

2009

William Sherratt v. Utah Board of Pardons, et al. : Brief of Appellee

Utah Court of Appeals

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William Sherratt; Pro Se.

Brent A. Burnett; Assistant Attorney General; Attorney for Appellee.

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IN THE UTAH COURT OF APPEALS

WILLIAM SHERRATT,	:	
Petitioner / Appellant,	:	
v.	:	Case No. 20090310-CA
UTAH BOARD OF PARDONS, et al.,	:	
Respondents / Appellees.	:	

BRIEF OF RESPONDENTS / APPELLEES

Appeal from the Judgment of the Third Judicial District Court, Salt Lake County,
Judge Denise Posse Lindberg

BRENT A. BURNETT (4003)
Assistant Attorney General
160 East 300 South, Fifth Floor
P. O. Box 140858
Salt Lake City, Utah 84114-0858
Telephone: (801) 366-0533
Attorney for Respondents / Appellees

WILLIAM SHERRATT
Inmate Number 30335
P.O. Box 250
Draper, Utah 84020
Petitioner / Appellant

**ORAL ARGUMENT AND PUBLISHED OPINION NOT
REQUESTED BY RESPONDENTS / APPELLEES**

**FILED
UTAH APPELLATE COURTS**

SEP 16 2009

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LIST OF ALL PARTIES

To the best of Respondents' / Appellees' knowledge, all interested parties appear in the caption of this Brief.

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BRIEF OF RESPONDENTS / APPELLEES

STATEMENT OF JURISDICTION

This action comes within the original jurisdiction of the Utah Supreme Court under Utah Code Ann. § 78A-3-102(3)(i) (West Supp. 2009). It was transferred to this Court on May 14, 2009, pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

1. Sherratt cannot challenge the validity of his convictions in a Rule 65B petition for extraordinary relief against the Utah Board of Pardons and the Utah State Prison.

ISSUE PRESERVED BELOW. This issue was raised in the respondents' motion to dismiss. R. 497-98.

STANDARD OF REVIEW: The legal reasoning of a court granting an extraordinary writ is reviewed for correctness. Rice v. Div. of Securities, 2004 UT App 215, ¶4, 95 P.3d 1169.

2. Sherratt has no federal constitutional right to parole. He was given the due process mandated by the Utah State Constitution. No constitutional right of the petitioner was violated.

ISSUE PRESERVED BELOW. This issue was raised in the respondents' motion to dismiss. R. 493-511.

STANDARD OF REVIEW: The legal reasoning of a court granting an extraordinary writ is reviewed for correctness. Rice v. Div. of Securities, 2004 UT App 215, ¶4, 95 P.3d 1169.

DETERMINATIVE STATUTES AND RULES

All such provisions are set forth verbatim in Appendix A to this brief.

STATEMENT OF THE CASE

William Sherratt filed this petition for extraordinary relief on May 3, 2006. R. 1-294. The district court ordered the Attorney General's Office to respond to the petition on December 19, 2008. R. 441-43. On January 21, 2009, the respondents, Utah Board of Pardons and the Utah State Prison, filed their answer (R. 465-77) and their motion to dismiss. R. 478-808. The motion to dismiss was granted on February 18, 2009. R. 856-64. Sherratt filed his notice of appeal on March 10, 2009. R. 886.

STATEMENT OF RELEVANT FACTS

William Sherratt was convicted of two counts of rape, a first degree felony. R. 517. He was sentenced to two concurrent terms of five years to life on May 30, 2000. R. 518. On July 3, 2000, the Utah Board of Pardons scheduled Sherratt's original parole

hearing to be held during the month of May, 2005. R. 521. Originally, the board asked that an alienist report be prepared before the hearing. On March 25, 2004, the board decided that it didn't need an alienist report for the original parole hearing. R. 523.

Sherratt's original parole hearing was held on May 5, 2005. Before the hearing, Sherratt was given copies of the material that was in the board's file that would be considered at the hearing. He acknowledged receipt of this material. R. 535, 559.¹

On May 12, 2005, the board decided to give Sherratt a rehearing date of February, 2009. The board requested that a sex offender therapy memo be prepared prior to the rehearing. R. 525. The board also gave Sherratt notice of what aggravating circumstances it relied upon in reaching its decision. R. 527.

SUMMARY OF ARGUMENT

Sherratt seeks to challenge the validity of his two rape convictions through an action brought against the Utah State Board of Pardons and the Utah State Prison. The district court correctly refused to consider these claims in a Rule 65B proceeding. They need to be properly brought under Rule 65C.

Petitioner's constitutional claims also fail. Sherratt has no federal constitutional right to parole. Under Utah law, he has a limited due process right to be given notice of the date of his original parole hearing and access to the material that will be considered by

¹ Sherratt, at his request, was given a copy of the transcript of the original parole hearing. R. 555-75.

the board at the hearing. Sherratt acknowledged verbally and in writing that he had received this due process. No Utah constitutional right of the petitioner was violated.

