

1992

# Melvin Dean Frame v. Gary Deland, Department of Corrections, State of Utah : Brief of Appellant

Utah Supreme Court

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Paul Van Dam; Utah Attorney General; Attorney for Plaintiff/Respondent.

Melvin Dean Frame; Plaintiff/Appellant; Attorney Pro Se.

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BRIEF

920158CA

DOCKET NO. IN THE SUPREME COURT OF THE STATE OF UTAH

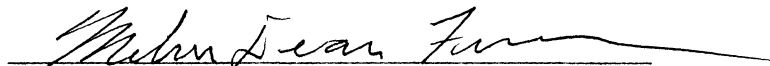
MELVIN DEAN FRAME,  
  
Plaintiff-Appellant,  
  
vs.  
  
GARY DELAND, DEPARTMENT OF  
CORRECTIONS, STATE OF UTAH,  
  
Defendant-Respondent.

Case No. 910481  
910900047HC

92-0158-CA

BRIEF OF APPELLANT

Appeal from an order dismissing Plaintiff's Petition for Writ of Habeas Corpus from the Fifth Judicial District Court for Iron County, State of Utah, the Honorable J. Philip Eves presiding.



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FILED

JAN 13 1992

CLERK SUPREME COURT  
UTAH

MELVIN DEAN FRAME,  
Plaintiff-Appellant,  
vs.  
GARY DELAND, DEPARTMENT OF  
CORRECTIONS, STATE OF UTAH,  
Defendant-Respondent.

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Appeal from an order dismissing Plaintiff's Petition for Writ of Habeas Corpus from the Fifth Judicial District Court for Iron County, State of Utah, the Honorable J. Philip Eves presiding.

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MELVIN DEAN FRAME,  
Plaintiff-Appellant,  
vs.  
GARY DELAND, DEPARTMENT  
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Defendant-Respondent.

Case No. 910481  
910900047HC

The Jurisdiction of the Supreme Court is established by 78-2-2(3)(j), Utah Code Annotated, 1953, as amended.

This is an appeal from a final order dismissing Plaintiff's Petition for Writ of Habeas Corpus from the Fifth Judicial District Court for Iron County, State of Utah.

The issue presented in this appeal is: Did the trial court err in finding that this was a successive petition and that Petitioner had not shown good cause pursuant to 65B(i)(4), Utah Rules of Civil Procedure.

### DETERMINATIVE STATUTES OR RULES

The rules believed to be determinative in this matter are Rule 65B(i) and Rule 65B(i)(4), Utah Rules of Civil Procedure. These rules are reproduced in total as an addendum to this brief.

### NATURE OF THE CASE

This is an appeal from an Order dismissing a petition for Writ of Habeas Corpus from the Fifth Judicial District Court of Iron County, State of Utah, following a hearing before the Honorable J. Philip Eves.

### COURSE OF THE PROCEEDINGS

After hearing argument from both parties on Respondent's Motion to Dismiss petitioner's Writ of Habeas Corpus, the court determined that Petitioner had filed an identical petition in February 1990 and that no good cause existed to allow the claim to be raised again. The Motion to Dismiss was granted and the Petition for Writ of Habeas Corpus was dismissed.

### DISPOSITION AT TRIAL COURT

Petitioner's Writ of Habeas Corpus was dismissed.

### STATEMENT OF FACTS

On June 25, 1991, the Appellant filed a Petition for Writ of Habeas Corpus. On July 3, 1991, the Respondents filed a motion to Dismiss the Petition for Writ of Habeas Corpus alleging that pursuant to Rule 65B(i)(4) of the Utah Rules of Civil Procedure this was a successive petition and should not be considered. Appellant filed an Objection to Motion to Dismiss on July 11, 1991, claiming that he had followed the requirements of Rule 65B(i) in

that Petitioner had prepared the previous petition on his own without legal counsel and that he had followed the requirement of Rule 65B(i)(4) in that the rules allow successive petition if "good cause is shown". The court determined that an identical Petition for post-conviction relief had been filed in February 1990 by the Petitioner and that no cause existed to allow the claim to again be raised. Respondent's Motion to Dismiss was granted.

