NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 2058

RHG

WILLIAM POWELL

VERSUS

LOUISIANA PAROLE BOARD
AND STATE OF LOUISIANA

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 573,219, Section 25
Honorable Wilson Fields, Judge Presiding

William Powell
Cottonport, LA

Plaintiff-Appellant
In Proper Person

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Baton Rouge, LA

Attorneys for
Defendant-Appellee
Louisiana Parole Board

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered May 6, 2011

Hughes, J., concurs.

Guidry, J., concurs.

PARRO, J.

William Powell, an inmate in the custody of the Louisiana Department of Public Safety and Corrections (DPSC), appeals a district court judgment affirming the decision of the Louisiana Board of Parole (the Parole Board) to revoke his parole. We affirm the judgment and render this opinion in accordance with Rule 2-16.2(5), (6), (7), and (8) of the Uniform Rules of Louisiana Courts of Appeal.

The record shows that Powell, a convicted sex offender, was on parole when, on February 15, 2008, he was arrested in New Orleans and charged with attempted forcible rape. As a result, a detainer for a possible parole violation was placed on him by the DPSC's Division of Probation and Parole, alleging a Rule Number 8 violation of conditions of parole. Rule Number 8 requires the parolee to "refrain from engaging in any type of criminal conduct." Powell signed a copy of the notice of preliminary hearing that specified this violation; he initially requested that the preliminary probable cause hearing be deferred until disposition of the new felony charge. Because of the victim's failure to appear and to cooperate with the prosecution, the charge against Powell was ultimately dismissed by the district attorney on April 11, 2008.

A preliminary hearing to determine if there was probable cause to believe there had been a violation of the conditions of his parole was held on July 30, 2008, where Powell appeared and was represented by counsel; probable cause was found to hold him for a parole revocation hearing. On October 2, 2008, Powell and his attorney participated in a parole revocation hearing before the Parole Board, where he testified and had the opportunity to present evidence and cross-examine any witnesses. After receiving all the testimony and evidence, the Parole Board revoked his parole for the Rule Number 8 violation, which constituted a violation of a condition of his parole.

Powell filed a petition for judicial review in the Nineteenth Judicial District Court, claiming that, since he was not convicted of any crime while on parole, the revocation of his "good-time" parole for "engaging in any type of criminal conduct" was a violation of his right to due process under the 14th Amendment of the United States

Constitution. He also alleged that LSA-R.S. 15:574.11(A) was unconstitutional if applied to "good-time" parolees, that the use of the preponderance of the evidence standard used by the Parole Board to revoke his parole was a violation of his 14th Amendment right to due process, that his 6th Amendment right to be free from hearsay evidence and to confront and cross-examine adverse witnesses was denied by the Parole Board, and that his procedural due process rights under LSA-R.S. 15:574.9 were violated by the Parole Board.[1] DPSC filed a response to his petition and attached the entire administrative record from the Parole Board, including the auditory recording of the revocation hearing. After reviewing all the evidence, the commissioner to whom the case had been assigned recommended that the Parole Board's decision be upheld, because a preponderance of the evidence established that Powell had been engaged in criminal activity, even though the district attorney had decided not to prosecute the case, and because Powell's rights to constitutional due process and a revocation hearing under LSA-R.S. 15:574.9 were not violated by the Parole Board. The district court judge agreed with the recommendation, affirmed the decision of the Parole Board, and dismissed Powell's petition at his cost. This appeal followed.[2]

We have reviewed the record and the commissioner's recommendation, a copy of which is attached as Appendix A. The record of the parole revocation hearing shows that Powell was notified of the hearing, was represented by counsel, and had the opportunity to challenge the allegations of the charge against him, to present witnesses, and to testify on his own behalf concerning the incident that had resulted in his arrest. We find no manifest error or legal error in the commissioner's

