

1992

Kendall Q. Northern v. N. Eldon Barnes, et al. : Brief of Petitioner

Utah Court of Appeals

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R. Paul Van Dam; Utah Attorney General; Kirk M. Torgensen; Assistant Attorney General; Attorneys for Respondents.

Jo Carol Nasset-Sale; Haley & Stolebarger; Pro Bono Attorney for Petitioner.

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BRIEF

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DOCKET NO. 920116 ~~IN THE SUPREME COURT OF THE STATE OF UTAH~~

KENDALL Q. NORTHERN,	:	
	:	Case No. <u>920116</u>
Petitioner,	:	
	:	
vs.	:	
	:	
N. ELDON BARNES, et al.,	:	Priority No. 13
	:	
Respondent.	:	

BRIEF OF PETITIONER

Appeal from a decision of the Utah Court of Appeals
affirming a judgment of the Third Judicial District
Court for Salt Lake County, State of Utah
The Honorable Timothy R. Hanson

JO CAROL NESSET-SALE
HALEY & STOLEBARGER
Tenth Floor, Walker Center
175 South Main Street
Salt Lake City, Utah 84111
Telephone: 801/531-1555

PRO BONO ATTORNEY
FOR PETITIONER,
KENDALL Q. NORTHERN

R. PAUL VAN DAM
UTAH ATTORNEY GENERAL
Kirk M. Torgensen
Assistant Attorney General
6100 South 300 East
Suite 403
Salt Lake City, Utah 84107
Telephone: 801/265-5638

ATTORNEYS FOR RESPONDENTS

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UTAH

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UTAH ATTORNEY GENERAL
Kirk M. Torgensen
Assistant Attorney General
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Suite 403
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Telephone: 801/265-5638

ATTORNEYS FOR RESPONDENTS

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BRIEF OF PETITIONER

JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider this case under Utah Code Ann. § 78-2-2 (3) (a) (1992) which grants the Utah Supreme Court appellate jurisdiction to review "a judgment of the Court of Appeals." Mr. Northern's Petition for a Writ of Certiorari was granted on October 28, 1992.

ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

Petitioner Kendall Q. Northern presents the following questions for review:

I. Did the Court of Appeals err in finding that habeas corpus relief was not available to Petitioner and that Foote v. Utah Board of Pardons, 808 P.2d 734 (Utah 1991), did not apply to

Petitioner's claims that the Board of Pardons failed to provide him procedural or substantive due process?

II. Did the Court of Appeals err by refusing to address the question of whether the Board of Pardons violated its own procedural and substantive rules and thereby denied Northern due process of law?

In reviewing decisions of the Court of Appeals, this Court accords the lower court's statement of law, statutory interpretation, or legal conclusions no particular deference. The decision is reviewed for correctness. State v. Humphrey, 823 P.2d 464, 465 (Utah 1991); City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah), cert. denied, 111 S.Ct. 120 (1990).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

A. United States Constitution, Fourteenth Amendment, 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.

B. Utah State Constitution, Article I, Section 7. No person shall be deprived of life, liberty, or property, without due process of law.

C. Utah State Constitution, Article I, Section 9. Excessive bail shall not be required; excessive fine shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested shall not be treated with unnecessary rigor.

D. Utah Code Ann. Section 77-27-5 (3) (1992):
Decisions of the Board of Pardons in cases involving paroles, pardons, commutations or terminations of

sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review. Nothing in this section prevents the obtaining or enforcement of a civil judgment.

Other rules or statutes are set forth in the body of the brief.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case originally was an appeal from the trial court's dismissal of a Petition for Writ of Habeas Corpus, and/or Writ of Mandamus and/or Declaratory Judgment.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

Northern filed a Petition for Writ of Habeas Corpus, and/or Writ of Mandamus and/or Declaratory Judgment on March 30, 1990, seeking to have certain actions of the Board of Pardons declared unlawful and to have the trial court order that he be placed on parole. (R.2)

On July 27, 1990, trial was held, at which time the court heard testimony, accepted documentary and deposition evidence, and heard the arguments of counsel. At the conclusion of the trial, the court took the matter under advisement. On September 26, 1990, the trial court convened the parties and from the bench denied Northern's petition. On December 7, 1990, the trial court entered its Findings of Fact and Conclusions of Law and Order of Dismissal, (R. 89) a copy of which is attached hereto as Addendum A.

Petitioner appealed, claiming: (1) the Board of Pardons violated its own procedural and substantive rules, thereby denying Northern due process of law, (2) the term "new evidence" as used in

Rule 3.10 should be given its plain and literal meaning and, given that meaning, there was no new evidence which justified rescission of Northern's parole date, (3) principles of due process require that Northern be given notice of the evidence relied on and the reasons for the rescission of his parole date, (4) the Board of Pardons's actions constituted cruel and unusual punishment, and (5) the court should order Northern's immediate parole.

On January 24, 1992, the Court of Appeals affirmed the trial court's denial of the writ, holding that habeas corpus is not available as a remedy in this case to modify the release date ordered by the Board of Pardons, Northern was afforded full procedural due process by the Board in its rescission of his parole date, and decisions related to the setting of parole dates are not subject to judicial review. Northern v. Barnes, 825 P.2d 696 (Utah Ct. App. 1992). A copy of the court's opinion is attached as Addendum B.

STATEMENT OF FACTS

On July 30, 1980, at age eighteen, Northern was convicted by guilty plea of second degree murder and aggravated robbery, both first degree felonies. Northern was sentenced to two five-to-life sentences at the Utah State Prison. Findings of Fact and Conclusions of Law and Order of Dismissal ("Findings of Fact") No. 1. (R. 89) These pleas arose out of the homicide of a Salt Lake City cab driver who was shot to death during the course of an armed robbery. The co-defendant, Robert Alan Phillips, who was then twenty-six years old, admitted to police and the evidence confirmed

that he alone had shot the victim. He claimed that Northern had encouraged the second and third shots; Northern denied that allegation. 90 day Diagnostic Evaluation, Exhibit 18 to Paul Boyden deposition. Northern, who was seventeen years old at the time of the crime, had participated in the armed robbery and was present when the cab driver was shot by Phillips; he testified against Phillips at the preliminary hearing. Plaintiff's Exhibit 18, p. 2, of deposition of Paul Boyden. Subsequently Phillips pled guilty to capital homicide and was sentenced to life in prison.

On July 8, 1981, a year after his arrival at the prison, Mr. Northern had an initial hearing before the Board of Pardons, which determined that Mr. Northern would be paroled from the Utah State Prison on May 10, 1988. Findings of Fact No. 2. (R. 90) During the summer of 1984, the Board of Pardons received information from the Utah State Prison which established that Mr. Northern had had a drug problem and that he had abused drugs during the first two years of his incarceration. Findings of Fact No. 3. (R. 90) On September 24, 1984, the Board of Pardons considered Mr. Northern's incarceration status, pursuant to a written request for a reconsideration of his parole date. Findings of Fact No. 11. (R. 92) Accompanying the request was a caseworker's recommendation to shorten Northern's term of incarceration. The Board of Pardons determined that Northern's parole date of May 10, 1988, should remain intact. Findings of Fact No. 4. (R. 90)

In March 1986 Mr. Northern was transferred to the Duchesne County Jail. He gained trusty status and during the next

two years worked outside of the jail. Frequently this was unsupervised work, including substantial periods of time when he labored on the farm of the elderly mother of the jail lieutenant. At another location he helped construct a fire station. During this extended trusty period there were no reported instances of misconduct within the community and no attempts to escape. Findings of Fact No. 5. (R. 91) Plaintiff's Exhibit #23¹ to the deposition of Board of Pardons member Paul Boyden, attached as Addendum C.²

On February 25, 1988, jail authorities learned that an inmate had brought some marijuana into the jail and had given a small amount to Northern. Northern admitted that he had smoked part of a marijuana cigarette. Defendant's Exhibit #41, p.19 of Defendant's Exhibit 33. This fact was timely reported to the Utah State Prison and subsequently obtained by the Board of Pardons sometime prior to May 10, 1988. Findings of Fact No. 6. (R. 91)

Despite this minor infraction, the Duchesne County Sheriff and the Duchesne jail commander wrote a letter on March 22, 1988, to the chair of the Board of Pardons in support of Northern's desire to be paroled to his home state of Arizona upon his May 10 release. Their letter commended Northern for the "substantial

¹All exhibits referred to in Petitioner's brief were received and their admission is not the subject of any controversy. The record page showing the offer and receipt of exhibits is attached as Addendum D.

²Mr. Boyden's deposition and the exhibits attached thereto were received by stipulation of the parties and considered by the court in lieu of live testimony. P. 16 of transcript of proceedings of July 27, 1990.

progress" he had made during his two years in Duchesne. Plaintiff's Exhibit #22 to Deposition of Paul Boyden, attached as Addendum E.

Northern had communications with Paul Larsen of the Board of Pardons prior to May 10, 1988, as attempts to work out the details of an intensive supervision parole were made.³ His April 1988 letter outlined his reasons for wanting to be paroled to Arizona, although he indicated he would accept whatever parole conditions that were required of him, whether in Utah or Arizona. Northern letter to the Board, Defendant's Exhibit #22, attached as Addendum G. See also Transcript of April 19 hearing, p. 7.

Arizona had agreed to supervise Northern but insisted that its parole unit determine the kind of supervision Northern needed. Utah was unwilling to trust Arizona to make that decision. Northern's only family in Utah lived in Moab, but Intensive Supervision Parole (ISP) was not available there. Where ISP was available Northern had no family or friends and the various psychological reports had indicated that family support would be essential to Northern's success on parole. Defendant's Exhibits #15, 24. The May 11, 1988, supplemental psychological report of Dr. Carlisle, described more fully below, concurred in the need for

³In the 1988 Board's determination that Northern should be on ISP, it had received during its decision-making process a document dated January 21, 1988, from the ISP supervisor and a correctional technician, that recommended Northern's placement on ISP. Attached as Addendum F, the document falsely stated that "the subject shot and killed a cab driver for \$26.00 in cash." Plaintiff's Exhibit #2 to Boyden deposition. The influence this document had in the May 9 recision decision is unknown, since Northern was never provided a copy of the document and had no recision hearing at that time.

family presence and support.

The communications between Northern and Larsen included a Special Attention Hearing at the prison on April 19, 1988. After the hearing Mr. Larsen recommended the following additions to Northern's 1981 parole agreement: (1) Complete Intensive Supervision Parole if available in Utah (2) Suggest maximum level of supervision in receiving state (3) Random urinalysis (4) Complete mental health therapy (5) Maintain full time employment or full time student status and (7) maintain nighttime (7:00 p.m.) curfew for first six months. Defendant's Exhibit #23, attached as Addendum H.

The intention of the unidentified chairperson and Mr. Larsen was to give the Board alternative courses of conduct: to either require Northern to remain in Utah and complete ISP or to permit him to parole to Arizona, where its highest level of supervision was recommended. Tr. of April 19 hearing, p. 9. Neither at that time nor at any later time was Northern's possession of a small amount of marijuana in February 1988 raised as an allegation of misconduct that would interfere with his parole date. Deposition of Paul W. Boyden, dated July 6, 1990.

On May 5, 1988, Dr. Al Carlisle, the Utah State Prison psychologist and Dr. Ted Brandhurst, the associate prison psychologist, conducted and filed a psychological evaluation on Mr. Northern at the request of the Board of Pardons. Unbeknownst to Northern, the 1988 Board had made the request to determine his suitability for release on parole. During the evaluative

interview, Northern candidly disclosed and discussed his prior drug abuse, which had begun at age sixteen. He insisted that he needed to continue drug therapy while on parole, in addition to any mental health therapy ordered by the Board. Defendant's Exhibit 24, attached as Addendum I.

Drs. Carlisle and Brandhurst noted that Northern presented himself as "articulate, intelligent and well-read", a presentation consistent with earlier testing that showed Northern to have a superior intellect. While at the prison Northern completed his Associate of Arts degree in Business and took three technical training courses offered by the prison. The psychologists also reviewed his prison jacket regarding disciplinary write-ups and noted that he was reported by the Duchesne County Jail staff to be a model inmate.

The psychologists also administered three standardized tests to Northern and concluded that he was "honest in answering test questions and tended to be overly truthful." Defendant's Exhibit 24. They found that:

Northern has shown a great deal of growth and maturing since his last evaluation in 1984. Part of this maturing may be due to age, but an important aspect of his growth can be attributed to the social interactions and interventions of adults, especially of the staff at the Duchesne County Jail. He has been given more responsibility and respect than at any other time of his life which, in turn, has led him to view himself as a responsible adult.

Mr. Northern shows no evidence of mental illness at this time. His major problem is his capacity to deal with life's stresses without the use of illegal substances. He fully realizes this shortcoming and wants to address drug issues as part of his parole agreement.

Although Mr. Northern can be physically and verbally imposing, he does not appear to have the capacity for violent acting out. He can be argumentative and assertive, but responds to authority when necessary.

It is this writer's recommendation that Mr. Northern, if he is paroled, be placed in a supportive environment such as family or friends to make transition to society as uneventful as possible. It is strongly recommended that, in addition to any mental health treatment, Mr. Northern receive drug abuse counseling.

