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Department of Corrections, Board of Probation and Parole.....16, 20-24, 30

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Parole, and Conditional Release.....27, 28

JURISDICTIONAL STATEMENT

This is an original writ proceeding in habeas corpus filed pursuant to Missouri Supreme Court Rule 91, that involves the question as to the cause and authority of the Petitioner's present incarceration in the Southeast Correctional Center located in Charleston, Missouri. Specifically, whether the Petitioner's right of due process guaranteed by the Fourteenth Amendment of the United States Constitution and Section Ten, Article 1 of the Constitution of the State of Missouri and his right to confront witnesses against him guaranteed by the Sixth Amendment of the United States Constitution, rights protected through the parole revocation procedures set forth by the United States Supreme Court, the Missouri Supreme Court, the Missouri Legislature and the Rules promulgated by the Missouri Department of Correction's Board of Probation pursuant to authority granted to them by §217.720 RSMo, and specifically §217.720.2 RSMo, were violated when the Missouri Board of Probation and Parole revoked the Petitioner's parole for:

an arrest, if there was no finding by the Board of culpability for the offense for which the Petitioner was arrested;

association with a felon, if the association was only presence in his uncle's house while a person unknown to the Petitioner who was also felon was also in the uncle's house; and

an allegedly positive urinalysis, if the initial lab report was unsigned and never provided to the Petitioner, and the subsequent lab report was never provided to the Petitioner, and if the Board prohibited the Petitioner from questioning those who allegedly conducted the tests and authored the lab reports.

In addition to questioning the validity of the finding of violations, this proceeding also involves the question as to whether the heretofore described rights to due process and to confront witnesses of the Petitioner was violated when Board ordered said revocation even though the evidence at the revocation hearing and relied upon for the revocation consisted solely of the Petitioner's testimony and certain Field Violation Reports authored by parole officers who did not testify and the previously mentioned lab reports that were never provided to the Petitioner, and whether his right to due process and to confront witnesses against him was further violated when the Board did not provide any police or lab reports to the Petitioner at any time during the revocation process, did not produce the authors of said reports at either the preliminary hearing or the revocation hearing and in fact did not produce any adverse witnesses at the Petitioner's parole revocation hearing at all.

This court has jurisdiction pursuant to Section Three, Article V of the Constitution of the State of Missouri as amended and Missouri Supreme Court Rule 91.

STATEMENT OF FACTS

Petitioner is currently incarcerated in the Southeast Correctional Center in Charleston, Missouri, pursuant to the parole revocation order dated July 30, 2002. The Superintendent of the Southeast Correctional Center is Donna McCondichie. Petitioner was previously convicted of one count of first-degree tampering, a Class C felony, and was sentenced to fifteen years in the custody of the Missouri Department of Corrections pursuant to sentence and judgment of the Circuit Court of St. Louis County entered May 14 1991. Petitioner was granted parole on July 28, 2000.

Petitioner was arrested in St. Louis, Missouri on April 14, 2002 pursuant to a parole warrant and taken to the St. Louis City Jail. He was transferred to St. Mary's Honor Center on April, 15, 2002.

Petitioner has not agreed to any of the violations and continues to maintain his innocence of any parole violations.

Petitioner requested a preliminary hearing as to validity of the alleged violations and was given a copy of what is known as the Board of Probation and Parole's "Red Book" on photocopy pages and a copy of the parole violations. The Red Book is a publication of the Missouri Board of Probation and Parole that describes to parolees their rights when charged with a violation of the conditions of parole.

Petitioner was granted a preliminary hearing that was scheduled for April 30, 2002. Other than the minimal use of the telephone when he got to St. Mary's to tell his family where he was, Petitioner was permitted no telephone privileges to help him

prepare for either the preliminary hearing or the revocation hearing.

Petitioner was denied a copy of any police reports referred to in the parole violation reports in the preliminary hearing and in the revocation hearing. Petitioner was denied the ability to question the lab technicians and no reason was given. In fact the authors of the lab reports did not testify at either hearing. Petitioner was denied access to copy any lab reports in preparation for the Preliminary Hearing and the Revocation Hearing. He was briefly shown the reports during the hearing.

