

2002

# Jeff Tucker v. State of Utah : Reply Brief

Utah Court of Appeals

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Jeff Tucker; Appellant.

Bent A. Burnett; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Attorneys for Appellee.

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IN THE UTAH COURT OF APPEALS

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JEFF TUCKER, :  
Petitioner/Appellant, :  
v. : Case No. 20020191-CA  
: :  
STATE OF UTAH, :  
Respondent/Appellee. :

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REPLY BRIEF OF APPELLANT

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Appeal from a Final Order of Dismissal  
of the Third Judicial District Court, Salt Lake County,  
State of Utah, the Honorable Glenn K. Iwasaki presiding

---

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ORAL ARGUMENT NOT REQUESTED  
PUBLISHED OPINION REQUESTED BY APPELLANT-PETITIONER

**FILED**  
Utah Court of Appeals

AUG 20 2002

Paulette Stagg  
Clerk of the Court

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## SUMMARY OF ARGUMENT

The state's argument is misplaced, and is an attempt to "cloud the waters". The sole basis for the dismissal of the petition of Mr. Tucker was the insistence by the office of the Attorney General that claims were improperly filed under URCiv.P 65B, and must be filed under 65C. Yet the Attorney General's office, in its response, now claims that the petition **was** properly filed under 65B. This, alone, should be reason enough to find for the appellant and grant him his relief.

The state's argument that Mr. Tucker fails to state a claim is equally flawed, and fatally so. Primarily, a pro se litigant's pleadings are to be construed liberally, and if they can reasonably be read to state a claim they must be read as such. Secondly, Mr. Tucker raises at **minimum** four valid claims for relief:

- a. The search of his computer and property, not by parole officers, but by police officers,
- b. The arrest warrant issued in violation of the Fourth Amendment,
- c. The cancellation of his revocation hearing for "adjudication of new charges" at least two weeks before any such charges existed, and
- d. The "ex post facto" application of Utah Code Ann. 76-3-202 (8)(1999) to his May 18, 1990 sentence.

## ARGUMENT

### I. DISMISSAL OF PETITION AS MIS-FILED

The Attorney General concedes that the petition was properly

filed under URCiv.P 65B. As the entire of their argument for dismissal consisted of their claim that Mr. Tucker's petition was improperly filed under 65B, and considering the extensive resources in manpower, experience, and materials at the disposal of the office of the Attorney General, this court should consider all arguments from the state, beyond the "65B or 65C?" question as forfeited.

The state, in the person of the office of the Attorney General, **is not** on appeal here. Mr. Tucker **is**. The state had plenty of opportunity to present its case. It **chose** as its case the frivolous argument that Mr. Tucker's petition was improperly filed, abandoning all other arguments. The state would now have this Court grasp at any possible means to clean up its "fouled nest", and at the same time makes the claim that no harm, no error, has occurred. This is not the case. The fact of the matter is that the state would perpetuate the harms, the same harms, that Mr. Tucker was seeking relief from in the first place. This Court should not allow that, and should grant Mr. Tucker the relief he seeks **in the form of a published opinion**, sending a clear message to all the agents of the state that abuses against its citizens, **all of its citizens**, will be neither condoned nor even tolerated.

## II. FAILURE TO STATE A CLAIM

### a. The search of the computer and property.

The state is correct that parole officers can conduct warrantless searches, based upon reasonable suspicion, and in their capacity as parole officers and **not** as peace officers.

They cannot, however, assist police in evading the warrant requirements of the Fourth Amendment.

The testimony, in federal court, of Det.'s Attack and Gruber, two of the detectives conducting the search, makes it plain that the search was a police investigation and not a parole search. Detective Gruber was in sole control of the computer, while Det. Attack and other police officers, **and not parole officers**, searched the apartment. AP&P opened the door to Mr. Tucker's apartment and gave the police free reign. AP&P's sole contribution, beyond gaining entrance for the police, was to secure Mr. Tucker and keep watch over him during the search. Both Attack and Gruber testified that it was Gruber who interrogated Mr. Tucker about various findings on his computer during the search, and that it was Attack who ordered Gruber to search the computer in the first place.

Jennifer Bartell, of AP&P, gave long and eloquent testimony (perjuring herself in the process, of which Mr. Tucker notified the Attorney General's office and provided copies of Attack's and Gruber's reports. The Attorney General chose to do nothing with this information.) as to how everything was conducted at her direction, testimony and reports of the detectives notwithstanding. Also relevant to this issue is the fact that Bartell testified that Utah parole officers are peace officers (thus they were acting as **police** not as parole officers), and the fact that absolutely none of the evidence (which Bartell testified was gathered at her direction) was requested by AP&P from the police for use to violate Mr. Tucker's parole.

**b. The arrest warrant.**

The state claims that a parole officer may arrest a parolee without a warrant. This is only partly true. This arrest, called an "administrative detention", is only valid for 72 hours. Beyond that AP&P must request a warrant from the Board of Pardons (Board). Mr. Tucker was taken into custody at his home the night of June 11, 1998. The next afternoon AP&P had received a "Board warrant" for Mr. Tucker's actual arrest and return "to actual custody". As Mr. Tucker has pointed out, and the fact which the Attorney General continues to ignore, this warrant was issued in violation of both the Utah and the United States constitutions. Specifically, the warrant states that Mr. Tucker is to be arrested **so that it can be determined whether there is probable cause** to believe that he has violated his parole. This is the issuance of a warrant for arrest in the absence of probable cause.

