

1989

# Humphries v. Deland and Barnes : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 9-722-CA

Case No. 890722-CA

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Humphries, Petitioner and  
Appellant

IN THE UTAH COURT OF APPEALS

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THOMAS R. HUMPHRIES,	)	
	)	
Petitioner and Appellant,	)	
	)	Priority No. 3
	)	
vs.	)	
	)	
GARY DELAND, and M. ELDON	)	Case No. 890722-CA
BARNES	)	
	)	
Respondents.	)	

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BRIEF OF APPELLANT

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, JUDGE FRANK G. NOEL

TO REVIEW ORDER GRANTING RESPONDENTS' MOTION TO DISMISS  
PETITION FOR WRIT OF HABEAS CORPUS

---

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IN THE UTAH COURT OF APPEALS

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THOMAS R. HUMPHRIES,	)	
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GARY DELAND, and M. ELDON	)	Case No. 890722-CA
BARNES	)	
	)	
Respondents.	)	

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JURISDICTION

Mr. Humphries filed a petition for writ of habeas corpus, which was dismissed by order of the district court on November 13, 1989. The Court of Appeals has jurisdiction to decide this appeal pursuant to Section 78-2a-3(2)(g) of the Utah Judicial Code (Utah Code Ann. § 78-2a-3(2)(g) (Supp. 1989).

NATURE OF PROCEEDINGS

This appeal is from the Order of the Third Judicial District Court, Salt Lake County, dismissing petitioner's writ of habeas corpus.

STATEMENT OF ISSUES

The primary issue on appeal is whether the district court has authority to review the actions taken by the Board of Pardons at Mr. Humphries' parole eligibility hearing. Decision on this issue is reached by considering the following collateral issues:

1. Does Mr. Humphries have a right of due process, as guaranteed by the Constitution of the United States, at the Board of Pardons parole eligibility hearing?

2. Does Mr. Humphries have a right of due process, as guaranteed by the Constitution of the State of Utah, at the Board of Pardons parole eligibility hearing?

3. Were the actions of the Board of Pardons at Mr. Humphries' parole eligibility hearing violative of the Utah enabling statutes under which the Board operates?

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

The following U.S. and Utah constitutional provisions are determinative:

**U.S. CONSTITUTION - AMENDMENT V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**U.S. CONSTITUTION - AMENDMENT XIV**

**Section 1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Article I, Section 7 of the Constitution of Utah**

"No person shall be deprived of life, liberty or property, without due process of law."

**Article VII, Section 12 of the Constitution of Utah.**

**[Board of pardons -- Respites and reprieves.]**

Until otherwise provided by law, the Governor, Justices of the Supreme Court and Attorney General shall constitute a Board of Pardons, a majority of whom, including the Governor, upon such conditions, and with such limitations and restrictions as they deem proper, may remit fines and forfeitures, commute punishments, and grant pardons after convictions, in all cases except treason and impeachments, subject to such regulations as may be provided by law, relative to the manner of applying for pardons; but no fine or forfeiture shall be remitted, and no commutation or pardon granted, except after a full hearing before the Board, in open session, after previous notice of the time and place of such hearing has been given. The proceedings and decisions of the Board with the reasons therefor in each case, together with the dissent of any member who may disagree, shall be reduced to writing, and filed with all papers used upon the hearing, in the office of the Secretary of State.

The Governor shall have power to grant respites or reprieves in all cases of convictions for offenses against the State, except treason or conviction on impeachment; but such respites or reprieves shall not extend beyond the next session of the Board of Pardons; and such Board, at such session, shall continue or determine such respite or reprieve, or they may commute the punishment, or pardon the offense as herein provided. In case of conviction for treason, the Governor shall have the power to suspend execution of the sentence, until the case shall be reported to the Legislature at its next regular session, when the Legislature shall either pardon, or commute the sentence, or direct its execution; he shall communicate to the Legislature at each regular session, each case of remission of fine or forfeiture, reprieve, commutation or pardon granted since the last previous report, stating the name of the convict, the crime for which he was convicted, the sentence and its date, the date of remission, commutation, pardon or reprieve, with the reasons for granting the same, and the



objections, if any, of any member of the Board made thereto.

Section 77-27-5(3) of the Utah Code of Criminal Procedure, set forth below, is also determinative:

The determinations and decisions of the Board of Pardons in cases involving approval or denial or any action, of paroles, pardons, commutations or terminations of sentence, orders of restitution, or remission of fines, forfeitures, and restitution, are final and are not subject to judicial review. Nothing in this section prevents the obtaining of enforcement of a civil judgment.