Petitioner was denied the right to contact witnesses while in prison awaiting the Preliminary Hearing and the Revocation Hearing, witnesses who could have supported his position that he was not in possession of any drugs and not in association with a felon.

No witnesses other than the Petitioner testified at the Revocation Hearing.

At the preliminary hearing the Petitioner was not permitted to write any notes and was handcuffed and shackled the entire time for reason that were never articulated by the hearing officers. The preliminary hearing was not recorded.

Petitioner went to the revocation hearing and it was recorded. There Petitioner asked for the reason he was denied copies of lab reports, police reports, the right to question lab technicians because the initial lab report was blank and devoid of anyone's signature, time or date. The Board presented no witnesses adverse to the Petitioner at the Revocation Hearing.

The Board gave the following reason for the revocation:

“The Board, from the evidence presented, specifically, the violation reports dated 2-9-02, 4-44-02, 4-17-02, 4-23-02, 4-24-02, and 5-1-02 and your testimony

during the 6-21-02 revocation hearing, finds by the preponderance of credible evidence, first you violated Conditions #1, Laws, of the Conditions and Order of Parole in that you were arrested on 1-31-02 for Suspect in Possession of a Controlled Substance and Suspect Possession of Drug Paraphanalia (sic). The Board also notes that the police officer attended the preliminary hearing and probable cause was found.

Secondly, and independently of the preceeding (sic) findings, The board finds you violated Condition #5, Association, of the Conditions and Order of Parole by associating with Clark Newsome who has been convicted of a felony. Reports indicate that Newsome was in the house on 1-31-02 at the time of your arrest.

Furthermore, and independently of the preceeding findings the Board finds you violated Condition #6, Drugs, by having a positive urinalysis for marijuana on 4-2-02. The Board relied on the lab reports for this finding.

Petitioner's parole was revoked and petitioner was denied the right to appeal the Parole Board's decision.

Petitioner filed a pro se petition for a writ of habeas corpus and a motion for appointment of counsel. This court issued the writ and appointed counsel. Appointed counsel files this brief pursuant to the Return filed by the Respondents to the writ issued by this Court and in support of Petitioner's request of this court to discharge Petitioner from the Southeast Correctional Center and expunge his parole record as to any violations of Conditions #1, #5 or #6.

POINTS RELIED ON

- I. PETITIONER REQUESTS THIS COURT TO ORDER PETITIONER DISCHARGED FROM THE SOUTHEAST CORRECTIONAL CENTER AND TO FURTHER ORDER THE MISSOURI BOARD OF PROBATION AND PAROLE TO EXPUNGE THE ALLEGED VIOLATION OF CONDITION #1, LAWS, FROM PETITIONER'S PAROLE FILE BECAUSE SAID BOARD ERRED IN FINDING THE PETITIONER VIOLATED CONDITION #1, LAWS, OF THE CONDITIONS AND ORDER OF PAROLE, BECAUSE THE BOARD BASED THEIR FINDING SOLELY UPON THE PETITIONER'S TESTIMONY AT THE REVOCATION HEARING AND THE VIOLATION REPORTS DATED 2-9-02, 4-11-02, 4-17-02, 4-23-02, 4-24-02 AND 5-01-02, VIOLATION REPORTS THAT ARE UNRELIABLE AND CONSTITUTE IMPERMISSIBLE HEARSAY EVIDENCE FOR THE FOLLOWING REASONS: THEY WERE NOT OFFERED INTO EVIDENCE THROUGH ANY WITNESS WHO COULD BE CROSS-EXAMINED AS TO THE TRUTH AND VERACITY OF THE CONTENT OF THE REPORTS; THE PETITIONER OBJECTED TO THE TRUTH AND VERACITY OF THE CONTENTS OF THE REPORTS; THE PETITIONER DID NOT STIPULATE OR AGREE TO THE TRUTH AND VERACITY OF THE REPORTS; THE VIOLATION REPORTS CONTAINED REFERENCES TO REPORTS WRITTEN BY POLICE OFFICERS; AND THE BOARD FAILED TO MAKE ANY SPECIFIC FINDINGS OF GOOD CAUSE