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[1] In Leach v. Louisiana Parole Bd., 07-0848 (La. App. 1st Cir. 6/6/08), 991 So.2d 1120, 1124, writs denied, 08-2385 (La. 8/12/09), 17 So.3d 378, and 08-2001 (La. 12/18/09), 23 So.3d 947, this court held that although LSA-R.S. 15:574.11(A) generally precludes an appeal from a decision of the Parole Board, under Subsection C of that statute, a district court has appellate jurisdiction over pleadings alleging a violation of LSA-R.S. 15:574.9, which sets out the procedures to be followed by the Parole Board in conducting a revocation hearing. Accordingly, an appeal is allowed when the parolee has alleged in his petition for judicial review that his right to a revocation hearing has been denied or that the procedural due process protections specifically afforded by LSA-R.S. 15:574.9 in connection with such a hearing were denied. An aggrieved party may appeal a final judgment of the district court to the appropriate court of appeal. LSA-R.S. 15:574.11(C).

[2] Powell initially filed an application for supervisory writs, which was granted by this court. The district court was ordered to act on Powell's motion for appeal and return date request. Powell v. Louisiana Parole Board, 09-1726 (La. App. 1st Cir. 11/23/09) (unpublished writ action).

recommendation,[3] which was adopted by the district court as its reasons, and the findings of fact and conclusions of law expressed therein adequately explain the judgment of the court. Therefore, we affirm the judgment and assess all costs of this appeal to William Powell.

AFFIRMED.

[3]The commissioner did not address Powell's contention that his due process rights were violated by the delay between his detention and the revocation of his parole. Powell himself requested deferment of the preliminary probable cause hearing until the charges against him had been resolved. This occurred on April 11, 2008, when the district attorney dismissed those charges. The preliminary probable cause hearing was held July 30, 2008, about three and one-half months after the charges were dismissed. In light of the efforts being made during that time by Powell's parole officer, his attorney, and an investigator hired by his attorney to locate the victim of the alleged attempted rape, we do not find this delay prejudiced Powell. The final revocation hearing was held October 2, 2008, just two months and two days after probable cause had been found to continue his detention. Therefore, we find no violation of Powell's due process rights as a result of the length of time between his detention and the revocation of his parole.

APPENDIX A

WILLIAM POWELL

VERSUS

LOUISIANA PAROLE BOARD

NUMBER: 573,219 SECTION 25

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

POSTED

JUN 02 2009

COMMISSIONER'S REPORT

The Petitioner, an inmate in the custody of the Louisiana Department of Public Safety and Corrections, filed this appeal seeking reversal of his parole revocation October 2008. By law, R.S. 15:574.11, this Court has only limited appellate jurisdiction over parole revocation complaints, and thus, the suit is being considered as an appeal of the revocation decision.[1] The Parole Board filed the entire Administrative record of the revocation proceedings, including the auditory record of the hearing, all of which has been marked as Exhibit A (documentary record) and Exh. B (audio record) in globo in the suit record for review.

Both parties were notified of their right to file briefs and those have been considered and are in the record for the Court's review. This report is issued on the record for the Court's de novo consideration and adjudication on the merits of the Petitioner's complaint.

ANALYSIS OF THE FACTS AND LAW

At the outset, the Court notes that parole is an act of grace by the State[2], and the Legislature has placed the authority to make decisions ordering parole and /or the revocation thereof in the executive branch, i.e. the State Parole Board.[3]

> "A. Parole is an administrative device for the rehabilitation of prisoners under supervised freedom from actual restraint and the granting, **conditions or revocation of parole rests in the discretion of the Board of Parole. No prisoner or parolee shall have a right of appeal from a decision of the Board regarding** release or deferment of release on parole, the imposition or modification of authorized conditions of parole, the determination or restoration of parole supervision . . . or the **revocation or reconsideration of revocation of parole except for the denial of a revocation hearing under R.S. 15:574.9.**"[4]

A state court's authority to oversee the parole revocation process is limited to insuring that due process is afforded in the revocation process.[5] Upon a finding, such as in this case, that the Petitioner's procedural due process rights have been violated, this Court is limited by the separation of powers clause and R.S. 15:574.11 to reversing the revocation decision and remanding for rehearing.

