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1994

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Utah Court of Appeals

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James H Beadles; Jan Graham. Attorney for Appellee
William Remine, Attorney Pro Se.

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IN THE UTAH COURT OF APPEALS

WILLIAM REMINE, Petitioner and Appellant, v. UTAH BOARD OF PARDONS, Respondent and Appellee.	**Case No. 940127-CA** **Priority No. 15**

BRIEF OF APPELLEE

ON APPEAL FROM DENIAL OF A PETITION FOR EXTRAORDINARY WRIT IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE HOMER F. WILKINSON, PRESIDING

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FILED
Utah Court of Appeals

MAY 16 1994

IN THE UTAH COURT OF APPEALS

WILLIAM REMINE, Petitioner and Appellant, v. UTAH BOARD OF PARDONS, Respondent and Appellee.	**Case No. 940127-CA** **Priority No. 15**

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ON APPEAL FROM DENIAL OF A PETITION FOR EXTRAORDINARY WRIT IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE HOMER F. WILKINSON, PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS 1

ISSUE PRESENTED FOR REVIEW 1

STANDARD OF APPELLATE REVIEW 1

STATUTES AND RULES 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

POINT I **REMINE'S MODIFICATION OF THE PAROLE AGREEMENT INDICATED HIS REJECTION OF THE TERMS OF THE AGREEMENT; THEREFORE, THE BOARD PROPERLY COMPLIED WITH UTAH LAW WHEN IT TERMINATED HIS PAROLE** 5

A. **Under contract law principles, Remine's alteration constituted a counteroffer and rejection of the Board-issued parole certificate; therefore, Remine never entered into a lawful parole agreement** 5

B. **Due to the lack of a lawful parole agreement, Remine's parole never began and the Board acted properly in issuing a warrant for his reincarceration and rescission of his parole** 7

POINT II **BECAUSE THE BOARD GRANTED REMINE A PAROLE REVOCATION HEARING, INCLUDING COUNSEL AND THE RIGHT TO PRESENT A DEFENSE, REMINE HAD ALL THE PROCEDURAL DUE PROCESS REQUIRED FOR THIS TYPE OF PAROLE TERMINATION** 9

CONCLUSION 11

ADDENDA

STATUTE, AND RULES . . . . ADDENDUM A

MINUTE ENTRY AND ORDER . . . . ADDENDUM B

BOARD OF PARDONS' PAROLE ORDER AND AGREEMENT . . . . ADDENDUM C

State v. Ruesga, 851 P.2d 1229 (Utah App. 1993) . . . ADDENDUM D

TABLE OF AUTHORITIES

CASES

Green v. Christiansen, 732 F.2d 1397 (9th Cir. 1984) . . 8

Shields v. Beto, 370 F.2d 1003 (5th Cir. 1963) 8

United States v. Merritt, 478 F.Supp. 804 (D.D.C. 1979) 8

City of Logan v. Utah Power & Light Co., 796 P.2d 697 (Utah 1990) 2

Crane v. Timberbrook Village, Ltd., 774 P.2d 3, 4, (Utah App. 1989) 6

Lancaster v. Utah Board of Pardons, 233 Utah Adv. Rep. . 3, 4 (Utah Feb. 28, 1994) 10

Northern v. Barnes, 825 P.2d 696 (Utah App. 1992), aff'd, Northern v. Barnes, 227 Utah Adv. Rep. 90 (Utah Dec. 10, 1993) 10

State v. Ruesga, 851 P.2d 1229 (Utah App. 1993) 7, 8, 9

Cal Wadsworth Construction, v. City of St. George, 865 P.2d 1373 (Utah App. 1993) 6

STATUTES AND RULES

Utah Code Ann. § 77-27-10 (Supp. 1993) 5

Utah Code Ann. § 78-2a-3(h) (Supp. 1993) 1

Utah Admin. Code R671-505 (1994) 9

Utah Admin. Code R671-310 (1994) 9

OTHER AUTHORITY

E. Allan Farnsworth, Farnsworth on Contracts, § 3.21 (1990) 6, 7

IN THE UTAH COURT OF APPEALS

WILLIAM REMINE, Petitioner and Appellant, v. UTAH BOARD OF PARDONS, Respondent and Appellee.	**Case No. 940127-CA** **Priority No. 15**

JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

This is an appeal from the district court's denial of a petition for extraordinary writ brought under Rule 65B, Utah Rules of Civil Procedure. Remine's petition challenges a decision of the Utah Board of Pardons and Parole. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(h) (Supp. 1993) because Remine was convicted of a second degree felony.

ISSUE PRESENTED FOR REVIEW

Did the Board of Pardons and Parole comply with procedural due process when it terminated Remine's parole based on his modification of the parole agreement and subsequent refusal to sign an unadulterated agreement?

STANDARD OF APPELLATE REVIEW

This appeal arises from the trial court's granting of the Board's motion to dismiss. Thus, the facts as alleged in the complaint are assumed to be true. Therefore, because this issue

raises only questions of law, this Court should give the trial court's ruling no deference and review it under a correctness standard. City of Logan v. Utah Power & Light Co., 796 P.2d 697 (Utah 1990).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant constitutional provisions, statutes, and rules are attached to this brief as Addendum A.

STATEMENT OF THE CASE

This is an appeal from the denial of a petition for extraordinary relief pursuant to Rule 65B. (R. at 125-26). Remine filed this petition on November 18, 1993, challenging the Board's termination of his parole on August 25, 1993. The trial court granted the Board's motion to dismiss, finding that the petition failed to state a claim for relief. (R. at 117; Addendum B). Remine filed this appeal on February 25, 1994. (R. at 119).

