

1992

Kendall Q. Northern v. N. Eldon Barnes : Petition for Writ of Certiorari

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

Kendall Q. Northern,
Petitioner,
vs.
N. Eldon Barnes, et al.,
Respondent.

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Case No. 920116

Priority No. 13

PETITION FOR A WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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UTAH

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PETITION FOR A WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

I. Did the Court of Appeals erroneously hold that habeas corpus is not available as a remedy to modify a release date ordered by the Board of Pardons?

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?

OPINION BELOW

The Court of Appeals' opinion, Northern v. Barnes, is found at 179 Utah Adv. Rep. 15 and is attached as Addendum A.

STATEMENT OF JURISDICTION

This Court has jurisdiction to consider this petition under Utah Code Ann. § 78-2-2(3)(a) (Supp. 1991) which grants the Utah Supreme Court appellate jurisdiction over "a judgment of the Court of Appeals." The Court of Appeals opinion was filed on January 24,

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.

C. 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.

On July 8, 1981, 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.

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. 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. 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. In March 1986 Mr. Northern

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1992 and an ex parte extension of time of fourteen days to file this petition was requested and granted on February 24, 1992.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes or rules pertinent to the questions presented for review is contained in the body of this petition.

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.

On July 27, 1990, trial was held at which time the court heard testimony, accepted documentary 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 ruled from the bench and denied Northern's Petition. On December 7, 1990, the trial court entered its Findings of Fact and Conclusions of Law and Order of Dismissal, a copy of which is attached hereto as Addendum B.

was transferred to the Duchesne County Jail. He gained trustee status and during the next two years worked outside of the jail.

On February 25, 1988, jail authorities learned that Northern had possessed marijuana without incident. This fact was 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. 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. Neither at that 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.

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.

On May 9, 1988, the Board of Pardons rescinded Mr. Northern's May 10, 1988, parole release date. Findings of Fact No. 13. Prior to the May 9, 1988, rescission, Northern was not notified of any allegations relating to the rescission nor did the Board of Pardons hold any kind of hearing. In the 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.

On Jun 23, 1988, the Board of Pardons scheduled a hearing for July 8, 1988, to review Northern's status. Findings of Fact No. 15. 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. 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.

Northern petitioned for extraordinary relief during his term of incarceration. During the appeal from the trial court's denial of his petition, Northern was paroled. As a new condition of parole, the Board required Northern to pay \$26,350.00 in restitution. 179 Utah Adv. Rep. at 16. Northern currently remains on parole.

ARGUMENT

POINT I

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE
COURT OF APPEALS ERRONEOUSLY HELD THAT HABEAS CORPUS
IS NOT AVAILABLE AS A REMEDY IN THIS CASE.

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 settled by this Court. Utah R. App. P. Rule 46(b) and (d). Indeed, the importance of the question is reflected by the fact that the respondents requested transfer of the case to this Court. That request was denied by the Court of Appeals, Northern v. Barnes, 164 Utah Adv. Rep. 58 (Utah Ct. App. 1991). Because of the importance of the Court of Appeals' action and potential impact on numerous cases beyond this case, the Supreme Court should review the decision of the Court of Appeals.

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.

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. In its designation of Northern's due process claims as merely a claim that he should have been credited on parole for 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 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. Footte anticipated the flushing out of such due process requirements in future cases.

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) (1953 as amended) 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 Parks that Smith be given 626 days credit for post-conviction time served prior to his commitment to prison. 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 in a similar view, Jensen v. the Utah Board of Parsons, 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. Certiorari should be granted to clarify for the Court of Appeals, the Board of Pardons and other pending litigants the jurisdictional and substantive issues raised by Mr. Northern.

POINT II

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE
COURT OF APPEALS REFUSED TO DECIDE IMPORTANT ISSUES OF
DUE PROCESS WHICH WERE PROPERLY PRESENTED TO IT

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. (A copy of the Argument portion of Mr. Northern's brief to the Court of Appeals is included as Addendum C.) In its opinion the Court of Appeals addressed none of these issues, opting instead to state that the issues were "without merit." 179 Utah Adv. Rep. at 17. In so holding the Court of Appeals departed from the accepted and usual course of judicial proceedings. Utah R. App. P. Rule 46(c). This Court should decide these important issues of state law. Utah R. App. P. Rule 46(d).

In order to function appropriately and effectively, the Board of Pardons is subject to certain rules and regulations which govern

its actions and proceedings. In May 1988, Board of Pardons Rule 3.10, which is set out in the Statement of Facts, provided that 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.

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.

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.

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 is 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. 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 has taken place 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. 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.

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 reactnowledge 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.

