

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 : Reply Brief

Utah Court of Appeals

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Mark L. Shurtleff; Attorney General; Patrick B. Nolan; Assistant Attorney General; Attorneys for Respondent.

Grant W. P. Morrison; Morrison & Morrison; Attorneys for Plaintiff.

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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 : Appellate Court No.
Appellee, 20020912-CA

:

:

REPLY 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

Grant W. P. Morrison, Esq.
MORRISON & MORRISON, LLC
352 East 900 South
Salt Lake City, Utah 84111
ATTORNEYS FOR PLAINTIFF/
APPELLANT

Mark L. Shurtleff, Esq.
Attorney General
Patrick B. Nolan
Assistant Attorney General
160 East 300 South, 5th Floor
P. O. Box 140812
Salt Lake City, Utah 84114-0812

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REPLY BRIEF OF APPELLANT

SUMMARY OF THE ARGUMENT

Appellee's Brief is littered with numerous asides that attempt to obfuscate the central issues on appeal. This Court should not be sidetracked by any of Appellee's superfluous arguments. The merits of this case cry out to be heard, and this Court should properly focus its attention upon them.

One aside mentioned first in Appellee's Brief (at 3) rather than at the lower court and thus is not part of any record, is "...after scientific advances in DNA technology permitted...". This

is nowhere in any record, and was never even discussed or argued at any stage of any proceeding. The implication is that DNA technology was somehow involved in Mr. Linden's charge. It was not, and its incorporation within the Statement of Facts by Appellee is exactly the type of superfluity that could have a negative impact but is totally without substance. This statement needs to be excised from consideration. The summary of the balance of Appellant's arguments in this reply brief are as follows.

The Appellee's urging to find Utah Administrative Code Rule 671-518-1 as mandatory is not in conformity with statute, other administrative rules, nor case law. The word "may" should be understood in its common usage, and cannot be construed as "mandatory". This is further contrasted by the use of the word "shall" in subsequent administrative rules, which relate to the same general issues of parole revocation.

In the final analysis, the option of R671-518-1 was never reached by the Parole Board. Instead, they elected to hold a parole board hearing and subjected themselves to the fairness requirements of due process. R671-518-1 is a non-issue.

Another argument raised by Appellee, with equally less than candescent illumination, is that Mr. Linden was somehow tasked with the responsibility of revealing to the Board at the hearing, all of his past ignominies and misdeeds. In other words, that he was required, at the hearing, to inform the Board of his involvement in a crime that occurred, at that time, 13 years previously. This was

to be offered by the inmate irrespective even though it wasn't in the parole agreement. Since it was not in the parole agreement as a requirement (and until there is an amendment taking the Fifth Amendment out of the U.S. Constitution), Mr. Linden should not be held to a requirement of which he had no knowledge.

This issue, again, is a non-issue as this is NOT the reason Mr. Linden's parole was violated. He was violated for violating Condition Three of his parole agreement.

The last issue raised by Appellee is that Utah should recognize and adopt the holding in the Patuxent case cited by both the Appellee and Appellant. The Appellee argues that this case allows parole to be revoked for violation of a condition of parole during the term of parole; for commission of a crime, whether or not the parole term has started; or for misconduct occurring either before, or after, the grant of parole. Patuxent Institution Board of Review v. Clarence J. Hancock, 620 A.2d 917, 930 (Maryland App. 1993).

This would mean that since Mr. Linden had committed a crime predating the granting of parole (in this case 1986), that under the law of this case he could have his parole violated. Unfortunately, this is actually the "smoking gun" case that favors the Appellant. The Appellee neglected to include the very next sentence, which states "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". There is no condition of parole that states that parole can be violated for a crime that predates the parole. It would have been a simple matter to include that as a special condition. It certainly is not listed in Condition Three of Mr. Linden's parole agreement. Under the law in this case, Mr. Linden should not have had his parole revoked.

Consequently, this Court should reverse the decision of the trial court and Mr. Linden should be immediately released.

ARGUMENT

The argument raised by Appellee regarding the application of Ut. Admin. Code R671-518-1 was addressed in Appellant's Brief and will not be further examined in this Reply Brief except in a limited fashion. Appellee argues throughout his brief that, although the Board of Pardons "was not required to do so" by virtue of this rule, they held a parole revocation hearing nevertheless. The implication is that R671-518-1 mandates a virtually automatic parole revocation. This is not the case. R671-518-1 provides

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 reincarcerate even if the criminal trial court or appellate court has granted a Certificate of Probably 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. (Addendum 5, Brief of Appellee).