ARGUMENT

I. A RULE 65B PETITION CANNOT BE USED TO CHALLENGE THE PETITIONER'S CONVICTIONS

Many of the issues raised by the petitioner in his opening brief deal with challenges to his convictions. Sherratt's claims concerning his convictions are not proper subjects for a Rule 65B petition. Sherratt sought to use his petition to challenge his criminal convictions under the guise of complaining that the Board of Pardons did not properly consider his claims that his convictions were defective. To do so would bring into question the validity of his convictions. But the present action is a Rule 65B petition challenging the actions of the Board and the Utah State Prison. Petitioner has failed to identify any authority the respondents might have to reverse his convictions. The attack upon petitioner's convictions cannot be raised in this proceeding. Utah Rule of Civil Procedure 65C provides the proper procedure for such a challenge.

The basis upon which "a person may petition the court for extraordinary relief" under rule 65B now only includes any of the grounds set forth in paragraph (b) (involving wrongful restraint on personal liberty), paragraph (c) (involving the wrongful use of public or corporate authority), or paragraph (d) (involving the wrongful use of judicial authority, the failure to exercise such authority, and actions by the Board of Pardons and Parole). Utah R. Civ. P. 65B(a) (2003). The use of rule 65B is limited to cases "[w]here no other plain, speedy and adequate remedy is available," and the scope of relief under paragraph (b) for "[w]rongful restraints on personal liberty," Utah R. Civ. P. 65B(a)-(b), is now narrowed to "proceedings involving wrongful restraint on personal liberty other than those governed by Rule 65C." Utah R. Civ. P. 65B (2003) advisory

committee note (emphasis added). Therefore, because rule 65C governs proceedings filed under the PCRA, which is the governing statute for "any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies," Utah Code Ann. § 78-35a-102(1), rule 65B is not applicable in a challenge focused on a criminal conviction, even if a restriction on liberty results from the conviction.

Manning v. State, 2004 UT App 87, ¶18, 89 P.3d 196, aff'd on other grounds, 2005 UT 61, 122 P.3d 628..

While the Utah Supreme Court affirmed Manning on other grounds, it agreed with this Court that "a defendant may no longer file a petition pursuant to rule 65B(b) in 'instances governed by Rule 65C.'" Manning v. State, 2005 UT 61, ¶23, 122 P.3d 628.²

The district court correctly rejected these claims as inappropriately brought in the present action. R. 860 ¶10. That decision should be affirmed on appeal.

II. PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED

Sherratt claims that his constitutional rights were violated by the manner in which the board held the petitioner's initial parole hearing. Sherratt had no federal constitutional right that was implicated in the board's decision-making process. His Utah constitutional rights were not violated.

² This is not the first time that Sherratt has improperly sought to challenge his convictions in a Rule 65B proceeding. In Sherratt v. Friel, 2007 UT App 3, *2, this Court held that "Sherratt's rule 65B petition for extraordinary relief was not a proper vehicle to challenge his underlying conviction." A copy of this unpublished decision is attached as Addendum C.

Unless Sherratt could show the existence of a federally protected liberty interest in parole, no federal constitutional right was implicated by the board's actions. He must first have a legitimate claim of entitlement to parole. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1978). "Not only is there no constitutional or inherent right to receive parole prior to the expiration of a valid sentence, but, absent state standards for the granting of parole, decisions of a parole board do not automatically invoke due process protections." Malek v. Haun, 26 F.3d 1013, 1015 (10th Cir. 1994). In Malek, the Tenth Circuit Court of Appeals held that there is no federal constitutional right implicated by Utah parole decisions.

Utah law mandates that board decisions be accorded great deference and, as a general rule, board decisions are not subject to judicial review. Walker v. State, 902 P.2d 148, 150 (Utah App. 1995). Indeed, the board has exclusive authority to determine the actual number of years a defendant is to serve, Preece v. House, 886 P.2d 508, 512 (Utah 1994)(citations omitted), and courts do not "sit as a panel of review on the result, absent some other constitutional claim." Lancaster v. Utah Bd. of Pardons, 869 P.2d 945, 947 (Utah 1994).

Only two limited exceptions allow for judicial review of Board decisions: 1) to assure that procedural due process was not denied, Labrum v. Utah State Bd. of Pardons, 870 P.2d 902 (Utah 1993) and 2) where there has been a clear abuse of discretion. Ward v. Smith, 573 P.2d 781, 782 (Utah 1978). Judicial review addresses "the fairness of the process by which the Board undertakes its sentencing function," not the result. Padilla v.

Utah Bd. of Pardons & Parole, 947 P.2d 664, 667 (Utah 1997) (citations omitted).

“[T]wo due process requirements must be met in parole grant hearings. First, an inmate must receive adequate notice to prepare for a parole hearing. Second, an inmate must receive copies or a summary of the information in the Board’s file upon which the Board will rely in deciding whether to grant parole.” Peterson v. Utah Bd. of Pardons, 931 P.2d 147, 150 (Utah App. 1997) (citations omitted).

The acknowledgement form signed by Sherratt on April 26, 2005, states that he received the documents the board would consider over a week before his original parole hearing. R. 535. The same document also shows the date of the parole hearing would be May 5, 2005. At the hearing, Sherratt agreed that he had been given an opportunity to review this information and that he was comfortable in proceeding with the hearing. R. 559.