#### SUMMARY OF ARGUMENT

The trial court erred in finding that the Petitioner filed a successive Petition because this Petitioner did show good cause, which allows the Petitioner to file a successive writ for the reason that Mr. Frame's original attorney, James L. Shumate, who was working with him on the original writ which was filed by the Petitioner, became Circuit Court Judge in Washington County, and Mr. Frame eventually filed the Petition by himself without a thorough review of that Petition by counsel.

#### ARGUMENT

##### POINT I

PLAINTIFF-APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS SHOULD NOT HAVE BEEN DISMISSED AS NOT HAVING SHOWN GOOD CAUSE IN FILING A SUCCESSIVE PETITION.

Rule 65B(i)(4) of the Utah Rules of Civil Procedure does not allow one to file a successive Writ for Habeas Corpus unless "good cause" is shown. This Petitioner argues that he did show good cause for the Fifth District Court to entertain his successive petition for the reason that the Fifth Judicial District Court

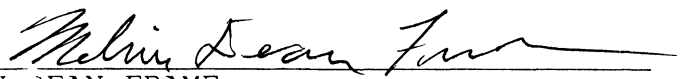


originally appointed James L. Shumate to represent Petitioner in the preparation of and argument for his Writ of Habeas Corpus. During that time, Mr. Shumate became Circuit Court judge. Petitioner was then represented by James M. Park who filed the successive Writ for Petitioner which the court denied claiming that Petitioner did not show good cause in filing his successive Petition.

#### CONCLUSION

Rule 65B(i)(4) of the Utah Rules of Civil Procedure does not define "good cause". Good cause is a fairly broad term which is left to the Court's discretion, and this Petitioner understands that he has the burden of establishing and/or justifying a sufficient reason why the Fifth Judicial District Court should review his Writ. It is this Petitioner's position that he did show good cause and respectfully requests this court to interpret or give some definition to the meaning of "good cause" which may provide some parameters for both the District Courts and petitioners when filing successive petitions in the future.

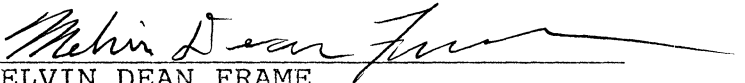
RESPECTFULLY SUBMITTED this 9<sup>TH</sup> day of January, 1992.

  
MELVIN DEAN FRAME

#### MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT to Mr. Paul Van Dam,

Utah Attorney General, 235 State Capitol Building, Salt Lake City,  
Utah 84114, this 9<sup>TH</sup> day of JANUARY, 1992, first class postage  
fully prepaid.

  
MELVIN DEAN FRAME

party wrongfully enjoined. *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 631 P.2d 1258 (Utah 1984).

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 defend-

ing 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.), cert. granted, 150 Utah Adv. Rep. 28 (1990).

—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.), cert. granted, 150 Utah Adv. Rep. 28 (1990).

#### 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 dis-

tion 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), 62 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.

**Key Numbers.** — Injunction — 9 et seq. 143, 148, 150, 189, 190, 204, 213.

### Rule 65B. Extraordinary writs.

(a) **Special forms of writs abolished.** Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, and other extraordinary writs, as heretofore known, are hereby abolished. Where no other plain, speedy and adequate remedy exists, relief may be obtained by appropriate action under these rules, on any one of the grounds set forth in Subdivisions (b) and (f) of this rule.

