

2002

James Harleston Linden, Petitioner and Appellant,
vs. The State of Utah Department of Corrections,
and The State of Utah Board of Pardons and Parole,
Respondent and Appellee : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES HARLESTON LINDEN, :

Petitioner and :
Appellant, :

vs. :

THE STATE OF UTAH DEPARTMENT OF :
CORRECTIONS, and THE STATE OF :
UTAH BOARD OF PARDONS AND :
PAROLE, :

Respondent and :
Appellee, :
: Appellate Court No.
: 20020912-CA
:

BRIEF OF APPELLANT

APPEAL FROM THE DISMISSAL OF A WRIT OF HABEAS CORPUS
OF THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE ROGER LIVINGSTON, PRESIDING

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AND PAROLE,

Respondent and : Appellate Court No.
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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal under Section 78-2a-3,(2)(f), Utah Code Ann. 1953 as amended. This statute provides appellate jurisdiction over all orders on petitions for extraordinary writs sought by incarcerated persons.

Section 78-2a-3(2)(g) provides that the Court of Appeals has jurisdiction on petitions for

extraordinary writs challenging the decisions of the Board of Pardons except in cases involving a first degree or capital felony. Although the instant case does involve an inmate convicted of a first degree felony, the Utah Supreme Court has held that an appeal from the dismissal of a habeas corpus petition, in which defendant claimed only that his due process rights were violated at a hearing before the parole board, lay to the Court of Appeals rather than the Supreme Court; the latter has jurisdiction only over direct appeals of first degree or capital felony convictions and appeals in habeas corpus cases where the conviction or sentence is challenged. Padilla v. Utah Board of Pardons, 820 P.2d 473 (Utah 1991); also cited in State v. Humphrey, 176 Utah Adv. Rep. 8 (1991). The focus of this appeal is on the denial of James Harleston Linden's due process rights by the Board of Pardons.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The following issues are presented for consideration by this court upon appeal:

1. Is it constitutionally permissive for the parole board to set conditions of parole, to which the inmate agrees, and then apply the conditions retroactively?
2. Must the parole board set as a condition of parole a condition that is capable of being performed?

There are not significant issues of fact and therefore the same standard of review applies to both issues.

The standard of review which applies to questions of law based on undisputed fact is correctness. State v. Streeter, 900 P.2d 1097, 1100-1101 (Ut. App. 1995). In reviewing

an appeal from a denial of a habeas corpus petition, the district court's "conclusions of law are accorded no deference but are reviewed for correctness." Termude v. Cook, 786 P.2d 1341, 1342 (Utah 1990) (citing Fernandez v. Cook, 783 P.2d 547)(Utah 1989); see generally Stewart v. State, 830 P.2d 306, 308 (Utah App. 1992).

DETERMINATIVE LAW

1. Article I, § 7, Declaration of Rights, Utah Constitution
2. Ut. R. Civ. Proc. § 65(B)(b).
3. Ut. R. Civ. Proc. § 65(B)(d).
4. § 77-27-11(1), Utah Code Ann. (1953 as amended).
5. § 77-27-5 (3), Utah Code Ann. (1953 as amended).
6. § 78-2a-3(2)(g).
7. Utah Administrative Code Rule R671-518-1.

STATEMENT OF THE CASE

A. Nature of the Case

This action is one in habeas corpus by an inmate at the Utah State Prison, James Harleston Linden. Mr. Linden is seeking immediate release from the prison because the parole board unlawfully terminated his parole. The parole board, in conjunction with Mr. Linden, agreed to certain conditions of release. Based upon these conditions, Mr. Linden was released, only to subsequently be violated because of a retroactive application of the conditions of parole.

B. Course of Proceedings

James Harleston Linden was last paroled from the Utah State Prison on January 27, 1998. On December 22, 1998, he was arrested for an offense that occurred fourteen years earlier, in 1986, in the State of Idaho. He pled guilty to one count of Accessory to Murder in that he had knowledge that a murder had been committed but had failed to report it.

Although the maximum sentence for this crime could have been life imprisonment, Mr. Linden received a two year sentence. This was in large part because he had assisted various law enforcement agencies in convicting a prisoner of attempting to kill a United States District Attorney, a federal judge, a police chief and their families.

Mr. Linden was extradited to Utah following his release from his Idaho incarceration on the 30th day of July, 2000. On October 3, 2000, the Board of Pardons revoked his parole.

The Idaho offense was held by the parole board to constitute a “new offense”, which was violative of condition three of the parole agreement between Mr. Linden and the parole board. This agreement led to his parole in 1998. Condition three states:

3. CONDUCT. I will obey all State, Federal and municipal laws. If arrested, cited or questioned by a peace officer, I will notify my parole agent within 48 hours of the incident.

On May 14, 2001, James Harleston Linden filed a Petition for Extraordinary Relief in the Third District Court. That action was dismissed upon motion of the State on October 11, 2002.

Mr. Linden appealed the order of dismissal on October 30, 2002.

STATEMENT OF FACTS

James Harleston Linden was convicted on September 19, 1987 of Aggravated Robbery, a First Degree Felony, Theft, a Second Degree Felony, and Possession of a Firearm, a Third Degree Felony, for crimes committed in Park City, Summit County, Utah. Record, p. 4, 15.

At the time, Mr. Linden was already on parole in California. Because of this, the Honorable Homer Wilkinson ordered the sentences to run concurrent to each other, but consecutive to the previous California parole. Mr. Linden's California parole was revoked and he returned to California to complete his sentence. Record, p. 4.

After Mr. Linden was released from his California commitment in 1991, he was transferred to the Utah State Prison to serve his sentence of five years to life. Record, p. 4.

On January 26, 1996, Mr. Linden was released from the Utah State Prison, but subsequently violated his parole for a curfew violation and his parole was revoked and he was returned to the Utah State Prison. He was again paroled on January 27, 1998. Record, p. 4.

Prior to Mr. Linden's release, however, he was required to sign a parole agreement. This agreement, entitled "Parole Agreement", is an agreement between the inmate and the prison. The first line of the agreement reads, "I agree to be directed and supervised by agents of the Utah State Department of Corrections and will abide the following conditions of parole". It is signed at the bottom by James H. Linden and a member of the Board of Pardons. The date both parties executed the agreement was December 31, 1997. Record, p. 106, Addendum B.

One of the conditions of parole outlined in the parole agreement was condition three.

Condition three provided:

3. CONDUCT. I will obey all State, Federal and municipal laws. If arrested, cited or questioned by a peace officer, I will notify my parole agent within 48 hours of the incident.

Record, p. 106, Addendum B.

As previously indicated, Mr. Linden was released on parole on January 27, 1998. The parole was restrictive and included, among other things, an ISP with ankle monitor, a requirement that he enter into a conjunctive restructuring program relating to issues of re-entering society from prison, and curfew restrictions. The curfew restrictions required him to maintain a 7:00 p.m. curfew for the first 90 days following release and, if satisfactorily completed, then the curfew was increased to 9:00 p.m. for the next 90 days. If these restrictions were adhered to strictly regular parole would follow, without further restriction.

Record, p. 5, 106.

Mr. Linden strictly abided by the parole restrictions and he was placed on regular parole.

Record, p. 5, 14.

On December 22, 1998, he was arrested for an offense relating to a murder that occurred in 1986, in Idaho. Record, p.5, 14.

Pursuant to advice from his Idaho attorney ¹, Mr. Linden pled guilty to one count of

¹ “As I stated in my opening paragraph, Mr. Linden’s two year sentence came as a result of his guilty plea which he made at my recommendation. I felt very strongly then, as I do now, that if Mr. Linden had pursued his remedies through a jury trial in the courts of Franklin County, he would have placed himself in a very perilous condition. It has been my experience that the typical juror in that community is not always able to follow the

Accessory to Murder. The underlying basis for the plea was that he had knowledge that a felony had been committed but that he had failed to report the same.² Record p. 9, Addendum C.

Mr. Linden was incarcerated in Idaho, for a crime that occurred in 1986, and he was sentenced on August 16, 1999. Record, p.5

On the 30th day of July, 2000, Mr. Linden was released from his Idaho incarceration and immediately extradited to Utah by Utah Adult Probation and Parole. Record, p. 5-6, 14, Addendum D.

The Utah Adult Probation and Parole issued a Probable Cause statement that stated under Allegations, “By having committed the offense of Accessory to Murder in the First Degree on or about May 2, 1986 in Franklin County, Idaho **in violation of condition number three of the Parole Agreement**”, which was the underpinning of Mr. Linden’s revocation. The Probable Cause statement was issued on the 31st day of July, 2000. Record, p. 14, Addendum

intricacies of a case as complex as Mr. Linden’s and often are more than willing to overlook flaws and holes in the case of the prosecution. Mr. Linden never asked me to “get him off” but rather asked that he only be responsible for what he did wrong—in this case not reporting the homicide...”. Letter from James C. Souza, Linden’s Idaho attorney, Record, p. 11-12.

² The maximum sentence for this charge is life imprisonment. In this case, Mr. Linden only received a two year fixed sentence. This was in large part because of his voluntary cooperation, at great risk to himself, in assisting various law enforcement agencies in securing information from a federal prisoner “...with regard to his [the federal prisoners] drug operation and his subsequent threats and intended actions...” against a United States District Attorney, a federal District judge, the Chief of Police of Preston, Idaho, and their families. Record, p. 5, 9-11.

D.

The Recommendation portion of the Probable Cause statement indicated that “It is the recommendation of Region III staff that Linden be given credit for his time served in Idaho and granted a Utah parole date **as early as feasible**. All previously order (sic) special conditions should be re-imposed.” Record, p. 16, Addendum D.

A parole board hearing was held on the 3rd day of October, 2000, and the Board of Pardons revoked the January 27, 1998 parole. Record, p. 18, Addendum E..

The reason for the revocation of parole was “Parole Agreement Violation”. Record, p.18, Addendum E.

The only applicable provision that could have been violated by Mr. Linden in the Parole Agreement, and the only provision mentioned in the charging documents, is Condition Number Three. Record, p. 106, 14, Addendum D.

The Board of Pardons ignored the recommendation of Region III staff that Mr. Linden be given credit for his time served in Idaho and be granted a parole date as early as feasible. Instead, they re-set parole for July 26, 2005. Record, p. 18, Addendum D and E.

The Board of Pardons noted in its Rationale for Decision, in the “Other” portion of that document, “Offender in prison for a crime which took place 14 years ago. Questions as to what concerns are applicable. Has extensive prior hy {history} but seemed to be maintaining in the 12 mos. before his arrest.”. Record, p. 62, Addendum F. Mr. Linden then filed his Petition for Extraordinary Relief, asking the district court to terminate the illegal activity

of the Board of Pardons {in that the Parole Board had violated Mr. Linden's parole for a condition that was applied retroactively}. Record, p. 7, 39-62, 95-107.

