

1992

## Utah v. Kenneth Ball : Reply Brief

Utah Court of Appeals

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Marian Decker; assistant attorney general; attorney for appellee.

Jan Graham; attorney for appellant.

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### Recommended Citation

Reply Brief, *Utah v. Kenneth Ball*, No. 920786 (Utah Court of Appeals, 1992).  
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DOCKET NO. 920786 IN THE UTAH COURT OF APPEALS

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STATE OF UTAH	:	
	:	
Plaintiff/Appellee,	:	
	:	PRIORITY 15
vs.	:	
	:	CASE NO. 920786-CA
KENNETH BALL	:	
	:	
Defendant/Appellant.	:	

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REPLY BRIEF OF APPELLANT

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AN APPEAL FROM A FINAL ORDER OF THE SECOND JUDICIAL  
DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH  
The Honorable Jon M. Memmott, presiding

---

Randy B. Birch, #4197  
Attorney for Appellant  
2964 West 4700 South, #210  
Salt Lake City, UT 84118  
(801) 967-6200

Attorney for Appellant

Jan Graham (1231)  
Attorney General  
Kenneth A. Bronston  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, UT 84114  
(801) 538-1022

Attorneys for Appellee

**FILED**

SEP 20 1993

**COURT OF APPEALS**

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH	:	
	:	
Plaintiff/Appellee,	:	
	:	
vs.	:	
	:	CASE NO. 920786-CA
KENNETH BALL	:	
	:	
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Randy B. Birch, #4197  
Attorney for Appellant  
2964 West 4700 South, #210  
Salt Lake City, UT 84118  
(801) 967-6200

Attorney for Appellant

Jan Graham (1231)  
Attorney General  
Kenneth A. Bronston  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, UT 84114  
(801) 538-1022

Attorneys for Appellee

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Randy B. Birch, #4197  
Attorney for Appellant  
2964 West 4700 South, #210  
Salt Lake City, UT 84118  
Telephone (801) 967-6200

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH	:	
	:	
Plaintiff/Appellee,	:	
vs.	:	
	:	CASE NO. 920786-CA
KENNETH BALL	:	
	:	
Defendant/Appellant.	:	

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REPLY BRIEF OF APPELLANT

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ARGUMENT

Appellant Ball contends that the Court has power to grant Appellant's petition for expungement of his criminal record.

**POINT I. APPELLANT/PETITIONER BALL'S RIGHTS TO AN EXPUNGEMENT VESTED WHEN HE COMPLETED ALL THE STATUTORY PREREQUISITES**

On April 15, 1992, Appellant/Petitioner Kenneth Ball had a legal right to petition the court for an expungement. This right was no different than a right to sue for negligence, breach of contract, or any other legal remedy. The actual filing of a petition is not part of the substantive remedy. It is simply the procedural mechanism of enforcing an existing substantive right to expungement. This right should not be retroactively taken away from Petitioner Ball, any more that the legislature could retroactively take away a right to sue for negligence or breach of contract.

Petitioner Ball agrees with the State's position as set forth on page 7 of its brief that a party's rights vest when the party claiming the right is first entitled to institute a judicial proceeding for the enforcement of his rights. Payne v. Meyers, 743 P.2d 186, 189 (Utah 1987), quoting Am.Jur.2d Actions §88 (1962).

Applying that rule to this case, it is clear that Petitioner Kenneth Ball became entitled to an expungement of his criminal records as of April 15, 1992, the date the order was entered reducing his conviction to a third degree felony.

The applicable portions of the statute that was in place on April 15, 1992, §77-18-2, the date Mr. Ball's conviction was reduced to a third degree felony, sets forth the requirements for an expungement as follows:

(1) (a) A person convicted of any crime, except a capitol felony, first degree felony or second degree forcible felony as defined in subsection 76-2-403(3), within this state may petition the convicting court for an expungement and for sealing of his record in that court. The person shall file both the petition and a certificate issued by the Utah Bureau of Criminal Identification,....indicating that there is no record with the bureau of an expungement regarding the petitioner. ...

(c) The Court shall enter an order to seal all records in the petitioner's case in the custody of the court or in the custody of any other court, agency, or official if the court finds:

(i) the petitioner has not been convicted of a felony or of a misdemeanor for a period of seven years...

(ii) that no proceeding involving a crime is pending or being instituted against the petitioner; and

(iii) the petitioner has presented to the court a certificate issued by the bureau as described in Subsection (1)(a).