FOR THE PURPOSES OF THE BOARD OF PARDONS DETERMINATIONS, THIS REPORT IS TO BE REGARDED AS A FAVORABLE ONE." (Emphasis in original.) May 5, 1988, psychological report of Drs. Carlisle and Brandhurst.

In May 1988 the Board of Pardons had certain policies in effect which governed its actions and proceedings, including Rule 3.10 which, in pertinent part, read as follows:

310-1. Policy

The release or rehearing date established by the Board of Pardons shall remain in effect [except] upon written referral indicating that the offender is in violation of the rules and regulations of the Utah State Prison, Community Corrections Centers, or laws of any local, state or federal government, or new evidence is presented that an inmate, if released, would present a serious risk or danger to the community.

310-2. Procedure

Prior to the rescinding of a parole or rehearing date, information shall be provided to the Board establishing the basis for the rescission hearing. Upon receipt of such information, the offender will be scheduled for a rescission hearing. Except under extraordinary circumstances, the offender will be notified of all allegations and the date of the scheduled hearing at least seven days in advance.

Findings of Fact No. 12. (R.93) The full text is attached as Addendum J.

On May 9, 1988, the Board of Pardons rejected the recommendation of its hearing officer, Paul Larsen, and without any further discussion with no notice to Kendall Northern, rescinded

his May 10, 1988, parole release date. Findings of Fact No. 13. (R. 93) The Board notified the Duchesne jail commander by telephone that it had rescinded Northern's parole date.

Prior to the May 9, 1988, rescission, Northern was not notified of any allegations relating to the rescission and the Board of Pardons did not hold any kind of hearing. Northern was not even informed that the Board was considering rescission of his parole date. In a document detailing the rescission, the Board of Pardons made the following remark: "Continue for another psychological evaluation and complete prison progress report." Findings of Fact No. 13. (R. 93)

On May 11, 1988, Dr. Carlisle conducted another psychological interview with Northern and administered another battery of psychological tests. The results of the five new tests, the personal history inventory, and the interview were the same as the testing done six days earlier:

"This test battery did not reflect any aggressive or hostile tendencies toward self or others. . .His situation has been thoroughly thought through in that he has anticipated the need for a support system and employment. . .His parents demonstrate concern and support. . .It is also recommended that Ken be placed close to a family support system to better enable him to cope with his job, expenses, and stress. His parents in Arizona appear to be the logical choice for a short period of time, and they are willing and anxious to help." May 11 Supplemental Psychological Report, Plaintiff's Exhibit #13 to Boyden deposition.

On June 23, 1988, the Board of Pardons scheduled a hearing for July 8, 1988, to review Northern's status. Findings of Fact No. 15. (R. 94) The hearing was designated by the Board as a Special Attention Hearing, not a Rescission Hearing. The Board

requested its staff to notify the family of the victim of the July 8 hearing. Defendant's Exhibit 27. Plaintiff's Exhibits 7, 8, and 9 of Boyden deposition. #9 is attached as Addendum K. At that hearing on July 8, 1988, Northern was permitted to address the Board of Pardons, present information to the Board, and to respond to questioning from the Board. Findings of Fact No. 16. (R. 94)

Northern's request to have counsel, David Bown, present at the July hearing was denied. His request to discover the psychological reports was also denied. Defendant's Exhibits 29, 30, and 31. #31 is attached as Addendum L. At the conclusion of the hearing, the Board of Pardons affirmed the rescission of Northern's May 10, 1988, parole release date based upon his "risk to society" and the need for "appropriate punishment," and rescheduled a rehearing for May 1990. Findings of Fact No. 17. (R. 94)

The first portion of Northern's July 8 hearing was devoted to the Board's review of and reconsideration of the 1980 robbery and homicide. Questions were put to Northern about his participation. The co-defendant's twenty year rehearing date was noted by the chairperson. Tr. of July 8 hearing, pp. 1-9. The next portion was a review of Northern's juvenile and institutional history, especially drug and alcohol use and their relationship to the robbery/homicide, including the matters considered by the 1981 Board and the 1984 Board that kept intact his 1988 release date. Tr. of July 8 hearing, pp.10-21. The next segment focused on some of the psychological information generated since 1980 and whether

Northern's statements about the crime to the 1981 Board are inconsistent with his statements to the 1988 Board, i.e., whether his involvement was a product of his immaturity or his drug usage. Tr. of July hearing, pp. 23-26.⁴

During the course of the hearing, Board members made statements pertinent to issues before the court:

"Chairperson ⁵: Now, you understand that the board is extremely concerned about anyone who's involved in this kind of a crime, particularly to the public. And there are other concerns too, you know, whether justice is served by the amount of time which is spent. Those are all things that we're concerned about, of course. And the board has taken a long hard look at it." Tr. July 8, p. 10.

"Ms. Palacios: I'm at four different theoretical places, four different approaches. . . [t]he conclusions that come from each of the four. . . is that you should not be free. . .

"First of all, your behavior since this board saw you in 1981 (reviews four c-notes from 1982-1985). The acknowledgement by you that drugs were a consequence, were part of the reason for your committing the crime."

"That tells me that there is sufficient new information about your behavior that relates to your dangerousness on the street that requires this board to rescind your date." Tr. July 8, p.26.

"Ms. Palacios: Second approach is one that has to do simply with a perception of dangerousness about us, having nothing to do with anything that occurred after 1981, but rather focusing on you as an individual and the crime." Tr. July 8, p. 27.

⁴References were made by the chairperson to his 1981 Board hearing. Ms. Palacios was a member of both Boards. The Board had at some unknown time destroyed or lost the tape recording of that hearing, rendering it unavailable to Northern for his July 8 hearing or subsequent judicial proceedings.

⁵The Chairperson is never identified in the transcript.

"Ms. Palacios: The third approach. . . is just whether in fact we had all of the relevant information at the time of the hearing. And I'm not sure, you say you told us about the . . drug problem. The fourth and final approach that I've taken is the just deniable (sic in original) approach. It's the notion--we have your fall partner in here on a 25 year rehearing. It's the notion that even though the Hambys are not here today, seven children grew up without their father, and you had a critical part in his death. And that to release you after only eight years is to depreciate the value of this life and ignore the impact on the Hambys." Tr. July 8, p. 29.

"Chairperson: Mr. Northern, I think my major concern . . . looking back on it, for a long time the major comment that was made by any report that was written early, it was that you just didn't seem to care about anybody, that in fact during the course of lots and lots of interviews, that you never expressed that you cared at all about the death of the victim or these seven children who lost their father and a woman who lost her husband." Tr. July 8, pp. 31-32.

Mr. Northern closed the informational part of the hearing with this response, provided in pertinent part:

"Even early on I did feel remorse for what had happened. I didn't show it. I played the tough guy all the way through and didn't let anybody see anything. But I have always had remorse about what happened and I have to relive it all the time. It's me that had to go through this all the time, of what I could have done to stop it is I could have stopped it. . . .I'm sorry for what happened. I was out of control; I know that. . .I realize that seven kids had to grow up without their dad. . .I can't change what happened. I know that. But I can go out and I can succeed and I can make my life better and maybe I can help somebody else along the line somewhere to help make up for what I did. I've done eight years in prison; I was 17 when I came in. I've grown up in prison. I've matured in prison. . .I've lived in here with a snitch jacket for all that time. . .I've shown, especially in the last two or three years where I've been out at Duchesne county jail that I have changed". Tr. July 8, pp. 33-34.

After a recess the Chairperson stated:

"Mr. Northern, as we explained earlier, the board is extremely concerned about first of all, the risk that you present to society from the overall record, from the nature of the crime and specifically also including the information which the board has received since that time and in comparing it with the overall record. We also have concern as to the--as to the

appropriate punishment for this seriousness of this kind of crime. We affirm the rescission of the parole date of May 10th of 1988 and we order a rehearing in May of 1990. That's an additional two years." Tr. July 8 p.36.

Northern petitioned for extraordinary relief during his term of incarceration.⁶ That petition was denied. During the appeal from the trial court's denial of his petition, Northern was paroled. As a new condition of parole, that was not part of his 1981 or 1988 parole agreements, the Board required Northern to pay \$26,350.00 in restitution. 825 P.2d at 698. Northern currently remains on parole in the state of Arizona, the state to which he was permitted to go upon his release from the Utah State Prison in July 1991.

SUMMARY OF ARGUMENT

The Court of Appeals erred in finding that habeas corpus relief was not available to Northern and that Foote v. Utah Board of Pardons, 808 P.2d 734 (Utah 1991) did not apply to his claims that the Board of Pardons failed to provide him procedural or substantive due process. The lower appellate court's sua sponte transformation of the important issues in this case related to the Board of Pardons's exercise of power, its accountability therefor,

⁶After the Board ordered the two year rehearing for Northern, he was returned to trusty status at the Duchesne County Jail. Some months later, when he was notified that the prison had ordered that he be returned the following day to the Point of the Mountain facility to serve out his time there--to the same facility in which the co-defendant was serving his sentence--Northern walked away. He was apprehended in 1990, charged with and convicted of escape, and returned to the Utah State Prison. None of the issues or argument presented within this brief consider that charge or conviction.

and the due process rights of inmates subject to that power, into a simplistic, illogical claim of credit for time served was an improper, avoidance response to Footie. Even though Northern was pardoned a year and a half ago, he is entitled to an appellate review and determination of the lawfulness of his incarceration post May 10, 1988, and to an declaration of the nullity of certain actions taken by the Board regarding his 1991 parole agreement.

The Court of Appeals also erred in refusing to address the issues of whether the Board of Pardons violated its own procedural and substantive rules and thereby denied Northern due process of law. Without any analysis or citation to any cases for support, it abruptly and succinctly concluded: "Since Northern was afforded full procedural due process by the July 8, 1988, hearing, any of the alleged procedural deficiencies in rescinding his original parole date were remedied before this petition was filed." Such conclusion was error. Subsequent tidying up by the Board cannot rectify the trampling of rights to due process. In refusing to address the underlying issues, the Court of Appeals compounded its error and this Court must now review for the first time the conclusions of the trial court.

Finally, this Court's consideration of the legal conclusions of the trial court will clearly indicate that the trial court erred in several ways. In so doing the Court should find that the Board of Pardons violated its own procedural and substantive rules, thereby denying Northern due process of law. After a review of all of the evidence, the court will have an

abiding conviction that Northern's parole date was rescinded because the Board believed the crime he committed in 1980 deserved more years of incarceration than the Board in 1980 had ordered.

The Court should find that when the term "new evidence" is given its plain and literal meaning, there was no new evidence that warranted a finding that Northern, who had been a trusty working outside of a county jail for two years, would be a serious risk or danger to the community.

Such review ought also conclude that Northern should have been given notice of the evidence relied upon by the Board in its May 9 rescission of his parole date. Additional information developed between May 9 and the July 9 hearing, such as the testimony of Northern at the hearing, cannot provide the justification for a May 9 decision to rescind. The actions of the Board of Pardons constituted cruel and unusual punishment in its permitting Northern's parole date to stand for two thousand four hundred eighty two days and on the day before he was to be paroled to revoke it without notice and without basis, other than its view that the earlier Board should have given him more time and that release in 1988 would denigrate the life of the victim.

As a consequence of the errors made by the Court of Appeals and by the trial court, this Court should reverse the holding of the Court of Appeals, identify the due process rights and violations at issue in this case that Footie left undefined, and hold that Northern's incarceration after May 10, 1988, was unlawful. As a result the Court should order deleted from his 1991

parole agreement the restitution order as it was improvidently added in 1991. Had he been timely paroled, such restitution order, which is in any event factually unsupportable, would not have been part of his parole conditions. In addition, the Court should order the termination of his parole in July 1993 in consideration of the unlawful actions of the Board in May and July 1988.

ARGUMENT

POINT I

THE COURT OF APPEALS ERRED IN FINDING THAT HABEAS CORPUS RELIEF WAS NOT AVAILABLE TO PETITIONER.

When the Court of Appeals held that "habeas corpus is not available in this case as a post-release remedy to modify the release date ordered by the Board," it rendered a decision in conflict with decisions of this Court and decided an important question of state law which should be and now will be settled by this Court. Utah R. App. P. Rule 46(b) and (d). Because of the importance of the Court of Appeals' action and potential impact on numerous cases beyond this case, this Court has, in granting Petitioner's Petition for Certiorari, decided to review the action of the Court of Appeals and consider issues regarding the accountability of the Board of Pardons that recent Utah Supreme Court cases have noted but not had an appropriate opportunity to fully examine.

In Foote v. Utah Board of Pardons, 808 P.2d 734 (Utah 1991), this Court specifically held that "there is no question that habeas corpus review of the Board of Pardon's action is available."

The Court of Appeals' opinion in this case sidestepped Foote by mischaracterizing the nature of Mr. Northern's claims. Had the Court of Appeals addressed the issues raised (as stated below), the Court could have reached no other conclusion than that Foote applied to this case.