STATEMENT OF FACTS

Remine was committed to the Utah State Prison on June 7, 1990 after being convicted of burglary, a third degree felony. (R. at 74). His sentence expires on July 12, 1995. (R. at 14). The Board initially paroled Remine on April 23, 1991, but due to a parole violation, that parole was revoked and Remine was returned to the

prison in 1993.[1] On May 13, 1993, the Board decided to grant Remine a new parole release date of June 8, 1993. (R. at 13).

On May 28, 1993, in accordance with state statute and prison policy, an employee of the Department of Corrections presented the parole agreement to Remine for his signature. Remine signed the agreement but, prior to signing, modified it to require the Board to give him a new parole revocation hearing[2]. (R. at 15). On June 14, less than one week after Remine's release from prison and after discovering the modification, the Board directed Remine's parole agent to present him with a new, unmodified copy of the agreement for signature. (R. at 17). Remine refused to sign. (Id.) Based on that refusal, AP&P filed an allegation that Remine had violated his parole by refusing to cooperate with the Board and refusing to sign the agreement without making modifications. (Id.) The Board issued a warrant for Remine's arrest and re-incarceration pending a parole revocation hearing.

The Board convened the parole revocation hearing on August 25, 1994. Through counsel, Remine moved to dismiss the parole revocation allegations. (R. at 4). On August 31, 1993, the Board granted Remine's motion to dismiss but nevertheless rescinded the

---

[1] The Board's revocation of the April 23, 1991 parole date is at issue before this Court in a separate appeal, Remine v. Utah Board of Pardons, Case No. 930752-CA.

[2] Before the signature line on the parole agreement, Remine printed the following addition: "only if the Board schedules a new parole revocation hearing." (R. at 15; Addendum D).

June 8, 1993 parole release date, thus terminating parole and recommitting Remine to prison. (R. at 27). In the same order, the Board gave Remine a new parole date of February 8, 1994, which was later rescinded due to numerous disciplinary violations at the prison. (Id.) Remine is still at the Utah State Prison and the Board has decided not to parole him again. Instead, Remine will remain in prison until his sentence expires on July 12, 1995. (R. at 14).

SUMMARY OF THE ARGUMENT

Remine rejected parole by modifying his parole agreement. Under contract law, through which an analysis of this proceeding can be undertaken, in order to constitute an acceptance of an offer, the acceptance must be the mirror image of the offer. Remine's modification constituted not an acceptance of the parole agreement but a rejection and counteroffer. Thus, parole never actually began and the Board legitimately withdrew its offer of parole as soon as it discovered the alteration and reincarcerated Remine.

Additionally, by giving Remine a parole revocation hearing, rather than a rescission hearing, the Board actually gave Remine more due process than required. Under the analogous situation of probation, a failure to sign a probation agreement means that probation never really occurs and a revocation hearing is not needed to validly withdraw the revocation offer. Similarly, in this case, parole never actually legally began so rescission was

appropriate. Given this, Remine's due process rights were respected and the Board fully complied with the law in its procedures.

ARGUMENT

I. REMINE'S MODIFICATION OF THE PAROLE AGREEMENT INDICATED HIS REJECTION OF THE TERMS OF THE AGREEMENT; THEREFORE, THE BOARD PROPERLY COMPLIED WITH UTAH LAW WHEN IT TERMINATED HIS PAROLE.

A. Under contract law principles, Remine's alteration constituted a counteroffer and rejection of the Board-issued parole certificate; therefore, Remine never entered into a lawful parole agreement.

On May 13, 1993, the Board of Pardons sent Remine an order telling him that he would be paroled on June 8, 1993. (R. at 14; Addendum C). However, the order also informed Remine that his release would be contingent on his agreement to the conditions of parole, which would be evidenced by his signing the parole agreement. (Id.) This requirement to sign the parole agreement is not merely a Board decision, but is taken from state law.[3]

As Remine admits in his complaint, he signed the parole agreement but modified it without the prior consent of the Board. Because the Board and Remine were not in the process of negotiation, Remine's unconsented modification actually constituted

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[3] "When the Board of Pardons releases an offender on parole, it shall issue to the parolee a certificate setting forth the conditions of parole which he shall accept and agree to as evidenced by his signature affixed to the agreement." Utah Code Ann. § 77-27-10 (Supp. 1993).

a **disagreement** with the parole conditions. The parolee's signature normally evidences consent to the parole conditions set forth in the Board-issued certificate. Utah Code Ann. § 77-27-10 (Supp. 1993). Due to his addition of a new clause, however, Remine's signature evidenced consent not to the Board-issued certificate, but to a new parole agreement that the Board neither issued nor authorized.

Though the parole agreement is not exactly analogous to the typical contract, it is helpful to review the facts in this case in light of contract law concepts. Invoking a principle that one commentator calls the "mirror-image" rule, this Court has ruled that an acceptance not in conformity with the offer is a counteroffer, not an acceptance; therefore, there is no contract. Cal Wadsworth Construction, v. City of St. George, 865 P.2d 1373, 1377 n.3 (Utah App. 1993) (citing Crane v. Timberbrook Village, Ltd., 774 P.2d 3, 4 (Utah App. 1989)); 1 E. Allan Farnsworth, Farnsworth on Contracts, § 3.21 (Little, Brown & Co. 1990)[4]. In contract terms, the Board-issued contract constituted the offer. Remine's modification, being an addition to the agreement, was a counteroffer and his signature was merely indicative of his intent to be bound by the counteroffer should it be accepted.

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[4] "An attempt to add to or change the terms of the offer turns the offeree's response from an acceptance into a counteroffer and a rejection of the offer. This rule is sometimes called the 'mirror image' rule because it requires that an acceptance be the mirror image of the offer." 1 E. Allan Farnsworth, Farnsworth on Contracts, § 3.21, at 259 (Little, Brown & Co. 1990).

In reality then, Remine never signed a lawful parole agreement; his modification evidenced not only a disagreement with the terms of parole but a rejection of the Board's offer of parole. Thus, because there never was a lawful parole agreement, parole never technically began and Remine was not "paroled" from prison. He was released by mistake.

