

1995

## Louis J. Malek v. Scott V. Carver : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Norma E. Plate; Assistant Attorney General; Jan Graham; Attorney General; Attorneys for Appellee. Louis J. Malek; Utah State Prison; Pro SE.

---

### Recommended Citation

Brief of Appellee, *Louis J. Malek v. Scott V. Carver*, No. 950812 (Utah Court of Appeals, 1995).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/7032](https://digitalcommons.law.byu.edu/byu_ca1/7032)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

LOUIS J. MALEK, :  
Petitioner/Appellant, : Case No. 950812-CA  
v. :  
SCOTT V. CARVER, Warden, : Priority No. 3  
Utah State Prison, et al., :  
Respondents/Appellees.

---

BRIEF OF APPELLEES

---

Appeal from the Judgment of the  
Third Judicial District Court, Salt Lake County  
Honorable Kenneth Rigtrup, Presiding

---

UTAH COURT OF APPEALS  
BRIEF  
UTAH  
DOCUMENT  
KFU  
50  
.A10  
DOCKET NO. 950812-CA

NORMAN E. PLATE - 6127  
Assistant Attorney General  
JAN GRAHAM - 1231  
Attorney General  
160 East 300 South, 6th Floor  
P.O. Box 140856  
Salt Lake City, Utah  
84114-0856  
Telephone: (801) 366-0100  
Attorneys for Appellees

LOUIS J. MALEK  
Utah State Prison  
P.O. Box 250  
Draper, Utah 84020-0250

Pro se

**FILED**  
JUL 01 1996  
COURT OF APPEALS

---

**IN THE UTAH COURT OF APPEALS**

---

LOUIS J. MALEK,	:	
Petitioner/Appellant,	:	Case No. 950812-CA
<b>v.</b>	:	
SCOTT V. CARVER, Warden,	:	Priority No. 3
Utah State Prison, et al.,	:	
Respondents/Appellees.	:	

---

**BRIEF OF APPELLEES**

---

Appeal from the Judgment of the  
Third Judicial District Court, Salt Lake County  
Honorable Kenneth Rigtrup, Presiding

---

NORMAN E. PLATE - 6127  
Assistant Attorney General  
JAN GRAHAM - 1231  
Attorney General  
160 East 300 South, 6th Floor  
P.O. Box 140856  
Salt Lake City, Utah  
84114-0856  
Telephone: (801) 366-0100  
  
Attorneys for Appellees

LOUIS J. MALEK  
Utah State Prison  
P.O. Box 250  
Draper, Utah 84020-0250

Pro se

**LIST OF ALL PARTIES**

To the best of Appellees' knowledge, all interested parties appear in the caption of this Brief.

**TABLE OF CONTENTS**

STATEMENT OF JURISDICTION . . . . .	1
STATEMENT OF THE ISSUES . . . . .	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES . . . . .	2
STATEMENT OF THE CASE . . . . .	2
A. NATURE OF THE CASE . . . . .	2
B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW . . . . .	3
C. STATEMENT OF RELEVANT FACTS . . . . .	3
SUMMARY OF ARGUMENT . . . . .	4
ARGUMENT . . . . .	5
I. THE DISTRICT COURT DID NOT ERR IN DECLINING TO ADDRESS MALEK'S CLAIM CONCERNING CREDIT FOR TIME SERVED . . . . .	5
II. THE DISTRICT COURT DID NOT FAIL TO PROVIDE A MECHANISM FOR ENFORCING ITS ORDER GRANTING MALEK'S PETITION FOR EXTRAORDINARY RELIEF . . . . .	6
III. THE BOARD'S ALLEGED REFUSAL TO IMPLEMENT THE DISTRICT COURT'S ORDER GRANTING MALEK'S PETITION FOR EXTRAORDINARY RELIEF IS NOT PROPERLY BEFORE THIS COURT ON THIS APPEAL . . . . .	7
CONCLUSION . . . . .	8
CERTIFICATE OF SERVICE . . . . .	9

Addendum "A" - Trial Court's Order

## **TABLE OF AUTHORITIES**

### **CASES**

<u>Board of Educ. of Granite Sch. Dist. v.</u> <u>Salt Lake County</u> , 659 P.2d 1030 (Utah 1983) . . . . .	7
<u>Golding v. Ashley Cent. Irrigation Co.</u> , 902 P.2d 142 (Utah 1995) . . . . .	5, 6
<u>Jones v. Bountiful City Corp.</u> , 834 P.2d 556 (Utah App. 1992) . . . . .	7
<u>Kennecott Corp. v. State Tax Comm'n</u> , 862 P.2d 1348 (Utah 1993) . . . . .	5, 6
<u>Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp.</u> , 850 P.2d 447 (Utah 1993) . . . . .	5, 6
<u>State v. Zeimer</u> , 10 Utah 2d 45, 347 P.2d 1111 (1960) . . . . .	7
<u>Stewart v. State By and Through Deland</u> , 830 P.2d 306 (Utah App. 1992) . . . . .	1

