

2002

# Jeff Tucker v. State of Utah : Brief of Appellant

Utah Court of Appeals

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Utah Court of Appeals

JEFF TUCKER,  
APPELLANT,

V.

CASE NO. 20020191 CA

STATE OF UTAH,  
APPELLEE.

BRIEF OF APPELLANT

PRIORITY II

oral argument not requested

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JUL 11 2002

Pauline Stagg

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## Statement on Authorities

### i. cases

° Boag v. MacDougal is invoked in regards to the entire following document, and the requirement that the pleadings of pro se litigants are to be construed liberally. This standard should have been applied to the original petition as well. Boag v. MacDougal, 454 US 364, 70 LEd.2d 894, 102 Sct 1697(1964).

° Bouie v. Columbia, Rogers v. Tennessee, and Smith v. Scott\* are invoked for their decisions on "ex post facto" issues, and are applied to argument **A,iii**, the tolling of the Utah sentence

° State v. Grate (or Grate v. State) is invoked for its ruling on what constitutes when a person has been "charged". It is applied to argument **A,ii**, the cancelation of revocation hearing.

° Houston v. Lack, 487 US 266, 101 LEd.2d 245, 108 Sct. 2379(1988), is invoked for its decision that a prisoner's pleadings are considered "filed" when given to prison authorities to be mailed.

° US Constitution, Amendment 4 and the analogous article of Utah's constitution are invoked and are applied to argument **A,iii**.

° Utah Rules of Civil Proceedure 65B, sections (c) and (e) of the 1995 Utah Code correspond to sections (b) and (d) Rule 65B of the Utah Code from 1996 to present. They are invoked to demonstrate the claims of the petition were properly filed under 65B. They are presented for the entire argument **A**, sections **i**, **ii**, and **iii**.

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\* Bouie v. Columbia, 378 US 347, 12 LEd.2d 894, 84 Sct 1697(1964)  
Smith v. Scott, 223 F.3d 1191 (10th Cir. 2000)

### Statement of Jurisdiction

Jurisdiction is proper to the Utah Court of Appeals per Utah Code 78-2a-3(2)(h). The instant matter is an appeal from a decision in the Third Judicial District Court.

### Constitutional provisions, statutes, and other determinative factors

The Fourth Amendment of the Constitution of the United States of America, and the corresponding article of the constitution of the state of Utah, the warrant requirement.

The Fourteenth Amendment of the Constitution of the United States of America, limiting the actions of a state against its citizens and guaranteeing due process of law to the citizens of ALL the states, and the corresponding article of the constitution of the state of Utah.

Title 18, United States Code, Appendix 2: Interstate Agreement on Detainers Act.

Utah Code Annotated;

- ° 76-3-203 (both pre and post 1998 amendment),
- ° URCP 65B sections (b) and (d) (compare to sections (c) and (e) of the pre-1996 amendment creating Rule 65C),
- ° URCP 65C (compare to 65B and the claims of petitioner).

### **Issue Presented for Review**

There really is only one question presented for review- was the dismissal of the appellant's (hereinafter referred to as "Mr. Tucker") petition for relief proper? Yet this question itself, if it is to be answered, asks the questions:

- was it proper to dismiss with prejudice valid claims of damage when Mr. Tucker offered on the record at oral argument to withdraw them, and was not given the opportunity to amend the petition to remove them? ,
- was it proper to dismiss the remaining claims of the petition, for the stated reason of its containing an admixture of Utah Rules of Civil Procedure Rules 65B and 65C (hereinafter referred to as Rule 65B and 65C, respectively) without allowing Mr. Tucker to amend the petition? , and
- was it proper to dismiss the petition for the stated reasons when-
  - a) Mr. Tucker stated on record that he makes no claims for post-conviction relief;
  - b) The State identified no claims which were allegedly for post-conviction relief; and
  - c) The State offered no evidence that any of Mr. Tucker's claims were anything other than valid claims for extraordinary relief properly filed under Rule 65B.

The question this Court must therefore ask itself is **does the petition of Mr. Tucker contain claims for post-conviction relief?** If the answer to this question is in the negative then this

Court must ask itself why Mr. Tucker's petition was dismissed in the first place?<sup>1</sup>

Whether Mr. Tucker's petition for extraordinary relief contains claims for post-conviction relief is a mixed question of fact and of law. Mr. Tucker is unable to cite relevant authority pertaining to standard of review, or indeed much relevant authority at all, due to the fact that he has no access to any state case-law at the federal facility where he is now housed. Mr. Tucker asserts, however, that under Boag v. MacDougal, 70 LEd.2d 551, a pro se litigant's pleadings must be construed liberally despite, among other things, a failure to cite proper legal authority.