Utah Code Ann. § 77-27-5(3) (Supp. 1989).

#### STATEMENT OF THE CASE

##### Nature of the Case

Mr. Humphries filed a petition for writ of habeas corpus in the Third Judicial District Court, challenging the Board of Pardons actions in determining his parole date at his eligibility hearing on March 24, 1989.

##### Course of Proceedings

This appeal is from the Order of the district court dismissing petitioner's writ of habeas corpus. Mr. Humphries was convicted of issuing a bad check by the Second Judicial District Court, Davis County. Mr. Humphries filed a pro se petition for writ of habeas corpus in May of 1989, seeking a determination that he was denied effective assistance of counsel at his criminal trial, that he was denied compulsory process at trial, that the evidence at his trial was insufficient to establish his guilt beyond a reasonable doubt, and that he was denied due process of law at his eligibility parole hearing before the Board

of Pardons when it considered inaccurate information as to Mr. Humphries' prior criminal record in setting his parole date.

The State filed a motion to dismiss Mr. Humphries' petition on May 22, 1989, and a supplemental motion to dismiss on June 28, 1989. Following a hearing before Judge Noel on August 25, 1989, the State's motion to dismiss was granted as to every issue but the Board of Pardons denial of due process issue.

Following the submission of written memoranda by counsel as to the remaining portion of the State's motion to dismiss the petition for writ of habeas corpus, the district court dismissed Mr. Humphries' petition by order dated November 13, 1989.

#### Disposition at District Court

The State's motion to dismiss Mr. Humphries' Petition for Writ of Habeas Corpus was granted. The district court's minute entry dated October 24, 1989, noted that "Section 77-27-5(3) Utah Code Annotated prevents the Court from reviewing the decision of the Board of Pardons, as Petitioner is here asking the Court to do. For this reason and for the reasons stated in Respondents' memo the motion to dismiss is granted."

#### **ARGUMENT**

##### Summary of Argument

The Board of Pardons actions in considering two prior felony convictions erroneously indicated on Mr. Humphries' prior criminal record in determining Mr. Humphries' parole date were violative of his rights of due process under the United States

and Utah constitutions. Those same actions constitute violations by the Board of Pardons of the State statutes that create and empower the Board of Pardons.

The district court has the fundamental authority and duty to review the Board of Pardons actions to decide these constitutional and statutory questions. Section 77-27-5(3) of the Utah Code of Criminal Procedure does not preclude review of Board of Pardon actions that impinge on constitutional protections nor those actions that constitute violations of the State's enabling statutes.

The State was not entitled to dismissal of the habeas corpus petition without an evidentiary hearing at which Mr. Humphries could establish that his parole date was inappropriately lengthened when the Board of Pardons improperly considered and relied on an inaccurate history of Mr. Humphries' prior criminal convictions.

I. Mr. Humphries had a Right of Due Process Under the U.S. Constitution at his Board of Pardons Parole Eligibility Hearing.

When a state adopts a parole system, it may create an expectancy of release which is worthy of Federal due process protection (the so-called "liberty interest"). See, e.g., Board of Pardons v. Allen, 482 U.S. 369, 96 L.Ed. 2d 303, 107 S.Ct. 2415 (1987) (the Montana parole scheme created a liberty interest protected by the due process clause); Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 60 L.Ed. 2d 668, 99 S.Ct. 2100 (1979) (the Nebraska statute under review

created an expectancy of release entitle to some constitutional protection).

Neither the Utah Supreme Court nor the Court of Appeals has yet decided whether the Utah parole system creates due process protections for inmates at the parole eligibility hearing stage. However, this Court has approached the issue previously. In White v. Board of Pardons, 114 Utah Adv. Rep. 31 (July 31, 1989), the Court, in dismissing a writ of mandamus petition to review the Board of Pardon's decision as frivolous, carefully noted: "Under the circumstances of this case, petitioner has not demonstrated that the Board's actions violate a substantial constitutional right." (emphasis added). The Court has left the door open to consider the constitutional rights afforded by the parole system.

