the end.