B. Due to the lack of a lawful parole agreement, Remine's parole never began and the Board acted properly in issuing a warrant for his re-incarceration and rescinding his parole.

In State v. Ruesga, 851 P.2d 1229 (Utah App. 1993) (Addendum E), the trial court revoked a person's probation because he failed to sign the probation agreement. Because the case came up on appeal as a probation revocation, the Court affirmed the revocation; nevertheless, from the content of footnote two, it appears that this Court believes a revocation was not needed. Id. at 1231 n.2.[5] Thus, the opinion provides a helpful insight into

[5] "The written probation agreement, which details the conditions of probation, embodies a defendant's acceptance of probation and the prescribed conditions. Inasmuch as a defendant's refusal to sign a probation agreement manifests an unwillingness to accept the conditions of probation, in a sense probation never occurs where such unwillingness is demonstrated. If he [Ruesga] in fact wanted to comply with the terms of his probation, the clearest manifestation of such would have been to sign the agreement. . . . By this sequence of events, defendant himself appears to have refused probation, which therefore never came into being. Seen in this light, there may have been no probation to revoke and it is far from clear that an evidentiary hearing was even required." Id.

the actual legal effect of Remine's rejection of the parole agreement.

In asserting that the trial court may not have needed to hold a revocation hearing, this Court implicitly found that an alternative procedure for imposition of the prison sentence may have been appropriate. By inference, the Court would have affirmed the trial court's action even if, rather than hold a revocation hearing, the trial court had merely "rescinded" the offer of probation and imposed the prison term based on Ruesga's rejection of probation.

Although it began the proceedings to terminate Remine's parole as a parole revocation, in the end, the Board took the action impliedly suggested in Ruesga. Acting from the proposition that Remine's June 8 parole never legitimately began, it gave him the opportunity to sign a clean copy of the parole agreement (R. at 17) and begin parole in a proper fashion. When he refused that opportunity, the Board rectified the mistaken release and rescinded the parole.[6]

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[6] An inmate is not entitled to his freedom merely because he is mistakenly released from prison. See Green v. Christiansen, 732 F.2d 1397, 1399 (9th Cir. 1984) (prison authorities properly recommitted inmate after he was released by mistake). Also, in United States v. Merritt, 478 F.Supp. 804, 807 (D.D.C. 1979), the court ruled that an erroneously released inmate will be excused from serving the balance of his sentence only if: (1) he did not contribute to the error; (2) the prison authorities' actions amounted to more than simple neglect; (3) the situation brought about by reincarceration would be "unequivocally inconsistent with fundamental principles of liberty and justice."

II. BECAUSE THE BOARD GRANTED REMINE A PAROLE REVOCATION HEARING, INCLUDING COUNSEL AND THE RIGHT TO PRESENT A DEFENSE, REMINE HAD ALL THE PROCEDURAL DUE PROCESS REQUIRED FOR THIS TYPE OF PAROLE TERMINATION.

Due to Ruesga's failure to sign the probation agreement, this Court expressed its opinion that a probation revocation evidentiary hearing may not have been required to satisfy due process. Ruesga, 851 P.2d at 1231-32 n.2. Here, Remine's parole also did not technically begin because he rejected the Board's offer of parole. By inference from Ruesga, a "rescission" of Remine's June 8, 1993 parole date may have satisfied due process. However, rather than hold a rescission hearing, the Board erred on the side of caution and due process by holding a parole revocation hearing, which grants more due process protection than a mere rescission hearing. Compare Utah Admin. Code R671-505 (1994) with Utah Admin. Code R671-310 (1994); Addendum F).

Given the Board's decision to proceed with a parole revocation hearing, Remine's protests that he was not afforded due process fall short of stating a claim for relief. Indeed, Remine essentially is arguing that he should have been given a rescission

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Remine does not meet these requirements. Not only did he contribute to the error by modifying and then signing the agreement, the prison's apparent failure to notice the discrepancy does not appear to have been more than simple neglect. Also, unlike those cases finding that recommitment would be fundamentally unfair due to the inmate's rehabilitation while free for a long period of time, see Shields v. Beto, 370 F.2d 1003, 1004 (5th Cir. 1963) (attempt to commit erroneously released inmate who had been free for twenty-eight years), Remine was only out for ten days and proved uncooperative even during that limited time.

hearing. However, the state's unilateral decision to give Remine more due process than required did not harm his legal interests. It probably benefitted him.

Because the Board's procedures were more than adequate to protect Remine's constitutional right to due process, his petition truly fails to state a claim upon which relief may be granted. In Lancaster v. Utah Board of Pardons, 233 Utah Adv. Rep. 3, 4 (Utah Feb. 28, 1994), the Utah Supreme Court stated that the courts were not allowed to review the discretionary decisions of the Board regarding parole. This decision builds upon other decisions of this Court that recognize the Board's substantive independence from judicial second-guessing. Specifically, in Northern v. Barnes, 825 P.2d 696, 698 (Utah App. 1992), aff'd Northern v. Barnes, 227 Utah Adv. Rep. 90 (Utah Dec. 10, 1993), this Court ruled that in reviewing a parole rescission a trial court could not reweigh the evidence and modify the Board's substantive decision to rescind parole.

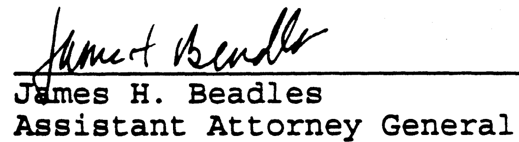
Therefore, because Remine cannot show a procedural due process violation in the Board's decision-making process, his request to overturn the Board's substantive decision, i.e., to withdraw the parole offer and recommit him to prison, fails to state a claim.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court affirm the trial court's order denying Remine's request for relief and dismissing the petition.