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

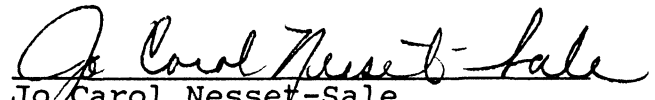
Northern be given notice of the reasons for the Board of Pardons' decision and the evidence it relied on in reaching that decision. Thus, the trial court erred in finding only that there was some basis upon which the Board of Pardons could have rescinded Northern's parole rather than determining the actual grounds upon which the Board of Pardons rescinded Northern's parole.

By refusing to address these important and properly raised issues of due process, the Court of Appeals deviated from the usual course of judicial proceedings. These issues will arise in other cases and should be addressed by this Court.

DATED this 8th day of March, 1992.

Respectfully submitted,


HALEY & STOLEBARGER


Jo Carol Nesset-Sale
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 1992, a true and correct copy of the foregoing Petition for a Writ of Certiorari to the Utah Court of Appeals was mailed, postage prepaid, to David Thompson, Assistant Utah Attorney General, 6100 South 300 East, Suite 403, Salt Lake City, Utah 84107.

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ADDENDUM A

, 794 P.2d 460 (Utah 1990) (Utah Supreme Court held that opening an unoccupied vehicle's door to inspect the VIN constituted an unreasonable search under Utah Constitution).

3. See *Thompson*, 712 F.2d at 1361. Although in similar cases we have remanded for more detailed findings, see, e.g., *State v. Lovegren*, 798 P.2d 767, 771 (Utah App. 1990), in this case the record at the suppression hearing is sufficiently detailed to allow us to determine whether or not the State has met its burden. See *State v. Sims*, 808 P.2d 141, 151 (Utah App.), cert. denied, 171 Utah Adv. Rep. 65 (1991); *State v. Robinson*, 797 P.2d 431, 437 (Utah App. 1990).

4. The Castners also allege that they were illegally detained. The trial court made no finding as to whether the Castners were illegally detained after Gustin issued the citation. The court did not address this issue because the Castners did not raise it below. We will not consider an argument on appeal unless it was raised at the trial court. *State v. Marshall*, 791 P.2d 880, 884 (Utah App.) cert. denied, 800 P.2d 1105 (1990). Thus, we decline to address this issue.

5. We note, that on appeal, the Castners challenge the search of the pouch found in the back seat, and the pouch taken from Bonnie Castner's purse. However, the Castners have waived their right to challenge the evidence found in the purse since this issue was not raised below. See *Marshall*, 791 P.2d at 886; *State v. Webb*, 790 P.2d 65, 71 n.2 (Utah App. 1990).

Cite as
179 Utah Adv. Rep. 15

IN THE
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.

No. 900566-CA
FILED: January 24, 1992

Third District, Salt Lake County
Honorable Timothy R. Hanson

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

Before Judges Bench, Billings, and Garff.

This opinion is subject to revision before
publication in the Pacific Reporter.

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 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 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. Al Villar*, 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, Presiding Judge

I CONCUR:

Regnal W. Garff, Judge

I CONCUR IN THE RESULT:

Judith M. Billings, Judge

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.

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).

Cite as
179 Utah Adv. Rep. 17

IN THE UTAH COURT OF APPEALS

Newton C. ESTES,
Petitioner and Appellant,

v.

Fred VAN DER VEUR, Warden, Central
Utah Correctional Facility,
Respondent and Appellee.

No. 910613-CA

FILED: January 27, 1992

Sixth District, Sanpete County
Honorable Don V. Tibbs

ATTORNEYS:

Newton C. Estes, Gunnison, Appellant Pro Se
R. Paul Van Dam and Lorenzo K. Miller, Salt
Lake City, for Appellee

Before Judges Russon, Bench, and Greenwood
(Law and Motion).

This opinion is subject to revision before
publication in the Pacific Reporter.

PER CURIAM:

This appeal is before the court on appellee's motion for summary affirmance and on appellant's motion for summary reversal and motion for declaratory judgment. Estes appeals an order dismissing his petition for writ of habeas corpus. We affirm.

On August 6, 1991, Estes filed a petition seeking a writ of habeas corpus in the Sixth Judicial District Court of Sanpete County. Estes named the acting warden of the Central Utah Correctional Facility as the sole defendant. He contended that he was unlawfully incarcerated because the board of pardons had allegedly violated the due process protections guaranteed by the Utah Constitution, based upon the recent Utah Supreme Court case of *Foote v. Board of Pardons*, 808 P.2d 734 (Utah 1991).

