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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

STATEMENT OF FACTS

Petitioner would respectfully request this court to permit him to correct a statement of fact that appeared in his Jurisdictional Statement of his brief that was filed on January 16, 2004, and within the discussion of Point Relied On III wherein he state that he was at his uncle's house when he was arrested. He was not at his uncle's house, he was at a residence where his uncle was working and had gone there in order to deliver a message to his uncle. (Respondent's Brief, Appendix, at A5).

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.

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.

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.

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.

REPLY TO RESPONDENT'S ARGUMENT

I. This case is not moot because the Board of Probation and Parole has set aside its revocation of Petitioner's parole and scheduled Petitioner for a new final revocation hearing, and a new final revocation hearing is not needed to cure the irregularities that existed in Petitioner's previous final revocation hearing.

Respondents' argument first asserts that the case is moot because the Board of Probation and Parole has set aside its revocation of Petitioner's parole and scheduled a new revocation hearing "and thus will cure any irregularities that may have existed in Petitioner's previous final revocation hearing." (Respondents Brief, at 10). The irregularities that existed in the final revocation hearing and the preliminary hearing need not be cured in any other way other than this court restoring the Petitioner to parole status, discharge him from the facility where he is currently incarcerated, and issuing a prohibition against any further revocation hearings that would be based upon the same set of facts as the violations at issue in this habeas proceeding and a full expungement of the Petitioner's file at the Missouri Department of Corrections and the Missouri Board of Probation and Parole as to any of the parole violations at issue in this habeas proceeding.

A. Petitioner's claims attack both the preliminary revocation hearing and the final revocation hearing, as well as the failure to disclose evidence to the Petitioner.

Respondents have summarized the Petitioner's Points Relied On as they view them but not as they were stated in Petitioner's brief. Petitioner has restated those Points Relied On in this Reply and from those Points Relied On this court can see that the Petitioner attacks both hearings as well as the Board's failure to disclose evidence as required by ***Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972),** and ***State ex rel. Mack v. Purkett,* 825 S.W.2d 851 (Mo. banc 1992)**.

B. Petitioner's claims attacking the preliminary revocation hearing were properly pled and have merit.

Respondent's mistakenly asserts that "…petitioner does not raise any claims attacking the preliminary revocation hearing in his Points Relied On." In Points II and III Petitioner specifically pleads within the Points Relied On first, that Condition #1 Laws, does not require the parolee to avoid arrest and second, that mere presence at the same location does not constitute a violation of condition #5 Association. In Point IV Petitioner pleads specifically that the Petitioner was not permitted to confront or cross-examine those who allegedly conducted the tests and Respondents refused to give a copy of said lab reports to the Petitioner in preparation of the revocation hearing. Such pleadings clearly apply at both the Preliminary revocation hearing stage where probable cause must be established and at the Final revocation hearing.

Petitioner has complied with the Rule. But even if this court would determine that Petitioner did not technically comply with the Rule, this court has ruled in the past that it is preferable not to dismiss a habeas corpus proceeding on a technical point. *State ex rel Mack v. Purkett,* 825 S.W.2d (Mo. banc 1992).

The Petitioner's claims attacking the preliminary revocation hearing were not abandoned and should not be deemed to be abandoned by this court.

Respondents' spend a significant amount of time in their argument that even though the Red Book gives the Parolee the right to have his preliminary hearing recorded, the Red book is not the law… not a statute or *a decision of any court*…" and as a result, there is no deprivation of due process rights. Of course this court can change that and provide a court decision that holds that the denial of rights granted by the Respondents in their "Red Book", which is as they say in the book "The ***rights*** of offender to preliminary and revocation hearing" is a denial of due process. (emphasis added).