### **STATE STATUTES**

Utah Code Ann. § 78-2-2 (Supp. 1995) . . . . .	3
Utah Code Ann. § 78-2a-3 (Supp. 1995) . . . . .	1

---

IN THE UTAH COURT OF APPEALS

---

LOUIS J. MALEK,	:	
Petitioner/Appellant,	:	Case No. 950812-CA
v.	:	
SCOTT V. CARVER, Warden,	:	Priority No. 3
Utah State Prison, et al.,	:	
Respondents/Appellees.	:	

---

BRIEF OF APPELLEES

---

STATEMENT OF JURISDICTION

This Court has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(k) (Supp. 1995).

STATEMENT OF THE ISSUES

1. Because it was not properly before the district court, the court did not err in declining to address petitioner Louis J. Malek's claim concerning credit for time served.

**STANDARD OF REVIEW:** Because the district court did not address this issue, no standard of review is applicable.

2. The district court did not fail to provide in its order granting Malek's petition for extraordinary relief a mechanism for the enforcement thereof.

**STANDARD OF REVIEW:** On review of the district court's grant of a petition for an extraordinary writ, this Court reviews the lower court's conclusions of law for correctness. Stewart v. State By and Through Deland, 830 P.2d 306, 309 (Utah App. 1992).

3. Malek's third issue, whether the Utah Board of Pardons and Parole has implemented the district court's order granting Malek's petition for extraordinary relief, is not properly before this court on this appeal and therefore should not be addressed.

**STANDARD OF REVIEW:** Because the district court did not address this issue, no standard of review is applicable.

**DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES**

To the best of Appellees' knowledge, there are no constitutional provisions or statutes that are pertinent to resolution of the issues before this Court.

**STATEMENT OF THE CASE**

**A. NATURE OF THE CASE**

Petitioner Louis J. Malek filed a petition for extraordinary relief against respondents on March 3, 1993, R. at 1-23, alleging in part that the Utah Board of Pardons and Parole (the Board) violated his due process rights under the Utah Constitution by including in his Board file "crimes for which he was neither charged nor convicted." R. at 5. Additionally, Malek alleged that Judge Rigtrup had improperly resentenced him in an unrelated case, Malek v. Jorgensen, Civil No. 910902392 HC. R. at 2-3.

Malek subsequently filed a first amended petition for extraordinary relief, R. at 40-63, and a second amended petition for extraordinary relief, R. at 286-93. Although Malek's first amended petition reiterated both claims, his second amended petition, filed after he had been appointed counsel, only raised the claim that his Board file contained erroneous information.

Specifically, Malek's second amended petition stated that his Board file inaccurately showed that he had a first degree murder arrest or conviction. R. at 288.

#### **B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

Following an evidentiary hearing on March 31, 1995, the district court granted Malek's second amended petition for extraordinary relief and entered findings of fact, conclusions of law, and an order that "[a]ll references in the Board's file to the alleged offense of 'Murder,' 'Murder I,' 'Murder, 1st degree,' 'Aggravated Murder' or any other similar terms shall be expunged and shall not be considered in the future by the Board." R. at 426. (A copy of the district court's findings of fact, conclusions of law, and order is attached hereto as Addendum A.) Malek subsequently filed the instant appeal,<sup>1</sup> alleging that the district court erred in "correcting" his sentence in Malek v. Jorgensen and erred in failing to provide an effective mechanism for the enforcement of its order granting Malek's petition for extraordinary relief in this case. He further asserted that the Board has refused to expunge the above references in violation of the district court's order.

#### **C. STATEMENT OF RELEVANT FACTS**

On July 8, 1983, Malek was sentenced to serve two five-year-to-life sentences for aggravated robbery, a first degree felony, and attempted criminal homicide, a first degree

---

<sup>1</sup>Malek originally filed his appeal in the Utah Supreme Court, which poured the matter over to this Court pursuant to Utah Code Ann. § 78-2-2(4) (Supp. 1995).



felony. R. at 423-24. Since his incarceration in the Utah State Prison, Malek has appeared before the Board on several occasions, seeking parole or an early release date. R. at 424. In denying these requests, the Board has considered the materials in Malek's file, some of which contained references to "Murder," "Murder I," "Murder, 1st degree," or "Aggravated Murder." Id. However, Malek has never been convicted of any of these offenses. Id.