Hurst v. Cook, 777 P.2d 1029 (Utah 1990) provided a retrospective of the writ of habeas corpus and the observation that "the writ provided a judicial means for securing the liberty of a person restrained by arbitrary or oppressive power." Hurst at 1033. It specifically recognized the writ of habeas corpus as a necessary tool of the judiciary so it can be "armed with process sufficient to fulfill its role as the third branch of government." Hurst at 1033.

In its designation of Northern's due process claim as merely a claim that the Board should have credited Northern's parole period with the additional years he served beyond his original parole date, the Court of Appeals improperly manipulated and characterized the claims to reach its conclusion that a writ is not available.

Northern did not ask the Board to give him credit for time served. Northern did not ask the trial court to give him credit for time served. His grievance was and is that the Board of Pardons should have paroled him on May 10, 1988, and that all of his detention after that date was contrary to the policies and procedures of the Board of Pardons and to constitutional notions of due process. His remedy sought from the trial court was a

declaration that his post May 10, 1988, detention was unlawful and his immediate release on parole.

Once he was paroled (after the filing of his brief to the Utah Court of Appeals), the remedy sought was a finding that the Board of Pardons had violated its policies and procedures in rescinding his parole date, that his continued incarceration after May 10, 1988, violated his due process rights secured by the Utah and United States Constitutions and was unlawful, and that, therefore, the new conditions of parole placed on him in 1991 were null and void. Chief among those new conditions was a restitution order of \$26,350.00, compensation ordered for the wrongful death of the victim and the wholly speculative cost of child care for the Hamby children, had Mrs. Hamby needed child care. (The information provided in 1980 was that she was beginning to provide child care as a source of income, not that she paid child care.) See 1991 parole agreement and p. 4 of Plaintiff's Exhibit 18 to Boyden deposition.

The Court of Appeals erred in analogizing this set of facts to an inmate's claim for credit for time served in a county jail while awaiting trial. While Northern has argued that his period of parole should be shortened by the length of his sentence that was unlawful, that claim is based on a violation of his constitutional rights, not because he was unable to make bail like the defendant in State v. Alvillar, 748 P.2d 207 (Utah App. 1988), who was held in jail prior to his conviction because of a parole hold placed on him. The pertinent question before the lower

appellate court was how it should treat the consequences of an unlawful period of incarceration. By failing to apply Foote v. Board of Pardons, 808 P.2d 734 (Utah 1991), the Court of Appeals compounded the error because it refused to examine the claimed violations of substantive and procedural due process, superficially concluding that any procedural errors were remedied later and that substantive due process claims would not be considered at all.

POINT II

THE COURT OF APPEALS ERRED IN FINDING THAT FOOTE DID NOT AUTHORIZE THE JUDICIAL REVIEW REQUESTED.

The Court of Appeals' conclusion that habeas corpus is not available to Mr. Northern, and its disregard of the violation of the substantive and procedural due process rights of Mr. Northern (whose parole date was wrongfully rescinded through both procedural defects and lack of legitimate basis), is inconsistent with this Court's opinion in Foote that: "It is the province of the judiciary to assure that a claim of the denial of due process by an arm of government be heard and, if justified, that it be vindicated." Foote at 4.

Northern presented the first opportunity since Foote for appellate review of specific Board of Pardons procedures regarding the interpretation and significance of its rules regarding rescission of an inmate's parole date -- and the extent to which an inmate is entitled to due process, including notice and a hearing, in such Board action. Foote anticipated the flushing out of such due process requirements in future cases.

Northern recognizes the discretion of the Board of Pardons to set whatever initial release or rehearing date it wants, as long as the date is within the parameters of the sentence imposed by the court. The Board in 1981 could have set his release date for 2000--or beyond. The questions to be decided in this case concern what rights an inmate has when the Board seeks to rescind an established parole date. Because an inmate has a liberty interest in that parole date, that date cannot be taken away except for cause, notice, and an opportunity to be heard.

In other words, while the Board can be arbitrary in the setting of the original parole date, it cannot later arbitrarily rescind that date just because it determines that the parole date no longer represents enough punishment, that today's society and today's Board want longer sentences, and that the sentencing guidelines in effect in 1988 recommend longer sentences. It cannot substitute its judgement for the Board which, in some cases, may have set a parole date twenty-five years earlier; such second guessing is not good cause to justify rescission of a parole date, although Board of Pardons member Paul Boyden believes it to be so and has testified that the Board can at any time prior to the moment an inmate walks out of the prison gates detain him and give him more time. Dep. of Paul Boyden, p. 77

District courts around the state are taking increasingly assertive actions toward the Board of Pardons, which continues to claim that under Utah Code Ann. § 77-27-5(3) (1992) its actions are beyond judicial review. In December 1991 the Third District Court

in Rawlings v. Utah Board of Pardons, Case No. 910905068, ordered the Board to give Rawlings post-conviction, pre-commitment credit for time served. In February 1992 the Third District Court in Smith v. Utah Board of Pardons, Case No. 910903060, considered via a writ, Smith's claim that the Board had ignored the order of Fourth District Court Judge Boyd Park that Smith be given 626 days credit for post-conviction time served prior to his commitment to prison. (Addendum M). In soundly criticizing the Board, Judge David Young wrote: "This entire area of law allows the Board of Pardons to engage in discriminatory practices that jeopardizes the credibility of the Board...." A third case with similar claims, Jensen v. the Utah Board of Pardons, Case No. 920901144CV, is now pending in the Third District Court. Whether discriminatory practices occur at the front end of a sentence because of the Board's unlawful practices or at the back end (in its refusal to honor parole dates set by earlier Boards just because its present members believe that the crime inherently demanded a longer incarceration), appellate courts must decide the parameters of the Board's discretion to act in these areas. The Court of Appeals' decision in this case is a retrenchment from this Court's opinion in Foote.

Again, in its brief (one page) analysis of the claims, the Court of Appeals, through Judge Bench, reached the indefensible conclusion that Northern presents a case of application for credit for time served, not a petition for a declaration that Northern's incarceration post May 10, 1988, was unlawful and that consequences

dependent upon the legality of that incarceration are null and void.

Despite the compelling language of Foote that the Board of Pardons must provide due process to prison inmates, and that violations must be vindicated because of protections under the habeas corpus, open courts, and due process provisions of the Utah and United States Constitutions, the lower appellate court looked at Foote only in light of the fictionalized "credit for time serve" claim and refused to consider its application in the due process claims. In misconstruing important claims that will continue to arise in inmate relationships with the Board of Pardons, it merely held, without any analysis at all, that the July 8 hearing remedied any due process errors, if there were any errors.

POINT III

NORTHERN WAS DENIED PROCEDURAL AND SUBSTANTIVE DUE PROCESS IN THE RESCISSION OF HIS MAY 1988

PAROLE DATE AND THE JULY 1988 AFFIRMATION OF THE RESCISSION.

On appeal to the Court of Appeals, Mr. Northern asserted inter alia: (1) that the Board of Pardons denied him due process because it violated its own procedural and substantive rules, (2) that the trial court erred which it applied an unusual definition to the term "new evidence" as used in Rule 3.10 of the Board's rules and that, if a plain and literal meaning had been given to the term, there was no "new evidence" to justify the Board's rescission of Northern's parole date, and (3) that Mr. Northern was not given notice of the evidence and reasons for the Board's

rescission of his parole date. In its opinion the Court of Appeals addressed none of these issues, opting instead to state that the issues were "without merit" or lumping them into the one sentence analysis that the July proceedings fixed everything. 825 P.2d 699. In so holding the Court of Appeals departed from the accepted and usual course of judicial proceedings. Utah R. App. P. Rule 46(c). In order to function legitimately and effectively, the Board of Pardons is subject to certain rules and regulations which govern its actions and proceedings. In May 1988 the Board of Pardons operated under Rule 3.10, the 1988 version of which is set out in the Statement of Facts. That rule set out the Board's policies and procedures regarding the setting and the rescinding of a parole date and of the necessity of giving an inmate notice of a rescission hearing and the opportunity to be heard before a rescission occurs. Findings of Fact No. 12. (R. 93)

Rule 3.10 was certainly adopted in recognition of the Board of Pardons' duty to afford due process to prisoners in determining their sentence. Fundamental notions of fair play require that the Board of Pardons adhere to those rules and any failure to do so was a denial of due process. International House v. National Labor Relations Board, 676 F.2d 906, 912 (2nd Cir. 1982); Bills v. Henderson, 631 F.2d 1287, 1299 (6th Cir. 1980); Government of Canal Zone v. Brooks, 427 F.2d 346, 347 (5th Cir. 1970). The trial court also recognized this proposition when it stated that "once a parole date has been granted, it cannot be taken away by the Board of Pardons inappropriately or unreasonably

or upon the whim of the Board members." Conclusions of Law, p. 7.
(R. 95)

The trial court found, as a matter of law, that the Board of Pardons complied with these rules. Unfortunately, the record in this case demonstrates that such a conclusion was erroneous and that the Board of Pardons violated its own rules in a number of respects. In its independent analysis of the conclusions of the Court of Appeal and the trial court, the court should correct these legal errors.

The language of Rule 3.10 is plain and unambiguous. As such, it should be construed according to its clear and literal language. Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989); Cox Rock Products v. Walker Pipeline Construction, 754 P.2d 672, 676 (Utah App. 1988).

The United States Supreme Court has held that a fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). The Utah Supreme Court recognized much the same principle when it stated that an established principle of due process is that a court, or in this case a governmental body acting in place of a court, "hears before it condemns, proceeds upon inquiry, and renders judgment only after trial." Christiansen v. Harris, 163 P.2d 314, 316 (Utah 1945). The provisions of Rule 3.10 seek to meet this due process requirement.

The obvious import of Rule 3.10 is that a hearing is to be held before the rescinding of a parole date. If it were not so, there would be no need for the rule to state that "the offender will be scheduled for a rescission hearing" because the rescission would have previously occurred [emphasis added].

Northern was not given a hearing prior to the rescission of his parole date. Findings of Fact No. 13. (R. 93) In fact, a hearing was not held until July 8, 1988 -- over two months after Northern's parole date had been rescinded. Common sense requires that the opportunity to be heard at a meaningful time and in a meaningful manner be provided before any deprivation of rights occurs. The Board of Pardons cannot hold a hearing some two months after the deprivation of a right and then claim that it has afforded Northern the due process to which he was entitled when having the length of his sentence determined.

The trial court seems to have held that the failure to hold a rescission hearing was proper because extraordinary circumstances existed which justified the rescission of Northern's parole date without providing prior notice to Northern. Conclusions of Law, p. 9. (R. 97) Assuming, arguendo, that such extraordinary circumstances existed, these circumstances only excused the requirement that Northern be "notified of all allegations and the date of the scheduled hearing at least seven days in advance." A plain reading of the rule reveals that the extraordinary circumstances exception has no application to the requirement that a rescission hearing be held prior to the

rescinding of a parole date. Thus, Northern was entitled to, but did not receive, a rescission hearing prior to having his May 10, 1988 parole date rescinded.

The procedures of Rule 3.10 further required that the Board of Pardons notify Northern of the allegations against him at least seven days in advance of the rescission hearing. Northern was not informed of any of the allegations against him prior to the July 1988 hearing, and at that hearing he was not notified of any allegations. Again, the Board designated that hearing as a Special Attention Hearing, not a Rescission Hearing.

Each of these violations of Rule 3.10 by the Board of Pardons denied Northern his right to due process. International House, 676 F.2d at 912; Bills, 631 F.2d at 1299, Government of Canal Zone, 427 F.2d at 347. The record shows that the Board of Pardons condemned before it heard and inquired only after passing judgment. Christiansen, 163 P.2d at 316. There can be little doubt that Northern's parole was indeed taken away at "the whim of the Board members" who, only after the fact, sought to justify and legitimize their actions.

The trial court defined "new evidence" as found in Rule 3.10-1 as any information about Northern not available to the Board in July 1981. Consequently, the six year presence of Northern within the prison system was new evidence; his omission after the initial Board of Pardons hearing to reaffirm or reacknowledge his remorse and regret about his crimes was new evidence; and the difficulty of the Board of Pardons in creating an intensive parole

program for Northern, who was to be paroled to his home state of Arizona, was new evidence. This definition is error. The plain and literal meaning of the term "new evidence" in Rule 3.10 is evidence which was previously concealed from the Board of Pardons or specific, affirmative acts that occurred or became known subsequent to an inmate's last review or consideration by the Board of Pardons. Because all else was known by the Board members or its agents, under this definition, the only new evidence the Board of Pardons had upon which to base its rescission of Northern's parole was a recent Psychological Evaluation -- a report which specifically stated that it was to be viewed as a favorable report.

However, the evidence must not only be "new" under Rule 310, but it must also establish that the "inmate, if released, would present a serious risk or danger to the community." There is no new evidence, even as the trial court defined "new", that could reasonably lead to such a conclusion. The best evidence of Northern's likely risk level to the community is the two years he spent as a trusty in the Duchesne County Jail, a privileged status he still held at the time of the July 8 hearing.