(b) **Grounds for relief.** Appropriate relief may be granted:

(1) where any person usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, or a franchise, or an office in corporation created by the authority of this state; or any public office, civil or military, does or permits to be done any act which by the prov-

sions of law works a forfeiture of his office; or an association of persons act as a corporation within this state without being legally incorporated; or any corporation has offended against any provision of the law, as it may have been amended, by or under which law such corporation was created, altered or renewed; or any corporation has forfeited its privileges and franchises by nonuser or has committed an act amounting to a surrender or a forfeiture of its corporate rights, privileges and franchises or has misused a franchise or privilege conferred upon it by law, or exercised a franchise or privilege not so conferred; or

(2) where an inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; or

(3) where the relief sought is to compel any inferior tribunal, or any corporation, board or person to perform an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully excluded by such inferior tribunal or by such corporation, board or person; or

(4) where the relief sought is to arrest the proceedings of any tribunal, corporation, board or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

(c) **Action by attorney general under Subdivision (b)(1) of this rule.** The attorney general may, and when directed so to do by the governor shall, commence any action authorized by the provisions of Subdivision (b)(1) of this rule. Such action shall be brought in the name of the state of Utah.

(d) **Action by private person under Subdivision (b)(1) of this rule.** A person claiming to be entitled to a public or private office unlawfully held and exercised by another may bring an action therefor. A private person may bring an action upon any other ground set forth in Subdivision (b)(1) of this rule, only if the attorney general fails to do so after notice. Any such action commenced by a private person shall be brought in his own name. Upon filing the complaint, such person shall also file an undertaking with sufficient sureties, in the same form required of bonds on appeal under the provision of Rule 73 and conditioned that such person will pay any judgment for costs or damages recovered against him in such action.

(e) **Nature and extent of relief under Subdivision (b)(2) of this rule.** Upon the filing of a complaint seeking relief under Subdivision (b)(2) of this rule, the court may require notice to be given to the adverse party before issuance of the writ, or may grant an order to show cause why such writ should not be issued, or may grant the writ without notice. If the writ is granted, it shall be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings, commanding such tribunal, board or officer to certify fully to the court issuing the writ, within a specified time, a transcript of the record and proceedings, describing or referring to them with sufficient certainty; and if a stay of proceedings is intended, requiring the party in the meantime to desist from further proceedings in the matter to be reviewed. The review by the court issuing the writ shall not be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

(f) **Habeas corpus.** Appropriate relief by habeas corpus proceedings shall be granted whenever it appears to the proper court that any person is unjustly imprisoned or otherwise restrained of his liberty. If the person seeking relief is imprisoned in the penitentiary and asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or under the Constitution of the state of Utah, or both, then the person seeking such relief shall proceed in accordance with Rule 65B(i). In all other cases, proceedings under this subdivision shall be conducted in accordance with the following provisions:

(1) The complaint seeking relief shall, among other things, state that the person designated is illegally restrained of his liberty by the defendant and the place where he is so restrained, if known (stating wherein and the cause or pretense thereof, according to the best information of the plaintiff, annexing a copy of any legal process or giving a satisfactory explanation for failing so to do); that the legality of the imprisonment or restraint has not already been adjudged upon a prior proceeding; whether another complaint for the same relief has been filed and relief thereunder denied by any court, and if so attaching a copy of such complaint and stating the reasons for the denial of relief or giving satisfactory reasons for the failure to do so.

(2) The complaint shall be filed in the court most convenient to the plaintiff.

(3) Upon the filing of the complaint the court shall, unless it appears from such complaint or the showing of the plaintiff that he is not entitled to any relief, issue a writ directed to the defendant commanding him to bring the person alleged to be restrained before the court at a time and place therein specified, at which time the court shall proceed in a summary manner to hear the matter and render judgment accordingly. If the writ is not issued the court shall state its reasons therefor in writing and file the same with the complaint, and shall deliver a copy thereof to the plaintiff.

(4) If the defendant cannot be found, or if he does not have such person in custody, the writ (and any other process issued) may be served upon any one having such person in custody, in the manner and with the same effect as if he had been made defendant in the action.