This rule allows for a revocation of parole upon the requirements set forth above. However, the critical element here is that this was not the election of the Board. Under rules of statutory construction, the use of the word "may" allows a choice. (Cite). The use of "may" is replete within R671-518-1. In fact, it begins in the first sentence ("...the Board **may** revoke parole...") and continues "...the Board **may** schedule a...", "...the Board **may** revoke parole and reincarcerate...", and "...the Board **may** then...". May allows may not. The Board of Pardons evidently made their election to allow Mr. Linden the opportunity of presenting a defense to their allegation that he violated Parole Agreement Condition Number Three (Brief of Appellant, pgs. 5-9, 12-21).

Although R671-518-1 provides the "may" option, Utah Code Ann § 77-27-11 (cited by Appellant at 3 and 12 of Appellant's Brief and its Addendum A, and Appellee's Brief at 2, 5 and 9 and its Addendum 2) it is clear that its requirements are not optional. Although paragraph 1 of this section utilizes "may" in that the board "may" revoke the parole of any person found to have violated a condition of parole,¹ paragraph (5)(a) does not. It states, "The board or

¹ Utah Code Ann. Section 77-27-11 states:

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.

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". "Shall" is not "may", and in accordance universally accepted rules of statutory construction "shall" means there is not an election, but is a predicate to the command "it will occur". It would appear then that the board may indeed violate an inmate's parole, but if it intends to, then it must follow certain requirements, among which are written notice of the hearing, the alleged violation, and so forth.

Even if the Court did not conclude that the statutory language in U.C.A. § 77-27-11 of "shall" didn't trump "may", it should nevertheless reach the "non-mandatory" conclusion (i.e., that R671-518-1 is not mandatory) by referencing Utah Administrative Code Rule 671-521. Rule 671-521-1 allows alternatives other than further imprisonment for parole violators. It also incorporates the word "may" and is as follows:

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

The Board may pursue alternatives other than further imprisonment for parole violators. A parole violation shall not preclude an offender from being considered for continuance on parole or re-parole. ² (Addendum 1).

² Craig Bennett, Linden's parole agent, stated in the Warrant Request & Parole Violation Report, "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." (Brief of Appellant, Addendum D, page 3).

The administrative rules themselves, upon which Petitioner has hung his figurative hat, when examined en toto, also do not lend support to Petitioner's position.

The statute and administrative rules do not stand alone. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation. **Morrissey v. Brewer**, 408 U.S. 471 (1972), 1972.SCT.42540<<http://www.versuslaw.com>>, at 9, para. 44. Moreover, the propriety of extending due process to Board proceedings has been established by the Utah Supreme Court which declared: "Due process pursuant to article 1, section 7 of the Utah Constitution, requires that the inmate know what information the Board will be considering at the hearing and that the inmate know soon enough in advance to have a reasonable opportunity to prepare responses and rebuttal of inaccuracies". **Peterson v. Utah Board of Pardons**, 931 P.2d 147 (Ut. Court of Appeal, 1997), 1997.UT.15942<<http://www.versuslaw.com>> at 14, para. 71 (citing **Labrum v. Utah State Board of Pardons**, 870 P.2d 902, 909).

Lastly, R671-518-1 is a non-issue if only because there is not evidence before this Court that the Parole Board considered applying R671-518-1. It wasn't applied; instead, there was a parole board hearing. Because there was a parole board hearing, Utah Code Ann. ¶ 77-27-11 applies.

In conclusion, raising the spectre of R671-518-1 and its alleged omnipotence is, as has been illustrated, at best a strawman argument easily dismantled by the scarecrows of logic. It attempts to obscure through misdirection the real issue, to wit: is it 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? That this issue is not addressed speaks volumes.

The next argument by Appellee relates to the issue that Appellant's withholding or concealing of his knowledge about the Idaho murder also constituted a violation of the terms and conditions of his Utah parole. (Brief of Appellee at 11).

The most serious problem with that argument is that this is not why Mr. Linden's parole was violated. There is simply no evidence in the documents before this Court that his withholding or concealing of his knowledge about the Idaho murder constituted a violation of the conditions of his parole agreement. If so, which one? Addendum B of the Brief of Appellant is a copy of the parole agreement. There is nothing within the four corners of that agreement, signed and agreed to by both Mr. Linden and authorized by the Board of Pardons by their representative's signature, that requires Mr. Linden to tell the parole board about any prior misdeeds.

Applying the logic of Appellee's argument to the case at bar, Mr. Linden would be required, then, as mentioned in Appellant's

Brief at 19, to bare his breast and confess to every crime he had ever committed, just to be on the safe side. All misdemeanors, felonies, infractions, including speeding, jay walking, income tax fudging, etc. must be disgorged, covering the lifetime of the parolee. This not only is not practical, it was not required by the Parole Board by the Parole Agreement. It is not even required in the Special Conditions, which are the non-stock requirements.