RESPECTFULLY SUBMITTED this 16th day of May 1994.

JAN GRAHAM
Utah Attorney General

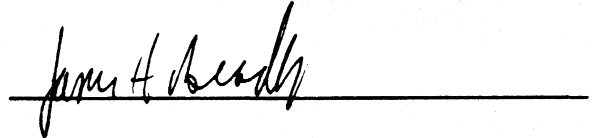


James H. Beadles
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on the 16th day of May 1994, I caused to be mailed, by U.S. Mail, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF APPELLEE** to:

William Remine
P.O. Box 550
Utah State Prison
Gunnison, Utah 84634



ADDENDA

ADDENDUM A

77-27-10. Conditions of parole - Intensive early release parole program.

(1) (a) When the Board of Pardons releases an offender on parole, it shall issue to the parolee a certificate setting forth the conditions of parole which he shall accept and agree to as evidenced by his signature affixed to the agreement.

(b) A copy of the agreement shall be delivered to the Department of Corrections and a copy shall be given to the parolee. The original shall remain with the board's file.

(2) If an offender convicted of violating or attempting to violate Section 76-5-301.1, Subsection 76-5-302(1), Sections 76-5-402, 76-5-402.1, 76-5-402.2, 76-5-402.3, 76-5-403, 76-5-403.1, 76-5-404, 76-5-404.1, or 76-5-405, is released on parole, the board shall order outpatient mental health counseling and treatment as a condition of parole. This subsection does not apply to intensive early release parole.

(3) (a) In addition to the conditions set out in Subsection (1), the board may place offenders in an intensive early release parole program. The board shall determine the conditions of parole which are reasonably necessary to protect the community as well as to protect the interests of the offender and to assist the offender to lead a law-abiding life.

(b) The offender is eligible for this program only if he:

(i) has not been convicted of a sexual offense; or

(ii) has not been sentenced pursuant to Section 76-3-406.

(c) The department shall:

(i) promulgate rules in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, for operation of the program;

(ii) adopt and implement internal management policies for operation of the program;

(iii) determine whether or not to refer an offender into this program within 120 days from the date the offender is committed to prison by the sentencing court; and

(iv) make the final recommendation to the board regarding the placement of an offender into the program.

(d) The department shall not consider credit for time served in a county jail awaiting trial or sentencing when calculating the 120 day period.

(e) The prosecuting attorney or sentencing court may refer an offender for consideration by the department for participation in the program.

(f) The board shall determine whether or not to place an offender into this program within 30 days of receiving the department's recommendation.

(4) This program shall be implemented by the department within the existing budget.

(5) During the time the offender is on parole, the department shall collect from the offender the monthly supervision fee authorized by Section 64-13-21.

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R671-505. Parole Revocation Hearings.

R671-505-1. General.

R671-505-1. General.

Prior to the Parole Revocation Hearing, the parolee shall be given adequate written notice of the date, time and location of the hearing and the alleged parole violations. At the hearing, the offender shall be provided with an opportunity to hear the evidence in support of the allegations, legal counsel unless waived, an opportunity to confront and cross-examine adverse witnesses unless they would be subject to risk or harm, and an opportunity to present evidence and witnesses in his/her own behalf.

Parolees are served with written allegations and notice of the hearing at least five working days prior to the Revocation Hearing. Such service and notice may be waived by the parolee. These allegations are again read at the hearing, after which the parolee enters a plea.

The parolee may plead guilty at the initial hearing and the dispositional phase will begin immediately, or the Board may continue the hearing upon request of the parolee, or on its own motion, pending the outcome of a court criminal action or an Evidentiary Hearing.

If a guilty plea is entered or the offender is found guilty in an Evidentiary Hearing, the Board will then hear discussion as to disposition from the offender or the attorney for the offender and the Department of Corrections. The Board may then retire to Executive Session, make a decision, reopen the hearing and render the decision on the record.

1993 77-27-11
77-27-27
77-27-28
77-27-29
77-27-30

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R671-310. Rescission Hearings.

R671-310-1. Rescission Hearings.

R671-310-1. Rescission Hearings.

Any prior Board decision may be reviewed and rescinded by the Board at any time until an offender's actual release from custody.

If the rescission of a release or rehearing date is being requested by an outside party, information shall be provided to the Board establishing the basis for the request. Upon receipt of such information, the offender may be scheduled for a rescission hearing. The Board may also review and rescind an offender's release or rehearing date on its own initiative. Except under extraordinary circumstances, the offender should be notified of all allegations and the date of the scheduled hearing at least seven calendar days in advance of the hearing. The offender may waive this period.

In the event of an escape, the Board will rescind the inmate's date upon official notification of escape from custody and continue the hearing until the inmate is available for appearance, charges have been resolved and appropriate information regarding the escape has been provided.

The hearing officer shall conduct the hearing and make an interim decision to be reviewed, along with a summary report of the hearing, by the Board members.

1993 77-26-7

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ADDENDUM B

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

REMINE, WILLIAM	:	MINUTE ENTRY
PLAINTIFF	:	CASE NUMBER 930906673 HC
	:	DATE 02/02/94
VS	:	HONORABLE HOMER F WILKINSON
	:	COURT REPORTER
BOARD OF PARDONS	:	COURT CLERK DAG
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

4-501 RULING

BASED ON THE FOLLOWING, RESPONDENT'S MOTION TO DISMISS IS GRANTED:

1. PETITIONER HAS FAILED TO STATE A CAUSE OF ACTION UNDER THE U.S. CONSTITUTION ON RULE 65B OF UTAH RULES OF CIVIL PROCEDURE
2. PETIOTIONER HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEMDIES
3. PETITIONER'S CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS
4. PETITIONER'S CLAIM IS FRIVOLOUS ON ITS FACE.

PETITIONER'S MOTION TO COMPEL DISCOVERY AND FOR DECLARATORY JUDGMENT BECOMES MOOT.