FOR NOT ALLOWING THE PETITIONER TO CONFRONT AND CROSS-
EXAMINE THE AUTHORS OF THE REPORTS REFERRED TO IN THE
VIOLATION REPORTS AT THE REVOCATION HEARING.

<i>Belk v Purkett</i> , 15 F.3d 803 (8 th Cir. 1994).....	16, 18, 19
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).....	16, 17, 19
<i>State ex rel. Mack v. Purkett</i> , 825 S.W.2d 851 (Mo. banc 1992).....	16, 18, 19
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II. PETITIONER REQUESTS THIS COURT TO ORDER PETITIONER DISCHARGED FROM THE SOUTHEAST CORRECTIONAL CENTER AND TO FURTHER ORDER THE MISSOURI BOARD OF PROBATION AND PAROLE TO EXPUNGE THE ALLEGED VIOLATION OF CONDITION #1, LAWS, FROM PETITIONER’S PAROLE FILE BECAUSE SAID BOARD ERRED IN FINDING THE PETITIONER VIOLATED CONDITION #1, LAWS, OF THE CONDITIONS AND ORDER OF PAROLE WHEN THE PETITIONER WAS ARRESTED FOR SUSPECT IN POSSESSION OF A CONTROLLED SUBSTANCE AND SUSPECT IN POSSESSION OF DRUG PARAPHENALIA, BUT SAID BOARD DID NOT MAKE A FINDING THAT PETITIONER WAS IN FACT IN POSSESSION OF A CONTROLLED SUBSTANCE OR IN FACT POSSESSION OF DRUG PARAPHERNALIA AND CONDITION #1 LAWS DOES NOT REQUIRE THE PAROLEE TO AVOID ARREST.

Fourteenth Amendment of the United States Constitution.....27

Article I, §10 of the Missouri Constitution.....27

14 CSR 80-4.020 Preliminary Hearing.....27

14 CSR 80-4.030 Revocation Hearing.....27

The White Book - The Rules and Regulations Governing the Conditions of Probation, Parole, and Conditional Release27, 28

III. PETITIONER REQUESTS THIS COURT TO ORDER PETITIONER DISCHARGED FROM THE SOUTHEAST CORRECTIONAL CENTER AND TO FURTHER ORDER THE MISSOURI BOARD OF PROBATION AND PAROLE TO EXPUNGE THE ALLEGED VIOLATION OF CONDITION #5, ASSOCIATION, FROM PETITIONER’S PAROLE FILE BECAUSE SAID BOARD ERRED IN FINDING THE PETITIONER VIOLATED CONDITION #5 ASSOCIATION, FIRST BECAUSE SAID BOARD RELIED UPON REFERENCES TO POLICE REPORTS THAT WERE CONTAINED WITHIN THE VIOLATION REPORTS AND SAID REPORTS CONSTITUTE IMPERMISSIBLE HEARSAY EVIDENCE, AND SECOND, NO INQUIRY OF ANY WITNESSES AS TO THIS CONDITION WAS PERMITTED BY THE BOARD, AND THIRD, MERE PRESENCE IN THE SAME LOCATION DOES NOT CONSTITUTE A VIOLATION OF CONDITION #5.