#### Statement of the Case

This case is an appeal from a Third Judicial District Court's dismissal of a Rule 65B petition for extraordinary relief. Mr. Tucker filed his petition in the Third Judicial District Court as a response to actions made by the State of Utah during his parole violation and revocation process. The office of the Attorney General, acting as the respondent and representing the State of Utah, filed a motion to dismiss on procedural grounds, both as their response and instead of answering the merits of the claims of the petition. Their claim- that Mr. Tucker's petition contained post-conviction relief claims that should properly be filed under Rule 65C.

1. It is quite possible that the dismissal of Mr. Tucker's petition for the stated reasons amounts to a denial of due process, and thus was a manifest constitutional error.



Mr. Tucker filed a reply to the states motion to dismiss. Oral arguments were given before the Honorable Glen K. Iwasaki. At oral argument Mr. Tucker stated his belief that his claims were properly filed under Rule 65B as either "actions of the Board of Pardons" (hereinafter referred to as the BOP) or as "other wrongful restraints on personal liberty", both of which are plainly enumerated under Rule 65B. Mr. Tucker also made the offer at that time that he could withdraw the claims for damages from the proceedings.

The state pointed out no specific claim as being one for post conviction relief, nor offered any evidence that any of Mr. Tucker's claims were for post- conviction relief. However, and in response to Mr. Tucker's admission that he used a 1995 volume of the Utah Code and filed his claims under subsections (c) and (e), the Attorney General pointed out that legislation had created a separate rule, 65C, for post-conviction relief since 1995. The State then offered to send Mr. Tucker the updated versions of Rules 65B and 65C so that he could refile his claims properly.

After hearing arguments the judge dismissed Mr. Tucker's claims for damages "with prejudice", and dismissed the rest of the petition with instructions that Mr. Tucker file his Rule 65B and Rule 65C issues in separate petitions.

### Summary of the Arguments

Both the lower court and states counsel make a mistake in classifying Mr. Tucker's claims as claims for post-conviction re-

lief. Mr. Tucker thinks that this is a mistake both of fact and of law. Mr. Tucker could not possibly be seeking relief from his 1990 state conviction for the simple reason that it occurred before the events of the parole violation process that he bases his petition on. Mr. Tucker's Utah sentence stems from an incident in April of 1990, for which he was sentenced in May of 1990. The incidents that form the basis of the petition, the arrest for parole violation, the intervening 19 months before revocation of parole, and the tolling of his Utah sentence while "paroled" to his federal sentence, all occurred **after** May, 1998.

Further, Mr. Tucker could not possibly be seeking relief from the 2001 federal conviction that arose out of the parole violation investigation. The state court system has no power to grant relief over a federal conviction. Mr. Tucker is therefore at a loss as to how the state, as a respondent, and the lower court itself characterize the claims of the petition as being for post-conviction relief. The petition clearly identifies each claim as being either actions of the BOP, or other wrongful restraints on personal liberty, both of which plainly fall under Rule 65B before **or after** the creation of Rule 65C.

Finally, as a prisoner, Mr. Tucker was made to pay a substantial filing fee to file his petition. Even at a reduced fee of approximately \$65.<sup>00</sup> this fee represented more than 2 months wages for Mr. Tucker at the prison. Even if the petition were, as both the state and the court proclaim, a bastard "hybrid", Mr.

Tucker should have been granted leave to amend the petition.

### ARGUMENTS

#### A. The petition raises no claims for post-conviction relief.

The court erred in accepting at face value the states contention that Mr. Tucker's petition contained claims for post-conviction relief. There is nothing in the record to signify which of Mr. Tucker's claims it would have the court believe were claims for post-conviction relief. The court itself makes no identification of any particular claims as being for post-conviction relief. And most importantly Mr. Tucker stated on record at oral argument that he made no claims for post-conviction relief, but only claims either against "actions of the Board of Pardons" or "other wrongful restraints on personal liberty".

