

1992

# Kendall Q. Northern v. N. Eldon Barnes, et al. : Reply Brief

Utah Supreme Court

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DOCKET NO.

920116

IN THE SUPREME COURT OF THE STATE OF UTAH

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KENDALL Q. NORTHERN,

Petitioner,

vs.

N. ELDON BARNES, et al.,

Respondent.

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Case No. 920116

Priority No. 13

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REPLY BRIEF OF PETITIONER

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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

---

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FILED

MAY 12 1993

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UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

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REPLY BRIEF OF PETITIONER

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Petitioner Kendall Q. Northern (hereinafter "Northern"), by and through his counsel Haley & Stolebarger, hereby submits this Reply Brief in support of his appeal from a decision of the Utah Court of Appeals affirming judgment of the Third District Court for Salt Lake County, State of Utah, Honorable Timothy R. Hanson.

SUMMARY OF REPLY ARGUMENT

Petitioner, Kendall Northern, is entitled to the extraordinary relief sought based upon this Court's decision in Foote v. Utah Board of Pardons, 808 P.2d 734 (Utah 1991). The Board of Pardon's own rules require that a hearing be held prior to rescission of a parole date and that an inmate be informed of the charges against him. see Rule 310. The Board failed to comply with these rules in rescinding Northern's parole the day before he was to be released, without notice of the allegations of misconduct or rule violations,

without a hearing that indicated that Northern would present "a serious risk or danger to the community," or without providing Northern with any information pertaining to any "new evidence" the Board had in its possession.

Moreover, the "new evidence" that the trial court found may have been relied upon by the Board was not "new evidence" at all, even as the trial court defined new evidence: "negative information." see Findings of Fact and Conclusions of Law, p. 8, attached to petitioner's opening brief as Addendum A. This evidence - a recent psychological report, a report pertaining to an incident of drug use in February of 1988, and Northern's drug use before and after the commission of his crime in 1980 - was either known to the Board and its agents prior to May 9, 1988, and knowingly not acted upon, or was not negative information, or both.

The Board's decision to rescind Northern's parole date the day before he was scheduled to be released, in violation of its written policies and procedures, was an abuse of discretion and violated Northern's due process rights and his liberty interest in his parole date. The Board had no rational, lawful basis in the record to support its conclusions, and its actions were arbitrary and capricious.

What is at issue here is the correctness of the Board of Pardon's actions in light of the facts and/or evidence the Board had before it in making its decision. A decision made and actions taken upon a Board's determination that an earlier Board was not harsh enough in meting out punishment to an inmate is not a lawful

basis upon which to rescind a release date under Rule 310; the inmate's liberty interest in his release date and the binding force of the rules outweigh a Board's desire to increase the punishment previously set.

The facts concerning the procedures followed by the Board have been "flushed out" in this case. see Foote at 745. Based on this Court's decision in Foote, the facts reveal that the Board of Pardons denied Northern his due process rights under article I, section 7 of the Declaration of Rights in the Utah Constitution. As such, extraordinary relief is appropriate, and Northern is entitled to have the actions taken by the Board at the July 8, 1988, hearing declared null and void, and the order of restitution issued by the Board in 1992 vacated.

#### ARGUMENT

##### **POINT 1**

##### **NORTHERN IS ENTITLED TO THE EXTRAORDINARY RELIEF REQUESTED BASED ON THIS COURT'S DECISION IN FOOTE V. UTAH BOARD OF PARDONS.**

Under Utah Rule of Civil Procedure 65B(e) (1992), Northern is entitled to the extraordinary relief requested where the respondent, Board of Pardons here, fails to "regularly pursue its authority," as defined by the statute and agency rules in place at the time in question. The Board of Pardons' own rules require notice be given and a hearing held prior to rescinding an inmate's parole date. The rules further provide that the inmate be informed of the charges against him and the reasons for the Board's ultimate decision.



Northern, however, was not provided with notice, nor was he given a hearing prior to the rescission of his parole date. He was also provided with no information concerning the reasons for the Board's actions. Even for the July 1988 rescission hearing that confirmed the Board's actions of May 9, the Board did not inform Northern of any violations or allegations of misconduct. At a time when the Board could not have claimed extraordinary circumstances, it still did not comply with its own rules. The reasonable inference is that it acted outside the scope of its written policies and procedures, relying upon its opinion that it could rescind a parole date at any time for any reason until the moment an inmate walked out the prison gate. As such, the Board denied Northern the due process of law required under article I, section 7, of the Utah Constitution, and this court's decision in Footte v. Utah Board of Pardons, 808 P.2d 734 (Utah 1991).