Appellee Van Der Veur's only connection to the petition is that he is the acting warden of the Central Utah Correctional Facility, and as warden, Van Der Veur has management control over the inmates housed in that facility. On August 15, 1991, appellee's counsel, the Utah Attorney General's office, filed a motion to dismiss the petition under Rule 12(b)(6), Utah Rules of Civil Procedure, for failure to state a claim for which relief may be granted. Appellee contended that the petition was improperly directed to him because it contained no allegation that appellee personally had violated appellant's constitutional rights. In response, appellant argued that the

ADDENDUM B

DEC - 7 1990

SALT LAKE COUNTY
Evelyn Thompson
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY

STATE OF UTAH

KENDALL Q. NORTHERN,	:
	:
Plaintiff and Petitioner,	:
	:
vs.	:
	:
N. ELDON BARNES, WARDEN, UTAH	:
STATE PRISON AND THE DEPARTMENT	:
OF CORRECTIONS THROUGH THE	:
BOARD OF PARDONS,	:
	:
Defendants and Respondents.	:
	:

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW
AND
ORDER OF DISMISSAL

CASE NO. 900901925HC

(Judge Timothy R. Hanson)

THE ABOVE CAPTIONED MATTER having come before the Court for trial on July 27, 1990, the plaintiff/petitioner KENDALL Q. NORTHERN being present in person and being represented by counsel, JO-CAROL NESSET-SALE, the defendants/respondents being represented by counsel, C. DANE NOLAN, Assistant Attorney General, the Court having heard testimony and accepted documentary evidence, the Court having heard the arguments of counsel, the Court having reviewed the entire case file and being

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.

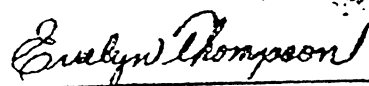


JUDGE TIMOTHY R. HANSON
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

ATTEST

By



Deputy Clerk


JO CAROL NESSET-SALE
Attorney for Plaintiff/Petitioner

ADDENDUM C

Further, because petitioner's constitutional rights have not been violated, his parole period should not be reduced.

ARGUMENT

POINT I

PETITIONER WAS PAROLED ON JULY 9, 1991,
THEREFORE, THE ISSUES IN THIS APPEAL ARE
RENDERED MOOT.

Petitioner requests that this Court order his immediate parole subject to reasonable terms and conditions (Brief of Appellant [hereafter Br. of App.] at 29). He also asks for other relief that the court may determine to be appropriate under law and equity (Br. of App. at 29). Because petitioner was paroled on July 9, 1991, he has received his requested relief. As a result, the issues before this Court are moot. In the event the court elects to proceed with this matter, however, appellees have briefed the issues in full.

POINT II

BECAUSE MAKING A CORRECTNESS DETERMINATION ON
THE TRIAL COURT'S CONCLUSIONS OF LAW
NECESSARILY INCORPORATES A REVIEW OF THE
TRIAL COURT'S RESOLUTION OF FACTUAL
QUESTIONS, THE TRIAL COURT'S DECISION SHOULD
BE GIVEN SOME DEFERENCE.

This case is unusual in that this Court is dealing with two levels of review i.e., the trial court's review of the Board of Pardons' action and this Court's review of the trial court's conclusion based on that review. The issue before the trial court on July 27, 1990, at the hearing on petitioner's petition for writ of habeas corpus was whether or not there was any reasonable basis in the record that would support the Board of

Pardons' decision to rescind petitioner's parole date (R. at 101 p.14; R. at 102, p.135). The issue before this Court is whether the trial court was correct in concluding that the record supported the Board of Pardons' decision to rescind petitioner's prospective parole release date.

As a general rule, the correction-of-error standard applies to agency rulings on issues of law and extends no deference to agency rulings. An agency's findings of fact, however, are accorded substantial deference and will not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible. As to questions of mixed law and fact, a reviewing court usually accords a agency decision some deference, i.e., an agency's decision will not be set aside unless the agency's conclusion is unreasonable. Hurley v. Board of Review of Indus. Com'n, 767 P.2d 524, 526-527 (Utah 1988).

The rationale behind the reasonableness standard is that issues of mixed law and fact are often illuminated by an agency's expertise. Id. at 527. Further, an agency's special technical knowledge may be of particular help in determining whether the facts of a specific case are governed by a certain rule or statute. Id. Therefore, a reviewing court will give some deference to an agency's decision, when that decision involves an area of technical expertise or an area where the legislature has specifically granted the agency discretion in its

decision-making process. Savage Industries v. Utah State Tax Comm., 160 Utah Adv. Rep. 5, 7 (Utah 1991).