THE RESPONDENT SHALL PREPARE AN ORDER AND THE NECESSARY FINDINGS OF FACT & CONCLUSIONS OF LAW.

CC: LORENZO MILLER
WILLIAM REMINE

Judicial District

MAR 07 1994

COUNTY

By Deputy Clerk

LORENZO K. MILLER (5761)
Assistant Attorney General
JAN GRAHAM (1231)
Attorney General
Attorneys for Respondents
330 South 300 East
Salt Lake City, Utah 84111-2525
Telephone: (801) 575-1600

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

WILLIAM REMINE,	:	
	:	FINAL ORDER
Petitioner,	:	
v.	:	
	:	Case No. 930906673
UTAH BOARD OF PARDONS,	:	
	:	Judge Homer F. Wilkinson
Respondents.	:	

The above-entitled matter came before this Court on February 2, 1994, for Respondents' Motion to Dismiss. The Court having issued its ruling by minute entry on that date now makes the following:

ORDER

1. The petition in this case is a petition for extraordinary relief that should be filed pursuant to Rule 65B(e); however, it was improperly properly filed under Rule 65(b) and (c).

2. For the reasons stated and set forth in the February 2, 1994 minute entry, Respondents' motion to dismiss is

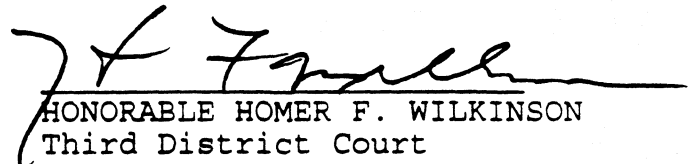
granted.

3. The relief requested by Petitioner is denied.

4. The action is dismissed forthwith.

DATED this 7 day of ~~February~~ March, 1994.

BY THE COURT:

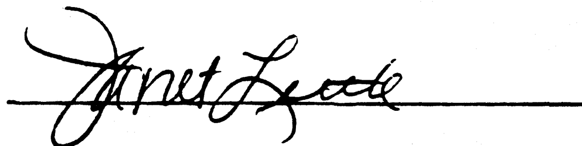


HONORABLE HOMER F. WILKINSON
Third District Court

CERTIFICATE OF MAILING

I certify that on the 28th day of February, 1994, I caused to be mailed a true and correct copy of the foregoing FINAL ORDER to:

William Remine
P.O. Box 550
Central Utah Correctional Facility
Gunnison, Utah 84634



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ADDENDUM C

(B)

Norman H. Bangerter
Governor
H.L. (Pete) Haun
Chairman

PUBLIC

Members
Donald E. Blanchard
Michael R. Sibbett
Curtis L. Garner
Cheryl Hansen

BEFORE THE BOARD OF PARDONS OF THE STATE OF UTAH

ORDER OF PAROLE
UTAH STATE OBSCIS NO. 00032763
UTAH STATE PRISON NO. 20102
IN THE MATTER OF THE APPLICATION OF REMINE, WILLIAM GARY

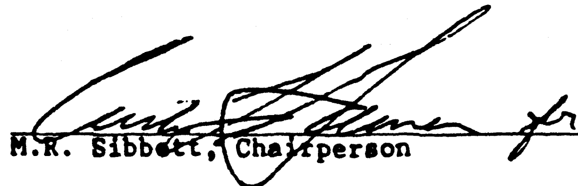
This matter of application for parole, termination of sentence, or expiration of sentence having come before the Utah State Board of Pardons in a regularly scheduled hearing on the 13th day of May, 1993, and the applicant appearing in person or having waived in writing the right to appearance and the Board having heard the case, issues the following order:
It is hereby ordered that REMINE, WILLIAM GARY be paroled from the punishment and sentence heretofore imposed upon him/her by a judge of the Third District Court in and for the County of Salt Lake for the crime(s) of BURGLARY, 3rd degree felony, Expiration 07/12/95.

The parole shall not become effective until 8th day of June, 1993. The applicant agrees to the conditions of parole and evidences his agreement by signing the parole agreement. The parole agreement or contract shall be administered by duly authorized agents of the Utah State Department of Corrections for the Utah State Board of Pardons.

It is further ordered that if and in the event the above named applicant shall be guilty of any infractions of the rules and regulations of the Utah State Prison or shall fail or refuse to perform duties as assigned by the Utah State Prison or is found to be in violation of any other law of the State of Utah prior to the effective date of said parole, then this Order of Parole is revoked and becomes null and void.

Dated this 13th day of May, 1993.

By Order of the Board of Pardons of the State of Utah, I have this 12th day of May, 1993, reduced its decision in this matter to writing and hereby affix my signature as Chairman for and on behalf of the State of Utah, Board of Pardons.