<i>Arciniega v. Freeman</i> , 404 U.S. 4, 92 S.Ct. 22, 30 L.Ed.2d 126 (1971).....	28
<i>United States v. LanFranca</i> , 955 F. Supp. 1167, 1169 (W.D.Mo.1997).....	28
<i>United States v. Romero</i> , 676F.2d406 (9thCir. 1982).....	29

IV. PETITIONER REQUESTS THIS COURT TO ORDER PETITIONER DISCHARGED FROM THE SOUTHEAST CORRECTIONAL CENTER AND TO FURTHER ORDER THE MISSOURI BOARD OF PROBATION AND PAROLE TO EXPUNGE THE ALLEGED VIOLATION OF CONDITION #6, DRUGS, FROM PETITIONER’S PAROLE FILE BECAUSE SAID BOARD ERRED IN FINDING THE PETITIONER VIOLATED CONDITION #6, DRUGS, OF THE CONDITIONS AND ORDER OF PAROLE, BECAUSE THEY BASED THEIR ACTIONS SOLELY UPON THE LAB REPORTS BUT DID NOT PERMIT THE PETITIONER TO CONFRONT AND CROSS-EXAMINE THOSE WHO ALLEGEDLY CONDUCTED SAID TESTS AND REFUSED TO GIVE A COPY OF SAID LAB REPORTS TO THE PETITIONER IN PREPARATION OF THE REVOCATION HEARING.

<i>Belk v Purkett</i> , 15 F.3d 803 (8 th Cir. 1994).....	30
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)	30
<i>State ex rel. Mack v. Purkett</i> , 825 S.W.2d 851 (Mo. banc 1992).....	30
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14 CSR 80-4.020 Preliminary Hearing.....	30
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Rights of Offender to Preliminary and Revocation Hearing

Department of Corrections, Board of Probation and Parole.....30

ARGUMENT

POINT I

Petitioner requests this Court to order Petitioner discharged from the Southeast Correctional Center and to further Order the Missouri Board of Probation and Parole to expunge the alleged Violation of Condition #1, Laws, from Petitioner's parole file because said Board erred in finding the Petitioner violated Condition #1, Laws, of the Conditions and Order of Parole, because the Board based their finding solely upon the Petitioner's testimony at the revocation hearing and the violation reports dated 2-9-02, 4-11-02, 4-17-02, 4-23-02, 4-24-02 and 5-01-02, violation reports that are unreliable and constitute impermissible hearsay evidence for the following reasons:

the reports were not offered into evidence through any witness who could be cross-examined as to the truth and veracity of the content of the reports;

the Petitioner objected to the truth and veracity of the contents of the violation reports;

the Petitioner did not Stipulate or agree to the truth and veracity of the reports;

the violation reports contained references to reports not written by any parole officer but by Police officers; and

the Board failed to make any specific findings of good cause for not allowing the petitioner to confront and cross-examine at the Revocation Hearing

the authors of the lab reports and the lab police reports referred to in the violation reports.

In reaching this conclusion the Board failed to follow the requirement that the Board had a duty to present witnesses at the Revocation Hearing so that the Petitioner could exercise his right to confront and cross-examine the witnesses against him and their failure to disclose to the parolee the evidence against him. Notice of the violations is a separate and distinct requirement with which the Board complied. These requirements were first set out in *Morrissey v. Brewer*, 408 U.S. 471, 486-87, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and adopted by the Missouri Supreme Court in *State ex rel. Mack v. Purkett*, 825 S.W.2d 851 (Mo. banc 1992), and reiterated by the Eighth Circuit Court of Appeals in *Belk v Purkett*, 15 F.3d 803 (8th Cir. 1994), adopted by the Missouri Legislature through the passage of §217.720 RSMo, and adopted by the Department of Correction's Board of Probation and Parole through the promulgation of 14 CSR 80-4.020 and 14 CSR 80-4.030 and as further articulated as a right of the Parolee in the Board of Probation and Parole's Red Book.

The court in *Morrissey* stated that the minimum requirements of due process include:

- (a) written notice of the claimed violations of parole;
- (b) *disclosure to the parolee of evidence against him*;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) *the right to confront and cross-examine witnesses (unless the hearing*

officer specifically finds good cause for not allowing confrontation);adverse

(e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and

(f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey, at 2604. (*Emphasis added*)

While Missouri has not codified these requirements verbatim, §217.720.2 RSMo requires a preliminary hearing and a revocation hearing conducted “...under such rules and regulations as the board may adopt.”