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[1] See Also Madison *v. Ward* 825 So2d 1245 (1st cir. 2002).
[2] *Parkerson v. Lynn* 556 So2d 95 (1st Circuit 1994).
[3] See R.S. 15:574.4(E); R.S. 15:574.7; R.S. 15:574.9 and R.S. 15:574.11.
[4] R.S. 15:574.11; see also *Madison v. Ward*, supra.
[5] See *Morrissey v. Brewer*, 92 S.Ct. 2593 (1972).

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In this case, the record shows that the Petitioner was revoked for criminal conduct—attempting to forcibly rape a woman in New Orleans in the early morning hours of February 15, 2008. The following facts appear not to be in dispute from the audio and documentary evidence in the record—that the Petitioner met the alleged victim, who was highly intoxicated, on or around Canal Street. She asked him to take her to another part of town, either to meet a friend or to get a hotel room and something to eat. At some point, he parked his van in a somewhat secluded/industrial area of town, ostensibly intending to have sexual intercourse with the alleged victim. The Petitioner indicated it was to be consensual sexual intercourse, but at some point, the Harbor police pulled up behind the van. At that time, the victim, for reasons not explained by the Petitioner, she jumped out of the van with no clothing on her lower body, yelling for help and that the Petitioner tried to rape her. At that point, the Petitioner drove off, again without explanation in the record, leaving the alleged victim and the police behind. He was located shortly thereafter when he had a wreck in his van. According to the police report, which is not denied or explained by the Petitioner, when he was located, he was removing the victim's clothing from his van. He was returned to the scene of the incident, at which time, the victim positively identified him as the man who had tried to rape her.

He was arrested, but the victim failed to cooperate with the prosecution of the case. It was ultimately dismissed for failure of the victim to come to court and pursue the charges.

The Petitioner had another preliminary hearing before a Parole Department Supervisor wherein his parole officer and his attorney were present. The only witnesses who gave statements were the Petitioner and one of the arresting officers who arrived on the scene before the Petitioner was returned and identified there. The police report was also considered in evidence, and included hearsay evidence of the victim.

According to the record, Mr. Powell stated that "the victim was distraught and thought someone was going to hurt her." The preliminary hearing report states that "He claims that her demeanor suddenly changed several times. She also jumped out of the van, but he turned around and picked her back up. He claims that they agreed to have consensual sex.....The victim claims that she was in a bar in the French Quarter and thought Powell was a friend of a friend.[6]... They ended up in a dark wooded area where Powell tried to talk her into having sex with him. When she refused, he forced her pants and panties off. She wrestled with him and was able to jump from the van. Several attempts were made to contact the victim, but to no avail. We were able to contact the detective on the scene, Cliff Neely. Det. Neely state that the victim positively identified Powell as the person who tried to rape her. Powell claims he

[6] The victim's statements are only included in the police reports and the officer's statement at the preliminary hearing. The victim was not able to be located.

panicked and fled the scene, crashing his vehicle a short distance away. As the police approached the vehicle, Powell was removing items that belonged to the victim".[7]

The Hearing Officer noted in his "synopsis" of the preliminary hearing evidence that the modus operandi of this incident was similar to that of Mr. Powell in crime of Attempted Aggravated Rape for which he was apparently on parole at the time:

> "There appears to be a mirror image of the instant offense as Powell has the same mode of operation. In the instant offense, Att. Agg. Rape, Powell claims that the victim was distraught and needed his help. He also claims that the victim became hysterical and jumped out of his vehicle. The victim claims she was at a party and went outside to talk to her ex-boyfriend. They were sitting in a car when approached by Powell who identified himself as a DEA Agent. Powell then drove off with the victim his vehicle. Powell parked his vehicle in an empty parking lot and at knifepoint, threatened and attempted to rape the victim, Mary M [in the crime for which he is on parole]."[8]