M.R. Sibbett, Chairperson

Norman H. Bangerter
Governor
H.L. (Pete) Haun
Chairman

PUBLIC

Members
Donald E. Blanchard
Michael R. Sibbett
Curtis L. Garner
Cheryl Hansen

BEFORE THE BOARD OF PARDONS OF THE STATE OF UTAH

PAROLE AGREEMENT

Name: REMINE, WILLIAM GARY OBSCIS No. 32763 USP No. 20102

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

1. RELEASE: On the day of my release from the institution or confinement, I will report to my assigned Parole Agent, unless otherwise approved in writing from the parole office.
2. ABSCONDING: I will not abscond from parole supervision:
   A. Reporting: I will report as directed by the Department of Corrections
   B. Residence: I will establish and reside at a residence of record and will not change my residence without first obtaining permission from my parole agent.
   C. Leaving the State: I will not leave my state of residence, even briefly, or any other state to which I am released or transferred without prior written permission from my parole agent.
3. CONDUCT: I will obey all State, Federal and municipal laws. If arrested , cited or questioned by a peace officer, I will notify my parole agent within 48 hours of the incident.
4. HOME VISITS: I will permit visits to my place of residence by agents of Adult Probation and Parole for the purpose of ensuring compliance with the conditions of my parole. I will not interfere with requirement; i.e. having vicious dogs, perimeter security doors, refusing to open the door, etc.
5. SEARCHES: I will permit agents of Adult Probation and Parole to search my person, residence, vehicle or any other property under my control, without a warrant, at any time, day or night, upon reasonable suspicion to ensure compliance with the conditions of my parole.
6. WEAPONS: I will not own, possess, have under my control or in my custody any explosives, firearms or dangerous weapons as defined in Utah Code Annotated, Section 76-10-501, as amended.
7. EMPLOYMENT: Unless otherwise authorized by my parole agent, I will seek, obtain and maintain verifiable, lawful full-time employment (32 hours per week minimum) as approved by my parole agent. I will notify my parole agent of any change in employment within 48 hours.
8. ASSOCIATION: I will not knowingly associate with any person who is involved in criminal activity or who has been convicted of a felony, without approval from my parole agent.
9. CHEMICAL ANALYSIS: I will submit to test of my breath, body fluids or hair to ensure compliance with my parole agreement.
10. TRUTHFULNESS: I will be cooperative, compliant and truthful in all my dealings with Adult Probation and Parole.
11. SPECIAL CONDITIONS: I will:
    1 Successfully complete ISP Program.
    2 Submit to random drug testing.
    3 Successfully complete Mental Health Therapy.
    4 Not be self employed with legal business license, taxes and
    5 approval of Parole Officer.
    6 Provide Parole Officer with documentation of employer contracts.

I have read, understand and agree to be bound by this agreement. If I violate any of the conditions of this agreement, the Board of Pardons may revoke my parole or the Department of Corrections may take other appropriate action against me. *Only if The Board Schedules A new Parole Revocation hearing*

5/29/93 SIGNED: [signature] USP NO: *20102*
DATE

5/29/93 WITNESSED BY: [signature]
DATE

AUTHORIZED BY: [signature] BOARD OF PARDONS

00015

ADDENDUM D

fy the prosecutor from the sentencing hearing. Accordingly, Gray's convictions are affirmed.

BILLINGS and GREENWOOD, JJ., concur.

STATE of Utah, Plaintiff and Appellee,

v.

Fernando RUESGA, Defendant and Appellant.

No. 920426-CA.

Court of Appeals of Utah.

April 22, 1993.

Probation revocation proceeding was brought. The Salt Lake County District Court, Timothy R. Hanson, J., revoked probation. Defendant appealed. The Court of Appeals, Orme, J., held that defendant's failure to sign probation agreement was a willful violation of probation.

Affirmed.

1. Criminal Law ⇐982.9(.5)

Determination to revoke probation is within discretion of trial court.

2. Criminal Law ⇐1147

Court of Appeals will reverse trial court's determination on whether to revoke probation only if evidence, when viewed in light most favorable to court's decision, is so deficient that it must be concluded trial court abused its discretion.

3. Criminal Law ⇐1158(1)

Trial court's underlying factual findings supporting conclusion that defendant violated probation will not be disturbed on appeal unless they are clearly erroneous.

4. Criminal Law ⇐982.6(.5)

Defendant is free to accept court's offer to spend time under probation or to decline court's good grace and spend entire sentence in prison.

5. Constitutional Law ⇐270(5)

Due process requires conditions of probation to be clear enough so that defendant has notice as to what constitutes probation violation. U.S.C.A. Const.Amends. 5, 14.

6. Constitutional Law ⇐270(5)
Criminal Law ⇐982.9(1)

Defendant was not denied due process when trial court revoked probation based on his refusal to sign probation agreement, although court did not specifically state during sentencing that signing probation agreement was a condition of probation, where at first hearing on motion to show cause trial court told defense counsel, with defendant at his side, that it would continue hearing for two weeks but if defendant did not sign probation agreement, he was going to prison and defendant failed to sign agreement. U.S.C.A. Const.Amends. 5, 14.

7. Criminal Law ⇐982.9(5)

For trial court to revoke probation based on violation of probation, it must determine by a preponderance of the evidence that violation was willful or, if not willful, must presently threaten safety of society. U.C.A.1953, 77-18-1(10).

8. Criminal Law ⇐982.9(6)

Trial court entered ample oral and written findings to support conclusion that defendant willfully refused to sign probation agreement and therefore violated probation; after considering testimony from both sides court specifically found that probation officer's testimony was believable and credible while defendant's testimony was not, defendant manifested attitude that he could do what he wanted, and defendant's language suggested refusal to cooperate and sign agreement.

9. Criminal Law ⇐982.9(5)

Trial court's conclusion that defendant understood English well enough to participate in third hearing on probation revocation without a translator was not clearly

erroneous; defense counsel agreed that defendant could understand English well enough to participate in proceedings, defendant did not ask for translator until beginning of third hearing, and defendant later read written statement in English which, by his own testimony, he prepared with only minimal assistance.

Roger K. Scowcroft and Elizabeth Holbrook, Salt Lake City, for defendant and appellant.

Jan Graham and Christine F. Soltis, Salt Lake City, for plaintiff and appellee.

Before GARFF, GREENWOOD and ORME, JJ.

OPINION

ORME, Judge:

Defendant appeals the revocation of his probation based on his unwillingness to sign a probation agreement. He argues that signing the agreement was not a condition of probation, that his failure to sign was not willful, and that he lacked the ability to understand the proceedings against him. He also contends that the trial court's findings supporting its decision are in error. We affirm.