The Board did adopt rules for the preparation and conduct of both the Preliminary Hearing and the Revocation Hearing. 14 CSR 80-4.020 and 14 CSR 80-4.030. The Rules provide that at a Preliminary Hearing:

The hearing officer will initiate all questioning of witnesses and may terminate any questioning if the testimony becomes irrelevant, repetitious or excessive. 14 CSR 80-4.020(C).

It further states:

It will be the responsibility of the alleged violator to produce his/her own witnesses, and if s/he is in custody the officials in charge of the detaining facility will allow him/her to make contacts as may be necessary. *Id.*, at 14 CSR 80-4.020(C)2.

At Revocation Hearing the Board Rules provide:

The alleged violator may confront and cross-examine any adverse witness unless the board finds good cause for not allowing a confrontation or cross-examination. 14 CSR 80-4.030(E).

For the final revocation hearing, however, it is incumbent upon the state authorities to produce the witnesses upon whose testimony said authorities rely to strip a parolee of his liberty. Only when the hearing officer specifically finds good cause for disallowing confrontation is the state relieved of its burden. *Belk*, at 813.

There was no *specific* finding of good cause disallowing confrontation at the final Revocation Hearing. There was no *general* finding of good cause disallowing confrontation at the final Revocation Hearing.

If there had been a finding of good cause disallowing confrontation, the right of the Petitioner to confront and cross examine witnesses would be balanced against the grounds asserted for not requiring confrontation. *Mack*, at 855.

There are three factors that must be used in reviewing the basis for denial of confrontation. The Fact finder must assess: why confrontation is undesirable or impractical; whether the hearsay evidence sought to be admitted bears substantial indicia of reliability; and finally, whether the parolee challenges the accuracy of the hearsay evidence during the course of the hearing. *Mack*, at 856.

The Board fails the first factor of the balancing test because they made no finding. They fail the second factor because the hearsay evidence they relied upon cannot be shown to be reliable because, as in *Mack* and *Belk*, the hearsay aspect of the violation reports is compounded because the violation reports rely on earlier violation reports and

references to police reports and laboratory employees reports and none of the authors of any of the reports testified. The police reports alone without an officer to cross examine are unreliable. *Mack*, at 857. *Belk*, at 808. In fact, the Petitioner was able to impeach one of the Police Officers at the Preliminary Hearing, thus demonstrating the inherent unreliability of the officer's report.

The Board fails the third factor as well. The Petitioner has challenged the validity of the violations since the day he was arrested. He challenged them during the Preliminary Hearing, the Revocation Hearing and still today.

In addition, like *Belk*, the evidence was clearly not provided to the Petitioner. He was not provided any police or lab reports to examine prior to the hearing, only a synopsis of the evidence as provided for in the violation reports. *Belk*, at 812.

In addition to not following *Morrissey*, *Mack*, *Belk*, and the Rules they had promulgated, the hearing officer at the Preliminary Hearing failed to follow Missouri Board of Probation and Parole procedures in failing to record the Preliminary Hearing as required in their publication titled: "Rights of Offender To Preliminary and Revocation Hearing", but is popularly known as, and will be referred to herein as the "*Red Book*."

The purpose of the *Red Book* is stated in its Introduction as follows:

This booklet is designed to provide information and set out the rights of individuals who have been placed on probation, parole, or conditional release and who have become involved in alleged violations of the conditions of probation, parole, or conditional release.

Information contained in this booklet has been derived from Statutes of the State of Missouri, Court decisions, Attorney General's Opinions, rules of the Courts and policies of the Board of Probation and Parole.

Red Book –Introduction. (emphasis added)

The *Red Book* states the following as to the recording of preliminary hearings:

The preliminary hearing is mandatory in cases of the violation of condition #1, LAWS with no new conviction, or violation of condition #1 and related technical violation(s) only, when there is no admission by the parolee or conditional releasee that any of the violation(s) occurred. At these types of hearings, the adverse witness' testimony and cross-examination will be recorded on audio tape and forwarded to the Missouri Board of Probation and Parole.