Respondents also assert that the Petitioner's inability to take notes did not prohibit him from effectively cross-examining the witnesses at the preliminary hearing. Respondents offer the cross-examination of police officer William Noonan (Respondents' Brief at 13) as evidence that the Petitioner effectively cross-examined witnesses. What Respondents' don't say specifically is that on direct Noonan stated he saw Petitioner spit a plastic bag out of his mouth, and then on cross-examination by Petitioner, admitted to Petitioner that he had not seen Petitioner spit a bag out of his mouth. Police Officer Noonan lied. Why can't the Respondents just say that? Their police officer lied.

Respondents also state that Petitioner has failed to "*…establish anything not already in the accounts of the cross-examination that he could have elicited from the police offers (sic) or the probation officer if he been able to take notes. Thus, petitioner fails to show that he was prejudiced in the least."*

What might the Petitioner have done at the preliminary hearing if he could have taken notes?

When you are not permitted to take notes it is sometimes difficult to remember and reconstruct significant lines of questioning. However, because Respondents have been so kind to finally, and for the first time, provide Petitioner with a copy of the lab reports at issue, (Respondents brief, Appendix, at A14 – A15), Petitioner can demonstrate how he was prejudiced by not being able to take notes and not being provided with copies of the lab reports.

First, lets examine the report that appears on page A14 of the Respondents' Brief's Appendix. The report is a Final Report from the Missouri Department of Corrections Toxicology Laboratory-St. Louis, located at 220 South Jefferson, St. Louis, Missouri. It is not located in California so it really wouldn't have been a hardship for whoever did the analysis to appear at the preliminary or revocation hearing.

The report states in the upper left hand corner that it was printed on 4/09/02 at 10:42 AM by SMP. It does not state who SMP is. On the left hand side of the page it also states that the donor ID is 177729, name is Aziz, Wasim, control # is 0402 and the test date is 04/09/02 and the test time was 10:11. It does not say AM or PM.

The report states that the Agency is the Eastern Region District 8C, but does not list the Requesting Party. It does say the date collected was 4/02/00, *two years prior to testing*. Two years before Petitioner was arrested. In fact Petitioner was still incarcerated in April of 2000. It states the time collected as 0 but does not state by whom it was collected. It states it was created by SMP. It states the test for cocaine and opiate was

negative, the test for THC(Marijuana) positive and creatinine 341.6.

Notes might have been helpful to have been able to write down the above facts so that when the above report is compared to the Department of Corrections Request for Urinalysis/Chain of Evidence (A15) some of the discrepancies could be easily pointed out.

On this second report on page A15 of the Respondents' Brief' Appendix we see that three men's samples were taken on April 1, 2002. The Petitioner's was not taken until 4:30 p.m. However, in the Chain of Evidence section a signature in the "FROM" section appears to be that of John Buck, presumably the parole officer who testified at the preliminary hearing. He signed out the samples, as indicated by the line that begins "FROM", at 3:00 p.m. on 4-1-02, one and one-half hours before the Petitioner gave a sample.

Where it went from Mr. Buck is more confusing. The report says it went "TO" "Courier", but does not state the name of the courier or where the courier is from. But the date on the "TO" line says it did not go to the courier until 4-8-02 at 9:00 a.m. But it does not say what happened between "FROM" John Buck and "TO" courier, seven days. The next line is also "TO" and it was TO Sal Paez, but it appears there was simply a signature stamp. It says it went TO him on 4/9/02 at 1:30 p.m. There is no explanation as to why it did not get to the lab until 4/9/02 at 1:30 p.m. But what we do know from the lab report is that the test that allegedly indicates marijuana usage by the Petitioner was done three hours and nineteen minutes before the Petitioner's sample that was allegedly collected on April 1, 2002, got to the lab. Again, the laboratory report states that the

Petitioner's sample was allegedly collected on April 2, 2000.

It would have been nice to have been able to cross-examine Mr. Buck and the Lab technician on these points, but clearly if you only examine the lab reports, the same lab reports that Respondents state bear a substantial indicia of reliability, there was not even probable cause at the preliminary hearing to find the Petitioner was in violation of condition #6 Drugs.