SUMMARY OF ARGUMENT

Mr. Linden argues that he has been denied due process by the Board of Pardons. Specifically, that he and the Board of Pardons agreed, in the December 31, 1997 Parole Agreement signed both parties, that Mr. Linden would abide by the conditions set forth in that agreement. In return, the Board of Pardons agreed that Mr. Linden would be released on parole. Mr. Linden's parole was subsequently revoked for violation of Condition Number Three of that agreement. Condition Number Three, in pertinent part, was that Mr. Linden was to abide all State, Federal and Municipal laws. When the State of Idaho charged Mr. Linden with a crime that occurred in 1986, and he pled guilty and served two years in Idaho, his parole was revoked in Utah for violating Condition Number Three of the parole agreement. Mr. Linden argues that Board of Pardons should not have revoked his parole on the grounds that he did not obey all State, Federal and Municipal laws, because the Idaho conviction was based on an event that occurred in 1986. Therefore, it occurred prior to the Parole Agreement, and that a retroactive application was violative of his due process rights.

ARGUMENT

A. Introduction

IT IS VIOLATIVE OF FUNDAMENTAL DUE PROCESS FOR THE PAROLE BOARD TO SET CONDITIONS OF PAROLE, TO WHICH THE INMATE AGREES, AND THEN APPLY THE CONDITIONS RETROACTIVELY

The Board of Pardons contradicted its own rules and procedures by entering into a parole agreement with James Harleston Linden and then insuring it was impossible to perform. In other words, the agreement was ephemeral and designed to fail. Mr. Linden was doomed the moment his signature was inked on the document. He contractually agreed, in good faith, to abide by the terms of the contract with the Parole Board, yet his parole was terminated by the Board for failing to abide by all State, Federal and Municipal laws, when he was convicted, after his release on parole, for a crime that occurred in 1986. Mr. Linden abided by all State, Federal and Municipal laws AFTER his release, and there was nothing in his parole agreement that stated he would be violated for crimes committed prior to the execution of that agreement. The retroactive application of this condition of his parole agreement has denied him of his right of basic fairness and due process.

B. Due process protections apply to parole revocations

Do due process protections apply to parole revocations, as in the case of Mr. Linden? In accordance with Utah Code Ann. § 77-27-5(3), there is no judicial review of Board of Pardon's decisions involving parole. That, however, is not the issue before the Court. The issue before the Court is whether Mr. Linden maintains a cause of action by his claim that the Board of Pardons, in effect, contradicted its own rules and procedures and thus violated his right of due process. The lower Court found that it did not, and summarily dismissed Mr. Linden's Petition with prejudice. Due process requirements regarding parole revocations, however, are recognized both on the federal and state level.

On the federal level, due process requirements relating to revocations of parole are found in the watershed decision of **Gagnon v. Scarpelli**, 411 U.S. 778 (Supreme Court of the United States, 1973), which extended the finding in **Morrissey v. Brewer**, 408 U.S. 471, (U.S. Supreme Court, 1972), of the year before, that due process requirements for revocation of parole also apply to probation revocation proceedings.

The State of Utah has followed the federal lead. [The] mandate of the due process clause of Article I, Section 7 of the Declaration of Rights in the Utah Constitution is comprehensive in its application to all activities of state government. **Foote v. The Utah Board of Pardons**, 808 P.2d 734, <<http://www.versuslaw.com>, page 3 (Utah, 1991). For purposes of original parole grant hearings at which predicted terms of incarceration are determined, fundamental principles of due process under Article I, § 7 of the Utah Constitution apply. **Labrum v. Utah State Board of Pardons**, 870 P.2d 902, <<http://www.versuslaw.com>, page 12, para. 90 (Utah, 1993). See **Neel v. Holden**, 886 P.2d 1097, (Utah 1994), (extending due process rights announced in **Labrum**, to other parole hearings in which inmates' release dates are fixed or extended), **Rawlings v. Holden**, 869 P.2d 958, 961 (Utah App. 1994) (although the Board exercises unfettered discretion in determining the length of an inmates's sentence, its actions must not violate the inmates's constitutional rights). Also, the Utah Supreme Court, in **Preece v. House, et.al**, 886 P.2d 508 (1994), determined that judicial review of decisions by extraordinary writ are not precluded.

In **Renn v. Utah State Board of Pardons**, 904 P.2d 677, 683-684, (Utah 1995), the

Supreme Court of Utah further refined Preece and held that “...where there is a gross and flagrant abuse of discretion and fundamental principles of fairness are flouted, a court may, giving appropriate deference to legislative policy and the extraordinarily difficult duties of the Board of Pardons, intervene to correct such abuse by means of an appropriate extraordinary writ...”.

The process by which this matter has come before the court was by extraordinary writ, patterned in the habeas corpus mold, under the notion that James Harleston Linden was deprived of his right of due process by the parole board. In particular, that Mr. Linden was stripped of his liberty because he committed a violation of his parole agreement in which he agreed to obey all State, Federal and Municipal laws. It was a gross and flagrant abuse of discretion and a denial of fundamental principles of fairness to terminate his parole based on a condition that was violated, not prospectively, but in 1986.

C. The Parole Board is empowered to revoke the parole of inmates who violate their conditions of parole

Utah Code Ann. § 77-27-11(1) provides, in pertinent part,

1. The board may revoke the parole of any person who is found to have violated any condition of parole. (Addendum A).

The Board of Pardons found that Mr. Linden violated condition three of his conditions of parole as set forth in the parole agreement. Conditions in the parole agreement are generic unless they are delineated as “Special Conditions”. Condition three is as follows:

3. CONDUCT. I will obey all State, Federal and municipal laws. If arrested, cited or questioned by a peace officer, I will notify my parole agent within 48 hours of the

incident. (Record p. 106, Addendum B).

The finding by the parole board, however, is not specifically set forth in the finding document of the Board of Pardons, except as to stating “Before the Board of Pardons of the State of Utah...the above-entitled matter came on for consideration before the Utah State Board of Pardons on the 3rd day of October, 2000 for: Parole Agreement Violation”. (Record p. 18, Addendum E). The only parole agreement violation reference is in the Warrant Request & Parole Violation Report, which states:

Allegations:

1. By having committed the offense of Accessory to Murder in the First Degree on or about May 2, 1986 in Franklin County, Idaho in **violation of condition number three of the parole agreement**. (Emphasis mine). (Record p. 18, Addendum B).

It is clear that the violation that Mr. Linden is alleged to have committed is a violation of condition three. Condition three, as discussed previously, is a promise or an agreement (hence Parole “Agreement”) by the inmate that he or she, simply, will obey all State, Federal and Municipal laws. There is no evidence that Mr. Linden disobeyed any State, Federal or Municipal laws. Indeed, even the Board acknowledged in their Rationale for Decision, that “Offender in prison for a crime which took place 14 years ago....seemed to be maintaining in the 12 mos. before his arrest”. (Record p. 62, Addendum F).

D. The Parole Board must be held to a standard of accuracy and consistency.

Mr. Linden is entitled to know the precise reason the Utah Board of Pardons revoked his

parole. Labrum held that the Board must provide an inmate with “adequate notice to prepare for a parole release hearing, and ...copies or a summary of the information in the Board’s file on which the Board will rely.”, Id. at 904 . See also Padilla v. Utah Board of Pardons and Parole, 947 P.2d 664 (Utah 1997). Inherent within that holding is that the inmate needs to know the allegation so that he can adequately prepare a defense. The sole allegation in evidence is a violation of Condition Number Three of the parole agreement.

It is anticipated that the State will argue, as it did in the lower court, that Rule R671-518-1, Utah Administrative Code applies. This Rule allows the Board of Pardons to summarily revoke an inmate’s parole upon verification of a new criminal offense committed by an inmate on parole.

It can be argued that a crime committed in 1986, by any stretch of the imagination, is not a “new” criminal offense. The more important and salient argument, however, is that this is not the reason that Mr. Linden’s parole was revoked. It is nowhere mentioned in any documents in evidence before the Court. The sole evidence before the court is the violation of the parole agreement, i. e. , Condition Number Three. Further, the very revocation document itself states “Parole Agreement Violation”. (Addendum E). The Parole Board knows why it violated Mr. Linden’s parole, and stated it was a violation of his parole agreement. If Rule R671-518-1 applied, then we could expect, not a reference to “Parole Agreement Violation” but a straightforward statement by the Parole Board that he had violated the administrative rule and statutory prohibition of “being charged with a new

criminal offense”. The record is silent as to any reference to the administrative rule or the statutory prohibition.

If the State’s argument is that this indeed was why Mr. Linden’s parole was revoked, where is it in the record? Certainly Mr. Linden would have had to have been apprised. Labrum requires it. If the Parole Board relied on the administrative rule and statute, and did not inform Mr. Linden, he ought to be released on that violation of due process alone. It’s a matter of simple fairness.

Fairness is mandated in the parole revocation process. For example,

This court has expressed the importance of adopting procedures that preserve the appearance of fairness and the confidence of inmates in the decision making process. The Chief Justice recognized in Morrissey that ‘fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness. Labrum v. Utah State Board of Pardons, 870 P.2d 902 (Utah, 1993), 1993.Ut.304<<http://www.versuslaw.com>. page 11, para. 82, citing Justice Marhsall’s dissent in Greenholtz v. Nebraska Penal Inmates , 442 U.S. 1 (1979).

The interest of both society and criminal offenders are best served when fairness and accuracy are assured at all stages of the sentencing and correctional process. Monson v. Carver, 928 P.2d 1017 (Utah, 1996), 1996.UT.16136<<http://www.versuslaw.com>>, page 15, para. 73.

The parole board must be held to a standard of accuracy and fairness. The issue before this court is not R671-518-1, but Mr. Linden’s alleged violation of Condition Number Three of the Parole Agreement.

E. Violation of Condition Number Three of the Parole Agreement,

i.e., that an inmate must obey all State, Federal and Municipal laws, must occur subsequent to and not before, the parole

Mr. Linden was placed on parole January 27, 1998. He was convicted of a crime in Idaho that occurred in 1986. On this crime, for which he paid by serving to its completion a sentence beginning August 16, 1999, and concluding July 30, 2000, there is no further hold. He was then extradited to Utah for violating condition three of his parole agreement. Since the probation violations for which probation was revoked occurred before the judgment was signed, entered and filed, and since probation cannot be revoked upon the basis of a probation violation occurring before the appellant was placed on probation, the trial court erred in revoking appellant's probation. **Littlefield v. State**, 586 S.W.2d 534, 535 (Tex. Crim App., 1979), cited in **Bell v. State of Texas**, 656 S.W.2d 502 (1982). **Bell** also held that probation cannot be revoked upon the basis of an offense committed prior to appellant being placed on probation. **Bell v. State of Texas**, 1982.TX.41590 <<http://www.versuslaw.com>, page 3, para. 26. Improper conduct occurring prior to entry of probation order cannot be basis for revocation even though this conviction resulting from such conduct occurs while the defendant is on probation. **Demchak v. State of Florida**, 1977.FL.42457 <<http://www.versuslaw.com> page 2, para. 14. To revoke probation for violating federal law, the unlawful conduct must occur while on probation. See **United States v. Rifen**, 634 F.2d at 1144 n.2; **United States v. Reed**, 573 F.2d 1020, 1023 (8th Cir. 1978, both cited in **United States of America v. Drinkall**, 1984.CO8.40088, <<http://www.versuslaw.com>, page 3, para. 21 (1984).