The state obviously confuses the **nature** of Mr. Tucker's requested relief as being a claim **for** post-conviction relief. The type of relief Mr. Tucker seeks, the immediate termination of his Utah sentence for example, might more customarily be reserved to claims of post-conviction relief, but it is also proper relief in an improper parole revocation process as well. And tha clearly falls under the egis of Rule 65B, as parole revocation in Utah is the sole dominion of the Board of Pardons. It is the actions of Adult Probation and Parole (AP&P) as wrongful restraints on liberty, and the actions of the Board of Pardons (BOP), as they relate to Mr. Tucker's Utah parole violation, not any subsequent conviction, that he is seeking relief from. Thus Rule 65B.

### i The warrant for Mr. Tucker's arrest

The BOP issued a warrant to AP&P for Mr. Tucker's arrest. This warrant, and indeed all arrest warrants issued by the BOP, stated that the subject was to be arrested and returned "to actual custody" so that a determination could be made **as to whether there was probable cause** to believe that the subject had violated his parole. An arrest warrant. Without probable cause. The Constitutions of Utah and of the United States forbid this. This action by the BOP is but one of the claims for relief Mr. Tucker properly filed under Rule 65B.

### ii The cancelation of parole revocation hearing

Mr. Tucker was arrested, under a "Board warrant", on 06-12-98 and a parole revocation hearing was scheduled for 08-05-98. Upon that date Mr. Tucker was notified that this hearing was cancelled indefinitely, stated reason; "pending the adjudication of new charges". A "parole violation report" filed by the hearing officer that day stated that charges would be filed "in the next two weeks". The indictment issued by the Grand Jury was filed 08-19-98 a full two weeks **after** the cancellation of Mr. Tucker's revocation hearing. In other words, the charges did not exist at the time of the cancellation of Mr. Tucker's revocation hearing. There were no "new charges" to adjudicate.

State v. Grate<sup>2</sup> held that a person is not "charged" until

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<sup>2</sup> Mr. Tucker is unable to supply case citation for two reasons,

a complaint is formally filed against a person **AND** he is served notice of the charges he must answer, where he must answer and when. The indictment was not filed until August 19, 1998. Mr. Tucker was not served until September 21, 1998. Both of these events occurred **after** the cancelled revocation hearing. Obviously, no "new charges" existed at the time Mr. Tucker's revocation hearing was cancelled. This conclusion is inescapable. What this amounts to then is the BOP effectively arresting Mr. Tucker and binding him over for federal trial, without his even having been charged with a crime.

The BOP is granted statutory authority to deny, grant or revoke paroles, to commute sentences, fines or restitution. But the BOP is **not** granted the authority to arraign suspects, or even to make probable cause determinations. This is precisely the activities covered by the "actions of the Board of Pardons" subsection of Rule 65B.

Had Mr. Tucker been a citizen without a parole, it would have been required that he be arraigned within 72 hours or be released.

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2. (cont.) when Mr. Tucker was transferred to federal custody upon "parole" he was not allowed to take his collected legal materials, which included his relevant state statutory code and case law. Further, the federal facility in which Mr. Tucker is now housed provides no access to these materials.

This is also the reason that Mr. Tucker is unable to cite to the record in his brief as he was also unable to retain copies of the filings and pleadings made in the lower court. He was even denied, by the lower court, a copy of the transcript of the arguments presented on 01-28-02.

As it was, Mr. Tucker was not officially arraigned until, or about October 25, 1998. By Utah statute Mr. Tucker was entitled to a revocation hearing within 90 days or be released. Thus, even his diminished right as a parolee was violated. This is reminiscent of the agents of King George III, and the evils that the framers of the Constitution sought to protect us from. The Board of Pardons and Paroles has become a tyrant in the tradition of Goerge III himself. They think nothing of violating the constitution of their state, nor the Constitution of the United States, itself. It is therefore proper for Mr. Tucker to seek, under Rule 65B, as relief for his **re**-incarceration by the BOP, termination of his Utah sentence.

### iii The tolling of Utah sentence while in federal custody

First and foremost, this is an ex post facto application of a clause that did not even exist as a part of Utah Code (UC) 76-3-203 when Mr. Tucker was sentenced in 1990. Yet by its application Mr. Tucker's Utah sentence expiration date is extended from 2005 to the year 2009, effectively **increasing** the length of Mr. Tuckers sentence. This violates the ex post facto clause of Utah's constitution, as well as the due process clause of the Fourteenth Amendment of the United States Constitution.