The legislature granted the Board of Pardons discretion in its decision-making process in Utah Code Ann. § 77-27-5(3) (1985) which states:

The determinations and decisions of the Board of Pardons in cases involving approval or denial of any action, of paroles, pardons, commutations or terminations of sentence, orders of restitution, or remission of fines, forfeitures [sic], and restitution, are final and are not subject to judicial review.³

Because of the Board of Pardons' inherent expertise and its decision-making power, the trial court correctly applied the reasonableness standard.

Contrary to petitioner's assertion that the "trial court . . . found himself unable to determine with any kind of specificity why [petitioner's] parole has been rescinded" (Br. of App. at 24), the court issued detailed findings that support its conclusions. The trial judge reviewed the procedures of the Board under a reasonableness standard and denied petitioner's petition for writ of habeas corpus because the Board of Pardons did not violate his constitutional rights (R. at 97-98). The trial judge was candid in explaining his role in making this determination:

³ Although this statute states that Board of Pardons decisions are not subject to judicial review, review of procedural due process claims are not precluded. Hatch v. DeLand, 790 P.2d 49, 50 (Utah App. 1990).

We're talking about some areas of the law that are new, unique. And I'm confident that regardless of what I do, this matter is going to be reviewed by another court, and that's fine. I have no -- that's the way the system works. But that doesn't mean that I want to give it less consideration than I otherwise might. And if it's going to be reviewed, then for that reason alone it ought to have my best efforts. . . . [T]he parties are entitled to my best call on this. . . . I'm certainly not going to substitute my judgment for the Board of Pardons.

(R. at 102, p. 134-35). It is evident from these comments, that the trial court intended to conduct careful review of the facts of this case and the law pertaining to this case before reaching any conclusions.

At the September 26, 1990 hearing, the trial court stated:

After careful analysis of this entire record, and that includes all the prison records that were received, the transcripts of the various hearings that were had, all the information that was submitted, I cannot say that this record shows me that the Board of Pardons have [sic] no evidence before it that would not allow a conclusion that there was new evidence, and that if there was a release that there was not a potential risk to the community. There is evidence to suggest that the conclusion reached was not arbitrary or caprecious [sic] or without any foundation whatsoever.

I hasten to point out that the test is not whether or not this court agrees with the conclusion. That is not the standard. Because I've already said, it's not my prerogative to substitute my judgment for that of the Board of Pardons. I'm only reviewing this record to determine whether or not there is any reasonable basis upon which they could make a finding, and reach a conclusion that if [petitioner] was released on a parole date scheduled, that he could

present a serious risk, or danger to the community. And so as I reviewed the record, as I've indicated, I'm satisfied that there is some evidence to support that conclusion by the Board of Pardons.

(R. at 101, pp. 13-14) (Emphasis added). Thus, after careful review, the trial court concluded, as a matter of law, that "there was new evidence received by the Board of Pardons which justified the Board's decision to rescind [petitioner's] May 10, 1988 parole date" and that the "circumstances relating to [petitioner] on May 9, 1988, constituted extraordinary circumstances under Rule 3.10 which justified the rescission of the parole date without providing prior notice to [petitioner]" (R. at 97).

Based on the foregoing, this court should give some deference to the trial judge's determination, rather than conduct strict correctness review.

POINT III

PETITIONER HAS NO SUBSTANTIAL CONSTITUTIONAL RIGHT TO BE RELEASED ON PAROLE PRIOR TO THE EXPIRATION OF HIS SENTENCE.

On July 30, 1980, petitioner was sentenced to two five-to life sentences at the Utah State Prison (R. at 90). As acknowledged by petitioner, the Utah Board of Pardons determines the exact length of time the person actually serves (Br. of App. at 13). In Kelly v. Oklahoma Pardon and Parole Board, 637 P.2d 858 (Okla. Ct. App. 1981), cert. denied, 455 U.S. 923 (1982), the court stated:

Being given a parole docket date does not mean that a prisoner is going to be placed on

parole; it means that a prisoner is going to be considered for parole. There is a possibility that parole may be granted; there is also a possibility that parole may be denied. . . . Since the petitioner has been given no recognized liberty interest by having a docket date set, he has not been deprived of any constitutional right by having that date changed.

Kelly, 637 P.2d at 858, 859.

The Utah Supreme Court and the Utah Court of Appeals follow the Oklahoma court's reasoning and have determined that absent a state created right, an incarcerated person has no inherent right to be released prior to the expiration of the sentence. Homer v. Morris, 684 P.2d 64 (Utah 1984); Hatch v. DeLand, 790 P.2d 49 (Utah App. 1990). In Hatch, this Court stated:

[A]bsent statutory language limiting a parole board's discretion, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." (citation omitted).