Nor was any constitutional right violated by the fact that Sherratt’s access to sex offender therapy was limited because of his refusal to admit that he was guilty of his crimes. R. 537-44. The United States Supreme Court has held that an inmate’s constitutional rights are not violated by requiring he acknowledge his guilt before he can receive such treatment. McKune v. Lile, 536 U.S. 24, 33 and 37-39 (2002).

The same result was reached by the Utah Supreme Court in State v. Pritchett, 2003 UT 24, ¶¶28-33, 69 P.3d 1278 (holding the Utah probation statute is not unconstitutional because it required admission of guilt as a prerequisite to admission to certain sex offender therapy programs). Petitioner refused to admit his guilt. Accordingly, he was

ineligible for participation in the sex offender therapy program at the Prison and was therefore removed from the program.

The district court correctly held that Sherratt's constitutional rights were not violated and its decision should be affirmed on appeal.

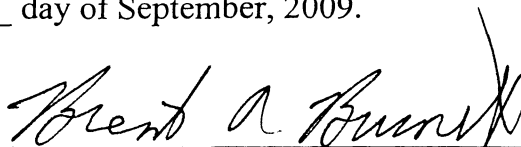
CONCLUSION

For the above stated reasons, respondents ask this Court to affirm the dismissal of this action.

RESPONDENTS DO NOT DESIRE ORAL ARGUMENT OR A PUBLISHED OPINION

Respondents / appellees do not request oral argument and a published opinion in this matter. The questions raised in this appeal, having already been decided by this Court and the Utah Supreme Court, are not such that oral argument or a published opinion is necessary, though respondents desire to participate in oral argument if such is held by the Court.

Respectfully submitted this 16th day of September, 2009.


BRENT A. BURNETT
Assistant Attorney General
Attorney for Respondents / Appellees

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Respondents / Appellees, postage prepaid, to the following on this 16th day of September, 2009:

William Sherratt
Inmate #30335
Utah State Prison
P.O. Box 250
Draper, Utah 84020
Petitioner/Appellant Pro Se

Brent A. Bunn

ADDENDUM “A”

Rule 65B. Extraordinary relief.

(a) Availability of remedy. Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful restraint on personal liberty), paragraph (c) (involving the wrongful use of public or corporate authority) or paragraph (d) (involving the wrongful use of judicial authority, the failure to exercise such authority, and actions by the Board of Pardons and Parole). There shall be no special form of writ. Except for instances governed by Rule 65C, the procedures in this rule shall govern proceedings on all petitions for extraordinary relief. To the extent that this rule does not provide special procedures, proceedings on petitions for extraordinary relief shall be governed by the procedures set forth elsewhere in these rules.

(b) Wrongful restraints on personal liberty.

(b)(1) Scope. Except for instances governed by Rule 65C, this paragraph shall govern all petitions claiming that a person has been wrongfully restrained of personal liberty, and the court may grant relief appropriate under this paragraph.

(b)(2) Commencement. The proceeding shall be commenced by filing a petition with the clerk of the court in the district in which the petitioner is restrained or the respondent resides or in which the alleged restraint is occurring.

(b)(3) Contents of the petition and attachments. The petition shall contain a short, plain statement of the facts on the basis of which the petitioner seeks relief. It shall identify the respondent and the place where the person is restrained. It shall state the cause or pretense of the restraint, if known by the petitioner. It shall state whether the legality of the restraint has already been adjudicated in a prior proceeding and, if so, the reasons for the denial of relief in the prior proceeding. The petitioner shall attach to the petition any legal process available to the petitioner that resulted in restraint. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior proceeding that adjudicated the legality of the restraint.

(b)(4) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(b)(5) Dismissal of frivolous claims. On review of the petition, if it is apparent to the court that the legality of the restraint has already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face and the reasons for this conclusion. The order need not state findings of fact or conclusions of law. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal.

(b)(6) Responsive pleadings. If the petition is not dismissed as being frivolous on its face, the court shall direct the clerk of the court to serve a copy of the petition and a copy of any memorandum upon the respondent by mail. At the same time, the court may issue an order

directing the respondent to answer or otherwise respond to the petition, specifying a time within which the respondent must comply. If the circumstances require, the court may also issue an order directing the respondent to appear before the court for a hearing on the legality of the restraint. An answer to a petition shall state plainly whether the respondent has restrained the person alleged to have been restrained, whether the person so restrained has been transferred to any other person, and if so, the identity of the transferee, the date of the transfer, and the reason or authority for the transfer. Nothing in this paragraph shall be construed to prohibit the court from ruling upon the petition based upon a dispositive motion.

(b)(7) Temporary relief. If it appears that the person alleged to be restrained will be removed from the court's jurisdiction or will suffer irreparable injury before compliance with the hearing order can be enforced, the court shall issue a warrant directing the sheriff to bring the respondent before the court to be dealt with according to law. Pending a determination of the petition, the court may place the person alleged to have been restrained in the custody of such other persons as may be appropriate.

(b)(8) Alternative service of the hearing order. If the respondent cannot be found, or if it appears that a person other than the respondent has custody of the person alleged to be restrained, the hearing order and any other process issued by the court may be served on the person having custody in the manner and with the same effect as if that person had been named as respondent in the action.

(b)(9) Avoidance of service by respondent. If anyone having custody of the person alleged to be restrained avoids service of the hearing order or attempts wrongfully to remove the person from the court's jurisdiction, the sheriff shall immediately arrest the responsible person. The sheriff shall forthwith bring the person arrested before the court to be dealt with according to law.