C. This case is not moot because Petitioner will receive a new revocation hearing.

Respondents assert that "This Court cannot grant petitioner more relief than the Board of Probation and Parole already has: reinstatement to parole status and a new final parole revocation hearing. *See* ***Mack***, 825 S.W.2d at 858." They are mistaken. First they misconstrue *Mack*. The court in *Mack* at the page referenced by Respondents simply says: "Petitioner is discharged from the revocation of his parole and restored to his status as a parolee without prejudice to the Board instituting further revocation proceedings." *Id.*, at 858. There is no dicta, let alone a holding, stating that this court cannot discharge a habeas petitioner, with prejudice. It is dependent upon the particular facts and circumstances of the case. In fact "If no legal cause be shown for the imprisonment or restraint, or for the continuation thereof, the court shall forthwith discharge such party from the custody or restraint under which he is held. §532.380. RSMo.

Further the law specifically prohibits one who has been discharged pursuant to a habeas proceeding from being imprisoned, restrained or kept in custody for the same cause. §532.550 RSMo. The law states it shall not be the same cause:

(1) If he shall have been discharged from a commitment on a criminal charge, and be afterward committed for the same offense by the legal order or process of the court wherein he shall be bound by a recognizance to appear, or in which he shall be indicted or convicted for the same offense; or

(2) If, after a discharge for defect of proof, or for any material defect in the commitment in a criminal case, the prisoner may again be arrested on sufficient proof, and committed by legal process for the same offense; or

(3) When the discharge in any case has been ordered on account of the nonobservance of any of the forms required by law, and the party is again arrested for imprisonment, by legal process, for sufficient cause, and according to the forms required by law.

In this habeas proceeding the Petitioner has proved both a defect in form and substance, defects that cannot be corrected in a future proceeding and if the form was corrected would lead to a finding of no probable cause.

The Petitioner should be discharged with prejudice.

II. Petitioner is entitled to a writ of habeas corpus because the Board of Probation and Parole improperly and unlawfully revoked parole in that the Board improperly and unlawfully determined that Petitioner violated Condition #6, Drugs, bybasing that finding on a laboratory report that is unreliable.

The Respondents have properly restated the law as to *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33L.Ed.2d 484 (1972). However the evidence that Respondents have submitted to this court shall prove conclusively that there was no probable cause to revoke the Petitioner based upon violation of Condition #6 Drugs.

A. Petitioner was improperly and unlawfully revoked on the drug violation.

Respondent incorrectly states the status of a parolee's right to confrontation in preliminary and final revocation hearings:

> "This Court has employed a three-factor balancing test in order to determine whether a parolee has a due process right to confrontation in a parole revocation hearing."

The court in *Mack* stated that there <u>*is*</u> a due process right to confrontation at parole revocation hearing. *Mack*, at 855. But it is less stringent than the Sixth Amendment right of confrontation at a criminal trial. Id. It is the exact boundaries of the right that must be examined on a case by case basis, not whether the right exists. Id. The right to confrontation is balanced against the grounds asserted by the government for not requiring confrontation. Id.

While stating that several factors must be evaluated, this Court in Mack discussed

three specific factors that needed to be evaluated in order to properly examine the government's basis *for dispensing with confrontation*, not whether the parolee has a due process right to confrontation in a parole revocation hearing. *Mack,* at 855-858.

An analysis of the factors used in Mack and applied to the facts of this case prove beyond any doubt that the Petitioner's rights have been violated.

Respondents assert that:

> The Board of Probation and Parole relied on the lab report, independent of any other testimony, to find that petitioner had used marijuana. Resp.App. at A8. (Respondents Brief at 18).

A careful examination of the very lab report and chain of custody document submitted to this court in the Respondents Appendix at A14 and A15 does not indicate a "very high indicia of reliability" as asserted by Respondents, but in fact indicate a careless and unreliable handling of evidence that has cost the Petitioner almost two years of incarceration.

Let us break down the Respondents' argument using the entries contained within the documents they have submitted to this court in support of their position, documents that for the first time, as a result of their submission as a part of Respondents Appendix, Petitioner has been provided copies.