What are the substantive requirements of the statute? Upon a close review, the requirements that the petitioner must meet are: 1) that he not be convicted of a capitol, 1st, or 2nd degree felony; 2) that he not have been convicted of a felony or misdemeanor for seven years; 3) that there not be a pending criminal proceeding; and 4) that he not have previously received an expungement.

It is undisputed that Petitioner Kenneth Ball, as of April 15, 1993, the date the order was entered reducing his conviction to a third degree felony, 1) had not been convicted of a capitol, first, or second degree felony; 2) since his conviction 12 years ago, Mr. Ball has not been convicted of any felony or misdemeanor; 2) there was no pending criminal proceeding against him; and 4) he had not previously received an expungement. THE PETITIONER BALL MET ALL THE SUBSTANTIVE REQUIREMENTS OF UTAH LAW! It was in complying with the procedural requirements of the statute that the problems that give rise to this appeal were encountered.

The Court should not be mislead into believing, as the State argues, that the filing requirements are substantive and accordingly the Petitioner did not qualify for the expungement. Literally by its simplest definition, filing requirements are procedural. It is true that the Court, in order to grant the expungement must find all of the above requirements are met, but the court so finding is different from whether or not the requirements had been met. It is clear that the requirements had



been met, the problem in the case at bar is that the court has not yet made the necessary findings.

**POINT II TO DEPRIVE APPELLANT BALL OF AN EXPUNGEMENT IS A RETROACTIVE APPLICATION OF A STATUTE AND THE EQUIVALENT OF AN EX POST FACTO LAW**

To deprive Petitioner Ball of a vested right based upon a change of the statute is the equivalent of an ex post facto law, which laws are prohibited by the United States Constitution, Article I §9[3], and the Utah Constitution, Article I, §18.

While expungement is arguably a civil remedy or right, its impact upon Mr. Ball, is equivalent to that of a crime being committed. By failing to allow the Petitioner the right to an expungement, the State of Utah has condemned Kenneth Ball to a penalty that lasts a lifetime. The application of a new expungement statute to a person who has already qualified for an expungement under the old law, constitutes a retroactive application of a statute to deprive the Petitioner of his substantive rights and must not be allowed by this court. As has been stated by our legislature, "No part of these revised statutes is retroactive, unless expressly so declared." §68-3-3, Utah Code Annotated, 1953 as amended.

The State argues that the petitioner's rights do not vest until the court actually makes the necessary findings. This is a red herring issue. The right to an expungement vested in the Petitioner on April 15, 1992; if the Petitioner were to commit a criminal offense, he may lose those rights, but that does not keep

the right to an expungement from vesting in the Petitioner once he has complied with all substantive requirements.

#### CONCLUSION

The 1992 amendment to §77-18-2 is not applicable to Appellant, to find otherwise would violate §68-3-3 and Utah's prohibition against retroactive application of substantive laws. Appellant had begun the expungement process and possesses the necessary Eligibility Certificate. Appellant does not fall into the category or purpose of the legislature, and the statute is unconstitutional due to internal ambiguities and inconsistencies.


Appellant respectfully requests that the court grant his petition for expungement.

RESPECTFULLY SUBMITTED this 20 day of September, 1993.

  
Randy B. Birch

#### CERTIFICATE OF SERVICE

I certify that on this 20 day of September, 1993, I caused two true and correct copies of the foregoing to be mailed, postage prepaid, to Kenneth Bronston, Assistant Attorney General, 236 State Capitol, SLC, UT 844114.



## **ADDENDUM**

Randy B. Birch, #4197  
WALSTAD & BABCOCK  
Attorney for Defendant  
254 West 400 South, #200  
Salt Lake City, Utah 84101  
Telephone (801) 531-7000

FILED IN CLERK'S OFFICE

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CLERK. COURT  
BY AD  
DEPUTY CLERK

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IN THE SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