#### SUMMARY OF ARGUMENT

Petitioner Louis J. Malek has failed to show any deficiency in the district court's order from which he appeals, and thus, his appeal from that order should be dismissed. First, it was not improper for the district court to decline to address Malek's claim concerning credit for time served because that claim was not properly before that court. Specifically, that claim solely pertains to an entirely unrelated case and was abandoned prior to the filing of Malek's second amended petition for extraordinary relief. Second, the district court did not fail to provide in its order granting Malek's petition for extraordinary relief a mechanism for the enforcement thereof. The order is mandatory on its face and thus needs no mechanism to compel its execution. Lastly, Malek's third issue, whether the Board has refused to implement the district court's order granting Malek's petition for extraordinary relief, is not properly before this court on this appeal. It should not, therefore, be addressed.

## ARGUMENT

### **I. THE DISTRICT COURT DID NOT ERR IN DECLINING TO ADDRESS MALEK'S CLAIM CONCERNING CREDIT FOR TIME SERVED**

On appeal, Malek asserts that the district court erred in not "stat[ing] for the record the amount of time a defendant has served in order that the Utah Board of Pardons can properly credit a defendant for service of sentence according to their own rules." Specifically, Malek complains that "Judge Rigtrup failed to enter such record when he 'corrected' Petitioner/Appellant's sentence in Malek v. Jorgensen, 3rd. Dist. No. 910902392 HC."

However, it is axiomatic that a trial court does not commit error by declining to address an issue that is not properly before it. Golding v. Ashley Cent. Irrigation Co., 902 P.2d 142, 148 (Utah 1995). Additionally, it is well settled that in order for an issue to be raised on appeal, it must generally first be raised before the trial court. Kennecott Corp. v. State Tax Comm'n, 862 P.2d 1348, 1352 (Utah 1993); Ong Int'l (U.S.A.), Inc. v. 11th Ave. Corp., 850 P.2d 447, 455 (Utah 1993).

Turning to the present case, it is clear from the record on appeal that Malek's claim that Judge Rigtrup had improperly resentenced him in Malek v. Jorgensen was abandoned prior to the filing of Malek's second amended petition for extraordinary relief. That document, filed by Malek's counsel after he had been appointed by the district court, makes no mention of Malek's claim concerning credit for time served. Thus, that issue was not properly before the district court at the time the court

entered its order and the court did not err in declining to address it. See Golding, 902 P.2d at 148. Likewise, because the issue was never properly presented to the trial court, it cannot now be raised on appeal. See Kennecott, 862 P.2d at 1352; Ong Int'l, 850 P.2d at 455.

Moreover, it was not improper for Malek's counsel to abandon this claim in the second amended complaint because it pertained to an entirely unrelated case. The record on appeal in this case indicates that Judge Rigtrup has had two unrelated cases filed by Malek before him. The first case was Malek v. Jorgensen, Civil No. 910902392 HC, and the second is the present case, Malek v. Carver, Civil No. 930901212 HC. The former pertained to Malek's claim that he had not been properly credited for time served; the latter concerns Malek's claim that his Board file contains inaccurate information. Because these are separate and unrelated matters, any alleged deficiency relating to the other case cannot be properly raised in this case. Thus, Malek's counsel properly abandoned this claim in the second amended complaint. Consequently, this claim was not properly before the district court, the court did not err in failing to address it, and Malek may not now raise this issue on appeal.

**II. THE DISTRICT COURT DID NOT FAIL TO  
PROVIDE A MECHANISM FOR ENFORCING ITS ORDER  
GRANTING MALEK'S PETITION FOR EXTRAORDINARY  
RELIEF**

On appeal, Malek asserts that "when Judge Rigtrup did enter the order in Malek v. Carver, 3rd Dist No. 930901212 HC, directing that all references to improper charges be

redacted/expunged from Petitioner/Appellant's prison files, he failed to provide an effective mechanism for the enforcement of this order." This claim, too, is without merit.