Respondents state:

> *The lab report and its accompanying chain of custody document show that petitioner had a urine sample taken on April 1, 2002, that was taken at the local parole office and delivered to the Missouri Department of Corrections Toxicology*

Laboratory in St. Louis. Resp.App. at A14-A15. (Respondents Brief at 18).

The Department of Corrections Request for Urinalysis/Chain of Evidence (Respondents Brief, Appendix, (A15)) reflects the fact that the Petitioner had a sample taken on April 1, 2002. In fact it states it was taken at 4:30 p.m. But the Chain of Custody does not reflect that the sample was delivered to the Missouri Department of Corrections Toxicology Laboratory in St. Louis on April 1, 2002.

Respondents then state:

> *The sample was taken by John Buck and received by Sal Paez at the laboratory. Resp.App. at A15.*
>
> (Respondents Brief at 18).

Respondents make the above statement without any declaration of time or date independent of the documents at issue. The Chain of Custody report reflects that the sample was taken from the Petitioner on April 1, 2002, at 4:30 p.m. (Respondents Brief, Appendix A15). John Buck is reflected as the Drug Test Coordinator, but the report does not specifically say whether Buck personally retrieved the sample from the Petitioner or merely supervised someone else who was responsible for retrieving the sample. Id.

The Chain of Custody document does contain John Buck's name and signature in the Chain of Evidence section but it does not reflect a direct exchange between Buck and Paez as may be inferred by the Respondents' statement: *The sample was taken by John Buck and received by Sal Paez at the laboratory*. Id.

The Chain of Custody document reflects that John Buck gave something to someone on April 1, 2002, at 3:00 p.m. Id. The reliability of the document and the

reliability of the chain of custody is brought into question because the Chain of Custody document submitted to this court by the Respondents reflects that the Petitioner's sample was not taken until 4:30 p.m., one and one-half hours after Mr. Buck delivered the samples to someone. Id. Petitioner uses the term "someone" because the Chain of Custody document indicates that Mr. Buck signed the "FROM" line on "April 1, 2002, at 3:00 p.m. but the "TO" line that is immediately below the "FROM" line containing Mr. Buck's name fails to state a name and corresponding signature, but only contains the printed word "courier". Id.

To further reduce the indicia of reliability of the document and the chain of custody of the Petitioner's sample, the "TO" line containing "courier" is dated April 8, 2002, at 9:00 a.m. Id. Almost seven days after the "FROM" line containing Mr. Buck's name. Id. What happened during this seven day period?

The very next "TO" line, immediately below the "TO" line containing the word "courier", is the name "Sal Paez" and what appears may be signature stamp for Sal Paez with only the word "lab." in the block for "institution district office". Id. Further reducing the indicia of reliability of the document and the chain of custody of the Petitioner's sample, is the fact that this line is dated April 9, 2002, and the time of the transaction is recorded as 1:30 p.m. Id. A day and one-half after the courier's receipt was recorded. What did the courier do for one and one-half days?

Obviously this REQUEST FOR URINALYSIS/CHAIN OF EVIDENCE document does not bear a substantial indicia of reliability as it relates to the Petitioner's urine sample.

In fact it may not be the Petitioner's sample at all. It may be the sample of Timothy Smith whose name and number is also contained within the document and whose number appears in the comments section and name appears in the screening block at the bottom of the page. Id.

If the Petitioner's urine sample was not taken until 4:30 p.m. this document would support the fact his sample was not delivered by Mr. Buck to anyone, as Mr. Buck transferred samples at 3:00 p.m., one and one-half hours before taking a urine sample from the Petitioner. Id.

Respondents Brief ignores this problem with the chain of custody and goes on to state:

> *The toxicology report bears Paez's initials, the time and date of the toxicology tests, and reference ranges for the tests. Resp.App. at 5.*
>
> (Respondents Brief, at 18).