Secondly, from a reading of UC 76-3-203(8) it is plain that the purpose of this section is to toll the sentence of a parolee who gets convicted in finds himself incarcerated in another state all while on parole to Utah. That is not the case here. Mr. Tuck-

er was not convicted while on parole. And in fact he had already been revoked for the activities which constituted his federal charges prior to his conviction on those charges. He was subsequently granted a new parole **after** conviction on those charges. It is this subsequent parole that is at issue here.

Mr. Tucker was in the custody of the state of Utah, and could not begin his federal sentence until Utah relenquished custody of him. Utah is not anxiously awaiting the return of Mr. Tucker to their state so that they may violate his parole, and therefore toll his sentence until he is once again in their custody. Their act relenquished their custody. Or would the BOP have us believe that they could shuttle Mr. Tucker back and forth, from custody to custody at whim? They are thus proposing a construction of the statute that violates the very essence of the "interstate agreement on detainers act".

The BOP knew full well at the time they granted Mr. Tucker his parole that he would be going to a federal facility. Their grant of parole clearly demonstrates their intent that **he should serve the remainder outside of their confinement**. Was this then a false intent? Was the parole grant merely a pretense to effect a transfer of custody in violation of the "detainers" act? Mr. Tucker was released **to** a detainer. Utah has said "we have our pound of flesh". Are we to allow them to flout with impugntity the "detainers" act, as it has the constitution of its state, as well as that of the United states itself?

If Mr. Tucker is indeed on parole, and has done nothing himself to invalidate that parole, then surely the clock must be running. Otherwise, of what value are the conditions of parole imposed upon him? He is in the same position as if his parole had been violated **before it even took effect**. Mr. Tucker has merely accepted what was purported to be a grant of parole. Yet he is being treated exactly as if he has absconded from supervision and then subsequently violated the law.

Or to look at it from another perspective, if Mr. Tucker were to be found guilty of using drugs, assault, or some other such serious infraction while in federal custody on "parole", this would be sufficient to reincarcerate him upon his federal release. Indeed, if this were not the case, then of what value are the parole conditions? There can therefore be only one conclusion: The state has released Mr. Tucker on parole. He was granted parole **after** his federal conviction, which itself occurred **after** the revocation of the parole he was serving when he committed the federal offense. Mr. Tucker has done nothing to violate the conditions of the latest parole. The actions, movements, and transport of Mr. Tucker were all conducted with the BOP's knowledge, and therefore with their authority and consent. Mr. Tucker's Parole, then, must be in effect, and the time he spends on "parole" during his federal sentence must be applied toward service of his Utah sentence.

This action of the BOP in tolling Mr. Tucker's Utah sentence is properly filed under Rule 65B.



#### iv Actions of Adult Probation and Parole

The same basic premise behind the arguments above apply also to the claims for relief due to the actions of Adult Probation and Parole (AP&P). It is by AP&P's contribution to the arrest and reincarceration of Mr. Tucker, **as a parole violator**, that Mr. Tucker seeks relief, and not relief from his prior state or subsequent federal convictions. His claims against AP&P for their part in the violation and revocation of Mr. Tucker's parole were filed under the "other wrongful restraints on personal liberty" clause of Rule 65B.

Even here the "hybrid petition" theory for dismissal fails, as Mr. Tucker is not attacking any conviction. His claims, therefore, cannot be claims for post conviction relief. At best, his claims might be said to be for "post revocation" relief. But, of course, there is no provision for "post revocation" relief, so Mr. Tucker's claims are properly filed under Rule 65B.

The AP&P's misuse of their authority to conduct warrantless searches by allowing police officers to search Mr. Tucker's apartment the evening of June 11, 1998, without a search warrant, ostensibly as a "parole violation search" becomes a valid ground for relief for Mr. Tucker when none of the evidence recovered from the search was ever requested from the police by AP&P nor was it used at the revocation hearing that was finally held. Thus, AP&P were clearly acting **as** police, **for** the police, and were merely utilizing the parole search to assist the police in evading the warrant requirement of the Fourth Amendment, and that of Utah's con-

stitution as well.

The Court is reminded that Mr. Tucker was taken into custody as a suspected parole violator on the 11th of June, 1998 and was not revoked until the 2nd of February, 2000. He was incarcerated at the Utah State Prison the entire intervening 20 months. His revocation hearing, scheduled for the 5th of August, 1998 was cancelled pending the "adjudication of new charges" that had not even been filed yet. The arrest was effected by the device of a warrant which stated on its face that probable cause for the arrest had yet to be determined. Adult Probation and Parole was the arresting agency. It is for AP&P's contributions to the extended incarceration and delayed parole revocation that Mr. Tucker seeks relief by virtue of Rule 65B, for other wrongful restraints on personal liberty.