The recommendations of the Sheriff and the officers who supervised him and his lack of a single write-up for conduct within the community suggests that Kendall Northern presented a very low risk to the community. For risk assessment purposes, Northern had essentially been released into the community, and he had performed very well. Lt. Stansfield would not have permitted Northern to work without supervision on his ninety-year-old mother's farm,

where Mrs. Stansfield and Northern would have only each other's company for lunch on occasion, if Northern presented even a moderate risk of danger, much less a serious risk.

While anyone who has been convicted of a felony and incarcerated at the Utah State Prison presents some risk of danger to the community, there is nothing about Northern's conduct in the community that suggests that he posed a serious risk or danger. The Board's contrary conclusion about his risk to society arose from the nature of his 1980 crime and cannot be justified as "new evidence" under Rule 310.

The most fundamental principle of due process is notice. The only notice ever given Northern concerning the basis for rescission of his parole date was that he was a risk to society and needed to be appropriately punished for his crime. Due process required that Northern be given notice of the reasons for the Board of Pardons' decision and the evidence it relied on in reaching that decision. Thus, the trial court erred in finding only that there was some basis upon which the Board of Pardons could have rescinded Northern's parole rather than determining the actual grounds upon which the Board of Pardons rescinded Northern's parole.

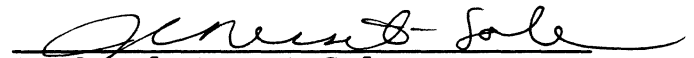
CONCLUSION

Based on the foregoing, the Court should find the actions of the Board of Pardons in May and July 1988 unlawful, eliminate the restitution order of 1991, and require that Petitioner be terminated from parole in July 1993.

DATED this 21st day of December, 1992.

Respectfully submitted,

HALEY & STOLEBARGER


Jo Carol Nessel-Sale
Pro Bono Attorney
for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing were ^{hand-delivered} ~~mailed~~ to the following, postage prepaid, this ^{21st} ~~20th~~ day of December, 1992:

R. Paul Van Dam
UTAH ATTORNEY GENERAL
Room 236
Utah State Capitol
Salt Lake City, Utah 84114



JO CAROL NESSET-SALE

ADDENDUM A

B. Quelby Thompson SALT LAKE COUNTY Deputy Clerk

fully advised in the premises, hereby makes the following:

FINDINGS OF FACT

1. Mr. Northern is presently incarcerated at the Utah State Prison. On July 30, 1980, at age eighteen, he was convicted of Criminal Homicide-Murder in the Second Degree, a first degree felony, and Aggravated Robbery, a first degree felony, and sentenced to two five-to-life sentences at the Utah State Prison.

2. On July 8, 1981, Mr. Northern attended a hearing before the Utah Board of Pardons. After the hearing the Board of Pardons determined that Mr. Northern should be paroled from the Utah State Prison on May 10, 1988.

3. During the summer of 1984, the Board of Pardons received information from the Utah State Prison which established that Mr. Northern had had a serious drug problem and that he had abused drugs heavily during the first two years of his incarceration. This information was new information in that it was not available to the Board of Pardons on July 8, 1981.

4. On September 24, 1984 the Board of Pardons considered Mr. Northern's incarceration status, including a caseworker's recommendation to shorten his term of incarceration, and determined that he should not be released on parole prior to the scheduled parole date of May 10, 1988.

5. In March 1986 Mr. Northern was transferred to the

Duchesne County Jail. He gained trustee status quickly and during the next two years worked outside of the jail. Frequently this was unsupervised work including substantial periods of time when he labored on the farm of the elderly mother of Mr. Ralph Stansfield. At another location he helped construct a fire station. During these periods he never attempted to escape.

6. Also, on February 25, 1988 Mr. Northern was discovered using marijuana by jail authorities. This fact was reported to the Utah State Prison and subsequently obtained by the Board of Pardons sometime prior to May 10, 1988. This information was new information in that it was not available to the Board of Pardons on July 8, 1981.

7. On March 24, 1988, the Utah Board of Pardons requested that the Utah State Prison perform a Psychological Assessment upon Mr. Northern and supply that information to the Board of Pardons.

8. On May 5, 1988 the Board of Pardons received a Psychological Evaluation performed by Dr. Al Carlisle, Chief Clinical Psychologist at the Utah State prison, and his assistant Dr. E. Ted Branthurst. The evaluation indicated that at age 16 Mr. Northern had left home to wander the western states and became deeply involved with drugs and people using drugs. It noted that Mr. Northern admitted that he was high on LSD at the

time he committed his crime and that he had used LSD, cocaine, amphetamines, and marijuana. The report also stated that Mr. Northern viewed his drug dependency as a major factor in his anti-social behavior. The report indicated that Northern's major problem was his inability to deal with life's stresses without the use of illegal substances.

9. In Northern's favor the psychologists noted that while at the Utah State Prison and Duchesne County Jail, Northern maintained an excellent volunteer and work record, had an I.Q. in the superior range, and had completed his Associate of Arts in Business and three technical training courses offered by the Utah State Prison. The evaluation also noted that Northern had shown growth and maturing since his evaluation in 1984 and did not appear to have the capacity for violent acting out. The psychologists closed the report with a statement that "for purposes of the Board of Pardons determinations, this report is to be regarded as a favorable one."

10. This information contained in the May 5, 1988 Psychological Evaluation was new information in that it was not available to the Board of Pardons on July 8, 1981.

11. During his 1984 written request for redetermination to the Board of Pardons Mr. Northern did not express any remorse about the crimes he had committed or the victims of his crimes.

12. In May 1988 the Board of Pardons had certain policies in effect which governed its actions and proceedings. In May 1988 Board of Pardons Rule 3.10, in pertinent part, read as follows:

310-1. Policy

The release or rehearing date established by the Board of Pardons shall remain in effect upon written referral indicating that the offender is in violation of the rules and regulations of the Utah State Prison, Community Corrections Centers, or laws of any local, state or federal government, or new evidence is presented that an inmate, if released, would present a serious risk or danger to the community.

310-2. Procedure

Prior to the rescinding of a parole or rehearing date, information shall be provided to the Board establishing the basis for the rescission hearing. Upon receipt of such information, the offender will be scheduled for a rescission hearing. Except under extraordinary circumstances, the offender will be notified of all allegations and the date of the scheduled hearing at least seven days in advance.

13. On May 9, 1988 the Board of Pardons rescinded Mr. Northern's May 10, 1988 parole release date. Prior to that rescission Northern was not notified of any allegations relating to the rescission and no hearing occurred prior to the Board's action on May 9, 1988. In the document detailing the rescission the Board made the following remark: "Continue for another psychological evaluation and complete prison progress report".

14. The second psychological report was prepared on May 11,

1988, by Dr. Carlisle and his psychology intern, Gail Caldwell. It considered the issue of how Mr. Northern's relationship with his father might affect his success on parole and concluded that while the demanding nature of his parents, especially his father, might create stress for Northern, his goal was to depend on them for emotional support for only a short time after being paroled. The report recommended that Northern be paroled to Arizona so he could be close to his parents, who were anxious and willing to help him adjust to life outside of prison.

15. On June 23, 1988, the Board of Pardons scheduled a hearing for July 8, 1988 to review Mr. Northern's status. Mr. Northern received notification of that hearing by June 28, 1988.

16. On July 8, 1988, the Board of Pardons conducted the hearing. At that hearing Mr. Northern was permitted to address the Board of Pardons, present information to the Board, and to respond to questioning from the Board.

17. At the conclusion of the hearing the Board of Pardons affirmed the rescission of Mr. Northern's May 10, 1988 parole release date based upon his "risk to society" and the need for "appropriate punishment", and rescheduled a rehearing for May, 1990.

18. On October 9, 1988, Mr. Northern escaped from the Duchesne County Jail. On October 24, 1988, the Board of Pardons,

because of Mr. Northern's escape, rescinded Mr. Northern's May 1990 scheduled rehearing.

19. Subsequently Mr. Northern was captured and returned to the Utah State Prison.

CONCLUSIONS OF LAW

The Board of Pardons, in working within the indeterminate sentencing scheme of the State of Utah, has the power to consider the sentence imposed upon each criminal offender under its jurisdiction and make that offender's sentence determinate.

The Courts should not interfere or review particular Board of Pardons decisions lightly and should not reverse or set aside such decisions unless the Board of Pardons has clearly violated a constitutional right of the offender.

It is well established that an offender has no right to be given a parole date by the Board of Pardons. However, once a parole date has been granted, it cannot be taken away by the Board of Pardons inappropriately or unreasonably or upon the whim of the Board members.

The question presented by this case is whether there is a reasonable basis supporting the Board of Pardons' decision to rescind Mr. Northern's May 10, 1988 parole date. Board Rule 3.10 (text set forth above) provides the framework for answering this

question. It states that the Board of Pardons may rescind an offender's parole date if the Board receives a written referral indicating that an offender has violated correctional institution rules or the laws of any local, state, or federal government, or new evidence is presented which shows that the offender, if released, would present a serious risk or danger to the community.

On May 9, 1988, the Board of Pardons had received no written referral from any source which suggested that Mr. Northern had violated institutional rules. Thus, that portion of Rule 3.10 is inapplicable. Additionally, the grant of parole had not been rescinded upon its own terms because of any violation of institutional rules.

Under the second alternative under Rule 3.10, this Court defines "new evidence" as negative information received by the Board of Pardons between the time that a parole release date is set and the time that a rescission determination is made. In this case those dates are July 8, 1981 and May 9, 1988. This Court defines "risk or danger to the community" to include the situation where a person is likely to commit a crime.

After a careful analysis of the entire record in this case and keeping in mind that this Court cannot substitute its judgment for that of the Board of Pardons, this Court's ruling is

that there was "new evidence" received by the Board of Pardons which justified the Board's decision to rescind Mr. Northern's May 10, 1988 parole date. There was evidence regarding Mr. Northern's drug use at the Utah State Prison and drug use at the Duchesne County Jail. Such drug use was illegal. There was also evidence which showed that Mr. Northern failed to show any remorse for his victim or regarding the crimes he had committed and that his behavior was, to some extent, anti-social. This new evidence indicated that, if released, Mr. Northern would present a serious risk or danger to the community.

Also, the circumstances relating to Mr. Northern on May 9, 1990, constituted extraordinary circumstances under Rule 3.10 which justified the rescission of the parole date without providing prior notice to Mr. Northern.

Additionally, a review of the entire record leads the Court to conclude that the Board of Pardons did not rescind Mr. Northern's parole release date because it believed he deserved to be incarcerated for a longer period of time because of the nature of his crime.

ORDER OF DISMISSAL

For the reasons set forth above, the Board of Pardons did not violate Mr. Northern's constitutional rights. The petition

for a writ of habeas corpus is, therefore, denied with prejudice.

DATED THIS 7 DAY OF DECEMBER, 1990.


JUDGE TIMOTHY R. HANSON
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

ATTEST

By 

Deputy Clerk


JO CAROL NESSET-SALE
Attorney for Plaintiff/Petitioner

ADDENDUM B

JAN 24 1992

✓ Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

Kendall Q. Northern,
Plaintiff and Appellant,

v.

N. Eldon Barnes, Warden,
Utah State Prison and the
Department of Corrections
through the Board of
Pardons,

Defendants and Appellees.

Case No. 900566-CA

FILED
(January 24, 1992)

Attorneys: Jo Carol Nasset-Sale, Salt Lake City, for Appellant
R. Paul Van Dam, Lorenzo K. Miller, and Kirk M.
Torgensen, Salt Lake City, for Appellees

BENCH, Presiding Judge:

FACTS

In 1980, Northern, an eighteen-year-old drifter, pleaded guilty to second degree murder and aggravated robbery for his participation in the shooting death of a cab driver earlier that same year. Northern was sentenced to two five-to-life sentences at the Utah State Prison. He later admitted he was under the influence of LSD at the time of the shooting, and had been deeply involved in drugs.

After Northern had been imprisoned for a year, the Board met and granted him a May 10, 1988 parole date. The Board reconsidered Northern's status in 1984, and determined that the 1988 parole date would remain intact despite evidence that Northern had used drugs at the prison during his incarceration.

In 1986, Northern was transferred to the Duchesne County Jail where he attained trustee status. Over the next two years, Northern was allowed to work unsupervised outside the jail. In early 1988, with only a few months remaining before his projected parole, jail authorities discovered that Northern was again using drugs. This information was reported to the prison and received by the Board before his parole date.

Two months before his parole date, a psychological assessment of Northern was made at the request of the Board. The report indicated that Northern had been a heavy drug user, and had been unable to deal with life's stresses without drugs. The report also said Northern acknowledged that his drug dependence was a major factor contributing to his antisocial behavior. Before the report was published, the Board also attempted to obtain Northern's consent to additional terms of release that would have included drug testing. On the advice of his father, however, Northern refused to consent to the new conditions.

On May 9, 1988, the Board rescinded Northern's May 10 parole date, pending further review, and ordered another psychological evaluation. The need for another psychological evaluation and complete prison progress report was listed in the written notice by the Board as the ground for rescinding Northern's original parole date. The supplemental assessment focused on potential problems affecting Northern's adjustment into society posed by his relationship with his father. A full rescission hearing was then scheduled for July 8, 1988.¹

At that hearing, the Board determined that Northern continued to be a risk to society, and refused to grant him parole at that time. The Board scheduled a rehearing for May 1990, and Northern was returned to the Duchesne County Jail. Two months later, however, he escaped and fled to Canada. The Board then rescinded the rehearing scheduled for May 1990. Northern was captured and returned to prison on October 6, 1989.