FACTS

On February 18, 1992, defendant pled guilty to one count of unlawful possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp.1992). On April 6, 1992, after the Office of Adult Probation and Parole had evaluated defendant and recommended he be incarcerated, the trial court sentenced defendant to a prison term of zero to five years and imposed a $5,000 fine, but stayed the sentence pending completion of eighteen months probation. The court required defendant to spend six months in jail and to pay $1,500 of the fine plus a twenty-five percent surcharge. At sentencing, the court described the general conditions of probation, which included prohibitions against possessing controlled substances and drinking alcohol and directives to complete appropriate treatment programs, to establish a permanent address, and to work full time. On April 28, 1992, in response to an affidavit filed by defendant's parole officer alleging defendant refused to sign a standard probation agreement, the district court issued an Order to Show Cause why defendant's probation should not be revoked. Three hearings transpired subsequent to that order.

At the first hearing, on May 4, defendant, through counsel, denied the allegation that he refused to sign the probation agreement. However, due to a family emergency that had arisen for defense counsel, the court granted a two-week continuance for the hearing. Before concluding the proceedings, the court warned: "If Mr. Ruesga doesn't sign the probation agreement, he's going to prison. Simple as that."

When the second hearing commenced on May 18, defendant had not yet signed the probation agreement. On several occasions throughout the hearing, the court asked why the probation agreement had not been signed, and defense counsel reiterated defendant's willingness to sign. Yet, counsel never stated defendant would do so unconditionally, nor did defendant ever actually sign the agreement, although it was apparently available for his signature. Defense counsel stated that defendant was willing to sign the agreement *if* the court would strike the Order to Show Cause. However, from all that appears, even if defendant had admitted to the allegations in the affidavit, which was the basis for the Order to Show Cause, the judge and probation officer were still willing to proceed with probation, providing only that defendant sign the implementing agreement. In response to the court's inquiry as to the State's position in the case, defendant's probation officer stated that "[i]f he's willing to sign, we'll give him a try."

As the hearing continued, the court discovered that defendant had also threatened to go to Mexico when he was released from jail. Defense counsel never denied defendant's statement or intent to go to Mexico, but attempted to explain "[i]t's not his in-

tention to just leave Utah, Your Honor. He just wants to go to Mexico to see his parents." Upon hearing this, and having no signed probation agreement in hand, the court, apparently frustrated by defendant's recalcitrance, scheduled an evidentiary hearing for June 2.

At the June 2 hearing, defendant requested an interpreter who would translate English to Spanish for him. The court refused the request. Only defendant and his parole officer testified at the hearing. Defendant's parole officer recounted the April 16 incident at the jail when defendant refused to sign the agreement. She testified that when she attempted to explain the parole agreement the defendant became "extremely argumentative," contesting the $1,875 fine as incorrect [1] and claiming the agreement did not reflect what took place in court. According to the parole officer, defendant used profanities and vituperative epithets directed at the court to exclaim he did not have to do what the trial judge told him to do. Furthermore, she testified that defendant "stated he was going to go to Mexico."

Defendant testified that his lack of proficiency in English led to him misunderstanding the agreement. He further explained that he did not even know what probation was when his probation officer spoke to him, that he planned to go to Mexico only after he completed his probation obligation in Utah and not immediately upon release from jail, and that he was willing to do everything required to complete his probation, including signing the probation agreement.

After testimony and arguments concluded, and after the court orally explained the basis for its decision, the trial court terminated its offer to grant probation and committed the defendant to the Utah State Prison. Defendant objected to proposed written findings submitted the next day by the State, but on June 9, 1992, the court signed those findings.

Defendant makes the following claims on appeal: (1) the court erred by revoking probation based on failure to sign the agreement and (2) the court's factual findings concerning the willfulness of the probation violation and the defendant's ability to understand English are clearly erroneous.

STANDARD OF REVIEW

[1-3] A determination to revoke probation is within the discretion of the trial court. We will reverse only if the evidence, when viewed in a light most favorable to the court's decision, is so deficient that it must be concluded the trial court abused its discretion. *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990). Furthermore, the court's underlying factual findings supporting its conclusion that defendant violated probation will not be disturbed unless they are clearly erroneous. *State v. Martinez*, 811 P.2d 205, 209 (Utah App.1991).

FAILURE TO SIGN AS PROBATION VIOLATION

[4-6] Defendant's chief argument on appeal is that the trial court denied him due process by revoking probation based on his refusal to sign the probation agreement because the court had not explicitly stated during sentencing that signing the probation agreement was a condition of probation. While due process certainly requires conditions of probation to be clear enough so that defendant has notice as to what constitutes a probation violation, *see Douglas v. Buder*, 412 U.S. 430, 432, 93 S.Ct. 2199, 2200, 37 L.Ed.2d 52 (1973), defendant's position in this case is untenable.[2]

1. The $1,875 figure accurately reflected the trial court's reduction of defendant's fine from $5,000 to $1,500 plus the required twenty-five percent surcharge.

2. Although the trial court entered a judgment upon conviction whereby it placed the defendant on probation, arguably defendant did not begin probation until he entered into a written probation agreement. Under Utah law, "'[p]robation' is an act of grace by the court suspending the imposition or execution of a convicted offender's sentence upon prescribed conditions." Utah Code Ann. § 77-27-1(10) (Supp. 1992). The defendant is free to accept the court's offer to spend time under probation or to decline the court's good grace and spend the

Even if, as defendant claims, he had no notice that signing the agreement was a condition of probation at the time of sentencing, the record of the first hearing on the Motion to Show Cause leaves no doubt that defendant was on such notice after May 4. As noted above, the court told defense counsel, with defendant at his side, that it would continue the hearing for two weeks, but "[i]f Mr. Ruesga doesn't sign the probation agreement, he's going to prison. Simple as that." Yet, the agreement remained unsigned two weeks later at the May 18 hearing. If anything, the trial court was abundantly generous in allowing defendant two weeks to sign a probation agreement, a simple act that would take but a moment.