It appears, then, that an act by a party on probation that occurred *before* the probation

began, cannot be utilized to revoke probation.³ Although as a matter of fundamental fairness and due process it would appear that this should apply to parole violation as well, has the court extended probation issues to parole issues? It has. Due process requirements relating to revocation of parole are found in the previously referenced Gagnon v. Scarpelli decision. As previously indicated, this case amplified the finding in Morrissey v. Brewer, 408 U.S. 471, (U.S. Supreme Court), 1972), which held that due process requirements for revocation of parole also apply to probation revocation proceedings. Lastly, the Utah Court

³Judge Livingston apparently struggled with the fairness of applying pre-parole conduct to violate parole, when he stated in the October 23, 2001 motion hearing, “I think that it’s really a legal issue of was it permissible to consider pre-parole conduct in violating parole when that conduct had not yet been adjudicated. And I think it’s a fairly narrow legal issue in whether I think their judgment as wisely exercised or not, I don’t think is a player and I’ve intentionally tried not to be emotionally involved in the fairness issue of, you know, is Mr. Linden, you know, kind of getting shafted in the sense that it isn’t fair vis-a-vis what others might have had for similar kinds of things...does the Board of Pardons have the legal authority to revoke parole...when the conduct constituting the parole violation occurs prior to the, to the setting of parole, with the caveat that it was not yet adjudicated.

...I can’t imagine how in that situation the Board would have the prerogative of revoking parole on fully adjudicated matters...”. Record, p. 134, Transcript, p. 7, lines 14-25 and p. 8, lines 1-17.

This remained troublesome to Judge Livingston in the September 26, 2002 hearing, in which he stated “...I believe Mr. Linden’s petition and Mr. Morrison’s position on the petition is done in good faith and is, expresses a legitimate concern of the fundamental fairness of violating parole, revoking parole based on conduct that essentially occurs prior to the granting of the parole. **There is just, it is troublesome, I guess would be a fair way of putting that**”. (Emphasis mine). Record, p. 135, Transcript of Motion Hearing on 9-26-02, p. 4, lines 2-8. Nevertheless, the Court went on to state that after carefully reviewing the legal authority of the Attorney General’s office, that “It’s within their jurisdiction and authority, indeed, to make that exact decision and I believe it would be inappropriate and not consistent with my oath to follow the law to grant the relief sought”. Id, Transcript, p. 4, lines 13-16.

of Appeals in Labrum, stated, as to due process rights, “Because of the critical nature of the [parole] Board’s decision, these [constitutional] rights apply in parole hearings...”. Labrum, 870 P.2d at 909.

F. A condition of parole must be capable of being performed

Since parole is a matter of grace and not of right, the State may condition continuance of parole on the parolee’s compliance with certain prescribed conditions. Morrissey, 408 U.S. at 478.

Such conditions may restrict the parolee’s conduct and activities “substantially beyond the ordinary restrictions imposed by law on an individual citizen,” Id., so long as they are not illegal or unrelated to rehabilitative purpose, or *impossible to perform*. (Italics mine). Arciniaga v. Freeman, 404 U.S. 4 (1971), cited in Patuxent Institution Board of Review v. Hancock, 1993.MD.40309, <[http.versuslaw.com](http://versuslaw.com), p.9, paras. 57-58).

Mr. Linden would find, as anyone else in his position would find, that it is impossible to perform a condition of parole requiring him to obey all State, Federal and Municipal laws that predated his date of parole, which was January 27, 1998.

It is disingenuous to suggest that somehow Mr. Linden ought to have confessed to every crime he committed prior to his parole release, to insure he would be in compliance with this condition. There isn’t a special dispensation given to the parole board that allows them to dispense with the Fifth Amendment to the Constitution of the United States, either.

When the lower court dismissed Mr. Linden’s petition, it essentially conceded the authority

of the parole board to do this very thing. See footnote 3. This belies common sense.

Is an inmate required to confess his every criminal act in order to achieve parole? Does this include all offenses? Infractions? Just felonies? Speeding? How far back do we go? Ten years? To the prior parole date? Thirteen years, as in the present case of Mr. Linden?

If this “telling all” requirement is truly required by the parole board, and failure to do this constitutes a kind of obstruction of justice, it needs to specifically be set forth in the conditions of parole. Mr. Linden was entitled to know the conditions of his parole in order that he be able to protect his liberty interest in remaining free, once he was actually released. Patuxent, at p.7, para. 9. Indeed, there is a “Special Conditions” section, which is paragraph 12, that is ideally designed to accomplish this purpose. It would be a simple matter to put in Special Conditions the requirement that the inmate own up to whatever misdeeds the parole board feels are necessary to be disclosed. In the present case, none of these Special C conditions requirement this, nor, it is argued, could they ever be, if they were to pass constitutional muster.

As to the core issue that a condition of parole must be capable of being performed, the court should adopt the holding in Patuxent Institution Board of Review v. Clarence J. Hancock, 329 Md. 556, 620 A.2d 917 (Maryland, 1993)(previously cited). The issues are virtually identical and the facts fairly close.

In Patuxent , the defendant was convicted in 1976 of murder, attempted murder, and assault and battery. He was sentenced to life imprisonment, plus thirty-five years. In 1987,

he was recommended for parole. One of the conditions of parole was General Condition Number Three. This condition required that “the parolee shall not commit any act which would be a violation of any Federal, State law or Municipal ordinance; and shall conform to all rules of conduct imposed upon him by the Patuxent Institution or authorized representative.” This condition is very similar to Parole Agreement Condition Number Three signed by Mr. Linden and the Board of Pardons. (See p. 13 of this brief, also Addendum B).

The Patuxent Institution ultimately violated the inmate’s parole on the grounds that during his last year to the institution, he refused to fully participate in program services vital to his rehabilitation. This was argued by the Patuxent Institution that his refusal constituted a nonconformity with condition three in that the inmate didn’t follow the rules imposed on him by Patuxent.

The Court of Special Appeals reversed the parole board and held that “revocation of appellant parole, based on conditions that appellant was not made aware of until the moment his parole was revoked, is a violation of appellants due process rights under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution.” The inmate was ordered released immediately. The holding of the Court of Special Appeals was appealed to the Court of Appeals of Maryland. The Court of Appeals upheld the lower Court’s decision and went to some length exploring the very issue before the court. They held as follows:

“...noncompliance [of a parole condition] must occur when the offender is on parole.” Id, at p. 10, para.59. (Emphasis mine).

Further,

“We held...that probation revocation proceedings may be pursued and may be held after the probationary period has expired so long as the act constituting a violation of probation occurred during the probationary period (p.10, para. 62, cited **State v. Miller**, 289 Maryland 443 (1981) at 446. “Revocation of probation, in other words, must be based on conduct occurring subsequent to the grant of probation, but prior to its expiration. **Patuxent**, p. 10, para. 62).

As to the issue of whether an inmate is entitled to know of the alleged violation, **Patuxent** held that “When violation of a condition of parole is alleged, the parolee must be aware that the conduct constituting the violation is prohibited by a condition of parole.” (Underlining mine). Id, at 930).

CONCLUSION

James Harleston Linden was paroled from the Utah State Prison January 27, 1998. Among other conditions of parole he was not to violate any State, Federal or Municipal laws. He abided by all the conditions of his parole. Although he was subsequently convicted of a crime that occurred in Idaho 13 years previously, he served his sentence fully and was released. He has not committed any other crimes since 1986. Following his sentence in Idaho he was immediately extradited to Utah on a charge that the commission of the crime in Idaho constituted a violation of condition number three of his parole agreement.

Although Mr. Linden has committed no crimes since 1986, the parole board held that his

Idaho conviction violated the terms of his parole agreement, and his parole was terminated.

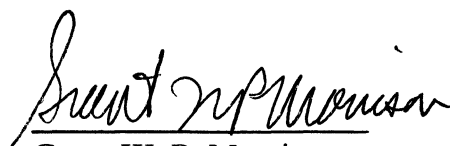
There were no conditions in the parole agreement that required Mr. Linden to reveal his participation or commission in any prior crimes prior to his 1998 parole release. The law is clear that an inmate must be informed, in an unequivocal fashion, what the conditions of parole are to that he may have a fair opportunity to abide by those conditions. Anything less is an absolute denial of due process.

It is equally clear that violations of parole must occur prospectively. Retroactive violations, as in the instant case, are constitutionally adrift. Thus, although the [parole] Board exercises unfettered discretion in determining the length of an inmate's sentence, its actions must not violate the inmate's constitutional rights. Rawlings v. Holden, 869 P.2d 958, 961 (Utah App. 1994).

There is overwhelming evidence that the Board of Pardons has denied Mr. Linden due process, resulting in a revocation of his parole. The Third District Court order should be reversed and Mr. Linden should be ordered released.

DATED this 9th day of March, 2003.

MORRISON & MORRISON, LLC

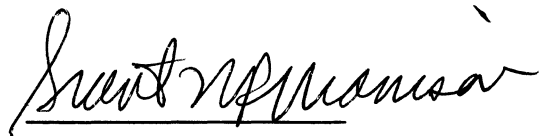

Grant W. P. Morrison
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Certificate of Hand Delivery

This is to certify that I hand delivered two true and correct copies of the foregoing Brief of Appellant, to:

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on the 10th day of March, 2002.

A handwritten signature in cursive script, reading "Scott W. Peterson", written over a horizontal line.

ADDENDA

ADDENDUM A

of fingerprints for the purpose of conducting a national criminal history background check.

(2) Fingerprints of applicants for admission to the Utah State Bar shall be submitted to the Department of Public Safety, Bureau of Criminal Identification to be used to conduct a criminal history background check and to the Federal Bureau of Investigation to obtain a national criminal history background check.

(3) The criminal history background information obtained from the Department of Public Safety and the national criminal history background information obtained from the Federal Bureau of Investigation pursuant to this section may be used by the Utah State Bar to determine an applicant's character, fitness, and suitability for admission to the Utah State Bar.

2001

78-2-5. Repealed.

1988

78-2-6. Appellate court administrator.

The appellate court administrator shall appoint clerks and support staff as necessary for the operation of the Supreme Court and the Court of Appeals. The duties of the clerks and support staff shall be established by the appellate court administrator, and powers established by rule of the Supreme Court.

1988

78-2-7. Repealed.

1986

78-2-7.5. Service of sheriff to court.

The court may at any time require the attendance and services of any sheriff in the state.

1988

78-2-8 to 78-2-14. Repealed.