(b)(10) Hearing or other proceedings. In the event that the court orders a hearing, the court shall hear the matter in a summary fashion and shall render judgment accordingly. The respondent or other person having custody shall appear with the person alleged to be restrained or shall state the reasons for failing to do so. The court may nevertheless direct the respondent to bring before it the person alleged to be restrained. If the petitioner waives the right to be present at the hearing, the court shall modify the hearing order accordingly. The hearing order shall not be disobeyed for any defect of form or any misdescription in the order or the petition, if enough is stated to impart the meaning and intent of the proceeding to the respondent.

(c) Wrongful use of or failure to exercise public authority.

(c)(1) Who may petition the court; security. The attorney general may, and when directed to do so by the governor shall, petition the court for relief on the grounds enumerated in this paragraph. Any person who is not required to be represented by the attorney general and who is aggrieved or threatened by one of the acts enumerated in subparagraph (2) of this paragraph may petition the court under this paragraph if (A) the person claims to be entitled to an office unlawfully held by another or (B) if the attorney general fails to file a petition under this paragraph after receiving notice of the person's claim. A petition filed by a person other than the attorney general under this paragraph shall be brought in the name of the petitioner, and the

petition shall be accompanied by an undertaking with sufficient sureties to pay any judgment for costs and damages that may be recovered against the petitioner in the proceeding. The sureties shall be in the form for bonds on appeal provided for in Rule 73.

(c)(2) Grounds for relief. Appropriate relief may be granted: (A) where a person usurps, intrudes into, or unlawfully holds or exercises a public office, whether civil or military, a franchise, or an office in a corporation created by the authority of the state of Utah; (B) where a public officer does or permits any act that results in a forfeiture of the office; (C) where persons act as a corporation in the state of Utah without being legally incorporated; (D) where any corporation has violated the laws of the state of Utah relating to the creation, alteration or renewal of corporations; or (E) where any corporation has forfeited or misused its corporate rights, privileges or franchises.

(c)(3) Proceedings on the petition. On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(d) Wrongful use of judicial authority or failure to comply with duty; actions by board of pardons and parole.

(d)(1) Who may petition. A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph may petition the court for relief.

(d)(2) Grounds for relief. Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; (B) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station; (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled; or (D) where the Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law.

(d)(3) Proceedings on the petition. On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may direct the inferior court, administrative agency, officer, corporation or other person named as respondent to deliver to the court a transcript or other record of the proceedings. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(d)(4) Scope of review. Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority.

ADDENDUM “B”

FILED DISTRICT COURT
Third Judicial District

FEB 18 2009

SALT LAKE COUNTY

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

WILLIAM SHERRATT,	:	RULING AND ORDER WITHDRAWING
Petitioner,	:	APPOINTMENT OF COUNSEL,
vs.	:	DISMISSING PETITION FOR
	:	EXTRAORDINARY RELIEF, AND
	:	DENYING QUO WARRANTO RELIEF
	:	
	:	
UTAH BOARD OF PARDONS, et al,	:	Case No.060907262
Respondent.	:	
	:	Judge Denise Posse Lindberg

¶1 On May 3, 2006, Petitioner filed a 250 page Petition for Extraordinary Relief under Utah R. Civ. P. 65B. Since that time Petitioner has filed numerous other motions, complaints, etc., to which he has attached this case number. Most of those motions have now been ruled upon, but the underlying Rule 65B Petition has never been addressed directly. When this problem was brought to the Court's attention on or about December 15, 2008, the Court called for a response from the Utah Attorney General's office (the "AG"). Thereafter, the Court also referred the matter to the Utah Bar to explore the possible appointment of *pro bono* counsel to assist Mr. Sherratt. The Utah Bar has since informed the Court that it has recently had a spate of requests for assistance with *pro bono* appointments and is unable, at this point, to identify counsel willing to accept appointment. The Court had sought the assistance of *pro bono* counsel to narrow and frame the issues for decision. However, given that attempts to secure *pro bono* assistance may further delay an already long-delayed ruling in this case, and after reviewing the parties' thorough submissions, the Court is satisfied that it has before it all the information necessary to consider and rule on the merits of the Petition without further assistance of counsel. Accordingly, the Court WITHDRAWS its prior Order appointing counsel. After considering the briefing of the parties and reviewing the supporting documentation and applicable case law, the Court agrees with Respondent that the Petition should be DISMISSED.

¶2 In his Petition and Memorandum in support of his Petition, Mr. Sherratt argues that his rights "were violated prior to, during, and after, his May 5, 2005" hearing before the Utah Board of Pardons and Parole (the "Board"). Although Petitioner filed an over-length Memorandum without first seeking leave of Court to do so, in light of his *pro se* status the Court has considered

his submissions in full.¹ The AG also filed an over-length memorandum but obtained leave of Court to do so. On February 3, 2009, Petitioner filed a Motion for Extension of Time to Answer Respondent's Answer. Because an Answer to the Petition does not require a responsive pleading, the Motion is DENIED.