Red Book - Preliminary Hearing (emphasis added)

The Red Book states the following as to right of the parolee to contact witnesses for the Preliminary Hearing:

It will be the responsibility of the offender to produce his/her own witnesses. If in custody, he/she is entitled to ample opportunity by the detaining authority to make such contacts as may be necessary to assure the appearance of the witnesses.

Red Book - Preliminary Hearing (emphasis added)

The Red Book states the following as to right of the parolee at the preliminary hearing:

At the hearing the offender has the following rights:

(1) the offender may present his/her own testimony in regard to the alleged violation, as well as present any documents or other evidence of mitigating circumstances, which may address the violation;

(2) the offender may present his/her own witnesses who can give relevant information concerning this violation. These witnesses cannot be character witnesses;

(3) the offender may confront or cross-examine any adverse witness unless the hearing officer determines that the witness may be subject to risk.

(4) as the preliminary hearing is an informal review to establish probable cause only, attorneys do not have a role to play in this particular process. Generally, any request to have an attorney present shall be denied. The only exception shall be when the hearing officer has reason to believe that the offender is incapable of understanding the proceedings;

(5) upon completion of the preliminary hearing, the hearing officer will forward a written report to the Parole Board or the Court for further action. The offender will receive a copy of the report as soon as possible.

Red Book - Preliminary Hearing (emphasis added)

The Red Book states the following as to right of the parolee at the Revocation hearing:

At the Revocation Hearing the offender has the following rights:

1) the offender may present his/her own testimony regarding violation and may present documents, evidence, or mitigating circumstances which may throw light on the violation;

2) the offender may present witnesses who have relevant information concerning the violation(s) and/or consideration for revocation;

3) the offender may confront and cross-examine any adverse witness, unless the Board or Court finds good cause for not allowing confrontation or cross-examination;

4) the parolee or conditional releasee may have a representative of their choice at the revocation hearing before the Parole Board. The representative may include a family member, a friend, an employer or legal counsel;

5) at parole and conditional release revocation hearings the offender, if found to be indigent may be provided legal counsel;

6) at probation/Court parole revocation hearings the offender, if found to be indigent, may have legal counsel as provided by the rules of the Court;

7) if the offender appears to be incapable of representing himself/herself, legal counsel may be provided; and

8) a statement by the Court or the Board as to the evidence relied on and reasons for revoking shall be supplied to the probationer, parolee or conditional releasee.

Red Book - Revocation Hearing

The Red Book states the following as to right of the parolee to contact witnesses for the Revocation Hearing:

It will be the offenders responsibility to produce his/her own witnesses and to pay any expenses incurred in preparation for or resulting from the hearing. He/She will be given an opportunity by officials to make such contacts as may be necessary to assure the appearance of any witness.

Red Book - Revocation Hearing. (emphasis added)

In addition to the Red Book, Department of Corrections Rules also requires the officials in charge of the detaining facility to allow the alleged violator the right to make contacts as may be necessary for attendance at a preliminary hearing. 14 CSR 80-4.020(3)(C)2 as authorized by §217.720.2 RSMo..

In addition to the Red Book, Department of Corrections Rules also permit a wide latitude in cross examination of witnesses at a preliminary hearing, limiting cross examination only if the hearing officer determines that the witness may be subject to risk of harm if their identity is disclosed. 14 CSR 80-4.020(3)(C)3 as authorized by §217.720.2 RSMo. Yet the officer restricted the Petitioner's cross-examination of witnesses at the Preliminary Hearing.

In addition to the Red Book, Department of Corrections Rules also requires the officials in charge of the detaining facility to allow the alleged violator the right to make contacts as may be necessary for attendance at the revocation hearing. 14 CSR 80-4.030(1)(D) as authorized by §217.720.2 RSMo..