1986, 1988

CHAPTER 2a

COURT OF APPEALS

Section

- 78-2a-1. Creation — Seal.
- 78-2a-2. Number of judges — Terms — Functions — Filing fees.
- 78-2a-3. Court of Appeals jurisdiction.
- 78-2a-4. Review of actions by Supreme Court.
- 78-2a-5. Location of Court of Appeals.
- 78-2a-6. Appellate Mediation Office — Protected records and information — Governmental immunity.

78-2a-1. Creation — Seal.

There is created a court known as the Court of Appeals. The Court of Appeals is a court of record and shall have a seal.

1986

78-2a-2. Number of judges — Terms — Functions — Filing fees.

(1) The Court of Appeals consists of seven judges. The term of appointment to office as a judge of the Court of Appeals is until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court.

1988

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

- (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
- (ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any

issue. Upon conclusion of all evidence, the person presiding may allow each party a brief closing argument.

R671-517-8. Recommendation.

After closing arguments, the person presiding may tell the parolee his or her recommendation. However, the person presiding shall inform the parolee that the recommendation does not bind the Board, which makes its decision by majority vote of all Board members.

References: 77-27-5, 77-27-9, 77-27-11.

History: 21614, NEW, 01/01/99; 21703, NSC, 11/01/99.

R671-518. Conduct of Proceedings When a Criminal Charge Results in Conviction.

R671-518-1. Conduct of Proceedings When a Criminal Charge Results in Conviction.

R671-518-1. Conduct of Proceedings When a Criminal Charge Results in Conviction.

If a parolee has been charged with a new criminal offense, which is also the basis for revocation, and the parolee is convicted of a criminal charge, the Board may revoke parole upon receipt of verification of conviction. The Board need not hold a parole revocation or evidentiary hearing even if the parolee continues to deny guilt. It is sufficient that a trial court has adjudicated guilt. However, the Board may schedule a special appearance hearing or parole rehearing if it wishes to ask questions of the parolee or a victim asks to give testimony. The Board may revoke parole and incarcerate even if the criminal trial court or appellate court has granted a Certificate of Probable Cause in the criminal matter. After a conviction of guilt and revocation of parole, the Board may then place the parolee on a hearing calendar.

References: 77-27-5, 77-27-9, 77-27-11.

History: 21615, NEW, 01/01/99.

R671-519. Conduct of Proceedings When Criminal Charge Results in Acquittal.

R671-519-1. Conduct of Proceedings When Criminal Charge Results in Acquittal.

R671-519-2. Evidence Explanation.

R671-519-3. Personal Appearance.

R671-519-1. Conduct of Proceedings When Criminal Charge Results in Acquittal.

If the basis for revocation proceeding is a criminal charge in which the parolee was acquitted, the parolee or representative of the Department of Corrections 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 officer 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.

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 officer concludes that parole has been violated, a personal appearance hearing may be held for purposes of taking mitigation and aggravation evidence in determining disposition and listening to any victim comments.

References: 77-27-5, 77-27-9, 77-27-11.

History: 21616, NEW, 01/01/99.

R671-520. Treatment of Confidential Testimony.

R671-520-1. Treatment of Confidential Testimony.

R671-520-1. Treatment of Confidential Testimony.

Confidential testimony shall be admitted at an evidentiary hearing on an alleged parole violation under the following three-part procedure:

1. The State shall make a specific, written preliminary showing of good cause for the testimony to be received in camera.

2. Upon a finding of just cause for confidentiality, the Board shall conduct an in camera inspection of the witness, the proffered testimony, and any supporting testimony to determine:

- a. the credibility and veracity of the witness;
- b. the overall reliability of the witness itself; and
- c. that keeping the information confidential will not substantially impair the parolee's due process rights to notice of the evidence or to confront and cross-examine adverse witnesses.

If the Board is satisfied with these three aspects, it shall receive the testimony and give it whatever weight it considers appropriate. An electronic record shall be made of this in camera proceeding.

3. A summary of the testimony taken in camera shall be prepared for disclosure to the parolee, informing the parolee of the general nature of the testimony received in camera but without defeating the good cause found by the Board for treating the information confidentially. This summary shall be presented on the record at the public evidentiary hearing and the parolee shall be given an opportunity to respond.

References: 77-27-5, 77-27-9, 77-27-11.

History: 21617, NEW, 01/01/99.

R671-521. Alternatives to Re-Incarceration of Parolees.

R671-521-1. Alternatives to Re-Incarceration of Parolees.

R671-521-2. Considerations.

R671-521-3. Release Before Adjudication.

R671-521-4. Re-parole.

R671-521-1. Alternatives to Re-Incarceration of Parolees.

The Board may pursue alternatives other than further imprisonment for a parolee who has violated parole.

COLLATERAL REFERENCES

Utah Law Review. — The Mootness Question in Habeas Corpus Proceedings Where Petitioner Is Released Prior to Final Adjudication, 1969 Utah L. Rev. 265.

Habeas Corpus and the In-Service Conscientious Objector, 1969 Utah L. Rev. 328.

Post-Conviction Procedure Act: Limitation on Habeas Corpus?, 1969 Utah L. Rev. 595.

Am. Jur. 2d. — 39 Am. Jur. 2d Habeas Corpus §§ 5 to 7.

C.J.S. — 16A C.J.S. Constitutional Law § 472 et seq.; 39 C.J.S. Habeas Corpus § 5.

A.L.R. — Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 A.L.R.3d 301.

Key Numbers. — Constitutional Law ⇐ 83(1), 121 to 123.

Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

History: Const. 1896, L. 1984 (2nd S.S.), S.J.R. 3.

Compiler's Notes Laws 1983, Senate

Joint Resolution No. 2, proposing to amend this section, was repealed by Senate Joint Resolution No. 3, Laws 1984 (2nd S.S.), § 2.

NOTES TO DECISIONS

ANALYSIS

Prospective application.

Regulation of right to bear arms.

Prospective application.

The amendment to this provision by Laws 1984 (2nd S.S.), Senate Joint Resolution No. 3 is to be given prospective application only. *State v. Wacek*, 703 P.2d 296 (Utah 1985).

Regulation of right to bear arms.

This section gives sufficient authority for the legislature to forbid the possession of dangerous weapons by those who are not citizens, or who have been convicted of crimes, or who are addicted to drugs, or who are mentally incompetent. *State v. Beorchia*, 530 P.2d 813 (Utah 1974).

COLLATERAL REFERENCES

Utah Law Review. — The Individual Right to Bear Arms: An Illusory Public Pacifier?, 1986 Utah L. Rev. 751.

Am. Jur. 2d. — 79 Am. Jur. 2d Weapons and Firearms § 4.

C.J.S. — 16A C.J.S. Constitutional Law § 511; 94 C.J.S. Weapons § 2.

A.L.R. — Gun control laws, validity and construction of, 28 A.L.R.3d 845.

Validity of statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Key Numbers. — Constitutional Law ⇐ 82; Weapons ⇐ 1 3, 6 et seq

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

History: Const. 1896.

Cross-References. — Eminent domain generally, § 78-34-1 et seq.

The award of attorney fees to be paid from an injunction bond should be limited only to the hours spent by defendants' counsel as a result of the wrongfully issued injunction. *Beard v. Dugdale*, 741 P.2d 968 (Utah Ct. App. 1987).

Showing by party sought to be enjoined.

—Operation of nuisance.

A defendant who wants to operate a plant which has been declared to be a nuisance is required to offer evidence to the court as to how the plant can be used without creating a nuisance before he can complain that the court did not tell him how he could use his plant. *Draper v. J.B. & R.E. Walker, Inc.*, 121 Utah 567, 244 P.2d 360 (1952).

Wrongful injunction.

—Attorney's fees.

When attorney's fees are incurred in defending against wrongfully obtained injunctive relief and also against an underlying lawsuit, it is appropriate to determine the amount of the total fees attributable to resisting the injunction. *Saunders v. Sharp*, 793 P.2d 927 (Utah Ct. App. 1990).

Under this rule, a party is entitled to recover only those attorney fees that would not have been incurred but for the application for, and issuance of, the preliminary injunction. Fees that would have been incurred anyway, in the course of proving the party's entitlement to judgment and refuting the opposing party's defenses, are not recoverable. *Tholen v. Sandy City*, 849 P.2d 592 (Utah Ct. App.), cert. denied, 860 P.2d 943 (Utah 1993).

Defendant was entitled to those attorney fees and costs it incurred in defending against wrongfully obtained injunctive relief, because it collaterally attacked the wrongful order when

it resisted the order's continuance as a preliminary injunction. However, defendant should not be awarded any fees that it would have incurred in litigating the underlying case, even if those fees were incurred in defendant's effort to show that plaintiff was unlikely to prevail on the merits of the underlying claim. *IKON Office Solutions, Inc. v. Crook*, 2000 UT App 217, 6 P.3d 1143.

—Measure of damages.

The correct measure of damages is the reduction or diminution in the value of the property during the period of restraint. If the value of the property did not diminish during that period, any measure of damages other than a comparison of the fair market value of the property before and after the injunction would be incorrect. *Saunders v. Sharp*, 793 P.2d 927 (Utah Ct. App. 1990).

—Noncompliance with rule.

A temporary restraining order that failed to define the injury and state why it was irreparable, containing instead mere conclusory statements, and that failed to list the reasons for extending the order, was improperly granted. *Birch Creek Irrigation v. Prothero*, 858 P.2d 990 (Utah 1993).

—No showing of likelihood of success.

Where the plaintiff had failed to show that there was a substantial likelihood of its prevailing on the merits of its claim against a former salesman for misappropriation of trade secrets, the trial court erred in granting a preliminary injunction against the defendant. *Water & Energy Sys. Technology, Inc. v. Keil*, 1999 UT 16, 974 P.2d 821.

Cited in *Aquagen Int'l, Inc. v. Calrae Trust*, 972 P.2d 411 (Utah 1998).

COLLATERAL REFERENCES

Am. Jur. 2d. — 42 Am. Jur. 2d Injunctions §§ 10, 14, 48 to 52, 69 et seq., 265, 296 to 303, 310 to 316.

C.J.S. — 43 C.J.S. Injunctions §§ 8, 16, 22 to 24, 36 et seq.; 43A C.J.S. Injunctions §§ 165, 166, 180, 206, 208.

A.L.R. — Infant's employment contract, enforceability of covenant not to compete in, 17 A.L.R.3d 863.

Appealability of contempt adjudication or conviction, 33 A.L.R.3d 448.

Review other than by appeal or writ of error, contempt adjudication or conviction as subject to, 33 A.L.R.3d 589.

Propriety of permanently enjoining one guilty of unauthorized use of trade secret from engaging in sale or manufacture of device in question, 38 A.L.R.3d 572.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility, 42 A.L.R.3d 426.

Preliminary mandatory injunction to prevent, correct, or reduce effects of polluting practices, 49 A.L.R.3d 1239.

What constitutes fraud or forgery justifying refusal to honor, or injunction against honoring, letter of credit under UCC § 5-114(1), (2), 25 A.L.R.4th 239.