¶3 There are a couple of preliminary matters that need to be addressed. **First**, Petitioner does not expressly identify the subsection(s) of Utah R. Civ. P. 65B(d) under which he seeks relief, but the Petition attacks a number of actions and decisions of the Board; the Court construes these claims as being brought under Rule 65B(d)(2)(D). To the extent that some of Petitioner's claims also challenge the legality of the conviction, those claims should have been brought under Rule 65C. That said, because Petitioner has framed his challenge to the trial court's actions as a challenge to the "jurisdiction" of the trial court, the Court construes the claims as being brought under Rule 65B(d)(2)(A). **Second**, and more importantly, because of the lengthy delay that has already occurred in adjudicating this Petition, the Court called for a response by the AG without first evaluating whether any of Petitioner's claims were frivolous or whether the issues raised in the Petition have already been adjudicated in prior proceedings. *See* Rule 65B(b)(5). The fact that the AG has responded does not eliminate the Court's duty to make those determinations under the Rule. Therefore, as appropriate, the Court has identified those claims by Petitioner which are either frivolous on their face or were previously adjudicated. Although the Court need not enter findings of fact or conclusions of law, pursuant to the Rule the Court has provided a brief statement of its rationale (with citation to authority, as needed).

¶4 Petitioner appears to complain about the non-binding nature of the Utah sentencing guidelines, comparing them to the federal sentencing guidelines, which he wrongly asserts are "mandatory." *United States v. Booker*, 543 U.S. 220(2005)(striking down as *unconstitutional* the *mandatory* provisions of the U.S. Sentencing Guidelines but retaining the Guidelines as advisory to the courts). To the extent the Court is properly understanding the claim, the Court finds the apparent objection to the Utah sentencing guidelines to be without basis in law or fact and frivolous on its face. The Utah and federal guidelines are not comparable as they apply to wholly different sentencing schemes—i.e., determinate vs. indeterminate sentencing. The constitutionality of indeterminate sentencing schemes (such as Utah's), has been affirmed by the U.S. Supreme Court. Therefore, neither *Booker* nor *Blakely v. Washington*, 542 U.S. 296 (2004),

¹The Attorney General has asked that the Court require Petitioner to comply with the Utah Rules of Civil Procedure as he is a prolific filer of multiple lawsuits. After thoroughly reviewing the record the Court sympathizes with the AG's argument. Petitioner's multiple submissions of unrelated matters under this case number have resulted in a voluminous and confusing Court record. His repeated failures properly to notice motions for decision under Utah R. Civ. P. 7 have also contributed substantially to the delays of which Petitioner has complained. Were this Petition not being dismissed, the Court would absolutely require Petitioner to comply *strictly* with the rules of procedure or risk having his filings stricken. However, for purposes of this Ruling the Court has considered *all* of Petitioner's submissions.

support Petitioner's arguments.

¶5 Petitioner claims that the Board violated a number of its own Rules, starting with the process followed by the Board in setting his original parole hearing date. Petitioner misreads the Board rules of which he complains. As explained below at note 3, in setting his original hearing date the Board in fact considered the appropriate information. Moreover, with respect to the information considered by the Board at the May 2005 hearing itself, the AG correctly notes that the Board has discretion to consider all relevant information in making its parole decisions. See *Walker v. State*, 902 P.2d 148, 150 (Ut. Ct. App. 1995), *cert. denied*, 913 P.2d 749 (Utah 1996). Petitioner does *not* claim that he was not given access to all the information upon which the Board relied in either scheduling and conducting his parole hearing date. Petitioner's claims that the Board has not followed its Rules in setting or conducting his parole hearing are frivolous and should be dismissed.

¶6 Petitioner also argues that the Board violated his due process rights to notice and hearing in connection with a 2004 special review which he argues altered his "eligibility for parole."² The Court rejects the claim as frivolous on its face. Essentially Petitioner complains that the Board cancelled its request for an alienist report or a therapy report in advance of the 2005 parole hearing, and that he should have received notice and a hearing in advance of the Board's decision to cancel those reports. Petitioner offers no support for his due process argument with respect to this 2004 decision. Notably, Petitioner does *not* argue that as a result of the 2004 special review the Board failed to hold the previously scheduled parole hearing in 2005, or that his actual hearing date was postponed or compromised.³ Petitioner acknowledges receiving advanced notice of the scheduled 2005 parole hearing, reviewing the documents considered by the Board at that hearing, appearing at the hearing, and having the opportunity to be heard. On these facts there is simply no basis for Petitioner's claim that the Board altered his "eligibility for parole" as

²The Court generally agrees with the AG that Petitioner has provided no information to allow the Court to determine whether he exhausted his administrative remedies before bringing this Petition. Nevertheless, among the materials submitted by the Petitioner there is indication that he did maintain some correspondence regarding his participation in STOP. While not conclusive, the Court relies on this as evidence that Petitioner at least attempted to avail himself of his administrative remedies. As a result, the Court believes that judicial economy will ultimately be better served by considering the substance of Petitioner's claims.

³By letter dated June 30, 2000, the Board informed Petitioner that his "original parole grant hearing" would be set for May 2005. Consistent with Board Rule, the letter indicated the information that was considered in setting that date ("After carefully reviewing the Judgment(s) and Commitment(s) in your case, taking into account the Pre-sentence Investigation Report and recommendation(s) if any from the sentencing court, the Board has determined you will be scheduled for an original parole grant hearing in May, 2005"). Petitioner's parole hearing in fact took place in May 2005.

a result of the 2004 decision not to get an alienist report.