I assume the Respondents are referencing the report at A14 of Respondents' Brief – Appendix, as Resp. App. at 5, is the table of authority and A5 is the Parole officer's report discussing the alleged laws and association violations. While the report bears the initials SMP, the initials are typed not handwritten. There is nothing specifically in the report that states it was Sal Paez.

The report does indicate the time and date of the tests, April 9, 2002, at 10:11 a.m. Three hours and nineteen minutes before the samples that are covered by the chain of evidence report previously discussed were received by Sal Paez. (Respondents' Brief – Appendix, A14 and A15).

This report also lists the name Aziz, Wasim. (Respondents' Brief – Appendix, A14). However this reports states that the sample was collected on April 2, 2000. Id. That is two years before the sample referred to in the Request for Urinalysis/Chain of Evidence Document. (Respondents' Brief – Appendix, at A15). The Petitioner had not yet been paroled on April 2, 2000.

Another factor that reduces the indicia of reliability in this document is the fact that it does not state who actually conducted the tests. It simply states that SMP printed the report at 10:42 a.m. on April 9, 2002, and that the report was reviewed by SMP. The report does not contain any names or signatures of anyone conducting the test and thus does not possess the indicia of reliability required under either *Mack* or *In re Carson*, 789 S.W.2d 495 (Mo. App. 1990).

The respondent in summarizing his point that the Petitioner's point should be denied states:

> *Here, as in Bell, petitioner has presented absolutely no evidence that any form of cross-examination would have assisted him as petitioner makes only conclusory statements that the process may have been flawed. Petitioner also did not produce any evidence that he had not used drugs prior to his April 1, 2002, test. In sum, petitioner fails to show that he has any avenue to show that the tests were not reliable. Confrontation is this case would have been impractical and undesirable because, as the Eighth Circuit stated, cross-examination of urinalysis chemists "rarely leads to any admissions helpful to the party challenging the evidence." Id.*

The Petitioner consistently asked for copies of the lab reports. The Field Violation Report states that when finally shown, but not given copies, of the lab reports he questioned the "handling of the sample and the labeling" and asked who had done the tests. He requested a copy of the reports and was denied. (Respondents' Brief – Appendix, A6). He did not receive a copy until he received the Respondents Brief. Once he was in possession of such reports, he has more than adequately shown that the reports upon which the Respondents have stated they relied are fatally flawed as they relate to any incriminating information against the Petitioner, and in fact are exculpatory in nature.

The failure to provide all of the reports related to the urine sample and the failure to produce the toxicologist and the courier constitute a due process violation.

In addition the report that appears on page A14 of the Respondents' Brief' Appendix, a Final Report from the Missouri Department of Corrections Toxicology Laboratory-St. Louis, indicates the lab is located at 220 South Jefferson, St. Louis, Missouri. It is not located in California so it really wouldn't have been a hardship for whoever did the analysis to appear at the preliminary hearing that took place at the St. Louis Community Release Center.

B. Petitioner's other due process claims

Respondents state that any error with regard to the Petitioner's claims of violation of his rights to due process when the Board revoked him based alleged violations of Condition #1 Laws and Condition #5 Association without providing him the right to confrontation or failing to make the necessary factual finding as required for Condition #1 Laws is harmless because of the Board "…properly found that petitioner violated

condition six, drugs." (Respondents' Brief, at 21).

The Petitioner has established that the Board's revocation based upon Condition #6 Drugs was improper and unlawful, therefore the other errors are not harmless. The Respondents have admitted as much as they have attempted to correct the problem by scheduling a new revocation hearing and state the same more broadly in the next section of their argument when they state: "Even though due process problems exist with regard to violations of conditions 1 and 5….

C. There is no drug violation, therefore there is no violation sufficient to sustain the parole revocation.

Respondents state:

> *Even though due process problems exist with regard to violations of conditions 1 and 5, the Board's decision to revoke parole is proper because the Board properly determined that petitioner violated condition 6, drugs.*

As stated previously, the Petitioner has proven with Respondents' own evidence that evidence of the Condition #6 Drugs violation is nonexistent, let alone unreliable, and because Respondents have admitted the Petitioner's rights of due process were violated as applied to Condition #1 Laws and Condition #5 Association, the Petitioner should be discharged from the correctional facility in which he is detained and the Board prohibited from pursuing a violations hearing based upon the evidence submitted in this habeas proceeding.