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond, 30 A.L.R.4th 273.

Right of employee to injunction preventing employer from exposing employee to tobacco smoke in workplace, 37 A.L.R.4th 480.

Propriety of federal court injunction against suit in foreign country, 78 A.L.R. Fed. 831.

Rule 65B. Extraordinary relief.

(a) *Availability of remedy.* Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful restraint on

corporate authority) or paragraph (d) (involving the wrongful use of judicial authority, the failure to exercise such authority, and actions by the Board of Pardons and Parole). There shall be no special form of writ. Except for instances governed by Rule 65C, the procedures in this rule shall govern proceedings on all petitions for extraordinary relief. To the extent that this rule does not provide special procedures, proceedings on petitions for extraordinary relief shall be governed by the procedures set forth elsewhere in these rules.

(b) *Wrongful restraints on personal liberty.*

(1) *Scope.* Except for instances governed by Rule 65C, this paragraph shall govern all petitions claiming that a person has been wrongfully restrained of personal liberty, and the court may grant relief appropriate under this paragraph.

(2) *Commencement.* The proceeding shall be commenced by filing a petition with the clerk of the court in the district in which the petitioner is restrained or the respondent resides or in which the alleged restraint is occurring.

(3) *Contents of the petition and attachments.* The petition shall contain a short, plain statement of the facts on the basis of which the petitioner seeks relief. It shall identify the respondent and the place where the person is restrained. It shall state the cause or pretense of the restraint, if known by the petitioner. It shall state whether the legality of the restraint has already been adjudicated in a prior proceeding and, if so, the reasons for the denial of relief in the prior proceeding. The petitioner shall attach to the petition any legal process available to the petitioner that resulted in restraint. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior proceeding that adjudicated the legality of the restraint.

(4) *Memorandum of authorities.* The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(5) *Dismissal of frivolous claims.* On review of the petition, if it is apparent to the court that the legality of the restraint has already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face and the reasons for this conclusion. The order need not state findings of fact or conclusions of law. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal.

(6) *Responsive pleadings.* If the petition is not dismissed as being frivolous on its face, the court shall direct the clerk of the court to serve a copy of the petition and a copy of any memorandum upon the respondent by mail. At the same time, the court may issue an order directing the respondent to answer or otherwise respond to the petition, specifying a time within which the respondent must comply. If the circumstances require, the court may also issue an order directing the respondent to appear before the court for a hearing on the legality of the restraint. An answer to a petition shall state plainly whether the respondent has restrained the person alleged to have been restrained, whether the person so restrained has been transferred to any other person, and if so, the identity of the transferee, the date of the transfer, and the reason or authority for the transfer. Nothing in this paragraph shall be construed to prohibit the court from ruling upon the petition based upon a dispositive motion.

(7) *Temporary relief.* If it appears that the person alleged to be restrained will be removed from the court's jurisdiction or will suffer irreparable injury before compliance with the hearing order can be enforced, the court shall issue a warrant directing the sheriff to bring the respondent before the court to be dealt with according to law. Pending a determination of the petition, the court may place the person alleged to have been restrained in the custody of such other persons as may be appropriate.

(8) *Alternative service of the hearing order.* If the respondent cannot be found, or if it appears that a person other than the respondent has custody of the person alleged to be restrained, the hearing order and any other process issued by the court may be served on the person having custody in the manner and with the same effect as if that person had been named as respondent in the action.

(9) *Avoidance of service by respondent.* If anyone having custody of the person alleged to be restrained avoids service of the hearing order or attempts wrongfully to remove the person from the court's jurisdiction, the sheriff shall immediately arrest the responsible person. The sheriff shall forthwith bring the person arrested before the court to be dealt with according to law.

(10) *Hearing or other proceedings.* In the event that the court orders a hearing, the court shall hear the matter in a summary fashion and shall render judgment accordingly. The respondent or other person having custody shall appear with the person alleged to be restrained or shall state the reasons for failing to do so. The court may nevertheless direct the respondent to bring before it the person alleged to be restrained. If the petitioner waives the right to be present at the hearing, the court shall modify the hearing order accordingly. The hearing order shall not be disobeyed for any defect of form or any misdescription in the order or the petition, if enough is stated to impart the meaning and intent of the proceeding to the respondent.

(c) *Wrongful use of or failure to exercise public authority.*

(1) *Who may petition the court; security.* The attorney general may, and when directed to do so by the governor shall, petition the court for relief on the grounds enumerated in this paragraph. Any person who is not required to be represented by the attorney general and who is aggrieved or threatened by one of the acts enumerated in subparagraph (2) of this paragraph may petition the court under this paragraph if (A) the person claims to be entitled to an office unlawfully held by another or (B) if the attorney general fails to file a petition under this paragraph after receiving notice of the person's claim. A petition filed by a person other than the attorney general under this paragraph shall be brought in the name of the petitioner, and the petition shall be accompanied by an undertaking with sufficient sureties to pay any judgment for costs and damages that may be recovered against the petitioner in the proceeding. The sureties shall be in the form for bonds on appeal provided for in Rule 73.

(2) *Grounds for relief.* Appropriate relief may be granted: (A) where a person usurps, intrudes into, or unlawfully holds or exercises a public office, whether civil or military, a franchise, or an office in a corporation created by the authority of the state of Utah; (B) where a public officer does or permits any act that results in a forfeiture of the office; (C) where persons act as a corporation in the state of Utah without being legally incorporated; (D) where any corporation has violated the laws of the state of Utah relating to the creation, alteration or renewal of corporations; or (E) where any corporation has forfeited or misused its corporate rights, privileges or franchises.

(3) *Proceedings on the petition.* On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(d) *Wrongful use of judicial authority or failure to comply with duty; actions by board of pardons and parole.*

(1) *Who may petition.* A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph may petition the court for relief.

(2) *Grounds for relief.* Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; (B) where an inferior

required by law as a duty of office, trust or station; (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled; or (D) where the Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law.

(3) *Proceedings on the petition.* On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may direct the inferior court, administrative agency, officer, corporation or other person named as respondent to deliver to the court a transcript or other record of the proceedings. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(4) *Scope of review.* Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority.

(Amended effective September 1, 1991; May 1, 1993; July 1, 1996.)

Advisory Committee Note. — This rule represents a complete reorganization of the former rule. This rule also revises parts of the former rule dealing with habeas corpus and post-conviction remedies. The rule applies generally to proceedings that are necessitated by the absence of another plain, speedy and adequate remedy in the court. After the rule's introductory paragraph, each subsequent paragraph is intended to deal with a separate type of proceeding. Thus, subparagraph (b) deals with proceedings involving wrongful restraint on personal liberty other than those governed by Rule 65C; paragraph (c) deals with proceedings involving the wrongful use of public or corporate authority; and paragraph (d) deals with proceedings involving the wrongful use of judicial authority or the failure to exercise such authority. Paragraph (d) also deals with petitions challenging actions by the Board of Pardons and Parole and the failure of the Board to perform a required act. To the extent that the special procedures set forth in these paragraphs do not cover specific procedural issues that arise during a proceeding, the normal rules of civil procedure will apply.

This rule effectively eliminates the concept of the "writ" from extraordinary relief procedure. In the view of the advisory committee, the concept was used inconsistently and confusingly in the former rule, and there was disagreement among judges and lawyers as to what it meant in actual practice. The concept has been replaced with terms such as "hearing order" and "relief" that are more descriptive of the procedural reality.

Paragraph (b). This paragraph governs all petitions claiming that a person has been wrongfully restrained of personal liberty other than those specifically governed by paragraph Rule 65C. It replaces paragraph (f) of the former rule. Paragraph (b) endeavors to simplify the procedure in habeas corpus cases and provides for a means of summary dismissal of frivolous claims. Thus, if it is apparent to the court that the claim is "frivolous on its face", the court may issue an order dismissing the claim, which terminates the proceeding. Apart from this significant change from former prac-

tice, paragraph (b) is patterned after the former rule.

Paragraphs (c) and (d) replace paragraph (b) of the former rule. The committee's general purpose in drafting these paragraphs was to simplify and clarify the requirements of the preexisting paragraph.

Paragraph (c). Paragraph (c) replaces paragraph (b)(1) of the former rule. This paragraph deals generally with proceedings for the unlawful use of public office or corporate franchises. As a general matter, the attorney general may seek relief on grounds enumerated in the paragraph. Any other person, including a governmental officer or entity not required to be represented by the attorney general, may also seek relief under paragraph (c) if the person claims to be entitled to an office unlawfully held by another or if the attorney general fails to file a petition under paragraph (c) after receiving notice of the person's claim. In allowing appropriate governmental entities and officers to proceed under this paragraph, the rule eliminates a procedural barrier that previously prevented anyone other than the attorney general and "private" persons to seek relief. Although the rule removes the procedural barrier, it was not intended to modify the substantive rules that limit the authority or standing of any governmental entity or officer. Nor was the rule intended to modify the constitutional or statutory authority of the attorney general. Since paragraph (c) provides only a general outline of procedures to be used in such proceedings, litigants should look to the other rules of civil procedure for guidance on specific questions not covered by paragraph (c). In proceedings under this paragraph and paragraph (d), parties seeking temporary relief in advance of a hearing on the merits should comply with the requirements of Rule 65A.

Paragraph (d). This paragraph governs relatively unusual proceedings in which the normal rules of appellate procedure are inadequate to provide redress for an abuse by a court, administrative agency, or officer exercising judicial or administrative functions. This paragraph replaces subparagraph (2), (3) and (4) of paragraph (b) of the former rule. This paragraph allows the court wide discretion in the manner

(12) "Termination" is the act of an appropriate authority discharging from parole or concluding the sentence of imprisonment prior to the expiration of the sentence

(13) "Victim" means

(a) a person against whom the defendant committed a felony or class A misdemeanor offense, and regarding which offense a hearing is held under this chapter, or

(b) the victim's family, if the victim is deceased as a result of the offense for which a hearing is held under this chapter

1996

77-27-2. Board of Pardons and Parole — Creation — Compensation — Functions.

(1) There is created the Board of Pardons and Parole. The board shall consist of five full-time members and five pro tempore members to be appointed by the governor with the advice and consent of the Senate as provided in this section. The members of the board shall be resident citizens of the state. The governor shall establish salaries for the members of the board within the salary range fixed by the Legislature in Title 67, Chapter 22, State Officer Compensation.

(2) (a) (i) The full-time board members shall serve terms of five years. The terms of the full-time members shall be staggered so one board member is appointed for a term of five years on March 1 of each year.

(ii) The pro tempore members shall serve terms of five years. The five pro tempore members added by Subsection (1) shall be appointed to terms that both commence on May 1, 1996, and respectively end on February 28, 1999, and February 29, 2000. These terms are reduced by two and one years respectively so that the appointment of one pro tempore member expires every year beginning in 1996. Terms previously set to expire will now expire the last day of February of their respective years.