It is clear from this Court's decision in Footte v. Utah Board of Pardons that the due process clause of the Utah Constitution applies to the Board of Pardons. This Court stated that:

the parole board is not outside the constitutional  
mandate that the actions of government must afford due  
process of law.

\* \* \* \* \*

there is no question that habeas corpus review of the  
board of pardons' actions is available.

Id. at 735. However, the Court in Footte left open the question of "[p]recisely what due process requires of the board of pardons," stating that such a determination can only be made "after the facts concerning the procedures followed by the board are flushed out." Id. The facts concerning the procedures followed by the Board in

this case have been flushed out through an evidentiary hearing, and reveal that Northern has been denied due process of law.

**a.           The State's reliance on Preece v. House is misplaced.**

The state first cites to Preece v. House, 207 Utah Adv. Rep. 28 (Utah App. 1993), apparently for the proposition that the proper remedy here would have been an order requiring the Board of Pardons to follow its own procedural rules, and provide Northern with a hearing. Under the state's analysis, because a hearing was held in July 8, 1988, albeit almost two months after Northern's parole date had been rescinded, the violation of Northern's due process rights was somehow remedied. This is simply incorrect.

The decision in Preece, however, is inapposite to the claims raised by Northern. In Preece an inmate, upon learning that an incorrect guideline had been applied in setting his release date, challenged his continued imprisonment past the date which should have been set if the proper guideline had been applied. Id. at 28. The Board had affirmed, without written explanation, the release date set using the incorrect guideline, and the inmate filed a writ of habeas corpus seeking his release. Id. The district court thereafter ordered the inmate's release "forthwith." Id.

The Court of Appeals found that although petitioner was entitled to a written explanation of his parole determination, the district court exceeded its authority in ordering the release of the inmate. Id. The Court held that:

the appropriate remedy for the procedural due process violation found by the district court in this case is to require the Board expeditiously to provide the district

court and petitioner with a written explanation of its reasons for the parole decision.

Id. (emphasis added). The court's holding is a narrow one, based solely on the "procedural due process violation found by the district court in [that] case." Id. Had the court intended its holding to apply to any and all perceived due process violations, rather than the narrow violation found by the district court in that case, it certainly could have drafted its opinion to make such an intent clear.<sup>1</sup> However, in light of the court's narrow holding, it cannot be said that the due process violations in Northern's case could be remedied by a subsequent hearing.

**b. The procedures followed by the Board of Pardons denied Northern due process of law.**

The procedural due process violations here center around the Board's failure to give timely and proper notice of a decision to rescind Northern's May 10, 1988, parole date. The May 1988 Board of Pardons Rule 310-2 read as follows:

**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

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<sup>1</sup> Northern's case is also distinguishable from Preece in that Preece was not provided with an explanation by the Board as to reasons for its decision. Thus, the facts in Preece had not been flushed out, as petitioner there did not know the procedures used or facts relied on by the Board in making its determination. In the instant case the Board did provide a written basis for its rescission; however, its basis were contrary to law, public policy, its own policies and rules, and the Utah and United States Constitutions.

allegations and the date of the scheduled hearing at least seven days in advance.

(emphasis added). The facts of this case demonstrate that there were no "extraordinary circumstances" to justify the Board's "temporary" rescission. As set forth in Point 2, there was no "new evidence" that Northern posed a serious risk or danger to society. In fact, the evidence established the exact opposite.

Moreover, the Board is required to provide Northern with the seven days notice and hold a hearing prior to rescinding Northern's parole date. Even assuming, arguendo, that extraordinary circumstances exist this does not waive the Board's requirement of providing notice and a hearing, contrary to the state's argument; it merely permits the hearing to occur on fewer than seven days notice. Under any circumstances Northern was entitled to some notice of the allegations against him and he was further entitled to notice and a hearing prior to having his parole date rescinded.

In Byrnes v. Oregon State Board of Parole, 750 P.2d 499 (Or.App. 1988), the Oregon Court of Appeals held that the State Board of Parole had improperly reset petitioner's prison term by failing to comply with its own rules regarding proper notice, and reversed the Board's action. Id. The statute in question provided that an inmate's prison term determination could be reopened for one of the grounds enumerated in the statute, such as "substantial new evidence." Id. at 499-500. After first determining that none of the enumerated grounds were present, the Court went on to state that even if one of the enumerated grounds were present, the Board

was still bound by the statutory requirement of 14 days' advance notice. Id. at 500.