An inmate should not have to contend with a legal game of hide the banana. If Mr. Linden was required to tell the parole board of any other crimes with which he had some involvement as a condition of parole (and aren't there serious Fifth Amendment issues?), then the Parole Board had a duty to spell it out in the Parole Agreement. It was not. This argument is specious and non-meritorious.

Finally, as to this issue, Appellee cites State v. Barnes, 826 P.2d 1346 (Idaho App. 1992) in support of the notion Mr. Linden was required to tell the parole board about his 1986 Idaho crime, and therefore his failure to do so constituted a violation of his Utah parole. This case is inapposite. Although the facts are somewhat similar to Lindens, the similarity is superficial. This case has absolutely nothing to do with parole revocation. There was no finding that the party charged violated his parole by withholding information of a prior offense. Eugene (therein probably lies the reason for his lifelong criminal behavior) Barnes pled guilty to

being an accessory to a murder and was sentenced to two years. He appealed this sentence because he felt the sentence was excessive. He was not on parole and there were no revocation of parole issues. **Barnes** simply does not apply.

The final issue raised in appellee's brief faults appellant for failing to acknowledge a particular holding in the **Patuxent** case cited by both appellant and appellee. Brief of appellee at 13. Appellee states, "the Maryland Court of Appeals held that parole may be revoked for violation of a condition of parole during the term of parole; for commission of a crime, whether or not the parole term has started; or for misconduct occurring either before, or after, the grant of parole". Ibid. This statement is taken out of context and its meaning is thus altered. The next sentence was not included, and continues "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**". (Emphasis mine). **Patuxent Institution Board of Review v. Clarence J. Hancock**, 620 A.2d 917, 930 (Maryland App. 1993), 1993.MD.40309, <<http://www.versuslaw.com>>, at 14, para. 80. Since virtually the entire case is a treatise on the issue on the prospective application of a condition of parole and appropriate notice to the parolee of the condition, a meaning not intended by the holding of the case is particularly obvious. As in the Maryland case, Utah must insure that the parolee is aware that the

conduct constituting a violation of parole is prohibited by a condition of parole. In other words, the parolee, to have his parole violated, must violate a condition of parole. It must not be a superfluity, or an ambiguity, or an amorphous prior conduct. It must be straightforward and spelled out in the parole agreement.

Patuxent is the appellant's smoking gun. It should be adopted in Utah.

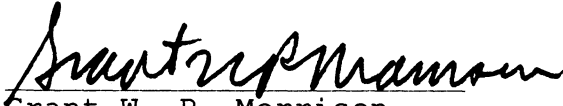
CONCLUSION

Based on the foregoing, appellant asks this Court to reverse the decision of the District Court granting a dismissal of the Petitioner's Writ of Habeas Corpus. James Harleston Linden should be given his immediate release.

DATED this 11th day of July, 2003.

Respectfully submitted,

MORRISON & MORRISON, LLC


Grant W. P. Morrison
Attorney for Petitioner/
Appellant

Certificate of Hand Delivery

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

Patrick B. Nolan, Esq.
Annina M. Mitchell, Esq.
Assistant Attorney's General
160 East 300 South, 5th and 6th Floors
Salt Lake City, Utah 84114-0854

on the 11th day of July, 2003.

David J. Newman

ADDENDUM 1

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

As in effect on June 1, 2001

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- R671-521-1. Alternatives to Re-Incarceration of Parolees.
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- R671-521-4. Re-parole.
- KEY
- Date of Enactment or Last Substantive Amendment
- Authorizing, Implemented, or Interpreted Law

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

The Board may pursue alternatives other than further imprisonment for parole violators. A parole violation shall not preclude an offender from being considered for continuance on parole or re-parole.

R671-521-2. Considerations.

At any time during the parole revocation process, the Board may consider alternatives to reincarceration. In order to determine whether to place or retain an alleged parole violator in custody, the Board shall consider:

- a. the nature of the alleged violation;
- b. the offender's criminal history (particularly violent behavior and escapes);
- c. the impact of reincarceration on the offender; and

d. any other factors relating to public safety and the well-being of the offender.

R671-521-3. Release Before Adjudication.

Release before adjudication of a parole violation allegation may be granted by the Board for good cause.

R671-521-4. Re-parole.

When the Board decides that a parolee has violated his parole, the offender may be considered for re- parole.

KEY

parole, alternatives, hearings

Date of Enactment or Last Substantive Amendment

January 1, 1999

Authorizing, Implemented, or Interpreted Law

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

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