III. The Board of Probation and Parole improperly revoked Petitioner's parole because Petitioner did not associate with Clark Newsome, a convicted felon, in that Petitioner was not involved with drugs at the same residence as Newsome and was not associating with Newsome.

Respondents have misstated the facts when they allege:

> *At the time of his arrest, petitioner was "keeping company" in the same room as Clark Newsome and three other individuals, all of whom were engaged in drugs and arrested for various drug offenses.* (Respondents' Brief at 24).

First, Petitioner was not keeping company with Mr. Newsome, and was not in the same room as the Respondents' Brief states. Id. Nor was being in the same room the basis for the violation. The basis for the violation was that Petitioner was in the same residence. In fact, the Field Violation Report that is cited as the authority to state Petitioner was in the same room says the Petitioner was in the same "residence" and that was the basis for the violation, being in the same residence, not room. (Respondents' Brief –Appendix- at A5).

Quoting from the report:

> *Aziz wanted further explanation of how he was associating with Mr. Newsome, to which Officer Buck explained that, since he was in the same residence with Mr. Newsome at the same time, that was considered association." Id.. (emphasis added).*

Respondents misstate the evidence again when they state the Petitioner was "engaged in drugs" with Mr. Newsome and three other individuals. Petitioner has always

proclaimed his innocence of being in possession of any drugs and has never been proven to have possessed drugs that day. Thus there is no evidence to support Respondent's statement that "petitioner and four other men all possessed drugs". Petitioner has never been convicted of possession of drugs that day.

Under Respondents' logic a parolee would have to inquire of everyone he meets at every location and in every room of every structure in which he enters as to whether or not a felon is present somewhere in the structure.

Respondent states:

> *Petitioner clearly believed that he was doing something wrong or he would not have attempted to escape through a bedroom window.*

Unfortunately for Respondent a higher level of proof is needed than the assumption that first he was in fact trying to escape through a bedroom window and second that even if he was that meant he did something wrong.

Respondent also states:

The Board is entitled to disbelieve petitioner's testimony and credit the officers' testimony.

The Board is also entitled to disbelieve a police officers testimony, especially after one of the other officers admitted he lied.

Respondents have already admitted due process violations pursuant to the Board finding of a violation of Condition #5 Association. Therefore Petitioner should be discharged from the correctional facility in which he is currently being detained and the Board prohibited from holding any hearing based upon the same facts leading to this

habeas proceeding.

Petitioner requests this Court to order Petitioner discharged from the correctional facility in which he is currently being detained, prohibit the Board from holding any hearing based upon the same facts as this habeas case 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.

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 because the fact that mere arrest does not constitute the failure to obey the law, and mere presence in the same building in which another felon is located does not constitute "association", and finally the fact that the lab reports related to the alleged drug violation are patently unreliable, the Board's revocation of the Petitioner was a great injustice and this Honorable Court should discharge the Petitioner from the correctional facility in which is being detained and expunge all records of such alleged violations immediately and further explicitly prohibit the Board of Probation and Parole from pursuing revocation of the Petitioner's parole based upon any of the allegations that constituted the basis for this habeas proceeding.

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 5660 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 corrected Table of Contents of the **Petitioner's Reply Brief** were mailed, postage prepaid on this 16th day of March, 2004, to:

Andrew W. Hassell
Assistant Attorney General
P. O. Box 899
Jefferson City, Missouri 65102
Fax # (573) 751-3825

copy to:

Mr. Wasim Aziz, #177729
Southeast Correctional Center
6D108
300 East Pedro Simmons Drive
Charleston, Missouri 63834

_____
Joseph P. Bednar, Jr.