In its order granting Malek's petition for extraordinary relief, the district court specifically stated: "All references in the Board's file to the alleged offense of 'Murder,' 'Murder I,' 'Murder, 1st degree,' 'Aggravated Murder' or any other similar terms shall be expunged and shall not be considered in the future by the Board." (Emphasis added.) Given the mandatory nature of the language contained in the district court's order, it was clearly sufficient without further direction to require enforcement. See, e.g., Jones v. Bountiful City Corp., 834 P.2d 556, 559 (Utah App. 1992) (use of term "shall" is presumed mandatory rather than discretionary); Board of Educ. of Granite Sch. Dist. v. Salt Lake County, 659 P.2d 1030, 1035 (Utah 1983) (same); State v. Zeimer, 10 Utah 2d 45, 48, 347 P.2d 1111, 1113 (1960) (same). Thus, there is no need for a "mechanism" in the district court's order to compel the execution thereof. Accordingly, Malek's claim that the district court's order was insufficient to require enforcement fails.

**III. THE BOARD'S ALLEGED REFUSAL TO  
IMPLEMENT THE DISTRICT COURT'S ORDER GRANTING  
MALEK'S PETITION FOR EXTRAORDINARY RELIEF IS  
NOT PROPERLY BEFORE THIS COURT ON THIS APPEAL**

Lastly, Malek alleges on appeal that, subsequent to the district court's order granting his petition for extraordinary relief, the Board has refused to expunge the ordered references from its files, in violation of the district court's order.


However, regardless of whether these allegations are true or false, this claim is not properly before this court on this appeal. It is clear that if Malek wants to challenge the actions by the Board subsequent to the district court's order granting his petition for extraordinary relief in this case, the proper approach for so doing is to file an action in the district court to enforce its order (i.e., a motion for a contempt order), not to appeal the district court's order to this Court. In fact, given the fact that all the alleged events giving rise to this claim have occurred after the district court's entry of its order in this matter, such a claim simply cannot be viewed as within the purview of an appeal from the district court's order here.

Moreover, even if an appeal from the district court's order granting Malek's petition for extraordinary relief were somehow the proper avenue by which to raise such a claim, the record on appeal is completely devoid of any evidence whatsoever to support Malek's allegations that the Board has refused to expunge the ordered references. Accordingly, this Court should decline to address Malek's third claim on appeal as being outside the bounds of this appeal.

#### **CONCLUSION**

On the basis of the foregoing, Malek's appeal from the district court's order granting his petition for extraordinary relief should be dismissed.

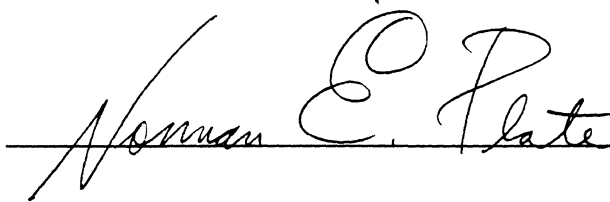
RESPECTFULLY SUBMITTED this 1<sup>ST</sup> day of July, 1996.

  
\_\_\_\_\_  
NORMAN E. PLATE  
Assistant Attorney General  
Attorney for Respondents/Appellees

CERTIFICATE OF SERVICE

This is to certify that I mailed two copies of the foregoing  
**BRIEF OF APPELLEES** to the following this 1<sup>ST</sup> day of July, 1996:

LOUIS J. MALEK  
Utah State Prison  
P.O. Box 250  
Draper, Utah 84020-0250

  
\_\_\_\_\_

## **ADDENDUM "A"**

FILED DISTRICT COURT  
Third Judicial District

AUG 21 1995

VAN COTT, BAGLEY, CORNWALL & MCCARTHY  
J. Keith Adams (0018)  
Jon E. Waddoups (5815)  
Attorneys for Petitioner  
50 South Main Street, Suite 1600  
P. O. Box 45340  
Salt Lake City, Utah 84145  
Telephone: (801) 532-3333

By *[Signature]*  
SALT LAKE COUNTY  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LOUIS J. MALEK,	)	
	)	
Petitioner,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW, AND
vs.	)	ORDER GRANTING PETITION FOR
	)	EXTRAORDINARY RELIEF
	)	
SCOTT VERNAL CARVER, Warden,	)	
Utah State Prison, et al.,	)	Civil No. 930901212
	)	
Respondents.	)	Honorable Kenneth Rigtrup
	)	
	)	

On March 31, 1995, the Court conducted an Evidentiary Hearing in connection with the Petition for Extraordinary Relief filed by the petitioner Louis J. Malek. The Petitioner was present and represented by Jon E. Waddoups, Esq. The Respondents were represented by Lorenzo K. Miller, Esq.