1. The administrative rules of the Board state, as policy, that "[a]n offender shall be notified at least seven calendar days in advance of a hearing, except in extraordinary circumstances, and shall be specifically advised as to the purpose of the hearing." See Utah Admin. R. 655-202 (1991).

Northern petitioned for extraordinary relief and habeas corpus under Rule 65B(b)(2) and (4), and (f) of the Utah Rules of Civil Procedure.² The petition prayed for (1) declaratory relief as to the unlawfulness of Northern's confinement since May 10, 1988, (2) a demand for his immediate release, and (3) damages in excess of \$10,000 for "breach of contract" on the ground that a parole date created a legally binding agreement on the State. After a hearing, the trial court denied the petition, and Northern filed a notice of appeal. The Board subsequently set a July 1991 parole date, and required restitution of \$26,350 by Northern as a condition of parole. Northern agreed to the new conditions, and was paroled on July 9, 1991, while this appeal was pending.

ANALYSIS

In general, the purpose of extraordinary relief under Rule 65B is to test the lawfulness of imprisonment, and the propriety of any related proceedings, by forcing a judicial hearing. See Ziegler v. Miliken, 583 P.2d 1175, 1176 (Utah 1978). Northern presents no authority, however, for extending the purposes of extraordinary writs as a procedure to bring contract claims. We also conclude that the demand for Northern's immediate parole is moot because parole was granted subsequent to the filing of this appeal. Spain v. Stewart, 639 P.2d 166, 168 (Utah 1981).³ We are therefore left only with Northern's prayer for declaratory relief as to the unlawfulness of his "confinement."

Inasmuch as Northern is no longer incarcerated, we must consider whether his request for declaratory relief is also moot. Courts have reviewed habeas corpus petitions that would have been otherwise rendered moot by the release of a prisoner when the prisoner suffers "collateral legal consequences" from a conviction, such as "the use of the conviction to impeach the petitioner's character or as a factor in determining a sentence

2. Rule 65B was completely reorganized after Northern's petition was filed. See Utah R. Civ. P. 65B (amended effective September 1, 1991) and advisory committee note.

3. Although moot questions are generally not considered on appeal due to the judicial policy against advisory opinions, courts have reached the merits of an issue that is technically moot, but is "of wide concern, affects the public interest, is likely to recur in a similar manner, and, because of the brief time any one person is affected, would otherwise likely escape judicial review" Wickham v. Fisher, 629 P.2d 896, 899 (Utah 1981).

in a future trial, as well as petitioner's inability to vote, engage in certain businesses, or serve on a jury." Duran v. Morris, 635 P.2d 43, 45 (Utah 1981).

Northern argues that he would have completed his parole in May 1991, if the Board had not violated his due process rights in rescinding his original parole date. Thus, the request for declaratory relief becomes a question of whether Northern's extended parole status was a collateral legal consequence of alleged due process violations. In Jones v. Cunningham, 371 U.S. 236, 243, 83 S. Ct. 373, 377 (1963), the United States Supreme Court held that release on parole does not render a petition for habeas corpus moot because parole "imposes conditions which significantly confine and restrain [a parolee's] freedom." Since parole imposes conditions of confinement and Northern's parole status past May 1991 is a consequence of rescinding his original parole date, we proceed to address his claim for credit against his parole period for time served while incarcerated after his original parole date.

In prior cases, discretion to give credit for time served was determined to lie solely with the Board. In State v. Schreuder, 712 P.2d 264, 277 (Utah 1985), the reason given for rejecting a similar argument demanding credit for time served was the Board's discretion to determine the period of time to be served. Likewise, in State v. Alvillar, 748 P.2d 207, 208-09 (Utah App. 1988), we held that Utah courts have no authority to grant credit for time served prior to conviction since the power to reduce or terminate sentences is vested exclusively with the Board under Utah Code Ann. § 77-27-5(3) (1990).

Northern suggests that the Board's exercise of this discretionary authority is now subject to judicial review under the recent case of Foote v. Utah Board of Pardons, 808 P.2d 734 (Utah 1991). We disagree. In Foote, a prisoner sought an extraordinary writ, contending "that the manner in which his parole hearings have been conducted [had] deprived him of procedural due process." Id. The Utah Supreme Court held that, under the Utah Constitution, an inmate is entitled to due process in proceedings before the Board. Id. at 735. The supreme court then referred the case to a trial court to ascertain factually "the procedures followed by the board" and to decide what is procedurally required in "the conduct of the parole hearings." Id. Since Northern was afforded full procedural due process by the July 8, 1988 hearing, any of the alleged procedural deficiencies in rescinding his original parole date were remedied before this petition was filed. Northern's claim relates, therefore, not to the procedural due process issues outlined in Foote, but to the reasonableness of the Board's decision in not

granting Northern credit for the time served beyond his original parole date.

Termination of Northern's sentence is triggered by "completion of three years on parole outside of confinement and without violation . . . unless the person is earlier terminated by the Board of Pardons." Utah Code Ann. § 76-3-202(1)(1990). "Any time spent in confinement awaiting a hearing . . . concerning revocation of parole constitutes service of sentence" rather than time on parole. Section 76-3-202(3)(c). Since the Board has discretion to parole or discharge an inmate at any time, see section 76-3-202(5), it could have given Northern a parole period of less than three years and thereby credited him for the time served while incarcerated beyond his original parole date. We deem the Board's decision to not give Northern an earlier release date an exercise of its discretion.

The Board's right to rely on any factors known in May 1988, or later adduced at the July 1988 hearing, and the weight to be afforded such factors in deciding whether Northern posed a societal risk, as well as whether an order of restitution was appropriate, are all matters within the discretion of the Board. They are precisely the kinds of issues that are not subject to judicial review under section 77-27-5(3). Accordingly, we hold that habeas corpus is not available in this case as a post release remedy to modify the release date ordered by the Board.

We have reviewed the remaining issues raised on appeal and deem them to be without merit. See State v. Carter, 776 P.2d 886, 888 (Utah 1989) (it is within our discretion to "analyze and address in writing each and every argument, issue, or claim raised").

CONCLUSION

The trial court's denial of the writ is affirmed.

Russell W. Bench

Russell W. Bench,
Presiding Judge

I CONCUR: -----

Reginal W. Garff

Reginal W. Garff, Judge -----

I CONCUR IN THE RESULT:

Judith M. Billings

Judith M. Billings, Judge

COVER SHEET

CASE TITLE:

JAN 27 1992

Kendall Q. Northern,
Plaintiff and Appellant,
v.
N. Eldon Barnes, Warden,
Utah State Prison and the
Department of Corrections
through the Board of Pardons,
Defendant and Appellees.

Case No. 900566-CA

January 24, 1992. OPINION (For Publication).

Opinion of the Court by RUSSELL W. BENCH, Presiding
Judge; REGNAL W. GARFF, Judge, concurs. JUDITH M.
BILLINGS, Judge, concurs in result.

CERTIFICATE OF MAILING

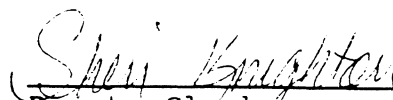
I hereby certify that on the 24th day of January, 1992, a
true and correct copy of the foregoing OPINION was deposited in
the United States mail to each of the parties listed below:

Jo Carol Nasset-Sale (Argued)
Attorney at Law for Appellant
175 South Main Street
10th Floor, Walker Center
Salt Lake City, Utah 84111

R. Paul Van Dam
State Attorney General
Lorenzo K. Miller (Argued)
Kirk M. Torgensen
Assistant Utah Attorney General
6100 South 300 East, Suite 204
Murray, Utah 84107

and a true and correct copy of the foregoing OPINION was
deposited in the United States mail to the district court judge
listed below:

Honorable Timothy R. Hanson
Third District Judge
240 East 400 South, Room 302
Salt Lake City, UT 84111


Deputy Clerk

TRIAL COURT:

Third District Court, Salt Lake County, Case No. 90090125HC.

**Kendall Q. NORTHERN, Plaintiff
and Appellant,**

v.

**N. Eldon BARNES, Warden, Utah State
Prison and the Department of Correc-
tions through the Board of Pardons,
Defendants and Appellees.**

No. 900566-CA.

Court of Appeals of Utah.

Jan. 24, 1992.

Inmate petitioned for habeas corpus after his original parole date was rescinded. The Third District Court, Salt Lake County, Timothy R. Hanson, J., denied the petition, and inmate appealed. While appeal was pending, inmate was paroled. The Court of Appeals, Bench, P.J., held that: (1) inmate's request for declaratory relief was not moot following his release on parole, and (2) decision of Board of Pardons to not give inmate earlier release was an exercise of its discretion.

Affirmed.

Billings, J., concurred in the result.

See also 814 P.2d 1148.

1. Courts ⇐207.1

In general, purpose of extraordinary relief under extraordinary writs rule is to test lawfulness of imprisonment, and propriety of any related proceedings, by forcing judicial hearing. Rules Civ.Proc., Rule 65B.

2. Courts ⇐207.1

Extraordinary writs rule does not provide procedure to bring contract claims. Rules Civ.Proc., Rule 65B.

3. Habeas Corpus ⇐826(2)

Inmate's demand for immediate parole was moot where parole was granted subsequent to filing of appeal from denial of petition for writ of habeas corpus. Rules Civ.Proc., Rule 65B.

4. Declaratory Judgment ⇐84

A parolee's request for declaratory relief as to unlawfulness of his confinement was not rendered moot by fact that parole was granted subsequent to filing of appeal; parolee was alleging that if Board of Pardons had not violated his due process rights in rescinding his original parole date he would have completed his parole, and parolee was claiming credit against his parole period for time served while incarcerated after his original parole date. U.S.C.A. Const.Amends. 5, 14.

5. Criminal Law ⇐1216.1(2)

Discretion to give credit for time served lies solely with the Board of Pardons. U.C.A.1953, 77-27-5(3).

6. Prisons ⇐15(1)

Power to reduce or terminate sentences is vested exclusively within Board of Pardons. U.C.A.1953, 77-27-5(3).

7. Pardon and Parole ⇐59

Any of alleged procedural deficiencies in rescinding inmate's original parole date were remedied by full rescission hearing held before Board of Pardons. U.S.C.A. Const.Amends. 5, 14.

8. Habeas Corpus ⇐516

Habeas corpus was not available as postrelease remedy to modify release date ordered by the Board of Pardons, even though parolee's original scheduled parole date was rescinded by Board of Pardons one day before parole date; Board had right to rely on any factors known at the time, including parolee's drug history, or later adduced at hearing ordered and had discretion to determine weight to be given to the factors. U.C.A.1953, 76-3-202(1), (3)(c), (5), 77-27-5(3).

Jo Carol Nessel-Sale, Salt Lake City, for plaintiff and appellant.

R. Paul Van Dam, Lorenzo K. Miller, and Kirk M. Torgensen, Salt Lake City, for defendants and appellees.

Before BENCH, P.J., and BILLINGS and GARFF, JJ.

OPINION

BENCH, Presiding Judge:

Kendall Q. Northern unsuccessfully petitioned the trial court for a writ of habeas corpus following a decision of the Board of Pardons (the Board) to rescind his original parole date. Northern appealed the trial court's decision, but was subsequently paroled during the pendency of this appeal. We affirm.

FACTS

In 1980, Northern, an eighteen-year-old drifter, pleaded guilty to second degree murder and aggravated robbery for his participation in the shooting death of a cab driver earlier that same year. Northern was sentenced to two five-to-life sentences at the Utah State Prison. He later admitted he was under the influence of LSD at the time of the shooting, and had been deeply involved in drugs.

After Northern had been imprisoned for a year, the Board met and granted him a May 10, 1988 parole date. The Board reconsidered Northern's status in 1984, and determined that the 1988 parole date would remain intact despite evidence that Northern had used drugs at the prison during his incarceration.

In 1986, Northern was transferred to the Duchesne County Jail where he attained trustee status. Over the next two years, Northern was allowed to work unsupervised outside the jail. In early 1988, with only a few months remaining before his projected parole, jail authorities discovered that Northern was again using drugs. This information was reported to the prison and received by the Board before his parole date.

Two months before his parole date, a psychological assessment of Northern was made at the request of the Board. The report indicated that Northern had been a

heavy drug user, and had been unable to deal with life's stresses without drugs. The report also said Northern acknowledged that his drug dependence was a major factor contributing to his antisocial behavior. Before the report was published, the Board also attempted to obtain Northern's consent to additional terms of release that would have included drug testing. On the advice of his father, however, Northern refused to consent to the new conditions.