In addition to the Red Book, Department of Corrections Rules also permit a wide

latitude in cross examination of witnesses at a revocation hearing, limiting cross examination only if the Board "... finds good cause for not allowing a confrontation or cross-examination. 14 CSR 80-4.030(1)(E) as authorized by §217.720.2 RSMo.

Unfortunately, there were no witnesses at the Revocation Hearing.

The Department Rules also permit wide latitude in the presentation of evidence by the alleged violator in that the Rule states that in addition to the alleged violator's own testimony, the alleged violator may present "...any other documents or evidence of mitigating circumstances which may throw light on the violation. 14 CSR 80-4.030(1)(D) as authorized by §217.720.2 RSMo.

In summary as to Point I, Petitioner was denied the right to contact any witnesses on his behalf to be present at the preliminary hearing.

Petitioner was denied the right to contact any witnesses on his behalf to be present at the revocation hearing.

The preliminary hearing wasn't recorded in violation of the Board of Probation and Paroles guarantee in their publication known as the "Red Book" when there is an alleged violation of Condition #1 LAWS.

Petitioner did not receive a copy of the police reports or lab reports referred to in the violation reports relied upon by the Board in making their decision to revoke the parole of the Petitioner.

Petitioner's inability to take notes prohibited him from effectively cross examining any witnesses at the preliminary hearing.

Petitioner was not afforded the opportunity to confront or cross-examine at the

revocation hearing the authors of the reports relied upon by the Board in making their decision to revoke the parole of the Petitioner.

There were no witnesses to confront or cross examine at the revocation hearing.

Petitioner was denied the right to question lab technicians at the revocation hearing and the Petitioner alleges that all that was before the Board was an unsigned lab report. Even if the Board had a signed report confirming the first unsigned report, the failure of the first report to be signed calls in to question its acceptance even under a business records exception and indicates an inherent unreliability of the reports.

Point II. Petitioner requests this Court to order Petitioner discharged from the Southeast Correctional Center and to further Order the Missouri Board of Probation and Parole to expunge the alleged Violation of Condition #1, Laws, from Petitioner's parole file because said Board erred in finding the Petitioner violated Condition #1, Laws, of the Conditions and Order of Parole when the petitioner was arrested for suspect in possession of a controlled substance and suspect in possession of drug paraphenalia, but said board did not make a finding that petitioner was in fact in possession of a controlled substance or in fact possession of drug PARAPHERNALIA and condition #1 Laws does not require the parolee to avoid arrest.

Revocation is impermissible as mere arrest does not violate Condition #1 Laws and therefore cannot be a basis for revocation. He was not violated for failing to obey the law which would require the Board to prove that he not only was arrested but was guilty of conduct that would constitute the disobedience of a particular state law.

The Rules and Regulations Governing the Conditions of Probation, Parole, and Conditional Release otherwise referred to by the Board as the *White Book* Provides:

1. LAWS: I will obey all federal and state laws, municipal and county ordinances.

I will report all arrests to my Probation and Parole Officer within 48 hours.

All of us are expected to obey the laws. If you are arrested at any time for any reason, you must report this arrest to your Probation and Parole Officer within 48 hours.

The Condition #1 laws requires the parolee to obey all laws, it does not state a

parolee cannot be arrested. The Board in their Order of Revocation and Report Relating to Revocation did not revoke the Petitioner because he did not obey the law, they revoked him because he was arrested. To revoke him merely because he was arrested violates the Petitioner's right of due process guaranteed by the Fourteenth Amendment of the United States Constitution and Section Ten, Article 1 of the Constitution of the State of Missouri, his right protected through the parole revocation procedures set forth by *Morrissey*, *Mack* and *Belk*, the Missouri Legislature and the Rules promulgated by the Missouri Department of Correction's Board of Probation pursuant to authority granted to them by §217.720 RSMo, and specifically §217.720.2 RSMo.