Moreover, the Washington Supreme Court, in Monohan v. Burdman, 530 P.2d 334 (Wash. 1975), recognized that an inmate acquires a "potential conditional liberty" in a tentative parole release date. Id. at 338. The Court stated that:

once parole or a promise of parole has been granted in the form of a tentative release date, we are satisfied that the prospective parolee enjoys a unique status and is deserving of minimal due process safeguards before cancellation of that date for reasons other than failure to develop an adequate rehabilitation plan.

Id. at 339 (citing cases). In determining what is meant by "minimum requirements of due process," the Court looked to the procedures set forth in Morrissey v. Brewer, 408 U.S. 471, 489 (1972), requiring, inter alia, written notice of the claimed violation, an opportunity to be heard, and disclosure of evidence to be used against the parolee. Id.

Two of the most fundamental notions of due process are notice and a right to be heard. Notice is more than the announcement of a hearing; for an inmate facing the rescission of his release date, it is also notice of the nature of the allegations that have triggered the hearing and caused the Board to consider rescission. Northern, however, was afforded neither. He was never informed of the reasons for the temporary rescission nor provided with an opportunity to be heard until the Board announced its decision on July 8. A hearing held two months after the fact hardly comports with due process of law, let alone the notice and hearing requirements of the Board of Pardons' own procedural rules.

POINT 2

**THERE WAS NO NEW EVIDENCE WHICH JUSTIFIED  
THE RESCISSION OF NORTHERN'S MAY 10, 1988,  
PAROLE DATE.**

The Board of Pardons Rule 310 states that a parole date may be rescinded if "new evidence is presented which shows that the prisoner, if released, would present a serious risk or danger to the community." The State claims that "new" evidence existed to support the rescission of Northern's May 10, 1988 parole date. Northern however, contends that there was no "new evidence" within the meaning of Rule 310 to support the Board's action in rescinding his May 10, 1988, parole date.

- a.       The evidence that may have been relied  
          upon by the Board was not "new" within  
          the plain meaning of the rule.**

A statute or regulation should be construed according to its plain and literal language. Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989). The term "new evidence" must be defined as evidence which was previously unknown or of recent or fresh origin. Ready v. United States Parole Commission, 483 F.Supp 1273 (M.D.Pa. 1980); Black's Law Dictionary 940 (5th ed. 1979) (defining "new"). A review of the record shows that the Board had before it three pieces of information that it may have considered on May 9 as new evidence.<sup>2</sup> The State in its brief does rely on those three pieces

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<sup>2</sup> Because Board member Paul Boyden refused to disclose the basis for the Board's decision in his deposition, which was admitted as substantive testimony at the evidentiary hearing on the writ, this Court must look to the information the Board had about its philosophy and sentencing practices in 1988 and the information the record demonstrates it had about Northern on May 1988 to determine whether it went outside of its written policies and

of "new" evidence as the basis for the rescission of Northern's May 10, 1988 parole date and assumes that the Board did as well, even though there is a paucity of evidence in the record to support that conclusion.

The first piece of "evidence" cited is that Northern abused drugs before, during, and after the commission of his crime in 1980. The Board through its counsel would have us believe that until the psychological evaluation on May 5, 1988 - which was specifically characterized as "FAVORABLE" by the evaluator - it was ignorant of Northern's drug problem. However, the record reveals that The Board of Pardons undeniably learned of Northern's drug problem in the summer of 1984; even with that knowledge in September of 1984 they reaffirmed his May 10, 1988, parole date.

Additionally, the Board, and/or its agents, had ample evidence of Northern's drug problem prior to May 5, 1988, when they received Northern's first psychological report. Northern had been receiving therapy for his drug problem while in prison. Prior to May 5, 1988, the Board, through Paul Larsen, had been attempting to work out the details of Northern's parole with authorities in Arizona. Continued drug therapy was to be a condition of any parole. As Northern has

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procedures to rescind Northern's release date. In the former category fall the sentencing matrices that were developed after Northern was given his release date in 1981; the Board's policy under that matrix of giving longer sentences in 1988 for homicides than the 1981 Board meted out; and its statements to Northern in the transcript of the July 8 hearing. In the latter category fall the factual information about Northern that the Board and the prison had and the dates on which it obtained the information. The information in these areas, plus the reasonable inferences drawn therefrom, give the clearest reason for Northern's rescission.

asserted throughout these proceedings, his drug problem, while arguably evidence, was certainly not "new" within the plain meaning of the statute.