On May 9, 1988, the Board rescinded Northern's May 10 parole date, pending further review, and ordered another psychological evaluation. The need for another psychological evaluation and complete prison progress report was listed in the written notice by the Board as the ground for rescinding Northern's original parole date. The supplemental assessment focused on potential problems affecting Northern's adjustment into society posed by his relationship with his father. A full rescission hearing was then scheduled for July 8, 1988.¹

At that hearing, the Board determined that Northern continued to be a risk to society, and refused to grant him parole at that time. The Board scheduled a rehearing for May 1990, and Northern was returned to the Duchesne County Jail. Two months later, however, he escaped and fled to Canada. The Board then rescinded the rehearing scheduled for May 1990. Northern was captured and returned to prison on October 6, 1989.

Northern petitioned for extraordinary relief and habeas corpus under Rule 65B(b)(2) and (4), and (f) of the Utah Rules of Civil Procedure.² The petition prayed for (1) declaratory relief as to the unlawfulness of Northern's confinement since May 10, 1988, (2) a demand for his immediate release, and (3) damages in excess of \$10,000 for "breach of contract" on the ground that

1. The administrative rules of the Board state, as policy, that "[a]n offender shall be notified at least seven calendar days in advance of a hearing, except in extraordinary circumstances, and shall be specifically advised as to the purpose of the hearing." See Utah Admin.R. 655-202 (1991).

2. Rule 65B was completely reorganized after Northern's petition was filed. See Utah R.Civ.P. 65B (amended effective September 1, 1991) and advisory committee note.

a parole date created a legally binding agreement on the State. After a hearing, the trial court denied the petition, and Northern filed a notice of appeal. The Board subsequently set a July 1991 parole date, and required restitution of \$26,350 by Northern as a condition of parole. Northern agreed to the new conditions, and was paroled on July 9, 1991, while this appeal was pending.

ANALYSIS

[1-3] In general, the purpose of extraordinary relief under Rule 65B is to test the lawfulness of imprisonment, and the propriety of any related proceedings, by forcing a judicial hearing. See *Ziegler v. Miliken*, 583 P.2d 1175, 1176 (Utah 1978). Northern presents no authority, however, for extending the purposes of extraordinary writs as a procedure to bring contract claims. We also conclude that the demand for Northern's immediate parole is moot because parole was granted subsequent to the filing of this appeal. *Spain v. Stewart*, 639 P.2d 166, 168 (Utah 1981).³ We are therefore left only with Northern's prayer for declaratory relief as to the unlawfulness of his "confinement."

[4] Inasmuch as Northern is no longer incarcerated, we must consider whether his request for declaratory relief is also moot. Courts have reviewed habeas corpus petitions that would have been otherwise rendered moot by the release of a prisoner when the prisoner suffers "collateral legal consequences" from a conviction, such as "the use of the conviction to impeach the petitioner's character or as a factor in determining a sentence in a future trial, as well as petitioner's inability to vote, engage in certain businesses, or serve on a jury." *Duran v. Morris*, 635 P.2d 43, 45 (Utah 1981).

Northern argues that he would have completed his parole in May 1991, if the Board had not violated his due process

rights in rescinding his original parole date. Thus, the request for declaratory relief becomes a question of whether Northern's extended parole status was a collateral legal consequence of alleged due process violations. In *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S.Ct. 373, 377, 9 L.Ed.2d 285 (1963), the United States Supreme Court held that release on parole does not render a petition for habeas corpus moot because parole "imposes conditions which significantly confine and restrain [a parolee's] freedom." Since parole imposes conditions of confinement and Northern's parole status past May 1991 is a consequence of rescinding his original parole date, we proceed to address his claim for credit against his parole period for time served while incarcerated after his original parole date.

[5, 6] In prior cases, discretion to give credit for time served was determined to lie solely with the Board. In *State v. Schreuder*, 712 P.2d 264, 277 (Utah 1985), the reason given for rejecting a similar argument demanding credit for time served was the Board's discretion to determine the period of time to be served. Likewise, in *State v. Alvillar*, 748 P.2d 207, 208-09 (Utah App.1988), we held that Utah courts have no authority to grant credit for time served prior to conviction since the power to reduce or terminate sentences is vested exclusively with the Board under Utah Code Ann. § 77-27-5(3) (1990).

[7] Northern suggests that the Board's exercise of this discretionary authority is now subject to judicial review under the recent case of *Foote v. Utah Board of Pardons*, 808 P.2d 734 (Utah 1991). We disagree. In *Foote*, a prisoner sought an extraordinary writ, contending "that the manner in which his parole hearings have been conducted [had] deprived him of procedural due process." *Id.* The Utah Supreme Court held that, under the Utah Constitution, an inmate is entitled to due

3. Although moot questions are generally not considered on appeal due to the judicial policy against advisory opinions, courts have reached the merits of an issue that is technically moot, but is "of wide concern, affects the public inter-

est, is likely to recur in a similar manner, and, because of the brief time any one person is affected, would otherwise likely escape judicial review...." *Wickham v. Fisher*, 629 P.2d 896, 899 (Utah 1981).

process in proceedings before the Board. *Id.* at 735. The supreme court then referred the case to a trial court to ascertain factually "the procedures followed by the board" and to decide what is procedurally required in "the conduct of the parole hearings." *Id.* Since Northern was afforded full procedural due process by the July 8, 1988 hearing, any of the alleged procedural deficiencies in rescinding his original parole date were remedied before this petition was filed. Northern's claim relates, therefore, not to the procedural due process issues outlined in *Footte*, but to the reasonableness of the Board's decision in not granting Northern credit for the time served beyond his original parole date.

[8] Termination of Northern's sentence is triggered by "completion of three years on parole outside of confinement and without violation . . . unless the person is earlier terminated by the Board of Pardons." Utah Code Ann. § 76-3-202(1) (1990). "Any time spent in confinement awaiting a hearing . . . concerning revocation of parole constitutes service of sentence" rather than time on parole. Section 76-3-202(3)(c). Since the Board has discretion to parole or discharge an inmate at any time, *see* section 76-3-202(5), it could have given Northern a parole period of less than three years and thereby credited him for the time served while incarcerated beyond his original parole date. We deem the Board's decision to not give Northern an earlier release date an exercise of its discretion.

The Board's right to rely on any factors known in May 1988, or later adduced at the July 1988 hearing, and the weight to be afforded such factors in deciding whether Northern posed a societal risk, as well as whether an order of restitution was appropriate, are all matters within the discretion of the Board. They are precisely the kinds of issues that are not subject to judicial review under section 77-27-5(3). Accordingly, we hold that habeas corpus is not available in this case as a post release remedy to modify the release date ordered by the Board.

We have reviewed the remaining issues raised on appeal and deem them to be

without merit. *See State v. Carter*, 776 P.2d 886, 888 (Utah 1989) (it is within our discretion to "analyze and address in writing each and every argument, issue, or claim raised").

CONCLUSION

The trial court's denial of the writ is affirmed.

GARFF, J., concurs.

BILLINGS, J., concurs in the result.



STATE of Utah, Plaintiff and Appellee,

v.

William Eluie CASTNER, II and Bonnie
Lee Castner, Defendants and
Appellants.

No. 910275-CA.

Court of Appeals of Utah.

Jan. 24, 1992.

Driver and passenger were convicted in the Eighth District Court, Duchesne County, Dennis L. Draney, J., of drug-related offenses. Driver and passenger appealed. The Court of Appeals, Jackson, J., held that: (1) request to search for second vehicle identification number on door post was not reasonably related to issuance of speeding ticket; (2) driver voluntarily consented to search of vehicle; (3) taint from illegal search for door post number had dissipated; and (4) consent to search vehicle extended to contents of containers found in vehicle and trunk.

Affirmed.

Orme, J., concurred in result only.

ADDENDUM C



CT 11 15.9.87 m

July 7. 1988

To Whom It May Concern:

I have known Ken Northern for the past 2 1/2 years while he has been a inmate here at the Duchesne County Jail. One of the biggest changes that I have seen Ken make is his attitude. His attitude about life, people, and the reasons why things happen the way they do. He seems to have alot better understanding about things and alot more patience.

Ken has shown us while he has been here all the many talents that he possess. He has kepted himself busy while here with many different work projects. Ken has been a good trustee here at the jail and has helped our department by cleaning, building, and giving us helpful ideas.

During the past few months Ken has helped me along with Sgt. Jerry Foote get our Photo Lab and Crime Lab put together. He has taught Sgt. Foote and myself how to develop pictures. I and Sgt. Foote have appreciated his help in the Lab.

During the time while our jail had work release Ken helped me and my widowed mother on our farm. Ken was a great help to me and my mother. Ken did all this on his own without much compensation. Also while on work release Ken also helped the Duchesne County Fair Board build a new arena, stalls, bleachers, and grandstand.

Ken along with a few of the other inmates helped a local boy with his Eagle Scout Project. they helped him put a flag pole in the ground out in front of the Sheriff's Office. Ken and the boy themselves bricked around the flag pole, so a memorial placue could be place on it. This flag pole is a memorial flag pole for Lt. Gerry L. Ivie who was killed in the line of duty.

I feel that Ken if paroled will have the support from his family who live in Arizona and I feel that he has the potential to be good citizen.

Respectfully,

Lt. Ralph Stansfield

ADDENDUM D

Date July 27, 1990
Kendall & Northern vs. No. Eldon Barnes, et al
 No. 90090 1935 HC
Jo Carol Nessel-Sale Dane Nolan
 Attorney for Plaintiff Attorneys for Defendant

DESCRIPTION OF EXHIBITS	REMARKS	DESCRIPTION OF EXHIBITS	REMARK
1-D Case hrg articale	Rec'd	18 -D 3/24/88 Psychological Therapy request Rec'd	
2-D R 655 "Law"	"	19 -D 3/28/88 Memorandum Connection	"
3-D 891901608 FS Verdict 21 Nov. 90	limited	20 -D 4/11/88 letter to pet fm Hrg Officer	"
4-D 891901608 FS Minute Entry 7/9/90	limited	21 -D 4/19/88 Hrg Transcript	"
5-D 3/14/80 Psychological Eval	"	22 -D Bd of Pardon letter	"
6-D Letter 3/13/80 R: Northern	"	23 -D 4/19/88 Bd Consideration Status	"
7-D 6/16/80 Psychological Eval	"	24 -D 5/5/88 Psychological Eval	"
8-D 7/28/80 90-Day J. Baldwin	"	25 -D 5/11/88 Psychological Report	"
9-D CR80-264 Judgment Commitment	"	26 -D Bd Consideration Status	"
10-D Documents Bd Pardon	"	27 -D	"
11 -D Bd Pardon Reg Hrg	"	28 -D 6-23-88 Letter Petition Hrg Officer	"
12-D 7/9/81 letter Pet fm Bd of Pardon	"	29 -D 6/28/88 Approval of Counsel	"
13-D 7/9/81 Application for Parole	"	30 -D 6/28/88 Mo for Counseling	"
14-D July 83/July 84 Bd Redetermination	"	31 -D 7/6/88 Bd Consideration	"
15-D 8/24/84 Psychological Eval	"	32 -D 7/8/88 Inmate Statement	"
16-D 5/10/88 Intensive Supervision	"	33 -D 7/8/88 Hrg Transcript	"
17-D Consideration of Status	"	34 -D 7/8/88 Consideration Status	"

Date July 27, 1990
Kendall Q. Northern vs. J. Eldon Barnes, et al
Carol Nussel-Dave No. 90090 1925 HC
 Attorney for Plaintiff Dave Nolan
 Attorneys for Defendant

DESCRIPTION OF EXHIBITS	REMARKS	DESCRIPTION OF EXHIBITS	REMARKS
1-P	Rec'd	18-P	Rec'd
2-P	"	19-P	Rec'd
3-P	"	20-P	Rec'd
4-P	"	21-P	Rec'd
5-P	"	22-P	7m Shuff letter to Pardon Rec'd
6-P	"	23-P	letter Shuff Pardon Rec'd
7-P	"	24-P	Re: letter Jph to Pardon Rec'd
8-P	"	25-P	1985 Bd Pardon Doc Rec'd
9-P	"	26	
10-P	"	27	
11-P	"	28	FILED DISTRICT COURT Third Judicial District
12-P	"	29	SEP 7 5 1990
13-P	"	30	By <u>E. Thompson</u> DEPUTY CLERK SHELBY COUNTY
14-P	"	31	
15-P	"	32	
16-P	"	33	
17-P	"	34	

1-P Orig Order of Parole Rec'd

CONTINUED

DESCRIPTION OF EXHIBITS		REMARKS	DESCRIPTION OF EXHIBITS		REMARKS
35	-D Prison Office Memo 10/24/88	Rec'd	55		
36	-D Consideration 4/30/82	"	56		
37	-D Inmate Violation Report 4/30/82	"	57		
38	-D Inmate Violation 4/30/82	"	58		
39	-D Violation Report 10-1-85	"	59		
40	-D Violation Report 11-21-85	"	60		
41	-D Inmate Infractor Report Decker Co	"	61		
42			62		
43			63		
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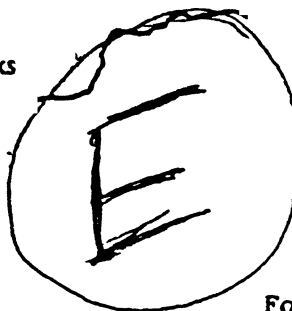
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ADDENDUM E



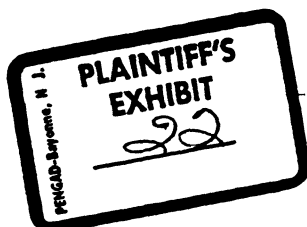
DUCHESNE COUNTY SHERIFF DEPARTMENT

Sheriff Clair M. Poulson
Chief Deputy Doug Horrocks



Drawer M
Duchesne, UT 84021
1-800-243-0456
(801) 738-2424
(801) 722-2210

For Emergency
(801) 738-2015
(801) 722-4444
For Business



March 22, 1988

Ms. Vicki Palacios, Chairman
Board of Pardons
6065 South 300 East
Salt Lake City, Utah 84107

Dear Ms. Palacios,

This letter is being written in regards to Inmate Kendall Quinn Northern, #15009. Inmate Northern has been in Duchesne County Jail on the prison outcount program for the past 2 years. He has made substantial progress with very few problems while here.