¶7 Petitioner also argues at length that he has been subject to wrongful reports regarding his involvement, or lack thereof, with the Sex Offender Treatment Program (“STOP”). He argues he’s been wrongfully denied access to the program,⁴ and that he should be allowed to participate (solely for purposes of parole consideration) even though he denies responsibility for the crime for which he has been convicted. The fact that Petitioner’s refusal to admit his guilt prevents his admission into STOP does not violate his due process rights nor make the Board’s actions unconstitutional. *See, e.g., Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976); *Wright v. Carver*, 2008 WL 803109 (D. Utah 2008)(slip op.)(no constitutional right to participate in rehabilitation programs, including sex offender treatment). Petitioner also alleges that his “denial of access” to STOP has been done in retaliation for his continued insistence that he is innocent and his complaints that the Board has failed to investigate another inmate’s alleged confession to the crime for which Petitioner was convicted. It appears that these same claims by Petitioner were raised and adjudicated in *Sherratt v. Friel*, 2005 UT App. 135, and *Sherratt v. Friel*, 2007 WL 1795720. *See* AG’s Motion to Dismiss, at 3, note 1 (and accompanying exhibits). As such, rearguing these claims is not proper in this R.65B Petition.

¶8 Petitioner alleges the Board has a “hidden agenda” regarding the “state sentencing practice,” which he claims usurps the “core judicial function” of sentencing defendants. This allegation is also frivolous on its face. The Utah Supreme Court has clearly upheld the constitutionality of the Board against similar challenges, holding that the power to sentence and the power to parole are distinct powers, and that the Board’s actions do not infringe on core judicial functions. *Padilla v. Utah Bd. of Pardons & Parole*, 947 P.2d 664, 669 (Utah 1997). As previously noted, the legal analysis of the federal sentencing guidelines in *Booker* and *Blakely* (or of comparable guidelines in other *determinate* sentencing schemes) is inapposite to an *indeterminate* sentencing scheme such as Utah’s.

¶9 With nothing more than conclusory statements Petitioner also argues the Board’s parole decision-making and release authority violates constitutional mandates of equal protection.⁵ Petitioner’s sole support for this contention is his bald assertion that the Board’s parole release determinations do not treat “the same conduct, or sentence” in similar manner. The Court rejects the claim as frivolous on its face. The Supreme Court has explicitly stated that “[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the

⁴He also appears to allege some form of cover-up, claiming improper edits to the Board’s parole hearing transcript.

⁵Petitioner has not identified any inmates (or facts concerning the circumstances of those inmates) who are arguably “similarly situated” to him but who have been treated dissimilarly by the Board in its parole determinations.

expiration of a valid sentence.” *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). Under Utah’s indeterminate sentencing scheme the sentence is a prescribed range of years, in this case, 5 years to life. The Board has the constitutional right and authority to determine whether a convict will be granted parole prior to the expiration of his legally imposed sentence, which in this case is a maximum of “life.” The Board’s exercise of authority within the statutorily-authorized limits does not create a constitutional violation. See *Preece v. House*, 886 P.2d 508 (Utah 1994).

¶10 Petitioner argues that as a result of various substantive and procedural violations his trial was not fair⁶, and that the trial court never acquired jurisdiction over the case because of problems with the Information(s) filed in this case (the original Information as well as the First Amended, and the Second Amended, Information). Again, all these issues have been already adjudicated in other cases brought by Petitioner. See note 1 of AG’s Motion to Dismiss. These same contentions were also the subject of this Court’s ruling and Order of November 13, 2006 denying Petitioner’s Rule 60(b)(4) Motion to Vacate Judgment. As an initial matter, the Court has already noted that challenges to the validity of Petitioner’s conviction appear more properly to belong in a petition for post-conviction relief (Rule 65C), which must be brought by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered (rather than as part of the present Petition). In any event, to the extent that Petitioner seeks to invoke R.65B(d)(2)(A), he has failed to articulate how this provision is implicated. As such, the Court rejects these claims as being beyond the proper scope of this Petition.

¶11 The Court has considered all of Petitioner’s remaining arguments and finds them to be without merit. The Court agrees with the analysis and reasoning of the AG in the Motion to Dismiss, adopts that reasoning and incorporates it as part of this Ruling and in further support of the Court’s determination to dismiss the Petition. The Court specifically rejects Petitioner’s “*ex post facto* law” argument, as well as his claim that Board members (and in particular, Board Member Gallegos), were not impartial, were biased against him, and treated him with “unnecessary rigor.” The Court also agrees with the AG that even if the Petitioner’s claims had merit, the relief Petitioner has requested (reversal of the conviction and sentence) is not available to him through a Rule 65B petition. Thus, even if Petitioner’s claims were found to be

⁶For the sake of keeping this Ruling within reasonable length, the Court declines to address specifically each of the numerous allegations regarding factual or other problems that Petitioner alleges infected the investigative, pretrial, and/or trial processes in this case. Suffice it to say that the Court has reviewed each and has determined the claims to be either meritless, brought in the wrong context (a R. 65B petition rather than R. 65C), or already adjudicated. To the extent that Petitioner re-alleges these problems as improperly affecting the Board’s parole determination, the Court rejects that claim as frivolous. As noted earlier, the Board has the right to consider what the “entire record” of the case shows, *Greenholtz*, 442 U.S. at 7, as well as what Petitioner has/has not done during his period of incarceration. See also *Walker v. State*, 902 P.2d 148 (Ut. Ct. App. 1995).

meritorious (which they are not), the available relief would not extend to reversal of a conviction and release from incarceration.