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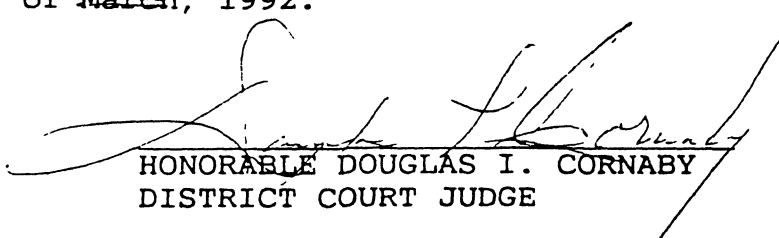
STATE OF UTAH	:	ORDER REDUCING JUDGMENT OF
	:	CONVICTION
Plaintiff,	:	
	:	81170
vs.	:	CASE NO. 3521
KENNETH BALL,	:	
	:	HONORABLE DOUGLAS I. CORNABY
Defendant.	:	

---

The Motion of the Defendant to reduce judgment of conviction pursuant to §76-3-402, Utah Code Annotated, came on for hearing on April 7, 1992, at the hour of 10:00 a.m. The Defendant was present and represented by counsel, Randy B. Birch, the County Attorney's office was also present.

Based upon the motion of the Defendant, no objection of the County Attorneys's Office and for good cause appearing, IT IS HEREBY ORDERED, that the conviction of the Defendant be reduced to a 3rd Degree felony and be recorded as such.

DATED this 15 day of <sup>April</sup>~~March~~, 1992.

  
HONORABLE DOUGLAS I. CORNABY  
DISTRICT COURT JUDGE

*Pre  
Amendment*

- (11) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated
- (b) (i) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified
- (ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended
- (c) (i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing
- (ii) The defendant shall show good cause for a continuance
- (iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent
- (iv) The order shall also inform the defendant of a right to present evidence
- (d) (i) At the hearing, the defendant shall admit or deny the allegations of the affidavit
- (ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations
- (iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders
- (iv) The defendant may call witnesses, appear and speak in his own behalf, and present evidence
- (e) (i) After the hearing the court shall make findings of fact
- (ii) Upon a finding that the defendant violated the conditions of probation the court may order the probation revoked, modified, continued, or that the entire probation term commence anew
- (iii) If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed
- (11) Restitution imposed under this chapter is considered a debt for willful and malicious injury for purposes of exceptions listed to discharge in bankruptcy as provided in Title 11, Section 523, U.S.C.A. 1985
- (12) The court may order the defendant to commit himself to the custody of the Division of Mental Health for treatment at the Utah State Hospital as a condition of probation or stay of sentence, only after the superintendent of the Utah State Hospital or his designee has certified to the court that
- (a) the defendant is appropriate for and can benefit from treatment at the state hospital,
- (b) treatment space at the hospital is available for the defendant, and
- (c) that persons described in Subsection 62A-12-209(2)(g) are receiving priority for treatment over the defendants described in this subsection
- (13) (a) The department shall make rules in accordance with Chapter 46a, Title 63, Utah Ad-

ministrative Rulemaking Act regarding disclosure of presentence diagnostic evaluation and investigation reports to maintain confidentiality of the report

(b) Disclosure of a presentence investigation report, including any supplemental diagnostic evaluation report, is exempt from the provisions of Chapter 2 Title 63 Government Records Access and Management Act 1991

#### 77-18-2 Expungement and sealing of records

- (1) (a) A person convicted of any crime, except a capital felony, first degree felony, or second degree forcible felony as defined in Subsection 76-2-402(3), within this state may petition the convicting court for an expungement and for sealing of his record in that court. The person shall file both the petition and a certificate issued by the Utah Bureau of Criminal Identification, hereafter referred to as "bureau" in this section, indicating that there is no record with the bureau of an expungement regarding the petitioner. Both documents shall be served upon the prosecuting attorney. The court shall then set a date for a hearing and notify the prosecuting attorney for the jurisdiction of the date set for hearing. Persons having relevant information about the petitioner may testify at the hearing. The court in its discretion may request a written evaluation by the adult parole and probation section of the Department of Corrections, except that a written evaluation is required for any conviction of a sexual offense under Title 76

(b) A person who at the time of petition for expungement has two or more convictions for any type of felony offense on his record, not arising out of a single criminal episode, or whose felony criminal record has been previously expunged is not eligible for expungement of any of those offenses regardless of type or degree of offense

(c) The court shall enter an order to seal all records in the petitioner's case in the custody of that court or in the custody of any other court, agency, or official if the court finds:

- (i) the petitioner has not been convicted of a felony or of a misdemeanor for a period of seven years in the case of a felony, six years in the case of an alcohol-related traffic offense under Title 41, five years in the case of a class A misdemeanor, or three years in the case of all other misdemeanors or an infraction under Title 76 after his release from incarceration, parole, or probation, whichever occurs last,