**B. Mr. Tucker should have been allowed to amend the petition.**

Mr. Tucker offered, at oral argument, to withdraw the claims for damages from the proceedings. He was required to pay a filing fee on the petition which was a substantial part of his inmate wages, equivalent, in fact, to two months wages of the average inmate. If the petition in fact contained claims for post-conviction relief then it would have been proper to allow Mr. Tucker to amend the petition to separate the claims.

**Conclusion**

Mr. Tucker properly filed a petition seeking relief from the violation and revocation of his parole. The state of Utah, instead

of answering the merits of the petition, chose as their response the frivolous argument that the petition was one for post-conviction relief. This contention is not supported by either fact or by law. Mr. Tucker had also requested of the lower court that no continuances or extensions be granted, as this would have the effect of invalidating some of his claims due to the fact that on April 2nd, 2002 he would be placed in the position of having to either accept or refuse his parole.

The denial and dismissal of the petition was not warranted by the facts, was not in the interests of justice, benefitted only the state, and placed unnecessary rigor upon the petitioner by delaying a review of the **facts** until a time when the petitioner himself was forced to invalidate his claims.

Mr. Tucker therefore requests that the remaining three years, two weeks and one day remaining of his Utah sentence at the time of his release on "parole" to federal custody on April 2, 2002 be **terminated** in lieu of the three years, nine months and twenty one days that he spent re-incarcerated as a result of the violations of his rights listed in the petition. This relief is requested specifically for the reasons that;

- a.) the state forfeited any argument pertaining to the actual merits of the petitioner's claims when they chose to answer by filing for dismissal on frivolous grounds,
- b.) the state misrepresented the facts to the lower court by claiming that the petition contained claims for post-conviction relief, and

c.) the lower court failed to establish factually that the petition did in fact contain claims for post-conviction relief.

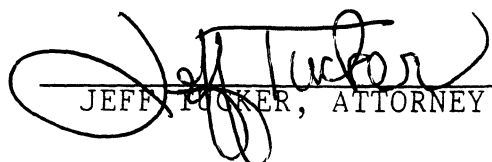
If this Court cannot or will not grant this relief, Mr. Tucker then requests reversal of the dismissal of his petition, and that it be remanded back to the court below with instructions to find in favor of the petitioner and grant him termination of his Utah sentence effective April 2, 2002.

Mr. Tucker further requests that, unless mooted by the termination of his sentence, he be credited for time spent on parole to his federal sentence and that his parole time "run" with his federal time.

### Oral Arguments

Oral argument is **NOT** requested, and it is in fact requested that oral arguments **NOT** be granted as this would create even further delay and place the appellant in an even more inequitable position due to the unavailability of legal authority. Mr. Tucker is in the unenviable position of having to stand on the strength of the arguments contained herein.

Signed by my hand and dated this 8<sup>th</sup> day of July, 2002.

  
JEFF TUCKER, ATTORNEY PRO SE

CERTIFICATE OF SERVICE

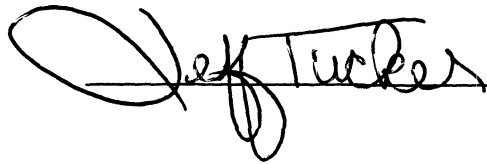
I hereby certify that on this 8 day of July, 2002, I  
mailed a copy of the forgoing, postage pre-paid, to the following

Nancy L. Kemp

160 E. 300 S. 6th floor

P.O. Box 140856

SLC, Ut. 84114-0856

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### ADDENDUM

A further note on Argument A,iii, the tolling of the Utah sentence, parole is a contract between the prisoner and the Department of Corrections. There is a duly signed contract that contains no mention of the tolling of the sentence, only the conditions under which the parole shall remain extant. As the contract, known as "parole agreement" contains no provision for the tolling of the parolee's sentence while in federal custody the state is in violation of its contract with Mr. Tucker by tolling his Utah sentence while he is in federal custody.

Mr. Tucker acknowledges his lack of exhibits and authorities in this document, and makes abject appology for this. But this is beyond his control as he was not allowed to take his collected documents into federal custody when he was released on "parole" from the Utah State Prison on April 2, 2002. It is hoped that the Court will be liberal in this respect, and review the foregoing in the eye of spying what strengths Mr. Tucker was able to supply under the circumstances.