At the Preliminary Hearing, according to the Report, the Petitioner was present with Counsel, and he agreed with many of the details in the police reports admitted, but disputed the fact given by the victim therein that they met in a bar.[9] He stated that the victim wanted to go to a bar in New Orleans East that was in a hotel, but did not specify where precisely. He stated they agreed to have consensual sex, but later she got very angry and tried to jump out of the van. He let her off, but turned around and picked her back up, at which time, he stated she again changed her demeanor and became friendly. She then agreed to have sex with him and began disrobing, but the police arrived with red lights going, and she again became angry and jumped from the van, crying for help. Mr. Powell stated he panicked and fled.

Det. Neely, of N.O. Sex Crimes also testified that he was called to the scene of an alleged rape and that he was told that the Petitioner was discarding the victim's items when he was located by the arresting officers. Neely stated that the victim, V.A., "immediately identified him as the person who tried to rape her." The officer stated that the victim related the information that was in the police report that had been entered into the preliminary hearing record and referred to by the Petitioner.

Upon cross examination, the officer stated that he saw no bruises or marks on the victim and he was unaware if the victim had changed her "story" during the course of the night.

The Preliminary Hearing officer found probable cause to believe the Petitioner had committed a crime based on the fact that the victim was without clothes on her lower body when she jumped from his van yelling for the police to help her. I note that it is significant that the

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[7] See Preliminary Hearing Report in Exh. A. it is not clear what was "hearsay" and what Det. Powell and/or Mr. Powell stated from their own recollections.
[8] See Exh. A, the Preliminary hearing Officer's Report, p. 2.
[9] Parolees are prohibited from entering bars while on parole.

Petitioner does not dispute these facts, only that he did not attempt to rape her, but only to have consensual sex with her. In addition, the Preliminary Hearing Officer also found significant that the Petitioner fled the scene in an apparent attempt to escape the police.

The primary fact in dispute in this case is whether the attempted sexual contact was consensual or not and the legal question before the Court is whether there is "some" direct evidence that it was not, sufficient to meet the due process guarantee. For reasons stated hereinafter, I opine that there is some direct evidence from which the Board could conclude that the act was a crime—and not consensual.

First, the Petitioner does not dispute that the victim was drunk and half-naked when she jumped to the police from his van, somewhat hysterical. Those are the facts in the reports that are admitted by the Petitioner. Further, the investigating officer was present when the victim identified the Petitioner as the man who tried to rape her. While the act itself is disputed by the Petitioner, he does not dispute that the victim called it nonconsensual, and attempted rape.

The circumstances of the entire incident, the time and place of the incident and the fact that the Petitioner fled the scene immediately, are all facts that were considered important by the parole authorities.

The Petitioner, on the other hand, relies on the fact that the DA refused to prosecute based on the victim's lack of cooperation and failure to appear in Court (and at the preliminary hearing on the revocation issues). He alleges that she changed her story several times, but there is no factual evidence in support of that conclusion in the record.

At the outset of the legal analysis, the Court notes that the proceedings in parole revocation hearings are less formal and more flexible than in criminal proceedings. Most importantly, the standard of proof necessary to revoke is much less than that in criminal court—by a preponderance of evidence as opposed to *beyond a reasonable doubt.* In addition, hearsay evidence is allowable and due process is more limited in a revocation proceeding:

> "The U.S. Supreme Court jurisprudence extends limited due process protection to the **parolee** or probationer, and the **revocation** hearing is considered an informal, flexible proceeding, not a stage of criminal prosecution. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998). Therefore, 'the full panoply' of the constitutional rights afforded the defendant in the criminal proceedings are not provided the probationer. *Morrissey v. Brewer, supra; Gagnon v. Scarpelli, supra.*[10]

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[10] See *State v. Michael* 891 So.2d 109, 113 La.App. 2 Cir.,2005.