(ii) that no proceeding involving a crime is pending or being instituted against the petitioner, and

(iii) the petitioner has presented to the court a certificate issued by the bureau as described in Subsection (1)(a)

(d) The court shall issue to the petitioner a certificate stating the court's finding that he has satisfied the statutory requirements for expungement

(e) The court may not expunge a capital felony, first degree felony, or second degree forcible felony conviction

- (2) (a) When a person has been arrested with or without a warrant, that individual, after one month if there have been no intervening arrests may petition the court in which the proceeding occurred, or, if there were no court proceedings

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any court in the jurisdiction where the arrest occurred, for an order expunging and sealing any and all records of arrest and detention which may have been made, if any of the following occurred:

- (i) he was released without the filing of formal charges;
  - (ii) proceedings against him were dismissed, he was discharged without a conviction and no charges were refiled against him within 30 days, or he was acquitted at trial; or
  - (iii) the record of any proceedings against him has been sealed under Subsection (1).
- (b) If the court finds that the petitioner is eligible for relief under this subsection, it shall issue its order granting the expungement and sealing.
- (c) This subsection applies to all arrests and any proceedings which occurred before, as well as those which may occur after, April 27, 1987.
- (d) The court shall enter an order to seal all records in the petitioner's case which are in the custody of that court, or any other court, or any state, county, or local entity, agency, or official.
- (e) The petitioner shall distribute the orders of expungement and sealing to all affected agencies and officials including the court, the arresting agency, booking agency, Department of Corrections, and the bureau. The bureau shall forward a copy of the expungement order to the Federal Bureau of Investigation. The bureau shall provide a list of the agencies named in this subsection and clear written directions regarding the requirements of this section to the petitioner.
- (3) The person who has received expungement and sealing of an arrest or conviction may answer an inquiring employer as though the arrest or conviction did not occur.
- (4) The court may permit inspection of the sealed records only upon petition by the person who is the subject of those records and only to the persons named in the petition.
- (5) (a) The bureau shall keep, index, and maintain all expunged and sealed records of arrests and convictions. Any agency or its employee who receives an expungement order may not divulge any information in the sealed expunged records. Employees of the bureau may not divulge any information contained in its index to any person or agency without a court order, except for certification of an applicant for peace officer status, or for use by the Board of Pardons.
- (b) For judicial sentencing, a court may order any records sealed under this section to be opened and admitted into evidence. The records are confidential and are available for inspection only by the court, parties, counsel for the parties, and any other person who is authorized by the court to inspect them. At the end of the action or proceeding, the court shall order the records sealed again.
- (6) A person who willfully violates any provision of this section is guilty of a class B misdemeanor.
- (7) (a) The clerk of the court where the arrest, conviction, and expungement occurred may charge a fee of \$50 under Section 78-3-16.5 or 78-4-24 for processing the expungement order.
- (b) The bureau may charge a reasonable fee for processing the expungement order under Section 63-38-3.

#### 77-18-3. Disposition of fines.

Fines imposed by the district court shall be paid into the General Fund, except fines received in counties that are not within the state district court administrative system. Those fines shall be paid to the county treasurer.

1988

#### 77-18-4. Sentence — Term — Construction.

Whenever a person is convicted of a crime and the judgment provides for a commitment to the state prison, the court shall not fix a definite term of imprisonment unless otherwise provided by law. The sentence and judgment of imprisonment shall be for an indeterminate term of not less than the minimum and not to exceed the maximum term provided by law for the particular crime. Except as otherwise expressly provided by law, every sentence, regardless of its form or terms, which purports to be for a shorter or different period of time, shall be construed to be a sentence for the term between the minimum and maximum periods of time provided by law and shall continue until the maximum period has been reached unless sooner terminated or commuted by authority of the Board of Pardons.

1980

#### 77-18-5. Reports by courts and prosecuting attorneys to Board of Pardons.

In cases where an indeterminate sentence is imposed, the judge and prosecuting attorney may, within 30 days, mail a statement to the Board of Pardons setting forth the term for which the prisoner ought to be imprisoned together with any information which might aid the board in passing on the application for termination or commutation of the sentence or for parole or pardon.