(b) All vacancies occurring on the board for any cause shall be filled by the governor with the advice and consent of the Senate pursuant to this section for the unexpired term of the vacating member.

(c) The governor may at any time remove any member of the board for inefficiency, neglect of duty, malfeasance or malfeasance in office, or for cause upon a hearing.

(d) A member of the board may not hold any other office in the government of the United States, this state or any other state, or of any county government or municipal corporation within a state. A member may not engage in any occupation or business inconsistent with his duties.

(e) A majority of the board constitutes a quorum for the transaction of business, including the holding of hearings at any time or any place within or without the state, or for the purpose of exercising any duty or authority of the board. Action taken by a majority of the board regarding whether parole, pardon, commutation, termination of sentence, or remission of fines or forfeitures may be granted or restitution ordered in individual cases is deemed the action of the board. A majority vote of the five full-time members of the board is required for adoption of rules or policies of general applicability as provided by statute. However, a vacancy on the board does not impair the right of the remaining board members to exercise any duty or authority of the board as long as a majority of the board remains.

(f) Any investigation, inquiry, or hearing that the board has authority to undertake or hold may be conducted by any board member or an examiner appointed by the board. When any of these actions are approved and confirmed by the board and filed in its office, they are considered to be the action of the board and have the same effect as if originally made by the board.

(g) When a full-time board member is absent or in other extraordinary circumstances the chair may, as dictated by public interest and efficient administration of the board, assign a pro tempore member to act in the place of a full-time member. Pro tempore members shall receive a per diem rate of compensation as established by the Division of Finance and all actual and necessary expenses incurred in attending to official business.

(h) The chair may request staff and administrative support as necessary from the Department of Corrections.

(3) (a) Except as provided in Subsection (3)(c), the Commission on Criminal and Juvenile Justice shall

(i) recommend five applicants to the governor for appointment to the Board of Pardons and Parole, and

(ii) consider applicants' knowledge of the criminal justice system, state and federal criminal law, judicial procedure, corrections policies and procedures, and behavioral sciences.

(b) The procedures and requirements of Subsection (3)(a) do not apply if the governor appoints a sitting board member to a new term of office.

(4) (a) The board shall appoint an individual to serve as its mental health adviser and may appoint other staff necessary to aid it in fulfilling its responsibilities under Title 77, Chapter 16a, Commitment and Treatment of Mentally Ill Persons. The adviser shall prepare reports and recommendations to the board on all persons adjudicated as guilty and mentally ill, in accordance with Title 77, Chapter 16a.

(b) The mental health adviser shall possess the qualifications necessary to carry out the duties imposed by the board and may not be employed by the Department of Corrections or the Utah State Hospital.

(i) The Board of Pardons and Parole may review outside employment by the mental health adviser.

(ii) The Board of Pardons and Parole shall develop rules governing employment with entities other than the board by the mental health adviser for the purpose of prohibiting a conflict of interest.

(c) The mental health adviser shall

(i) act as liaison for the board with the Department of Human Services and local mental health authorities;

(ii) educate the members of the board regarding the needs and special circumstances of mentally ill persons in the criminal justice system;

(iii) in cooperation with the Department of Corrections, monitor the status of persons in the prison who have been found guilty and mentally ill;

(iv) monitor the progress of other persons under the board's jurisdiction who are mentally ill;

(v) conduct hearings as necessary in the preparation of reports and recommendations; and

(vi) perform other duties as assigned by the board.

1996

77-27-3. Repealed.

1985

77-27-4. Chairperson and vice chairperson.

(1) The governor shall select one of the members of the board to serve as chairperson and board administrator at the governor's pleasure. The chairperson may exercise the duties and powers, in addition to those established by this chapter, necessary for the administration of daily operations of the board, including personnel, budgetary matters, panel appointments, and scheduling of hearings.

(2) The chairperson shall appoint a vice chairperson to act in the absence of the chairperson.

1990

77-27-5. Board of Pardons and Parole authority.

(1) (a) The Board of Pardons and Parole shall determine by majority decision when and under what conditions, sub-

ject to this chapter and other laws of the state, persons committed to serve sentences in class A misdemeanor cases at penal or correctional facilities which are under the jurisdiction of the Department of Corrections, and all felony cases except treason or impeachment or as otherwise limited by law, may be released upon parole, pardoned, restitution ordered, or have their fines, forfeitures, or restitution remitted, or their sentences commuted or terminated.

(b) The board may sit together or in panels to conduct hearings. The chair shall appoint members to the panels in any combination and in accordance with rules promulgated by the board, except in hearings involving commutation and pardons. The chair may participate on any panel and when doing so is chair of the panel. The chair of the board may designate the chair for any other panel.

(c) No restitution may be ordered, no fine, forfeiture, or restitution remitted, no parole, pardon, or commutation granted or sentence terminated, except after a full hearing before the board or the board's appointed examiner in open session. Any action taken under this subsection other than by a majority of the board shall be affirmed by a majority of the board.

(d) A commutation or pardon may be granted only after a full hearing before the board.

(e) The board shall determine restitution in an amount that does not exceed complete restitution if determined by the court in accordance with Section 76-3-201.

(2) (a) In the case of original parole grant hearings, rehearings, and parole revocation hearings, timely prior notice of the time and place of the hearing shall be given to the defendant, the county or district attorney's office responsible for prosecution of the case, the sentencing court, law enforcement officials responsible for the defendant's arrest and conviction, and whenever possible, the victim or the victim's family.

(b) Notice to the victim, his representative, or his family shall include information provided in Section 77-27-9.5, and any related rules made by the board under that section. This information shall be provided in terms that are reasonable for the lay person to understand.

(3) Decisions of the board in cases involving paroles, pardons, commutations or terminations of sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review. Nothing in this section prevents the obtaining or enforcement of a civil judgment, including restitution as provided in Section 77-27-6.

(4) This chapter may not be construed as a denial of or limitation of the governor's power to grant respite or reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment. However, respites or reprieves may not extend beyond the next session of the Board of Pardons and Parole and the board, at that session, shall continue or terminate the respite or reprieve, or it may commute the punishment, or pardon the offense as provided. In the case of conviction for treason, the governor may suspend execution of the sentence until the case is reported to the Legislature at its next session. The Legislature shall then either pardon or commute the sentence, or direct its execution.

(5) In determining when, where, and under what conditions offenders serving sentences may be paroled, pardoned, have restitution ordered, or have their fines or forfeitures remitted, or their sentences commuted or terminated, the board shall consider whether the persons have made or are prepared to make restitution as ascertained in accordance with the standards and procedures of Section 76-3-201, as a condition of any parole, pardon, remission of fines or forfeitures, or commuta-

(6) In determining whether parole may be terminated, the board shall consider the offense committed by the parolee, the parole period as provided in Section 76-3-202, and in accordance with Section 77-27-13.

1996

77-27-5.3. Meritless and bad faith litigation.

(1) For purposes of this section:

(a) "Convicted" means a conviction by entry of a plea of guilty or nolo contendere, guilty and mentally ill, no contest, and conviction of any crime or offense.

(b) "Prisoner" means a person who has been convicted of a crime and is incarcerated for that crime or is being held in custody for trial or sentencing.

(2) In any case filed in state or federal court in which a prisoner submits a claim that the court finds to be without merit and brought or asserted in bad faith, the Board of Pardons and Parole and any county jail administrator may consider that finding in any early release decisions concerning the prisoner.

1996

77-27-5.5. Review procedure — Commutation.

(1) The Board of Pardons and Parole may consider the commutation of a death sentence only to life without parole.

(2) Only the person who has been sentenced to death or his counsel may petition the Board of Pardons and Parole for commutation.

(3) The petition shall be in writing, signed personally by the person sentenced to death, and shall include a statement of the grounds upon which the petitioner seeks review.

(4) The state shall be permitted to respond in writing to the petition as may be established by board rules.

(5) The board shall review the petition and determine whether the petition presents a substantial issue which has not been reviewed in the judicial process.

(6) The board shall not consider legal issues, including constitutional issues, which:

(a) have been reviewed previously by the courts;

(b) should have been raised during the judicial process;

or

(c) if based on new information, are subject to judicial review.

(7) (a) If the board does not find a substantial issue, the board shall deny the hearing to the petitioner.

(b) If the board finds a substantial issue, the board shall conduct a hearing in which the petitioner and the state may present evidence and argument as may be provided by board rules.

1994

77-27-6. Payment of restitution.

(1) When the Board of Pardons and Parole orders the release on parole of an inmate who has been sentenced to make restitution pursuant to Section 76-3-201 or whom the board has ordered to make restitution, and all or a portion of restitution is still owing, the board may establish a schedule, including both complete and court-ordered restitution, by which payment of the restitution shall be made, or order compensatory or other service in lieu of or in combination with restitution. In fixing the schedule and supervising the paroled offender's performance, the board may consider the factors specified in Subsection 76-3-201(4).

(2) The board may impose any court order for restitution and order that a defendant make restitution in an amount not to exceed the pecuniary damages to the victim of the offense of which the defendant has been convicted, the victim of any other criminal conduct admitted to by the defendant to the sentencing court, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement, unless the board applying the criteria as set forth in Subsection 76-3-201(4) determines that restitution is inappropriate.

- (b) The offender is eligible for this program only if he
 - (i) has not been convicted of a sexual offense, or
 - (ii) has not been sentenced pursuant to Section 76-3-406
- (c) The department shall
 - (i) promulgate rules in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, for operation of the program,
 - (ii) adopt and implement internal management policies for operation of the program,
 - (iii) determine whether or not to refer an offender into this program within 120 days from the date the offender is committed to prison by the sentencing court, and
 - (iv) make the final recommendation to the board regarding the placement of an offender into the program
- (d) The department shall not consider credit for time served in a county jail awaiting trial or sentencing when calculating the 120 day period
- (e) The prosecuting attorney or sentencing court may refer an offender for consideration by the department for participation in the program
- (f) The board shall determine whether or not to place an offender into this program within 30 days of receiving the department's recommendation
- (4) This program shall be implemented by the department within the existing budget
- (5) During the time the offender is on parole, the department shall collect from the offender the monthly supervision fee authorized by Section 64-13-21

1996

77-27-10.5. Special condition of parole — Penalty.

- (1) In accordance with Section 77-27-5, the Board of Pardons and Parole may release the defendant on parole and as a condition of parole, the board may order the defendant to be prohibited from directly or indirectly engaging in any profit or benefit generating activity relating to the publication of facts or circumstances pertaining to the defendant's involvement in the criminal act for which the defendant is convicted
- (2) The order may prohibit the defendant from contracting with any person, firm, corporation, partnership, association, or other legal entity with respect to the commission and reenactment of the defendant's criminal conduct, by way of a movie, book, magazine article, tape recording, phonograph record, radio, or television presentations, live entertainment of any kind, or from the expression of the defendant's thoughts, feelings, opinions, or emotions regarding the criminal conduct
- (3) The board may order that the prohibition includes any event undertaken and experienced by the defendant while avoiding apprehension from the authorities or while facing criminal charges
- (4) The board may order that any action taken by the defendant by way of execution of power of attorney, creation of corporate entities, or other action to avoid compliance with the board's order shall be grounds for revocation of parole as provided in Section 77-27-11
- (5) Adult Probation and Parole shall notify the board of any alleged violation of the board's order under this section
- (6) The violation of the board's order shall be considered a violation of parole
- (7) For purposes of this section
 - (a) "convicted" means a conviction by entry of a plea of guilty or nolo contendere, guilty and mentally ill, no contest, and conviction of any crime or offense, and
 - (b) "defendant" means the convicted defendant, the defendant's assignees, and representatives acting on the defendant's authority

1997

77-27-11. Revocation of parole.