Motion to Disqualify Utah Attorney General

¶12 On February 20, 2008, Petitioner filed a motion to disqualify the AG and appoint the Salt Lake County attorney to investigate a malfeasance in office complaint that Petitioner had previously—and improperly—filed under this case number. The authority to bring a malfeasance in office/complaint to remove officials is found in Utah Code §77-6-1 *et seq.* Pursuant to the statute, this kind of claim must first be presented to the Presiding Judge of the district for filing; it may not be filed directly *See* Utah Code §77-6-4. *Only* if the Presiding Judge approves the filing of the complaint may it be filed as a new case. Petitioner has disregarded the procedure expressly outlined in the Code, and has filed various iterations of his malfeasance complaint under this case number. On three occasions the Presiding Judge has ruled on Petitioner’s misfiled complaints, in all three cases he has declined to authorize the matter to go forward. *See* Minute Entries by Judge Hilder dated January 10, 2008, March 3, 2008, and February 9, 2009. Because the motion to disqualify the AG is premised on a malfeasance complaint which the Presiding Judge has thrice denied and dismissed, this motion must also be DENIED.

¶13 Based on the Court’s decision to deny the motion, the Court need not discuss further the AG’s Opposition thereto, Petitioner’s Reply, or the AG’s Motion to Strike.

Quo Warranto Motion

¶14 On September 12, 2008, Petitioner filed a Motion for Quo Warranto Hearing.⁷ A Notice to Submit Petitioner purports to bring this motion under “Rule 81, F.R. Civ. P.” To the extent that Petitioner is, in fact, seeking to invoke the authority of the Federal Rules, those rules are inapplicable in this Court and his motion should be directed to the federal courts.

¶15 To be sure, Utah courts have constitutional authority to issue writs as appropriate. Utah Const. Art. VIII, sections 3, 5 (1984). However, as noted in *Renn v. Utah State Bd. Of Pardons*, 904 P.2d 677 (Utah 1995), Utah R. Civ. P. 65B(a) abolished all special forms of pleadings and writs, including the writ of *quo warranto*. The closest proceeding to a *quo warranto* writ is found in Rule 65B(c), which provides grounds for relief “where a person usurps, intrudes into, or unlawfully holds or exercises a public office, whether civil or military . . .” Petitioner’s present motion, fairly read, challenges the authority and jurisdiction of the trial court that adjudicated

⁷A *quo warranto* writ or proceeding is one which orders a person to show by what right he exercises an office, franchise, or privilege. Webster’s New World Dictionary (Second College Edition 1986).

Petitioner's case. That is different from a claim that a person has "usurp[ed], intrude[d] into, or unlawfully h[e]ld or exercise[d] public office." Thus, it does not appear that Rule 65B(c) is the appropriate vehicle to address the substance of Petitioner's claims.

¶16 Even if the Court were to overlook the fact that Petitioner has not stated a claim under Rule 65B(c) (our closest analog to the *quo warranto* writ), the Court disagrees with Petitioner's claim that this latest motion raises issues not previously ruled upon. In addition to the many other state and federal cases in which Petitioner has already raised these same claims, a comparison of the arguments raised herein with those raised in his prior Rule 60(b)(4) motion establishes that he is making the same arguments that this Court already adjudicated in its Order of November 13, 2006. In sum, Petitioner's latest *quo warranto* motion is nothing more than a re-tread of his well-worn claims that the charging Information was not properly verified and, therefore, the trial court never acquired jurisdiction over him.⁸

⁸Petitioner seeks to differentiate this motion from his prior Rule 60(b)(4) motion on the basis that the present motion requires the Court to determine "whether or not the process required by [Utah Code §] 77-2-1 was followed, or whether the documents were proper Informations . . ." Utah Code §77-2-1 provides that "[u]nless otherwise provided by law, no information may be filed charging the commission of any felony . . . unless authorized by a prosecuting attorney." Section 77-2-1.1 states that "[t]he prosecuting attorney shall sign all informations." It then goes on to state that "[t]he prosecuting attorney *may*: (1) sign the information in the presence of a magistrate; *or* (2) present and file the information in the office of the clerk where the prosecution is commenced *upon the signature of the prosecuting attorney*" (emphasis added).