**c. Cancellation of revocation hearing.**

The Attorney General states that the Board may "for good cause" continue a hearing beyond 30 days. Would the Attorney General have the Court believe that charges that did not yet exist at the time of the cancellation of the revocation hearing is an example of "good cause"? Mr. Tucker would respectfully remind this Court that at the time the revocation hearing was finally held, a full 19 months after Mr. Tucker's arrest, his federal trial, and thus the "adjudication" of the charges, was still a full year in the future. Thus, the Attorney General would have this Court believe that to cancel the hearing to adjudicate charges that do not yet exist, and then 19 months later to hold the hearing **before** the



trial of Mr. Tucker's charges constitutes "good cause". This staggers ones sense of credulity. Where is the basis for the Attorney general's contention that Mr. Tucker does not state a claim?

d. Ex post facto application of UC 76-3-203(8).

Subsection (8) was amended to UC 76-3-203 in 1999, a full nine years **after** Mr. Tucker was sentenced in May of 1990. The application of this law to Mr. Tucker's 1990 sentence **increases** the expiration of his sentence from April 16, 2005 until August of 2009 , effectively **increasing the length of his sentence by four years.**

Mr. Tucker would point out that this is not a case where a prisoner is released on parole, commits a crime, and finds himself incarcerated outside of the state before he can be transported back to Utah to have his parole revoked, as is the obvious intent of the statute. The parole that Mr. Tucker was serving at the time when the federal charges came about has already been revoked on 02-02-2000.

There are two paroles at question here; one, beginning in May of '96, during which the incidents described herein occurred and resulted in federal prosecution, and another, granted **after** federal prosecution and releasing Mr. Tucker to federal custody. Mr. Tucker is not in any way in violation of this new parole, and in fact accepted the parole in good faith as what it was purported to be: **a grant of parole.** The Board themselves, in this case, are the agents of Mr. Tucker's transfer to federal custody by granting him "parole". To all intents and purposes Mr. Tucker might as well

have a detainer filed against him, but without the protections and rights that a formal detainer would grant him. For the reasons stated above Mr. Tucker's time spent "on parole" to federal custody should be counted toward his Utah sentence unless this Court grants Mr. Tucker the relief of terminating that sentence.

### III. FAILURE TO AMEND PETITION

Mr. Tucker offered at trial to remove the claims for damages from his petition. As the Attorney General has generously pointed out, the court below had no jurisdiction to hear the damage claims. Consequently, that court had no jurisdiction to dismiss those claims with prejudice. As Mr. Tucker withdrew the claims, and as the Attorney General concedes that the remaining claims were properly filed under 65B, what was there to amend?

### CONCLUSION

The state admits that Mr. Tucker's claims **were** properly filed under 65B, even though their sole argument at trial was that they were not. Now the state begs this Court to find any other reason to affirm the original invalid dismissal of Mr. Tucker's petition, thereby stamping Its seal of approval on the violation of Mr. Tucker's rights. But the state **had** its day in court, and they were found wanting. For this reason alone Mr. Tucker asks that this Court grant his requested relief.

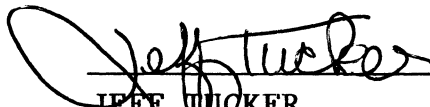
But the state then falls back on the lame argument that Mr. Tucker fails to state a claim. This argument should have been raise in the court below instead of the frivolous and recanted claim that

the petition was improperly filed under Rule 65B. But be that as it may, the state's argument that Mr. Tucker fails to state a claim fails miserably. For all of the foregoing reasons Mr. Tucker prays this Court grant him his requested relief.

**MR.TUCKER DOES NOT REQUEST ORAL ARGUMENT,  
BUT DOES REQUEST A PUBLISHED OPINION**

Mr. Tucker requests a published opinion to deter further and future abuses of the nature outlined herein. A clear message must be sent by this Court that consistent violations of any citizen's rights by agents of the state make a mockery of the judicial system, fostering public contempt for the judicial process. The sanctity and integrity of the courts **must** be preserved in the public eye.

Respectfully submitted this 19<sup>th</sup> day of August, 2002

  
JEFF TUCKER  
Appellant Pro Se

**CERTIFICATE OF SERVICE**

I hereby certify that I mailed, postage prepaid, two true and exact copies of the foregoing Reply Brief to the below named persons on this 19<sup>th</sup> day of August, 2002:

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### ADDENDUM

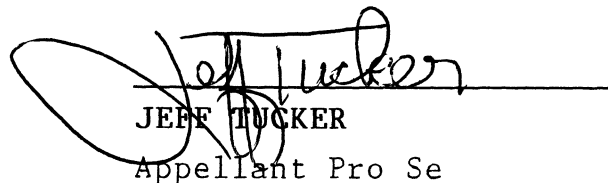
The arguments present in this reply are well supported by authentic transcripts of the three evidentiary hearings which took place during Mr. Tucker's federal trial. Mr. Tucker has provided some documentation with his original petition. However, on his release to federal custody Mr. Tucker was not allowed to transfer his collected legal materials. Does does believe that, should this Court wish to review these transcripts, Ms. Deirdre Gorman, who was Mr. Tucker's attorney during his federal trial, would be happy to supply the transcripts from the three **evidentiary hearings**. Mr. Tucker apologizes for the paucity of documentation and authority which he presents, and hopes that what he was able to present with his petition, while it was still available to him, is sufficient.

Ms. Gorman's address is:

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### DECLARATION

I declare, under penalty of perjury, the foregoing Reply is true and correct, as I understand it to be. Dated and signed by my hand this 19<sup>th</sup> day of August, 2002.

  
JEFF TUCKER  
Appellant Pro Se