- (1) The board may revoke the parole of any person who is found to have violated any condition of his parole
- (2) (a) If a parolee is detained by the Department of Corrections or any law enforcement official for a suspected violation of parole the Department of Corrections shall immediately report the alleged violation to the board, by means of an incident report, and make any recommendation regarding the incident
- (b) No parolee may be held for a period longer than 72 hours, excluding weekends and holidays, without first obtaining a warrant
- (3) Any member of the board may issue a warrant based upon a certified warrant request to a peace officer or other persons authorized to arrest, detain, and return to actual custody a parolee, and may upon arrest or otherwise direct the Department of Corrections to determine if there is probable cause to believe that the parolee has violated the conditions of his parole
- (4) Upon a finding of probable cause, a parolee may be further detained or imprisoned again pending a hearing by the board or its appointed examiner
- (5) (a) The board or its appointed examiner shall conduct a hearing on the alleged violation, and the parolee shall have written notice of the time and place of the hearing, the alleged violation of parole, and a statement of the evidence against him
- (b) The board or its appointed examiner shall provide the parolee the opportunity
 - (i) to be present,
 - (ii) to be heard,
 - (iii) to present witnesses and documentary evidence,
 - (iv) to confront and cross-examine adverse witnesses, absent a showing of good cause for not allowing the confrontation, and
 - (v) to be represented by counsel when the parolee is mentally incompetent or pleading not guilty
- (c) If heard by an appointed examiner, the examiner shall make a written decision which shall include a statement of the facts relied upon by the examiner in determining the guilt or innocence of the parolee on the alleged violation and a conclusion as to whether the alleged violation occurred. The appointed examiner shall then refer the case to the board for disposition
- (d) Final decisions shall be reached by majority vote of the members of the board sitting and the parolee shall be promptly notified in writing of the board's findings and decision
- (6) Parolees found to have violated the conditions of parole may, at the discretion of the board, be returned to parole, have restitution ordered, or be imprisoned again as determined by the board, not to exceed the maximum term, or be subject to any other conditions the board may impose within its discretion

1997

77-27-12. Parole discharge, sentence termination.

Any person released on parole shall be discharged from parole or have his sentence terminated subject to the conditions and limitations contained in Section 76-3-202

1985

77-27-13. Board of Pardons and Parole — Duties of the judiciary, the Department of Corrections, and law enforcement — Removal of material from files.

- (1) The chief executive officer and employees of each penal or correctional institution shall cooperate fully with the board, permit board members free access to offenders, and furnish the board with pertinent information regarding an offender's physical, mental, and social history and his institutional

ADDENDUM B

Michael O. Leavitt
Governor
Michael R. Sibbert
Chairman



Members
Donald E. Blanchard
H.L. (Pete) Haun
Curtis L. Garner
Cheryl Hansen

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

Name: LINDEN, JAMES HARLESTON OBSCIS No. 1857 USP No. 15373

I agree to be directed and supervised by agents of the Utah State Department of Corrections and will abide the following conditions of my parole:

1. **RELEASE:** On the day of my release from the institution or confinement, I will report to my assigned Parole Agent, unless otherwise approved in writing from the parole office.
 2. **ABSCONDING:** I will not abscond from parole supervision:
 - A. **Reporting:** I will report as directed by the Department of Corrections
 - B. **Residence:** I will establish and reside at a residence of record and will not change my residence without first obtaining permission from my parole agent.
 - C. **Leaving the State:** I will not leave my state of residence, even briefly, or any other state to which I am released or transferred without prior written permission from my parole agent.
 3. **CONDUCT:** I will obey all State, Federal and municipal laws. If arrested, cited or questioned by a peace officer, I will notify my parole agent within 48 hours of the incident.
 4. **HOME VISITS:** I will permit visits to my place of residence by agents of Adult Probation and Parole for the purpose of ensuring compliance with the conditions of my parole. I will not interfere with requirement; i.e. having vicious dogs, perimeter security doors, refusing to open the door, etc.
 5. **SEARCHES:** I will permit agents of Adult Probation and Parole to search my person, residence, vehicle or any other property under my control, without a warrant, at any time, day or night, upon reasonable suspicion to ensure compliance with the conditions of my parole.
 6. **WEAPONS:** I will not own, possess, have under my control or in my custody any explosives, firearms or dangerous weapons as defined in Utah Code Annotated, Section 76-10-501, as amended.
 7. **EMPLOYMENT:** Unless otherwise authorized by my parole agent, I will seek, obtain and maintain verifiable, lawful full-time employment (32 hours per week minimum) as approved by my parole agent. I will notify my parole agent of any change in employment within 48 hours.
 8. **ASSOCIATION:** I will not knowingly associate with any person who is involved in criminal activity or who has been convicted of a felony, without approval from my parole agent.
 9. **CHEMICAL ANALYSIS:** I will submit to test of my breath, body fluids or hair to ensure compliance with my parole agreement.
 10. **TRUTHFULNESS:** I will be cooperative, compliant and truthful in all my dealings with Adult Probation and Parole.
 11. **FEES:** I will pay supervision fees as determined by the Department of Corrections.
 12. **SPECIAL CONDITIONS:** I will:
 - 1 Successfully complete ISP Program.
 - 2 Successfully complete Electronic Monitoring Program.
 - 3 Have no contact with Lori Marler, Teresa Hemmett or their families.
 - 4 Pay restitution of \$100,000.00 CASE# 1159.
 - 5 Successfully complete Mental Health Therapy. (to address substance abuse and cognitive restructuring issues).
 - 6 Successfully complete Community Correctional Center.
- I have read, understand and agree to be bound by this agreement. If I violate any of the conditions of this agreement, the Board of Pardons may revoke my parole or the Department of Corrections may take other appropriate action against me.

12-31-97
DATE

SIGNED:

James A. Linden USP NO: 15373

12-31-97
DATE

WITNESSED BY:

Shirley A. Mackin

AUTHORIZED BY:

K. Nelson

BOARD OF PARDONS

Amended 09/30/1997

ADDENDUM C

LAW OFFICES OF
WHITTIER & SOUZA
CHARTERED

JOHN C. SOUZA

R.M. WHITTIER
(Retired)

653 East Center, Suite C
P.O. Box 4048
Pocatello, Idaho 83205-4048

TELEPHONE
(208) 233-6473

FAX
(208) 233-1554

June 19, 2000

Utah Department of Corrections
Board of Pardons & Parole

Murray, UT _____

RE: *State of Idaho v. James Harlston Linden, Jr.*

Gentlemen:

I write to you on behalf of my client, James Harlston Linden, Jr. to assist you and provide you with an accurate summation of the incidents of which I have knowledge involving Mr. Linden as those incidents may effect his eligibility for parole in the State of Utah.

Mr. Linden was original charged with _____. Mr. Linden was convicted by the District Court in Franklin County, Idaho on September 15, 1999 after he pled guilty to one count of Accessory to Murder. The basis for this plea, was the fact that Mr. Linden had knowledge that a felony had been committed but failed to report the same. A copy of Idaho Code § _____ relative to Accessories is attached herto and made a part hereof. Mr. Linden showed no reluctance to take responsibility for his actions, or in this case his lack there of with regard to the charge of failure to report. The maximum sentence, on the original charge could have been life. However, a plea agreement that was approved by both the prosecuting attorney and the local law enforcement allowed for a two year fixed sentence with no indeterminte time and no parole in Idaho.

Part of the reason that such a light sentence was acceptable to the State and the law enforcement was because Mr. Linden had proven himself to be very helpful during the period of his incarceration while he was pending the resolution of his own case. During that period of time, Mr. Linden offered his assistance and cooperation, to various law enforcement agencies including the following agencies and individuals:

- United State Attorney Office - State of Montana - U.S.A.D.A. Carl E. Rostad (U.S. Department of Justice);
- United State Attorney's Office, State of Idaho - U.S.A.D.A. Buckley and U.S.A.D.A. Monte J. Style (U.S. Department of Justice);

- Federal Bureau of Investigation - Derwyn Berg and Mr. Tom Summers;
- Idaho Department of Law Enforcement (CIB) - Robert Boone;
- Bannock County Sheriff's Department and Prosecuting Attorney's Office in Pocatello, Idaho; and,
- Franklin County Prosecuting Attorney, Jay R. McKenzie.

Mr. Linden's cooperation came as a result of his ability to glean information from a federal prisoner with regard to his drug operation and his subsequent threats and intended actions against U.S. Assistant District Attorney, Kim Lundquist and his family, Federal District Judge B. Lynn Winmill and even the family of the City of Preston's Chief of Police, Scott Shaw. Mr. Linden confided this information to me, not because he had to, he was already receiving a very appealing sentencing deal, but rather because it was without a doubt the right thing to do. Upon receipt of the information Mr. Linden provided the following events occurred:

- Mr. Murillo's threats were relayed to the U.S. Attorney's office in Boise and Mr. Linden was interviewed by FBI agent Berg and the head of the Marshall's office in the Bannock County Sheriff's office. From his statement to FBI agent Bert, a full investigation was put into place that later affirmed the statement of information he had provided with regard to the threats that Murillo was making. Most particularly was the confirmation that the two possible hitmen named by Murillo were very real people and without a doubt extremely dangerous with the ability to fulfill the threats that Murillo was making.
- One of the possible hitmen was a man by the name of Frank A. Smith who was due to be released from the Florence Federal Prison in Colorado and who had previously worked as an enforcer for Patrick Murillo.
- The other possible hitmen as per Murillo statements was a very close friend of his and an ex-Navy Seal by the name of John P. Evan.
- When the investigation was sent out of state to U.S.A.D.A. Carl E. Rostad of the District of Montana, Mr. Linden was asked to would wear a recording device into the maximum part of the Bannock County Jail against the Federal Inmate Patrick R. Murillo in an attempt to get more information of the threats he was making as well as more information concerning his pending case and Murillo's operations in general.