1980

#### 77-18-5.5. Judgment of death — Defendant to select method — Time of selection.

When a person is convicted of a capital offense and the judgment of death has been imposed, the defendant is entitled to select, at the time of sentencing, either a firing squad or a lethal intravenous injection as the method of execution. If the defendant does not indicate a preference at that time to the court, the judgment of death shall be executed by lethal intravenous injection.

1988

#### 77-18-6. Judgment to pay fine or restitution constitutes a lien.

A judgment which orders the payment of a fine or payment of restitution to a victim pursuant to Section 76-3-201 constitutes a lien when recorded in the judgment docket and shall have the same effect and is subject to the same rules as a judgment for money in a civil action.

1983

#### 77-18-7. Costs imposed on defendant — Restrictions.

Unless specifically authorized by statute, a defendant shall not be required to pay court costs in a criminal case either as a part of a sentence or as a condition of probation or dismissal.

1980

#### 77-18-8. Fine not paid — Commitment.

When a defendant is sentenced to pay a fine in addition to a jail or a prison sentence and the judgment is that the jail or prison sentence be suspended upon payment of the fine, the service of the jail or prison sentence shall satisfy the judgment. If a defendant fails to pay the fine and thereafter the court finds that the defendant failed to make a good faith effort to pay the fine, the court may, after a hearing, order the execution of the suspended jail or prison sentence. If a defendant is sentenced to pay a fine

covery of a penalty or forfeiture incurred, shall be affected by the repeal, but the proceedings may be conformed to the provisions of these revised statutes as far as consistent. 1953

#### 68-2-10. "Heretofore" and "hereafter" defined.

The terms "heretofore" and "hereafter," as used in these revised statutes, have relation to the time when the same take effect. 1953

### CHAPTER 3 CONSTRUCTION

#### Section

- 68-3-1. Common law adopted.
- 68-3-2. Statutes in derogation of common law liberally construed — Rules of equity prevail.
- 68-3-3. Retroactive effect.
- 68-3-4. Civil and criminal remedies not merged.
- 68-3-5. Effect of repeal.
- 68-3-6. Identical provisions deemed a continuation, not new enactment.
- 68-3-7. Time, how computed.
- 68-3-8. When a day appointed is a holiday.
- 68-3-9. Seal, how affixed.
- 68-3-10. Joint authority is authority to majority.
- 68-3-11. Rules of construction as to words and phrases.
- 68-3-12. Rules of construction.
- 68-3-13. Printing boldface in numbered bills — Purpose — Effect — Power of Office of Legislative Research and General Counsel to change.

#### 68-3-1. Common law adopted.

The common law of England so far as it is not repugnant to, or in conflict with, the constitution or laws of the United States, or the constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state. 1953

#### 68-3-2. Statutes in derogation of common law liberally construed — Rules of equity prevail.

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail. 1953

#### 68-3-3. Retroactive effect.

No part of these revised statutes is retroactive, unless expressly so declared. 1953

#### 68-3-4. Civil and criminal remedies not merged.

When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. 1953

#### 68-3-5. Effect of repeal.

The repeal of a statute does not revive a statute

any action or proceeding commenced under or by virtue of the statute repealed. 1953

#### 68-3-6. Identical provisions deemed a continuation, not new enactment.

The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment. 1953

#### 68-3-7. Time, how computed.

The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it also is excluded. 1953

#### 68-3-8. When a day appointed is a holiday.

Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next succeeding business day with the same effect as if it had been performed upon the day appointed. 1953

#### 68-3-9. Seal, how affixed.

When the seal of a court or public officer is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto. In all other cases the word "seal" may include a scroll printed or written. 1953

#### 68-3-10. Joint authority is authority to majority.

Words giving a joint authority to three or more public officers, or other persons, are to be construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority. 1953

#### 68-3-11. Rules of construction as to words and phrases.

Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition. 1953

#### 68-3-12. Rules of construction.

(1) In the construction of these statutes, the following general rules shall be observed, unless such construction would be inconsistent with the manifest intent of the Legislature or repugnant to the context of the statute:

- (a) The singular number includes the plural, and the plural the singular.
- (b) Words used in one gender comprehend the other.
- (c) Words used in the present tense include the future.

(2) In the construction of these statutes, the following definitions shall be observed, unless the definition would be inconsistent with the manifest intent of the Legislature, or repugnant to the context of the statute:

- (a) "Adjudicative proceeding" means:
  - (i) all actions by a board, commission, department, officer, or other administrative unit of the state that determine the legal rights, duties, privileges, immunities, or