He has been a trusty much of the time and has preformed a number of different jobs such as kitchen helper. He has done several remodeling jobs in the jail, assisted us in our photo lab and other things.

We have noted that Ken has good family support, his folks having traveled from Arizona to see him on a number of occasions. We have talked with them on the phone on other occasions. It appears to us that he would do well being back with his family in Arizona. We believe that his work opportunities and living arrangements in Arizona are very good. His chances for success if he were allowed to parole in Arizona would be much better than if he were required to stay in Utah.,

Thank you for your consideration in this matter.

Respectfully Yours

Sgt. Veldon Lefler
Jail Commander

Clair M. Poulson
Sheriff Duchesne County

ADDENDUM F

INTENSIVE SUPERVISION PROGRAM

APPROVAL/DENIAL CHECK LIST

CLIENT NAME: NORTHERN, KENDALL USP NO.: 15009
RELEASE DATE: MAY 10, 1988 XXX HIGH RISK
STAFFING DATE: JANUARY 21, 1988 ELEC. MONITORING

XXX

APPROVED: The above client has been found to meet all objective criteria listed on both the memo from the Board of Pardons and those developed by the ISP Team.

DENIAL: The above client does NOT meet all objective criteria. The following comments will explain why the ISP staff made the decision of rejection.

COMMENTS:

According to BCI and the current case file, the subject is incarcerated for Murder, Agg. Assault, and Forgery (9 counts). Although Mr. Northern has no prior adult arrests, he has seven juvenile referrals or arrests. It should be noted that the subject shot and killed a cab driver for \$26.00 in cash. The Region III ISP Staff recommends ISP High Risk as a condition of Mr. Northern's Parole. Risk score 31.

The above client has been seen by a member of the ISP Team, the program has been explained, he/she agreed to participate, and he/she has signed the attached ISP Agreement.

The above client has not been seen by a member of the ISP Team, but has had the ISP Program explained on _____ and agreed to participate.

JANUARY 21, 1988
DATE

Rich Bardo - for
J. LYLE WILDE, ISP SUPERVISOR

K. N. Egan
K. NEGAN, REGION III
CORRECTIONAL TECHNICIAN

ADDENDUM G

Board of Pardons
6100 South 300 East
Salt Lake City, Utah 84107

Re: Kendall Quinn Northern #15009

Dear Members;

I would like to open by thanking you for this opportunity to have a say in my future. The future is very important to me. The outcome of this hearing will have a lasting effect on both my families life and mine.

I was a seventeen year old kid when I entered this institution. I will be a twenty six year old man when I leave. I am no longer a child. I have matured and learned from this experience. I know that prison is not where I want to be. I know that I have the ability to succeed. My families support for me is tremendous. And with it I can not fail.

In 1981 I went before the Board of Pardons. My family and I spoke to them and told them at that time, I wanted to go home to Arizona when released. My family and I have been planing for my life upon return to Arizona since that hearing. We have planed for every forseeable problem, every detail of my return. Until a month ago.

A month ago a problem that was not forseen was thrown into my life. I received a waiver stating that my parole aggeement was being changed to include ISP. That is why I have requested this hearing. To ask why. And to explain my plans for the future. To explain how much of a detriment to myself and the state of Utah, Placing me on ISP in Utah would be.

On may tenth I am going to be released. I will leave here with the cloth's on my back and one hundred dollars. If I must stay in Utah and complete ISP, I must find a place to live where ISP is avialible. I have a Sister and a Brother in Blanding Utah as well as Aunts and Uncles, Cousins and a Grandmother there. I also have a job there. But ISP is not avialible there. Therefore I will have to find a place to live along the Wasatch Front, in Richfield or in St. George. I do not have any family or relatives in any of these areas. So I must find a place to live on my own. A place that will fit my budget of one hundred dollars, to eat, live and clothe myself on. In my opinion an enviornment such as that would not be condusive to the successfull completion of ISP. I also have to find a job. Yet if I spend money on clothing appropriate for job hunting. I will be spending money I need to live on and pay rent with. On the otherhand, in Arizona, my family can give me a place to live, food, and the support I need to be successfull. I also have a good job waiting for me there so I can go right to work.

During my incarceration I have been informed by prison officials on a number of occasions that there are contracts on my life. I testified agianst my partner and because of that my life has been threatend on a number of occasions. This is why I have been housed in the Duchesne County Jail for the past two years. For my own protection. Yet the type of enviornment I will have to stay in if I am required to stay in Utah. Would make it very easy to find me and carry out these contracts. As you can see my staying in Utah is not to your advantage or mine.

As you know from the letters you have received from my family. My best chance for successfully completing parole and becoming a productive member of society is in Arizona with them. I have a good job in construction waiting for me there. I have a place to live, food to eat and a family that is as determined for me to succeed as I myself am. Most of all Pheonix is my home. I grew up there and want to go back. I know I can succeed there. My family and I have been planing for my return to Pheonix for the past eight years.

My father has been in touch with the Arizona parole department and they have told him that they will accept me. But only under Arizona's parole system. They said they would not accept any parole stipulations from Utah. They will look at my record, crime, job, housing and prison record. From these they will place me on the level of parole they think is necessary. Arizona told my father that Utah is aware of this, yet the last parole agreement given to me to sign seemed to indicate Utah is unwilling to allow Arizona to set its own conditions for my parole.

Arizona is where I want to go and is where I belong. My best chance for success is there with my family. I have the abilities and resources to succeed on parole if you will help me. Please understand that I will live by, and I will succeed at, any type of parole I am placed on. In Utah or in Arizona. I am only asking that you help me to succeed. All I want is a fighting chance.

As I have explained my best chance for success is with my family in Arizona. Please give me that chance.

Thank You,

A handwritten signature in cursive script that reads "Kendall Quinn Northern". The signature is written in dark ink and is positioned above the printed name.

Kendall Quinn Northern #15009

ADDENDUM H

BOARD OF PARDONS

Consideration of the Status of Kendall Northern Utah State Prison No. 15009

The above-entitled matter came before a Hearing Officer on the 19 day of April, 1988 for consideration as:

1. ☐ ORIGINAL HEARING
2. ☐ PAROLE VIOLATION
3. ☐ RECISSION HEARING
4. ☒ OTHER Special Attention

After hearing the statement of Kindell Newberry and the following witness(es)
1) _____ 2) _____, the following decision was rendered:

Ans: (1) Complete I/P is available in Utah (2) Suggest Maximum level

1 Parole to become effective _____, 19____, with the following special conditions:

- A. SP Supervision in receiving state (3) Random Urinalysis (4) Complete Mental
B. Health Therapy (5) Maintain Full Time employment or Full-Time student status

1 Rehearing for _____, 19 _____, for the following reasons:

- A. (6) Maintain night time (7⁰⁰pm) Curfew for 1st Six months

1 Termination of Sentence to become effective _____, 19 ____.

1 Expiration of Sentence _____, 19 ____.

OTE: This Interim Decision is binding and in full force and effect until reviewed by the Board of Pardons members, who will make the final determination in this matter.

if the event the above named shall be found guilty of any infraction of the Rules and Regulations of the Utah State Prison, of any Community Correction Center or of any residential facility or is found in violation of any law of the State of Utah this order may be made null and void.

April 19, 1988

Paul Lane
Hearing Officers

ADDENDUM I

PSYCHOLOGICAL EVALUATION

CONFIDENTIAL REPORT
NOT TO BE SHOWN TO THE CLIENT
OR COPIED FOR FURTHER DISTRIBUTION.

NAME: Kendall Quinn Northern
DATE: 5 May 1988
JSP#: 15009

REASON FOR EVALUATION: Request of the Utah State Board of Pardons to aid in determining suitability of inmate for release on parole.

ASSESSMENT MODALITIES USED: Minnesota Multiphasic Personality Inventory, Driggs Developmental Inventory, BiPolar Psychological Inventory Report, Psychological Interview.

BACKGROUND INFORMATION: Mr. Northern is the youngest of four children born to Donald and Claire Northern. He is a well-nourished, healthy-looking white male 26 years of age. He reports his childhood was fairly uneventful except that he was always heavy and big for his age. His size appears to have caused him difficulty psychologically since he felt he never could fit in with others and attributes his initiation into the drug culture to the fact that "they would accept anybody, just as long as they took drugs." Mr. Northern's home life was reported as stable with major moves to Arizona and California as a youth. At 16 Mr. Northern left home to wander the western states and became more deeply involved with drugs and people using drugs. He stated that he was high on LSD at the time he committed his crime. Among drugs that Mr. Northern admitted to using were LSD, cocaine, amphetamines, and marijuana. He has tried other drugs such as downers, but stated he found them unsatisfactory. He said he had no alcohol abuse problem. He is single with no children.

As a prison inmate Mr. Northern has had disciplinary write ups for his drug usage, but that behavior has been absent from his jacket for at least the past four years. He is presently incarcerated at the Duchesne County Jail where he is reported to be a model inmate according to staff. He was transferred to the Duchesne facility two years ago as a protective measure. While at the Utah State Prison and Duchesne, Mr. Northern maintained an excellent volunteer and work record.

INTERVIEW BEHAVIOR: Mr. Northern was very verbal and cooperative during the assessment interview. It was obvious that he was anxious about the situation, but soon calmed down after venting his frustrations about the status of his upcoming parole. He was quite open about his past history and reflective about the consequences of his past crime. He was very insistent about having drug therapy in addition to any mental health therapy ordered by the Board, viewing his drug dependency as a major factor in his anti-social behavior.

INTELLECTUAL FUNCTIONING: No I.Q. tests were administered to Mr. Northern at this time. However, he presents himself as an articulate, intelligent, and well-read individual. This impression is consistent with earlier testing which placed his overall IQ at 129 (superior range). While at the prison Mr. Northern completed his Associate of Arts in Business degree and three technical training courses offered at the prison.

PAGE 1 of 2

PERSONALITY INTEGRATION: Testing showed that Mr. Northern was honest in answering test questions and tended to be overly truthful. He definitely feels proud about his abilities and has high self-esteem, security, self-satisfaction, and a positive self-image. He displays an open attitude in listening to and accepting help, and as a willingness to discuss himself and his problems and cooperate with professional health-care deliverers. He is mildly independent, non-conforming and may have difficulty in expressing anger or hostility in a modulated fashion. He is energetic and active with rebellious traits in his attitudes and behaviors.

RECOMMENDATIONS AND CONCLUSIONS: Overall, Mr. Northern has shown a great deal of growth and maturing since his last evaluation in 1984. Part of this maturing may be due to age, but an important aspect of his growth can be attributed to the social interactions and interventions of adults, especially of the staff at the Duchesne County Jail. He has been given more responsibility and respect than at any other time of his life which, in turn, has led him to view himself as a responsible adult.

Mr. Northern shows no evidence of mental illness at this time. His major problem is his capacity to deal with life's stresses without the use of illegal substances. He fully realizes this shortcoming and wants to address drug issues as part of his parole agreement.

Although Mr. Northern can be physically and verbally imposing, he does not appear to have the capacity for violent acting out. He can be argumentative and assertive, but responds to authority when necessary.

It is this writer's recommendation that Mr. Northern, if he is paroled, be placed in a supportive environment such as family or friends to make transition to society as uneventful as possible. It is strongly recommended that, in addition to any mental health treatment, Mr. Northern receive drug abuse counseling.

FOR THE PURPOSES OF THE BOARD OF PARDONS DETERMINATIONS, THIS REPORT IS TO BE REGARDED AS A FAVORABLE ONE.



Ted Brandhurst, Ph.D.
Associate Psychologist



Al Carlisle, Ph.D.
Chief Clinical Psychologist

ADDENDUM J

UTAH BOARD OF PARDONS
POLICIES AND PROCEDURES MANUAL

Number: 3.10 Date: July 14, 1986 Page: 1 of 2

Title: RESCISSION HEARINGS

Authority: Utah Code Annotated 77-26-7

Purpose: To establish a process for the taking of a release or rehearing date once it has been set, and to allow for the designation of a hearing officer to hear such cases.