FINDINGS OF FACT

1. Mr. Malek presently is incarcerated at the Utah State Prison and is serving concurrently two felony sentences for Aggravated Robbery and Attempted Criminal Homicide.



Mr. Malek was committed to the Utah State Prison on July 8, 1983 for these offenses.

2. Pursuant to a Writ of Habeas Corpus, Mr. Malek's sentence was amended on June 12, 1992 to remove a duplicate firearms enhancement that was improperly included in the criminal sentence.

3. Since Mr. Malek's incarceration in 1983, he has appeared before the Utah Board of Pardons and Parole (the "Board") on several occasions. Mr. Malek repeatedly has requested a parole or early release date. The Board had denied each such request by Mr. Malek.

4. Mr. Malek has not been represented by counsel at any of his appearances before the Board seeking early release.

5. In evaluating Mr. Malek's requests for early release, the Board has considered materials contained in the Board's file relating to Mr. Malek. These materials include numerous reports, letters, work sheets and evaluations by employees of the Department of Corrections.

6. The Board's file relating to Mr. Malek contains a number of references to an alleged conviction for "Murder," "Murder I," "Murder, 1st degree" and "Aggravated Murder." These references are incorrect.

7. Mr. Malek has not been convicted of the offense of Murder.

8. The Board's file relating to Mr. Malek contains a Psychological Evaluation prepared by Roger T. Pray, Ed.D. dated July 15, 1993. The Psychological Evaluation contains errors including a statement that Mr. Malek was involved in the "murder of a child."

9. Dr. Pray, a Psychology Associate at the Utah State Prison, does not hold a license from the State of Utah to practice as a psychologist or to conduct psychological evaluations. The Psychological Evaluation submitted to the Board is signed by Dr. Pray and by Frank M. Rees, Ph.D. as Supervising Psychologist.

10. Based upon the recommendation of Dr. Pray, the Board has requested that Mr. Malek submit to certain neurological and/or neuropsychological testing.

11. Mr. Malek was examined by Robert D. Jones, M.D., Clinical Director, Department of Corrections, at the instance and request of the Board. Dr. Jones saw no evidence of neurological disorder that would affect Mr. Malek's parole status.

#### CONCLUSIONS OF LAW

1. The Court finds that there is some merit to the Second Amended Petition for Extraordinary Relief. Mr. Malek's Due Process rights have been violated since the Board has

evaluated Mr. Malek's requests for a parole or early release date using files containing some misinformation.

2. Mr. Malek is entitled to have his requests evaluated by the Board based upon accurate and reliable information.

ORDER

1. Mr. Malek's Second Amended Petition for Extraordinary Relief is granted because of inaccurate information contained in the Board's file.

2. All references in the Board's file to the alleged offense of "Murder," "Murder I," "Murder, 1st degree," "Aggravated Murder" or any other similar terms shall be expunged and shall not be considered in the future by the Board.

Documents containing references, <sup>K.R. U</sup> that shall be expunged, <sup>K.R. U</sup> include but are not limited to the following:

- a. Letter from Paul Larsen to Louis Malek dated March 27, 1991;
- b. Corrected Worksheet dated August 20, 1992;
- c. Letter from Paul Larsen to Trudy Barns dated November 12, 1992;
- d. Corrected Worksheet dated December 7, 1992;
- e. Worksheet and Recommendations dated February 17, 1993; and
- f. Psychological Evaluation dated July 15, 1993.

*K.R.*  
~~3. The Psychological Evaluation dated July 15, 1993 shall be removed from the Board's file and shall not be considered in the future by the Board.~~ *UK*

4. The Board shall permit Mr. Malek to have at any future Board hearings counsel consistent with the Rules of the Board.

5. If the Board determines that any additional psychological evaluation relating to Mr. Malek is needed, the psychological evaluation may be performed by a licensed psychologist.

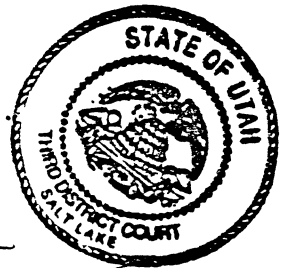
6. If the Board determines that any neurological or neuropsychological information relating to Mr. Malek is required, all neurological or neuropsychological testing shall be conducted under the supervision of a person licensed to perform such testing.

IT IS SO ORDERED.

DATED this 21<sup>st</sup> day of August, 1995.

BY THE COURT:

*Kenneth Rigtrup*  
Kenneth Rigtrup, Judge  
Third District Court



*Approved as to Form*  
*Douglas Miller*