Finally, an individual's recognition of his or her drug problem is an important step towards recovery. The Board's action of punishing such a recognition if such were the case forces an inmate with a present or past drug problem to make a Hobbesian choice. Either he continues to deny his drug problem, and thus seriously hamper any potential recovery, or admit the drug problem, only to have the Board of Pardons cite this as "new evidence" which justifies rescinding his parole date.

The second piece of evidence cited by the Board's counsel was Northern's use of marijuana on February 25, 1988. This "evidence" was also known to the Board prior to May 1988. A report of this incident was submitted by the Duchesne Jail, in writing, to the prison following the incident as monthly reports were submitted to the prison by the Duchesne Jail regarding Northern. It was known to the Board prior to May of 1988, and certainly could not be considered "new" evidence on May 9. The Board of Pardons, through Paul Larsen, continued in its attempts to work out the details of Northern's parole supervision with the authorities in Arizona, prior to May 9, 1988, after the February incident and with full knowledge of Northern's infraction.

Moreover, subsequent to this incident, the warden of the Duchesne Jail, also with full knowledge of the February incident, wrote a favorable recommendation to the Board supporting Northern's



release. Had this been the information relied upon by the Board, the Board would have alleged it as a rule violation, as provided by Rule 310-1 which, in pertinent part, reads as follows:

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 . . .

Findings of Fact No. 12. The full text is attached to petitioner's opening brief as Addendum A.

The final piece of evidence allegedly relied on by the Board was the psychological report dated May 5, 1988. However, the evaluation specifically noted that the Board of Pardons was to consider the report "A FAVORABLE ONE." (emphasis original). It was not "new," i.e. negative evidence, as Judge Hanson defined it. The report found that Northern had shown a great deal of growth and maturing and, significantly, he did not have the capacity for violent acting out. Despite this report, and with no reasonable basis for finding otherwise, the Board determined Northern to be a risk to society, and "temporarily" rescinded his parole date.

Not satisfied with the results of this May 5, 1988, psychological report and wanting a negative report, the Board ordered another evaluation. Contrary to the wishes of the Board, this evaluation also came back favorable. Neither report revealed any evidence that suggested Northern presented "a serious risk or danger to the community." In fact, perhaps the best evidence that Northern was not a risk to society is evidenced by the two years preceding May 1988, when he was at the Duchesne Jail working as a

trustee. In that capacity, Northern was assigned to work, for extended periods of days and weeks, virtually unsupervised, on a rural farm owned by an elderly woman. During the period from 1986 thru May 1988, he worked in other unguarded areas. He did so without incident. An individual posing such a "risk to society" would surely either have not been given such freedom and responsibility, or would not have performed so well in the local community. Yet the Board appears to have ignored this information.

Not to be denied, the Board of Pardons scheduled a hearing for July 8, 1988, almost two months after Northern's original parole. The Board found Northern posed a risk to society and that more time was required so that his punishment would fit his crime, thereby formally rescinding his May 10, 1988, parole date.

As a final coup de grace, the Board in 1992 imposed a twenty six thousand three hundred fifty dollar (\$26,350.00) restitution order on Northern. It did so despite the fact that from 1980 thru May 9, 1988, restitution had never been ordered by the Board. It did so without notice to Northern or his attorney (whom it refused to allow to appear). And it did so without a scintilla of evidence supporting the award, which it based on pure speculation of what the widow of the victim would have had to pay for child care if she had used child care after the death of her husband. The best and most current evidence about child care is in the 1980 ninety-day evaluation of Northern, in which Mrs. Hamby noted that she had begun to care for children to earn extra money.

In setting aside the July 1988 order, the Court ought also void the restitution order of 1992, which was improvidently and unlawfully entered. Even if the Court somehow affirms the rescission order, it should void this speculative, unsupported restitution order.