Policy: The release or rehearing date established by the Board of Pardons shall remain in effect except upon written referral indicating that the offender is in violation of the rules and regulations of the Utah State Prison, Community Corrections Centers, or laws of any local, state or federal government, or new evidence is presented that an inmate, if released, would present a serious risk or danger to the community.

Procedure:

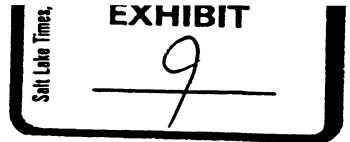
Prior to the rescinding of a parole or rehearing date, information shall be provided to the Board establishing the basis for the rescission hearing. Upon receipt of such information, the offender will be scheduled for a rescission hearing. Except under extraordinary circumstances, the offender will be notified of all allegations and the date of the scheduled hearing at least seven days in advance.

In the event of an escape, the Board will rescind the inmate's date upon official notification of escape from custody and continue the hearing until the inmate is available for appearance.

A Board of Pardons hearing officer shall hear all matters when the violation consists of a new complaint or conviction for a non-violent felony, misdemeanor, or an adjudicated violation of rules or regulations. All felonies involving crimes against persons or other violent felonies shall be heard by the Board.

The hearing officer shall conduct the hearing and make an interim decision to be reviewed, along with a summary report of the hearing, by the Board members. Any decision by a hearing officer shall be binding and in full force and effect until reviewed by Board members, who will make the final decision by approving, modifying, or overturning a hearing officer's decision. The decision is then entered into the record at a regular scheduled Board meeting and the offender is then informed by mail of the results. He is not afforded a personal appearance for this review.

ADDENDUM K



Members

PAUL W. BOYDEN
VICTORIA J. PALACIOS
GARY L. WEBSTER

THE STATE OF UTAH

BOARD OF PARDONS
6065 South 300 East
Salt Lake City, Utah 84107

PAUL W. SHEFFIELD,
Administrator

BEFORE THE BOARD OF PARDONS OF THE STATE OF UTAH

Consideration of the Status of Kendall Q. Northern, OBSCS No. 9991-5009
Utah State Prison No. 15009

The above-entitled matter came on for a hearing before the Utah State Board of Pardons on the 8th day of July, 1988 for consideration as:

1. ☐ ORIGINAL HEARING
2. ☐ REHEARING
3. ☐ REDETERMINATION
4. ☐ TERMINATION OF SENTENCE AND PAROLE

5. ☒ SPECIAL ATTENTION OF THE BOARD
6. ☐ RESCISSION
7. ☐

After the statement of Kendall Northern and the following witness(es)
1) _____ 2) _____
and good cause appearing, the Board made the following decision: _____

☒ Rescind 5-10-, 19 88, parole date, _____

☐ Parole to become effective _____, 19____, with the following special conditions:

☐ Amend parole agreement to add the following special conditions:

1. _____
2. _____
3. _____
4. _____

☒ Rehearing for May, 19 90, for the following reasons: RISK to Society. Appropriate Punishment.

☐ Termination of sentence and parole to become effective _____, 19____.

☐ Expiration of sentence _____, 19____.

REMARKS: Affirm Rescission of 5-10-88.

order Alienist Report

Crime	Sentence	Case No.	Judge	Expir. Date
1. Criminal Homicide	5-life	CR80-264	Baldwin	Life
2. Aggravated Robbery	5-Life	CR80-264	Baldwin	Life
3. _____	_____	_____	_____	_____
4. _____	_____	_____	_____	_____
5. _____	_____	_____	_____	_____
6. _____	_____	_____	_____	_____
7. _____	_____	_____	_____	_____

It is further ordered that in the event the above named shall be found guilty of any infraction of rules and regulations of the Utah State Prison, any community corrections center or other residential facility, or shall fail or refuse to perform duties as assigned or is found in violation of any other law of the State of Utah prior to the effective date of this decision, the order may be made null and void.

By order of the Board of Pardons of the State of Utah, I have this date July 8, 1988 affixed my signature as Administrator for and on behalf of the State of Utah, Board of Pardons.

Paul W. Sheffield by [Signature]
Paul W. Sheffield, Administrator

An application for redetermination may be made after one year from the Board's previous action. Applications may be obtained through a case worker.

ADDENDUM L



Members

PAUL W. BOYDEN
VICTORIA J. PALACIOS
GARY L. WEBSTER

THE STATE OF UTAH

BOARD OF PARDONS
6065 South 300 East
Salt Lake City, Utah 84107

PAUL W. SHEFFIELD,
Administrator

BEFORE THE BOARD OF PARDONS OF THE STATE OF UTAH

Consideration of the Status of KENDALL Q. NORTHERN, Utah State Prison No. 99915009
OBSCIS No. 99915009

The above-entitled matter came on for a hearing before the Utah State Board of Pardons on the 6TH day of JULY, 1988 for consideration as:

1. ☐ ORIGINAL HEARING
2. ☐ REHEARING
3. ☐ REDETERMINATION
4. ☐ TERMINATION OF SENTENCE AND PAROLE

5. ☒ SPECIAL ATTENTION OF THE BOARD
6. ☐ RESCISSION
7. ☐

After the statement of _____ and the following witness(es)

1) _____ 2) _____
and good cause appearing, the Board made the following decision: DENY MOTION REQUESTING APPEARANCE AS COUNSEL AT SPECIAL ATTENTION HEARING; DENY MOTION OF DISCOVERY ON PSYCHOLOGICAL REPORTS.

☐ Rescind _____, 19____ parole date, _____

☐ Parole to become effective _____, 19____, with the following special conditions:

☐ Amend parole agreement to add the following special conditions:

1. _____
2. _____
3. _____
4. _____

☐ Rehearing for _____, 19____, for the following reasons: _____

☐ Termination of sentence and parole to become effective _____, 19____.

☐ Expiration of sentence _____, 19____.

REMARKS: _____

	<u>Crime</u>	<u>Sentence</u>	<u>Case No.</u>	<u>Judge</u>	<u>Expir. Date</u>
1.	CRIMINAL HOMICIDE	5-LIFE	CR80-264	BALDWIN	LIFE
2.	AGGRAVATED ROBBERY	5-LIFE	CR80-264	BALDWIN	LIFE
3.					
4.					
5.					
6.					
7.					

It is further ordered that in the event the above named shall be found guilty of any infraction of rules and regulations of the Utah State Prison, any community corrections center or other residential facility, or shall fail or refuse to perform duties as assigned or is found in violation of any other law of the State of Utah prior to the effective date of this decision, the order may be made null and void.

By order of the Board of Pardons of the State of Utah, I have this date JULY 6, 1988 affixed my signature as Administrator for and on behalf of the State of Utah, Board of Pardons.

Paul W. Sheffield, Administrator

An application for redetermination may be
previous action. Applications may be at _____

Northern v Barnes et. al.

900901905 HC

Defendant's Exhibit # 31

WHITE COPY - BOARD CANARY COPY - INMATE/PAROLEE P

ADDENDUM M

FEB 5 1992

SALT LAKE COUNTY

By Deputy Clerk

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

CHARLES STONEMAN SMITH,	:	MEMORANDUM DECISION
Petitioner,	:	CASE NO. 910903060
vs.	:	
UTAH STATE BOARD OF PARDONS,	:	
Defendant.	:	

The above-entitled matter has come to the Court's attention as a result of a referral from the Fourth Judicial District Court. The case was transferred to this Court to consider the petitioner's pro se Petition seeking a "Writ of Habeas Corpus". The handwritten Petition was filed April 2, 1991 in Millard County.

On June 7, 1991, the Court conducted a prehearing conference and set a pretrial conference for June 17, 1991. On June 17, 1991, at the pretrial conference, the Court denied the State's Motion to Dismiss and referred the matter to Judge Boyd Park of the Fourth District for clarification and preparation of an Order specifically stating the amount of "credit for time served" to which petitioner was entitled. A copy of that

Order, dated the 30th day of October, 1991, is attached hereto and incorporated herein by reference as Exhibit "A".

In Judge Park's Order, he granted credit to the defendant of 626 days of incarceration prior to commitment to the Utah State Prison.

The Court is informed that the Board of Pardons does grant credit for time served in many categories of commitment, including a 90 day diagnostic evaluation, an evaluation while at the Utah State Hospital, custody while financially unable to make bail, retention awaiting parole revocation hearings, and other potential holdings, with the single exception of credit for jail time served as a condition of probation.

In Mr. Smith's case, many of the days served consistent with Judge Park's Order of October 30, 1991 should qualify for credit within the Board of Pardons' own guidelines yet the Board refused to consider the time (See Exhibits "B", "C" and "D"), and refused to clarify, if it did consider any credit, how it was considered and applied to this case.

The Board in a special attention hearing on the 3rd of December, 1991, determined to ignore and continues to ignore the ruling and commitment of Judge Parks (see Exhibit "D").

When the petitioner was committed to the Utah State Prison on September 27, 1989, he had then served 626 days of his commitment. Since the maximum time one may be held on a 0 to 5 commitment is 1,825 days (365 days times five years), and the defendant was given credit for 626 days time served, the maximum period in which the petitioner may be subject to the concurrent penalties imposed equals 1,199 days, that is 3.28 years. (1,825 days minus 626 credit = 1,199 days/365 = 3.28 years)

From the date of commitment, September 27, 1989, to the ultimate release date of January 9, 1993, equals 1,199 days. That constitutes the total exposure of the petitioner to custody on the concurrent penalties imposed by Judge Park.

The petitioner is now subject to parole release on February 25, 1992. That is within the period of the maximum exposure of the petitioner to custodial retention. It is not clear to the Court how on Exhibit "D", the defendant's exposure on one of the cases is to November 20, 1993. Notwithstanding that, the Court determines that the interests of the State of Utah and the Board of Pardons in the petitioner as a result of these concurrent commitments from Judge Parks shall terminate January 9, 1993.

The Court is aware of the case of State v. Danny Richards, 740 P.2d 1314 (S. Ct. June, 1987), allowing credit for time served when the defendant was not able to post bail due to indigency. Within that case, Justice Stewart indicated that both the Model Penal Code and the ABA Standards "...would grant credit for presentence detention in all cases." In the case of State v. Mark Francis Schreuder, (S. Ct. December, 1985), the court stated that "...our sentencing system vests almost complete discretion in the Board of Pardons to determine the period of time that will actually be served." [at p. 277], and finally, the Court has reviewed the case of State v. Alvillar, 748 P.2d 207 (Utah App. 1988), in which the Court said that when the defendant was precluded by statute from the right to bail, (because it was alleged that he had committed a felony while on probation or parole from another prior felony), that no credit would be approved for time served due to the fact that defendant's detention was not for indigency in meeting his bail, but rather was due to a statutory preemption from bail.

This entire area of law allows the Board of Pardons to engage in discriminatory practices that jeopardizes the credibility of the Board and the value of the commitment orders of the district courts. Certainly, it is infrequent that one would serve as many as 626 days confinement in a third degree

felony case before commitment to prison. Due to that fact, and as limited to the circumstances of this case alone, the Court finds that it would be cruel and unusual punishment to impose a further penalty on the defendant than the maximum of five years, minus the 626 days served. Certainly, within this outer limitation, the Board of Pardons has the ability to determine the time in actual custody at the Utah State Prison and/or subsequent halfway houses and the period of time on parole. In granting this Writ, the Court finds that all the discretionary internal date decisions available to the Board of Pardons must be within the outer limits set by the sentencing judge. This appears consistent with the indeterminate term sentencing statutes that have been created by the legislature, and an issue of concern such as this could only arise in a sentence with a fixed top, such as a second or third degree felony or lower offenses.¹

¹ If the Board of Pardons persists in categorically denying credit for time served while on probation without applying some standard of fairness or discretion to cases where, as in this case approximately two years time was served, it would seem that the defense bar and the sentencing judge in nearly all third degree felonies where the jail time served would be beyond six months should be inclined to impose a 0 to 5 commitment at the Utah State Prison. That sentence would require the defendant to serve a few more months on the average, but would avoid the exposure of twice serving as much as two years, which seems to be the result in this case.

Since the sentencing judge sets the outer limits of a commitment by imposing the statutory 0 to 5 years for a third degree felony, or 1 to 15 for a second degree felony, or 5 to life for a first degree felony, the sentencing judge has the authority, as done in this case, to set that limit consistent with credit.

Based upon the foregoing, this Court finds that the Writ of Habeas Corpus should be and the same is herein granted consistent with this Memorandum Decision. The maximum exposure of the petitioner to the criminal justice system in these concurrent offenses is to January 9, 1993.

This matter is returned to the Board of Pardons to implement this ruling and adjust their dates consistent herewith.

Dated this 5th day of February, 1992.



DAVID S. YOUNG
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy
of the foregoing Memorandum Decision, to the following,
this 5th day of February, 1992:

Charles Stoneman Smith
Petitioner
80 S. Orange Street
Salt Lake City, Utah 84116

Dexter L. Anderson
Deputy County Attorney
Attorney for Respondent
750 S. Highway 99
Star Route, Box 52
Fillmore, Utah 84631

Utah Attorney General
6100 South 300 East
Salt Lake City, Utah 84107

Charles