Defendant asserts that despite the notice he received during the first hearing, the revocation was based solely on defendant's refusal to sign the agreement at the jail, not on his failure to sign after the court's explicit warning. It follows, he contends, that since the court did not tell him at sentencing that signing the agreement was a condition of probation, he could not have violated probation by refusing to sign the agreement at the jail on April 16. While it is not altogether clear that defendant's argument would prevail even if termination was based on the single refusal to sign at the jail, we believe the court's termination of probation was correctly based on defendant's refusal to sign the agreement at any time after the sentencing hearing, not just at the time of the jail incident. The agreement was not signed at the jail; it was not signed at the May 4 hearing; it was not signed in the subsequent two weeks; it was not signed at the May 18 hearing. While the court's findings, viewed in isolation, appear to emphasize the jail episode, the court clearly had in mind this entire pattern of refusal in making its revocation decision.

WILLFULNESS OF VIOLATION

[7] Having concluded that signing the probation agreement was a condition of defendant's probation, which defendant violated, we turn to consider whether the court correctly concluded defendant violated that condition willfully. In order for a trial court to revoke probation based on a violation of probation under Utah Code Ann. § 77-18-1(10) (Supp.1992), it must determine by a preponderance of the evidence that the violation was "willful or, if not willful, must presently threaten the safety of society." *State v. Hodges*, 798 P.2d 270, 277 (Utah App.1990). In *State v. Archuleta*, 812 P.2d 80 (Utah App.1991), this court held that willfulness "merely requires a finding that the probationer did not make bona fide efforts to meet the conditions of his probation." *Id.* at 84. As applied to this case, the *Archuleta* rationale suggests that where defendant did not make a bona fide effort to cooperate with probation officials to initiate his probation, despite warning by the court, he willfully violated his probation. *Cf. State v. Hodges*, 798 P.2d 270, 275 (Utah App.1990) (probationer's inability to complete treatment program due to physiological problem was not willful violation because his efforts to participate were genuine). Defendant claims the trial court's findings do not support the conclusion that the violation was willful. We disagree.

[8] The trial court entered ample oral and written findings to support its conclu-

entire sentence in prison. The written probation agreement, which details the conditions of probation, embodies a defendant's acceptance of probation and the prescribed conditions. Inasmuch as a defendant's refusal to sign a probation agreement manifests an unwillingness to accept the conditions of probation, in a sense probation never occurs where such unwillingness is demonstrated. If he in fact wanted to comply with the terms of his probation, the clearest manifestation of such would have been to sign the agreement. Defendant's reluctance to enter into probation is further evidenced by his testimony at the June 2 hearing that, when asked to sign the agreement at the jail, "I did say that I would rather do all the time, and just get out of there without probation." By this sequence of events, defendant himself appears to have refused probation, which therefore never came into being. Seen in this light, there may have been no probation to revoke and it is far from clear that an evidentiary hearing was even required. *See* Utah Code Ann. § 77-18-1(10) (Supp.1992). Nonetheless, because this case is postured as a probation revocation proceeding, we will treat it as such.

sion that defendant willfully refused to sign the probation agreement and therefore violated probation. At the June 2 hearing, after considering testimony from both sides, the court explained in detail the basis for its decision. The court specifically found: (1) the probation officer's testimony was believable and credible, while the defendant's testimony was not; (2) defendant manifested an attitude that he could do what he wanted; (3) defendant's language suggested a refusal to cooperate and sign the agreement; and (4) defendant "knowingly and intelligently, and with purpose refused to cooperate with Adult Probation and Parole and sign the probation agreement." Notwithstanding that the oral findings alone sufficiently support the court's determination that defendant violated his probation, *see Hodges*, 798 P.2d at 274, the court subsequently signed written findings, which in essence were a summary of the oral findings.

The court's findings reveal "the evidence relied on and the trial court's reasons for revoking appellant's probation." *Id.* Contrary to defendant's contention that the findings are clearly erroneous, we believe they are amply supported and form a sound basis for the court's decision. The findings demonstrate that the court did not abuse its discretion in revoking defendant's probation.

DEFENDANT'S ABILITY TO UNDERSTAND PROCEEDINGS

[9] Defendant argues the court's additional finding that defendant could understand the proceedings is clearly erroneous. That finding reads:

> 3. That the defendant, while having a limited understanding of English, has an adequate command of the English language to fully understand the proceedings before this Court and the conditions of probation as presented by [his probation officer].

We believe the court's finding is fully supported by the record in this case. Defendant appeared at several proceedings in circuit court, including a preliminary hearing; an arraignment, at which he pled guilty; and two of the three hearings on the Motion to Show Cause—all without requesting a translator. Despite these appearances, defendant first asked for a translator at the beginning of the third hearing on June 2. The judge refused his request at that time. Defendant later read a written statement in English, which, by his own testimony, he prepared with only minimal assistance. He testified at the hearing with no apparent difficulty. After defense counsel referred to defendant's "difficulty understanding what he's supposed to do here," the following exchange occurred:

> THE COURT: Are you telling me, Mr. Scowcroft, that with regard to your client's understanding that it's now your position that he doesn't understand the English language well enough to proceed in these proceedings?
>
> MR. SCOWCROFT: I'm not saying that, Judge. We've not had an interpreter during these proceedings. There have been a number of appearances we've made in court.... I think his command of the English language is somewhat marginal, and I think his heavy accent is evidence of that. That's all I could say really in that regard.

The record largely speaks for itself. In light of defense counsel's agreement that defendant could understand English well enough to participate in the proceedings, we would certainly be reluctant to override the trial judge who reached the same conclusion after having had several opportunities to view and hear defendant. Accordingly, defendant's claim of error is without merit.

CONCLUSION

Defendant's failure to sign the probation agreement was a willful violation of his probation. Moreover, the trial court's conclusion that defendant understood English well enough to participate in the third hearing without a translator was not clearly erroneous. Accordingly, we affirm the probation revocation.

GARFF and GREENWOOD, JJ., concur.