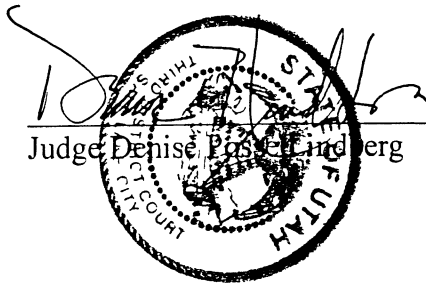
At the time it considered and ruled on Petitioner's Rule 60(b)(4) motion, the Court reviewed the Informations provided by Petitioner. That review showed that the prosecuting attorney—Deputy Iron County Attorney David E. Doxey—had signed the Informations as required by law. The original Information was signed on 25 May 1999 and filed with the clerk of the district court on 1 June 1999; Petitioner's copy of that Information clearly shows the signature. While the copy of the Amended Information dated 24 August 1999 does not bear Mr. Doxey's signature, it did carry a notation ("/s/") suggesting that the original document had been signed. The final Information filed in this case (the Second Amended Information, dated 11 January 2000), carried Mr. Doxey's signature. On their face, then, these Informations *clearly met* the requirements of Utah Code §§77-2-1 and 1.1. *Nothing more was needed to properly invoke the jurisdiction of the Court.* This was one of the two separate and independent grounds on which the Court based its November 2006 denial of Petitioner's Rule 60(b)(4) motion.

ORDER AND JUDGMENT

¶17 The Court hereby **WITHDRAWS**, as unnecessary, its prior Order appointing *pro bono* counsel. All claims raised in the Rule 65B Petition and in Petitioner's *Quo Warranto* motion are **DISMISSED with prejudice and on the merits**. Petitioner's Motion for Extension of Time to Answer the AG's Answer is **DENIED**; Petitioner's Motion to Disqualify the AG is also **DENIED**.

¶18 There being no further matters left for decision, the Court orders that the case be **DISMISSED and CLOSED**. **PETITIONER IS ADVISED THAT THIS IS A FINAL ORDER AND JUDGMENT OF DISMISSAL, ANY APPEAL MUST BE FILED WITHIN THIRTY DAYS OF THIS DATE.**

Entered by the Court this 17th day of February, 2009.


Judge Denise Postleberg

A circular court seal for the Utah State Court of Appeals is stamped over the signature. The seal contains the text "UTAH STATE COURT OF APPEALS" around the perimeter and "JAN 20 2009" in the center. The signature is written in black ink over the seal.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 060907262 by the method and on the date specified.

METHOD	NAME
Mail	WILLIAM SHERRATT Petitioner INMATE # 30335 PO BOX 250 DRAPER, UT 84020
Mail	MICHELLE I YOUNG Attorney RES CRIMINAL JUSTICE DIVISION 160 E 300 S 5TH FLR SALT LAKE CITY UT 84114-0812
Mail	UTAH STATE BAR Other Party 645 South 200 East Salt Lake City UT 84111

Dated this 18 day of feb, 2009.

WB
Deputy Court Clerk

ADDENDUM “C”

IN THE UTAH COURT OF APPEALS

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William Sherratt,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner and Appellant,)	
)	Case No. 20060842-CA
v.)	
)	F I L E D
Clint Friel,)	(January 5, 2007)
)	
Respondent and Appellee.)	<div style="border: 1px solid black; padding: 2px; display: inline-block;">2007 UT App 3</div>

Third District, Salt Lake Department, 040905805
The Honorable Tyrone E. Medley

Attorneys: William Sherratt, Draper, Appellant Pro Se
Mark L. Shurtleff and Brent A. Burnett, Salt Lake
City, for Appellee

Before Judges Bench, Greenwood, and Thorne.

PER CURIAM:

William Sherratt appeals the district court's denial of his "60(b)(4) motion to vacate judgment for void jurisdiction." This matter is before the court on its own motion for summary disposition based upon the lack of a substantial question for appellate review.

Sherratt brought a petition for extraordinary relief pursuant to rule 65B(b) of the Utah Rules of Civil Procedure. The only claims raised in that petition concerned certain conditions of his confinement. The petition was eventually dismissed and Sherratt appealed the decision to this court. This court affirmed the district court decision. See Sherratt v. Friel, 2006 UT App 135. During the pendency of that appeal, Sherratt filed a motion in the district court under rule 60(b) of the Utah Rules of Civil Procedure alleging that the district court that convicted him never obtained jurisdiction over him. Accordingly, he argued that he should be immediately released from prison. The district court denied the motion, and Sherratt now appeals.

Petitions filed under rule 65B of the Utah Rules of Civil Procedure are limited in scope to those "proceedings involving wrongful restraint on personal liberty other than those governed by [r]ule 65C." Manning v. State, 2004 UT App 87, ¶18, 89 P.3d 196, aff'd on other grounds, 2005 UT 61 (quotations and citation omitted). Thus, "rule 65B is not applicable in a challenge focused on a criminal conviction, even if a restriction on liberty results from the conviction." Id. Sherratt properly filed a rule 65B petition concerning various conditions of his confinement. However, his rule 60(b) motion to vacate judgment for lack of jurisdiction did not relate to the allegations in the petition. Instead, it focused on whether the court, which tried and sentenced him, lacked jurisdiction to do so. Because the motion was meant to attack the underlying conviction instead of the district court's authority to rule on Sherratt's 65B petition, the motion was improperly brought in this case. See id. Therefore, because Sherratt's rule 65B petition for extraordinary relief was not a proper vehicle to challenge his underlying conviction, the district court properly denied Sherratt's 60(b) motion.

Affirmed.

Russell W. Bench,
Presiding Judge

Pamela T. Greenwood,
Associate Presiding Judge

William A. Thorne Jr., Judge