While an arrest per se does not suffice to **revoke** parole[11], the Parole board is authorized to consider hearsay and circumstantial evidence, in addition to any direct evidence in deciding whether it is more likely than not that the parolee committed a crime.

R. S. 15:574.2-11 vests the parole board with wide discretion when a condition of parole is violated and it is clear that the legislature intended for the Board to consider the facts of the case, the seriousness of the misdeed, and the needs of the parolee as well as the public.

Due process requires that the Parolee be given an opportunity to explain the circumstances relating to the violation before the board decides on whether to revoke parole. In this case, the Petitioner was given a preliminary and final hearing, wherein he was represented by retained counsel. He was allowed to give his version of events, which he did very hesitantly and carefully in the audio record of the final hearing. He sought to diminish the significance of the victim's leap from his van half-clothed, by explaining that she had a sudden change in her demeanor from affectionate to angry.[12] The Board considered his claim that the victim consented to sex in the van, but concluded from the circumstances of the incident that it was more likely nonconsensual.[13] Even though the victim did not appear at the criminal proceeding or the parole proceedings, there is significant adverse circumstantial evidence from which the Board could have concluded that the incident was non-consensual. Much of the circumstantial evidence was not disputed by the Petitioner, including the victim's state of undress, her apparent anxiety, anger or distress when she jumped from the van to yell for the help of the police and the fact that the Petitioner quickly fled from the police when the victim got out of the van. In addition, the investigating officer on the scene was present when the victim identified the Petitioner as the person who attempted to rape her.

Given the circumstances that are not disputed in the record, I cannot suggest that the board's decision to revoke is in violation of the standard of proof or of the Petitioner's constitutional rights. While the Petitioner is correct that arrests alone are insufficient for revocation, this record contains other undisputed facts and evidence from which the Board could reasonably conclude that it was more likely than not that the petitioner committed a criminal act against the alleged victim. The fact that he was not prosecuted is an element to be considered, but does not legally prohibit the Board from revoking for criminal conduct. In fact, conviction of the attempted rape would negate any need for a revocation hearing, as it, by itself, results in automatic revocation.

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[11] *Baggert v. State* 350 So.2d 652, 655 (La. 1977). See also *State v. Harris* 368 So.2d 1066(La., 1979), *State v. O'Conner*, 312 So.2d 645 (La.1975); *State v. Harris*, 312 So.2d 643 (La.1975).
[12] See the Preliminary Hearing Report, summary of the Petitioner's statement. It is noted that at the final hearing, the audio record shows that the Petitioner did not attempt to address the issue of the victim's state of undress and her apparently attempt to "escape" from his van to the police.
[13] See audio record of the final hearing.

Thus, the legislature put in place an alternative to automatic revocation—i.e. a full hearing to determine by preponderance of the evidence—wherein the Board may consider actual evidence that a crime was committed irrespective of whether the DA actually prosecutes the case. In other words, the board is allowed to and is required to consider the facts that indicate criminal conduct. In this case, there is no actual evidence from the DA's office in the record to show the precise reason for dismissal or nolle-prossing the case. But, it appears clear that the victim was either unable to be located or was not a cooperative witness and thus, the State chose not to pursue the case. This decision is not evidence of innocence per se, as often, for a variety of reasons other than that the accused is innocent; a prosecution does not go forth. Very often it is because of a non-cooperative victim, or an inability to locate a victim, as it seems here, or because it may be difficult to meet the heavy burden of proof beyond a reasonable doubt, or because of evidentiary problems that apply only to criminal proceedings. These difficulties do not prevent a parole Board from revoking the parole for commission of criminal conduct, shown by preponderance of the evidence. A parolee's rights are limited, and include those fundamental rights discussed by the Supreme Court in *Morrissey v. Brewer.*

> "Both to prevent such an abuse of discretion and to guarantee a defendant minimal due process, the Supreme Court formulated certain basic guidelines for parole and probation revocation hearings. They 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 adverse witnesses** (unless the hearing officer specifically finds good cause for not allowing confrontation); (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 fact finders as to the evidence relied on and reasons for revoking parole.**" Morrissey, at 408 U.S. at 489, 92 S.Ct. at 2604. Accord, Baggert v. State, 350 So.2d 652 (La.1977); State v. Harris, 368 So.2d 1066 (La.1979).[14]"