Examining the Utah parole scheme in light of the statutes reviewed by the Supreme Court in Greenholtz and Allen, the Utah statute grants the Board of Pardons broad discretion in administering the parole system. So too do the Nebraska and Montana statutes reviewed in Greenholtz and Allen. As the Court in Greenholtz noted, the Nebraska parole statute is lenient in its notice and hearing provisions and does not require a submission of all evidence on which the board of pardons makes its decision. By contrast, the Utah Constitution requires its Board of Pardons to hold hearings "in open session, after previous notice of the time and place of such hearing has been given. The proceedings and decisions of the Board, with the

reasons therefor in each case . . . shall be reduced to writing, and filed with all papers used upon the hearing . . . ." Article VII, Section 12, Constitution of Utah.

This distinction in the Utah law, requiring full disclosure and reasoned decisions in Board of Pardon deliberations, is critically important in assessing the "liberty interest" of an inmate in parole eligibility hearings. As the Supreme Court in Greenholtz stated: "It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.' . . . The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions." 442 U.S. at 12-13 (citations omitted).

The State of Utah has placed the highest value it can, inclusion in the State's Constitution, on having a complete record of all information considered by the Board of Pardons in its hearings. Further, the Board must make its decisions in writing, "with the reasons therefor." The very concept of full disclosure and reasoned opinions carries with it the requirement that evidence before the Board be as accurate as possible, and the judicial system has found that accuracy is promoted by granting interested parties the right to confront and correct inaccuracies. From that accuracy of information, inmates naturally expect fair and evenhanded treatment from the Board in establishing parole dates. If the information is inaccurate, inmates have a right, a fundamental right of due process, to

correct the record, to confront the inaccuracies, in the hope of receiving a fair parole date. That is a liberty interest protected by the Federal Constitution, and created by the Utah parole system.

II. Mr. Humphries had a Right of Due Process Under the Utah Constitution at his Board of Pardons Parole Eligibility Hearing.

Section 7 of Article I of the Constitution of Utah provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." While State due process requirements must at least meet Federal due process standards, there is not prohibition against providing additional due process protections.

In Hurst v. Cook, 777 P.2d 1029 (1989), the Utah Supreme Court, in discussing factors that could justify successive petitions for writ of habeas corpus, noted the "fundamental unfairness" factor. In a footnote the court explained: "The United States Court of Appeals for the Tenth Circuit apparently believes that our 'fundamental unfairness' ground is a constitutional due process ground. . . . It is not that. There can be occasions where a trial was infected with a fundamental unfairness that would not meet federal due process standards." Id. at 1037 n. 10 (citation omitted).

Similar reasoning can be used by this Court to find that the Board of Pardons consideration of inaccurate information in determining Mr. Humphries' eligibility for parole violated a "fundamental unfairness" test, whether or not Federal due process

rights were violated. Whether the test is denoted State procedural due process or common law, it should be invoked to protect the integrity of the parole hearing process, particularly in light of the State's avowed interest in complete and accurate information being before the Board of Pardons.

III. The Board of Pardons' Actions Were in Violation of State Statutes.

The Board's actions in considering false prior criminal records and refusing to allow Mr. Humphries to refute the false information, as alleged by Mr. Humphries, are violative of the Board's enabling statutes. The State's motion to dismiss assumed the accuracy of Mr. Humphries' allegations. The propriety of court review of Board of Pardon decisions, and the necessity of the Board's abiding by the statutes creating it, were both reinforced by the recent decision of Andrews v. Haun, 779 P.2d 229 (1989). In Andrews, the Utah Supreme Court held that the Board of Pardons erred by not disclosing certain documents that were before it as required by Section 12 of Article VII of the Utah Constitution.

Even in the face of Andrews, the State argued (successfully at the district court) that, as a matter of law, Mr. Humphries has no protectible interest in the accuracy of information before the Board at his parole eligibility hearing and has no forum in which he can challenge the Board's action in giving weight to the inaccurate information in rendering their parole eligibility decision. The logical result of the State's

reasoning is that, while the Constitution requires full disclosure of all information relied upon by the Board of Pardons in rendering its decisions, that information can be completely erroneous and no illegality has occurred and no recourse lies for the decision rendered on the basis of the erroneous information. That cannot be the law.

Conclusion

The courts have the authority and the responsibility to review Board of Pardon decisions when those decisions are made in violation of an inmate's right of due process or when they involve violation by the Board of its State statutory and constitutional mandate. Mr. Humphries is entitled to an evidentiary hearing to test the validity of his claims.

DATED: February 26, 1990.

MOYLE & DRAPER, P.C.

By



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CERTIFICATE OF SERVICE

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