(5) If the defendant conceals himself, or refuses admittance to the person attempting to serve the writ, or if he attempts wrongfully to carry the person imprisoned or restrained out of the county or state after service of the writ, the person serving the writ shall immediately arrest the defendant, or other person so resisting, and bring him, together with the person designated in the writ, forthwith before the court before which the writ is made returnable.

(6) At the time of the issuance of the writ, the court may, if it appears that the person designated will be carried out of the jurisdiction of the court or will suffer some irreparable injury before compliance with the writ can be enforced, cause a warrant to issue, reciting the facts, and directing the sheriff to take such person and forthwith bring him before the court to be dealt with according to law.

(7) The defendant shall appear at the proper time and place with the person designated or show good cause for not doing so and must answer the complaint within the time allowed. The answer must state plainly

and unequivocally whether he then has, or at any time has had, the person designated under his control and restraint, and if so, the cause thereof. If such person has been transferred, the defendant must state that fact, and to whom, when the transfer was made, and the reason or authority therefor. The writ shall not be disobeyed for any defect of form or misdescription of the person restrained or defendant, if enough is stated to show the meaning and intent thereof.

(3) The person restrained may waive his right to be present at the hearing, in which case the writ shall be modified accordingly. Pending a determination of the matter the court may place such person in the custody of such individual or individuals as may be deemed proper.

(g) **When counsel appointed for petitioner.** Any person filing a petition for habeas corpus may be appointed counsel whenever the district court, upon examination of the petition, determines that the petition is not frivolous and that such person is financially unable to obtain representation. If the petition for habeas corpus is frivolous, the district court shall, without further action, dismiss the petition.

(h) **When writ returnable.** Any alternative writ issued by a court or a judge thereof, may be made returnable, and a hearing thereon may be had, at any time as such court may in its discretion determine.

(i) **Postconviction hearings.**

(1) Any person imprisoned in the penitentiary or county jail under a commitment of any court, whether such imprisonment be under an original commitment or under a commitment for violation of probation or parole, who asserts that in any proceedings which resulted in his commitment there was a substantial denial of his rights under the Constitution of the United States or of the state of Utah, or both, may institute a proceeding under this rule.

Such proceedings shall be commenced by filing a complaint, together with a copy thereof, with the clerk of the court in which such relief is sought. The complainant shall also serve a copy of the complaint so filed upon the attorney general of the state of Utah if imprisoned in the state prison, or the county attorney of the county where imprisoned if in a county jail. Such service may be made by any of the methods provided for service in Rule 4 of the Utah Rules of Civil Procedure, or by mailing such copy to the attorney general or county attorney by United States mail, postage prepaid, and by filing with the clerk of said court a certificate of mailing certifying under oath that a copy was so mailed to the attorney general or county attorney. Upon the filing of such a complaint, the clerk shall promptly bring the same to the attention of the presiding judge of the court in which such complaint is filed.

(2) The complaint shall state that the person seeking relief is illegally restrained of his liberty by the defendant; shall state the place where he is so restrained; shall state the dates of and identify the proceedings in which the complainant was convicted and by which he was subsequently confined and of which he now complains; and shall set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated. The complaint shall have attached thereto affidavits, copies of records, or other evidence supporting such allegations, or shall state why the same are not attached.

The complaint shall also state whether or not the judgment of conviction that resulted in the confinement complained of has been reviewed on appeal, and if so, shall identify such appellate proceedings and state the results thereof.

The complaint shall further state that the legality or constitutionality of his commitment or confinement has not already been adjudged in a prior habeas corpus or other similar proceeding; and if the complainant shall have instituted prior similar proceedings in any court, state or federal, within the state of Utah, he shall so state in his complaint, shall attach a copy of any pleading filed in such court by him to his complaint, and shall set forth the reasons for the denial of relief in such other court. In such case, if it is apparent to the court in which the proceeding under this rule is instituted that the legality or constitutionality of his confinement has already been adjudged in such prior proceedings, the court shall forthwith dismiss such complaint, giving written notice thereof by mail to the complainant, and no further proceedings shall be had on such complaint.