In this case, the Petitioner was afforded a preliminary hearing, based on the record, at which he and his counsel were present and had the opportunity to review the evidence against him, to cross examine one of the investigating officers who was present at the scene of the incident. He was also given the opportunity to testify and present any evidence he had in support of his defense. While he did not produce evidence that the charge was dismissed by the DA in Court, it appears clear from the record that the Parole authorities accepted this as a fact, and that they determined under the lesser burden of proof –by a preponderance of evidence— that the Petitioner had committed a crime.

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[14] *State v. Rideau 376* So.2d 1251, p. 1253 (La., 1979.)

That finding, as long as it is based on "some" evidence, including hearsay, direct and circumstantial, is unassailable in a Court of law. R. S. 15:574.11 limits this Court's review to the proceedings alone, and whether those proceedings afforded the due process referred to in the *Morrissey* case.

By brief, the Petitioner also raises an argument that the board cannot revoke any paroles wherein a prosecution is dismissed, basing his argument on language in R. S. 15:574.10 that imposes liability on the State for revocations of non-final convictions that are overturned on appeal. However, that statute only applies to the automatic revocations based on convictions of a new crime. The logical basis for the State's liability is the fact that in the case of the automatic revocation, the Board is relieved of holding a hearing at all and does not provide the parolee with all the rights inherent therein—and required by *Morrissey*. Therefore, when the State takes advantage of the automatic revocation without a hearing, it also takes on the responsibility to pay for lost wages if that conviction is not upheld on appeal.

Clearly, R. S. 15:574.10 applies only to those automatically revoked without a hearing and not to the situation as here, where the parolee is given a full hearing, with all rights accorded under the Constitution.

Consequently, for reasons stated herein, this Court has no authority to second-guess the factual findings of the Board and thus, no authority to overturn the decision to revoke. This Court is not authorized to reweigh the credibility of the witnesses or to countermand the discretionary determination of facts by the Board. Considering that the Board's decision is based on some evidence that a crime was committed, and given the circumstances that support that finding by a preponderance of evidence, I suggest that this Court is constrained to affirm the decision and deny this appeal.

IN SUM

The record sufficiently supports a finding that due process was afforded in all revocation proceedings. Even though the Petitioner was not tried for or convicted of any offense, and the victim did not pursue the charge or the revocation, there were undisputed facts and/or evidence showing that the victim was drunk, distraught and half naked when she leapt from the Petitioner's van in the early morning hours seeking help from the police. There was also evidence that the Petitioner sought to escape from the police and was caught only when he wrecked his van. Finally, there is evidence that he was arrested for attempted rape, and that he acknowledged that he intended to have sex with the victim, but it was consensual. Finally, the Petitioner is on parole for a similar crime, which the board noted concern about.

COMMISSIONER'S RECOMMENDATION

Having considered the entire administrative record and the briefs of the parties and the law applicable, for reasons stated hereinabove, I suggest that the Board's decision did not violate Due Process, and therefore, the decision must be affirmed and this appeal dismissed with prejudice at the Petitioner's costs.

Respectfully recommended, this 8th day of April 2009 at Baton Rouge, Louisiana.

RACHEL P. MORGAN,
COMMISSIONER, SECTION A
NINETEENTH JUDICIAL DISTRICT COURT

FILED
Apr 08 2009
DY. CLERK OF COURT
COMMISSIONER CT. SEC. A

I HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS/JUDGMENT/ORDER/ COMMISSIONER'S RECOMMENDATION/WAS MAILED WITH SUFFICIENT POSTAGE AFFIXED TO: ALL PARTIES. SIGNED THIS 9 DAY OF April 2009.

DEPUTY CLERK OF COURT