Point III Petitioner requests this Court to order Petitioner discharged from the Southeast Correctional Center and to further Order the Missouri Board of Probation and Parole to expunge the alleged Violation of Condition #5, Association, from Petitioner's parole file because said Board erred in finding the Petitioner violated Condition #5 Association, first because said board relied upon references to police reports that were contained within the violation reports and said reports constitute impermissible hearsay evidence, and second, no inquiry of any witnesses as to this condition was permitted by the board, and Third, mere presence in the same location does not constitute a violation of Condition #5.

Revocation of supervised release requires knowledge of the violation. *U.S. v. LanFranca*, 955 F. Supp. 1167, 1169 (W.D.Mo.1997). Mere incidental contact such as one caused by employment is not sufficient to be found to be an improper association. *Arciniega v. Freeman*, 404 U.S. 4, 92 S.Ct. 22, 30 L.Ed.2d 126 (1971). In this case Petitioner was at uncle's house as a result of an employment issue.

In *LanFranca*, a probationer was charged with, among other things, violating a condition of his probation forbidding association with persons convicted of a felony. *Id.* At 1168. LanFranca was in a car with another person who LanFranca knew had a conviction reversed by Missouri courts, but did not know that this person had a prior felony conviction in Kansas. *Id.* His condition of release did not include a "knowing" requirement, but the government argued that "a person on supervised release has the responsibility for determining the criminal history status of his associates." *Id.* The Federal District Court held that LanFranca had to know his associate was a convicted

felon for the government to alter his probation status, and relied on dicta in *United States v. Romero*, 676F.2d406 (9thCir. 1982).

Point IV Petitioner requests this Court to order Petitioner discharged from the Southeast Correctional Center and to further Order the Missouri Board of Probation and Parole to expunge the alleged Violation of Condition #6, drugs, from Petitioner's parole file because said Board erred in finding the Petitioner violated Condition #6, drugs, of the Conditions and Order of Parole, because they based their actions solely upon the lab reports but did not permit the petitioner to confront and cross-examine those who allegedly conducted said tests and refused to give a copy of said lab reports to the petitioner in preparation of the revocation hearing.

For this point Petitioner relies on his argument made pursuant to Point I in that no witnesses were present to testify as to even the admissibility of the lab reports under a business records exception. The first lab report was without any verification whatsoever and lacked any indicia of reliability. Given the unreliability of the first report the reliability of the second report is naturally called into question. But the failure to even cross-examine as to manner in which the report was prepared requires this court to find it unreliable and thus there existed no evidence to find the Petitioner violated Condition#6 Laws.

The Petitioner relies as well on the authorities supporting his arguments pursuant to Point I.

Petitioner further states that the fact that the Board's failure to produce the lab reports in advance of the hearing, the unsigned initial lab report and the failure to produce any witness to cross-examine in regard to the reports violates the principles of Mack and Morrissey as well as the Board's own Rule, and thus the Board's revocation of

Petitioner's Parole on this ground should be found to violate Petitioners right to due process.

CONCLUSION

In conclusion, Petitioner believes first that the failure of the Board to produce a single witness at the Revocation Hearing alone constitutes a violation of the Petitioner's right to due process sufficient to discharge the Petitioner from the Southeast Correctional Facility. But if you couple that fact with the fact that mere arrest does not constitute the failure to obey the law, and mere presence in the same building as a felon does not constitute "association", the Board's revocation of the Petitioner was a great injustice and this Honorable Court should discharge the Petitioner from the Southeast Correctional Center and expunge all records of such alleged violations immediately.

CERTIFICATE OF COMPLIANCE

In accordance with Rule 84.06 of the Missouri Rules of Civil Procedure, the undersigned certifies that the Petitioner's Opening Brief complies with the limitations contained in Rule 84.06(b) and that the number of words in this brief is 5750 words, as counted by the word processing system used in preparing this brief, Microsoft Word '97. The undersigned further certifies that the disk accompanying this Brief has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) true and correct copies of the foregoing **Petitioner's Opening Brief** were mailed, postage prepaid on this 16th day of January, 2004, to:

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