**b. The Board of Pardons acted in an arbitrary and capricious manner in denying Northern his May 10, 1988, parole date.**

The actions of the Board of Pardons, in "temporarily" rescinding Northern's parole date on May 9, 1988, and formally denying it at the July 8, 1988, hearing, were so arbitrary and capricious as to deny Northern due process of law. It is well recognized in the federal system that a decision by the Parole Commission may be reversed where the actions of the Commission are shown to be arbitrary and capricious and have no rational basis in the record. see e.g. Misasi v. United States Parole Commission, 835 F.2d 754, 758 (10th Cir. 1987); Fiumara v. O'Brien, 889 F.2d 254, 257 (10th Cir. 1989); Montoya v. United States Parole Commission, 908 F.2d 635, 637 (10th Cir. 1990); Dallas v. Martin, 929 F.2d 587, 589 (10th Cir. 1991).

Differences between the federal parole system and Utah parole system notwithstanding, the same principles which apply in the federal system regarding arbitrary and capricious acts of the Parole Commission also apply to the Board of Pardons in Utah. The Board of Pardons is bound by the due process clause of article I, section 7 of the Utah Constitution, which is identical to the due process clause in the United States Constitution at issue in the

above-referenced decisions from the Court of Appeals for the Tenth Circuit. Just as the United States Parole Commission cannot deny an individual due process of law by acting in an arbitrary and capricious manner, neither can the Utah Board of Pardons.

As the record reflects, Northern was denied due process of law through the arbitrary and capricious acts of the Board of Parsons. Not satisfied with the decision of the 1981 Board of Pardons, which had originally set Northern's May 10, 1988, parole date, and fully aware of its perceived "unfettered" discretion, the 1988 Board of Pardons sought to ensure Northern would remain in prison longer to serve a sentence more in line with the amount of prison time the 1988 Board was giving persons committed of homicides. In doing so it ignored Northern's substantial Constitutional rights.

### POINT 3

#### **THE BOARD'S DECISION HERE IS SUBJECT TO JUDICIAL REVIEW.**

The Board cannot circumvent the due process clause under the guise of its "unfettered" discretion and a statutory provision providing no judicial review of its substantive decisions. As this Court correctly recognized in Foote:

if section 77-27-5(3) was intended to preclude all judicial review, both by way of law and by way of extraordinary writs, then that section runs afoul of article I, section 11 of the Utah Constitution. In addition, the mandate of the due process clause of article I, section 7 of the Declaration of Rights in the Utah Constitution is comprehensive in its application to all activities of state government.

Foote supra at 735. (footnote omitted). Northern submits that this language inherently limits the "unfettered" discretion of the

Board, even in reaching substantive decisions, as such decisions must be rendered in accordance with due process of law and not in an arbitrary and capricious manner.

Furthermore, and contrary to the State's assertion, Northern is not directly challenging the Board's substantive decision, except as he attacks the procedures and underpinnings used by the Board in reaching the decision. Therefore, no separation of powers problem exists. As set forth by this court in Footte, the Board of Pardons actions are clearly subject to some judicial review. When due process rights are implicated it is this Court's prerogative, as the final arbiter of state constitutional issues, to determine whether an individual has been denied due process of law.

#### CONCLUSION

Northern asks this court to decide whether, in light of the record, he was afforded the requisite due process of law, and whether the Board "regularly pursued its authority" in so acting, or whether the actions of the Board in rescinding his May 1988 parole date was the result of a Board's determinations that it had authority unfettered by an inmate's constitutional safeguards. If an inmate has no liberty interest in a parole date, if the Board may violate or circumvent its written policies and procedures without any consequence or restraint, and if the Board of Pardons may rescind an inmate's parole date for any reason at all, (such as disagreeing with a prior Board's action) - or for no reason - until

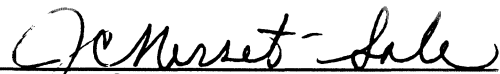
the moment an inmate passes through the prison gate, then Kendall Northern loses.

Northern submits, however, that the Board's violation of its own policies and procedures, and its denial to him of the due process protections afforded him by the Utah State Constitution and this Court's decision in Foote v. Utah Board of Pardons, will compel a finding and correction of error. Accordingly, Northern asks this court to render the Board's actions in the July 8, 1988, hearing null and void, vacate the restitution order issued by the Board in 1992, and enter other necessary orders regarding the term or conditions of parole entered by the Board upon Northern's release on parole in 1992.

DATED this 12<sup>th</sup> day of May, 1993.

Respectfully submitted,

HALEY & STOLEBARGER

  
Jo Carol Nasset-Sale  
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that 2 true and correct copies of the foregoing were mailed to the following, postage prepaid, this 12<sup>th</sup> day of May, 1993:

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UTAH ATTORNEY GENERAL  
James H. Beadles  
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