- At this time before the wire operation could be set up by the FBI, Mr. Linden was moved out of Bannock County and placed back into Franklin County Jail. There was no advance notice of this move provided to me or Mr. Linden by the Franklin County Sheriff's Department and it was almost six weeks later before he was again transferred back to the Bannock County facility and a wire operation could be set up. After being transferred back, I did however allow FBI agent Bert to place and tape said recording device to my body and I entered the maximum disciplinary pod where Mr. Murillo was being housed. After 2.5 hours of being in this area, FBI agent Berg has the recording device removed and a written statement was taken from Mr. Linden to ensure accuracy should the wire monitor have failed. Obviously, because Mr. Linden had been out of the facility for over a month, 2.5 hours were not really sufficient to rebuild the relationship to the point where the wire would have been the optimum way to glean information. However, despite the absence and the risks involved, Mr. Linden did wear the wire.
- From the very beginning, Mr. Linden at all times stayed ready and willing to do whatever was asked of him in this whole federal matter. He agreed from the start to take a polygraph test, however, FBI agent Berg stated at our first interview it wasn't necessary. He further agreed to testify before a federal grand jury or in federal court as needed. Additionally he provided the CIB a written letter that could of been used against Murillo and the co-defendants in this matter.
- It is, unfortunately, a fact that Mr. Linden's named showed up in a letter wrote by Mark Pentrack to his attorney (Freddie). CIB agent Robert Boone then stated that he made a mistake by failing to redact Mr. Linden's name from this letter before he turned it over to the defendants' attorneys in the discovery process. As Mr. Murillo became very much aware of this letter, he has a copy showing Mr. Linden as wanting to give full cooperation to the U.S.A. District Attorney Kim Lundquist. This action subsequently put Mr. Linden and his family in grave danger, yet, to Mr. Linden's credit he did not withdraw his cooperation or assistance in any respect.

As I stated in my opening paragraph, Mr. Linden's two year sentence came as a result of his guilty plea which he made at my recommendation. I felt very strongly then, as I do now, that if Mr. Linden had pursued his remedies through a jury trial in the courts of Franklin County, he would have placed himself in a very perilous position. It has been my experience that the typical

juror in that community is not always able to follow the intricacies of a case as complex as Mr. Linden's and often are more than willing to overlook flaws and holes in the case of the prosecution. Mr. Linden never asked me to "get him off" but rather asked that he only be responsible for that which he did wrong -- in this case not reporting the homicide. Incidentally, I think it is important for the board to also realize that this homicide was thirteen years old at the time of this trial.

It is my belief that Mr. Linden can be a productive member of society. I have seen a substantial change in his persona since his marriage and the birth of his grandson. I feel that his coming forward to assist the authorities shows an inherent strain of goodness that, perhaps, as he matures is becoming more prevalent in his being. One can never be sure of this, but I certainly feel as if that is the case. I would ask that the Board take his recent actions into consideration. I would ask that they provide ever consideration for lenience to Mr. Linden and allow him to be reunited with his wife and their family.

Thank you for your attention to this matter.

Sincerely,

WHITTIER & SOUZA, Chartered

John C. Souza

JCS/ljs

ADDENDUM D

Warrant Request & Parole Violation Report

| | |
|---|-------------------------------------|
| Offender Name: JAMES HARLESTON LINDEN | USP#: 15373 |
| Region: REGION 3 - SALT LAKE CITY | Date Received on Parole: 01/27/1998 |
| Agent: CRAIG BENNETT | Expiration Date: 01/27/2010 |
| Where Detained: Utah State Prison | Date Detained: 08/01/2000 |
| Allegations: 1. By having committed the offense of Accessory to Murder in the First Degree on or about May 2, 1986 in Franklin County, Idaho in violation of condition number three of the Parole Agreement. | |
| Probable Cause Statement: Linden was paroled for the third time on 1/27/98 for Aggravated Robbery, and was without violation until 12/22/98, when Linden was arrested by Agent Maxwell with authorities from Idaho, California, and the West Valley City Police Department. Idaho authorities had been working on an unsolved homicide from 1986 in which Linden was the suspect. Linden was extradited to Idaho on 12/31/1998, and has been in their custody since then. On 9/15/00 Linden was sentenced in the Sixth Judicial District Court of Idaho for, Accessory to Murder in the First Degree. Linden was ordered to a fixed and determinate term of 2 years incarceration. I provided this information to the Utah Board of Pardons and a warrant was issued on 1/27/98. I have previously provided the Board with a copy of the PSI detailing the incident and the J&C from the Idaho Court. Linden was released from Idaho custody on 7/30/00. He was shuttled to Burley, Idaho and transported from there to the Utah State Prison by AP&P agents. | |
| Number of paroles: 3 Comments: | |
| Number of alternative events: 0 Comments: | |
| Custody status: PAROLE | |
| Pending charges: None. | |

Employment:

The offender was employed at MONTROY SUPPLY, 1649 W 1700 S SUITE 200, SALT LAKE CITY UT. He was employed from 06/01/1998 to 12/22/1998, as a SUPERVISOR. He was working 40 hours per week earning 9.50 per hour.

Comments:**Restitution:**

Order Amount: 100,000.00
Paid to Date: 600.00
Balance Due: 99,400.00

Fines:

Order Amount: .00
Paid to Date: .00
Balance Due: .00

Supervision Fees:

Monthly Amount: .00
Paid to Date: .00
Unpaid Amount: .00

Last Payment: 11/13/1998 for 100.00

Living Arrangements:

Address: IDAHO STATE PRISON
BOISE, ID 83707
Phone:

Mental Health:

The offender participated in *SUBS ABUSE TX - OUTPATIENT* through VOC REHAB. He began treatment on 02/20/1998 and completed the program on 05/13/1998 with a status of SUCCESSFUL COMP.

Drugs and/or Alcohol:

A urine sample was requested and collected 12/01/1998 at 12:20. It was tested 12/01/1998 and tested negative.
A urine sample was requested and collected 07/02/1998 at 17:38. It was tested 07/02/1998 and tested negative.
A urine sample was requested and collected 05/28/1998 at 14:47. It was tested 05/28/1998 and tested negative.

Arrest History:

ARSON CRIMINAL OFFENSES - 3RD FELONY arrested by:
disposition:
06/30/1986 AGGRAVATED ROBBERY - 1ST FELONY arrested by: PARK CITY PD disposition: PRISON
06/30/1986 POSS DANGEROUS WEAPON-PERSON NOT PERMITD - 3RD FELONY arrested by: PARK CITY PD disposition: PRISON
06/30/1986 THEFT FROM A PERSON - 2ND FELONY arrested by: PARK CITY PD disposition: PRISON

Aggravating Factors:

Extensive criminal history of serious offenses.

Use of dangerous weapons.

Repeated parole violations.

Mitigating Factors:

One year of parole supervision without violations.


Date the crime was committed on or about May 2, 1986.

Recommendation, including any special conditions:

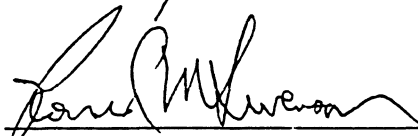
It is the recommendation of Region III staff that Linden be given credit for his time served in Idaho and granted a Utah parole date as early as feasible. All previously order special conditions should be re-imposed.

Comments:

Linden was shuttled to Utah from the Idaho prison in Boise, there are no extradition costs.


Agent's Signature

7-31-00
Date


Supervisor's Signature

7-31-00
Date

Notary:

ADDENDUM E



BEFORE THE BOARD OF PARDONS OF THE STATE OF UTAH

UTAH STATE OBSCIS NO. 1857

Consideration of the Status of LINDEN, James Harleston PRISON NO. 24658373

The above-entitled matter came on for consideration before the Utah State Board of Pardons on the 3rd day of October, 2000, for:

PAROLE AGREEMENT VIOLATION

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

RESULTS

Revoke 01/27/1993 parole. Parole effective 07/26/2005. Final decision of the hearing held on 08/30/2000.

- 1 Successfully complete ISP Program if residing in Utah.
- 2 Successfully complete Elec. Monit. if residing in Utah.
- 3 Have no contact with Lori Marler, Teresa Hammett or their families.
- 4 Pay restitution of \$100,000.00 CASE# 1159.

| No | Crime | Sent | Case No. | Judge | Expiration |
|----|--------------------|------|----------|-----------|------------|
| 1 | AGGRAVATED ROBBERY | 5-L | 1159 | WILKINSON | LIFE |
| 2 | THEFT | 1-15 | 1159 | WILKINSON | 08/11/2007 |

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 3rd day of October, 2000, affixed my signature as Chairman for and on behalf of the State of Utah, Board of Pardons.

M. R. Sibbett, Chairman

ADDENDUM F

James Linden
Name



15373
USP #

BEFORE THE BOARD OF PARDONS OF THE STATE OF UTAH

RATIONALE FOR DECISION ON 8/30/00 FOR Parole Revocation
Hearing Date Hearing Type

The Board of Pardons' decision is based on the following factors:

AGGRAVATING

MITIGATING

OFFENDER'S BACKGROUND

_____ Criminal history significantly underrepresented by guidelines (i.e., more than 4 felony convictions and/or 8 misdemeanors) . . .
_____ History of similar offenses . . .
_____ Pattern of increasingly or decreasingly serious offenses . . .
_____ History of unsuccessful or successful supervisions . . .

CHARACTERISTICS OF THE OFFENSE

_____ Use of weapons or dangerous instrumentalities . . .
_____ Demonstration of extreme cruelty or depravity . . .
_____ Abuse of position of trust, special skill, or responsibility . . .
_____ Multiple incidents and/or victims . . .
_____ Personal gain reaped from the offense . . .

OFFENDER'S TRAITS DURING THE OFFENSE

_____ Motive (intentional, premeditated vs. impulsive, reactionary) . . .
_____ Role (organizer, leader vs. follower, minimal participant) . . .
_____ Obstruction of justice vs. early withdrawal or self-surrender . . .

VICTIM CHARACTERISTICS

_____ Extent of injury (physical, emotional, financial, social) . . .
_____ Relatively vulnerable victim vs. aggressive or provoking victim . . .
_____ Victim in position of authority over offender . . .

OFFENDER'S PRESENT CHARACTERISTICS

② ✓ Denial or minimization vs. complete acceptance of responsibility . . .
✓ Repeated, numerous vs. first incarceration or parole revocation . . .
_____ Extent of remorse and apparent motivation to rehabilitate . . .
_____ Timeliness and extent of efforts to pay restitution . . .
_____ Programming (effort to enroll, nature of programming) . . .
_____ Disciplinary problems or other defiance of authority . . .
_____ Employment possibilities (history, skills, current job, future) . . .
_____ Extent of community fear, condemnation . . .
_____ Degree of meaningful support system . . .
_____ Nature and stability of release plans . . .
⑦ Unusual institutional vulnerability (due to age, health, other) . . .
_____ Overall rehabilitative progress and promise . . .
_____ Lengthy history of alcohol/drug abuse vs. apparent rehabilitation . . .
_____ Substantial continuous period in custody on other charges . . .
_____ Likely release to detainer . . .

OTHER

Offender in prison for a crime which took
place 14 years ago. Questions as to what
concerns are applicable. Has extensive prior
bx but seemed to be maintaining in the
12 mos. before his arrest.

10/2/2000

MPH
Board Member