(3) Argument, citations and discussion of authorities shall not be set forth in the complaint, but may be set out in a separate supporting memorandum or brief if the complainant so desires.

(4) All claims of the denial of any of complainant's constitutional rights shall be raised in the postconviction proceeding brought under this rule and may not be raised in another subsequent proceeding except for good cause shown therein.

(5) [Deleted.]

(6) Within ten days after service of a copy of the complaint upon him, the attorney general, or the county attorney, as the case may be, shall answer the complaint or otherwise plead thereto. Any further pleadings or amendments shall be in conformity with the Utah Rules of Civil Procedure.

(7) When an answer is filed, the court shall immediately set the case for a hearing within twenty days thereafter unless the court in its discretion determines that further time is needed. Prior to the hearing, the state or county shall obtain such transcript of proceedings or court records as may be relevant and material to the case. The court, on its own motion, or upon the request of either party, may order a prehearing conference if good reason exists therefor; but such conference shall not be set so as to unreasonably delay the hearing on the merits of the complaint. The complainant shall be brought before the court for any hearing or conference.

If the court in which the complaint is filed determines that in the interest of convenience and economy, the hearing should be transferred to the district court having jurisdiction over the place of confinement of complainant, the court may enter a written order transferring such case and shall set forth in such order its reasons for so doing.

(8) In each case, the court, upon determining the case shall enter specific findings of fact and conclusions of law and judgment, in writing, and the same shall be made a part of the record in the case.

If the court finds in favor of the complainant, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such further orders with respect to rearraignment, retrial, custody, bail or discharge as the court may deem just and proper in the case.

(9) If the complainant is unable to pay the costs of the proceedings, he may proceed in forma pauperis upon the filing of an affidavit to that effect, in which event the court may direct the costs to be paid by the county in which he was originally charged.

(10) Any final judgment entered upon such complaint may be appealed to and reviewed by the Supreme Court of Utah as an appeal in civil cases. (Amended effective Jan. 1, 1985; March 1, 1988.)

**Amendment Notes.** — Former Subdivision (g), relating to proceedings where extraordinary writs are sought in the Supreme Court, was repealed with the adoption of the Utah Rules of Appellate Procedure, effective January 1, 1985. For present provisions, see Rules 19 and 20, Utah R. App. P.

The 1988 amendment added present Subdivision (g) and deleted former Subdivision (1)(5).

**Compiler's Notes.** — There is no federal rule covering the subject matter contained in this rule, except for Rule 81(a)(2), F.R.C.P.,

which applies the federal rules to proceedings for habeas corpus.

The federal statute governing remedies on motion attacking sentence appears at 28 U.S.C. § 2255.

**Cross-References.** — Corporations, Title 16.

Statute of limitations for habeas corpus action, § 78-12-31.1.

Statute of limitations for postconviction relief action, § 78-12-31.2.

## NOTES TO DECISIONS

### ANALYSIS

Abolishment of special forms.  
—Mandamus.  
—Nature of present remedy.  
Grounds.  
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—Civil service commission.  
—Challenge to criminal court's jurisdiction.  
—Mandamus.  
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—Exhaustion of administrative remedies.  
—Fraud or abuse by executive.  
—Inadequate remedy at law.  
—Interpretation of statute.  
—Issuance of building permit.  
—Issuance of oil and gas lease.  
—Purpose and nature of remedy.  
—Review of city council decision.  
—Review of county commissioner's decision.  
—Statutory duty of agency.  
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—Judicial press restrictions.  
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—Cruel and unusual punishment.  
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—Written reasons for refusal.  
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—Subsequent proceeding.  
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Postconviction hearings.  
—Complaint.  
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—Dismissal.  
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—Grounds.  
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—Failure to apply new statutory interpretations retroactively.  
—Relief notwithstanding failure to raise issue below.