Id. at 51. No such statutory language exists in Utah. Where no substantial right exists, there can be no violation of that right.

This issue was also addressed in White v. Utah State Board of Pardons, 778 P.2d 20, 21 (Utah App. 1989). White involved a parole revocation hearing rather than a parole recision hearing, however, the court's reasoning is helpful to the present case. The court stated: "[P]etitioner has not demonstrated that the Board's actions violate a substantial constitutional right. This petition is clearly a request for

judicial review of a Board of Pardons decision and is precluded by section 77-27-5(3)." White, 778 P.2d at 21. This Court further stated that our sentencing system vests almost complete discretion in the Board of Pardons to determine the actual time served.

In the present case, the trial court concluded as a matter of law that "[t]he 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" (R. at 95). Petitioner has not suffered a violation of a substantial constitutional right because he has no right to be released on parole prior to the expiration of his sentence. Therefore, this Court should affirm the decisions of the Board of Pardons and the trial court.

POINT IV

THE BOARD OF PARDONS DID NOT VIOLATE ITS OWN
POLICIES AND PROCEDURES AND PETITIONER WAS
NOT DENIED HIS RIGHT TO PROCEDURAL DUE
PROCESS.

- A. The Board of Pardons' decision to rescind petitioner's May 10, 1988 parole date based on "new evidence" was justified.

Petitioner argues that there was no new evidence before the Board of Pardons that justified the rescission of his parole date (Br. of App. at 18). Petitioner's claim is not supported by the record.

At the July 27, 1990 hearing, the trial court invited counsel for petitioner and defendants to submit briefs on the meaning of "new evidence" (R. at 102, pp. 131-32). No briefs were submitted. Therefore, the court defined "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 recision determination is made" (R. at 96). In this case those dates are July 8, 1981 and May 9, 1988. Petitioner claims that the "trial court also found himself unable to determine with any kind of specificity why [petitioner's] parole had been rescinded [and that] the trial court dismissed this problem by finding that there was some evidence in the record which could have served as a basis for the rescission" (Br. of App. at 24). At the hearing on September 26, 1990, the trial court specified the incidents that constituted new evidence.

There was drug use early on after the initial parole date was set. And there was drug use when [petitioner] was in Duchene County Jail recently, albeit it was minimal, but it was still there. It's still a violation of the law, and it was still inappropriate conduct. And I think [petitioner] knew that. There were problems perhaps early on, but still new evidence regarding discipline at the Utah State Prison.

There is information in psychological reports that were received after the initial Board of Pardons' date was set, or after the initial date was set for parole from the Board of Pardons that was developed that showed a number of things, antisocial personality, lack of remorse, a number of things.

And finally, there were a number of problems with regard to the nature of the release that [petitioner] sought, and the

type of parole that he was anticipating, and whether or not that could be accomplished in any fashion, and might still protect the community . . . there is evidence in this record as I've indicated that would support the finding and conclusion of new evidence that presents a substantial risk.

(R. at 101, p.14-15).

At the September 26, 1990 hearing and in appellant's brief, petitioner asserts that incidents of drug use occurring prior to 1984 cannot be considered "new." The trial court addressed petitioner's assertion stating: "Information was received both before and after [the 1984 review date] that would be enough in my judgment to support the conclusions reached by the Board of Pardons when they did . . . it doesn't make any difference because there's information both before and after [1984]" (R. at 101, p. 17-18).

Because the record overwhelmingly supports the trial court's conclusion that there was "new evidence" received by the Board of Pardons which justified the Board's decision to rescind petitioner's May 10, 1988 proposed parole date, this court should affirm the trial court's ruling.

B. The Board of Pardons' actions fell within the exception to Rule 3.10.

Petitioner alleges that the Board of Pardons violated its own policies and procedures in rescinding his May 10, 1988 parole release date (Br. of App. at 14). In May and July of 1988, the Utah Board of Pardons was operating under R655-310-1 and R655-310-2. See Constitutional Provisions, Statutes and Rules of this brief.

On May 5, 1988, five days before petitioner's proposed parole date, the Board of Pardons received new information in a psychological evaluation (Def. Exh. #24 and included in this brief as Addendum E). The seven day notification deadline had already passed and therefore, the extraordinary circumstances exception to Rule 3.10 attached. The recommendation portion of the report reads:

It is this writer's recommendation that [petitioner], 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, [petitioner] receive drug abuse counseling.

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

(Def. Exh. #24, p.2, Addendum E) (emphasis added). This section of the report is just a recommendation and is not dispositive. The Board is not bound by it. The Board's concern over petitioner's drug problem outweighed the positive recommendation in this case (R. at 92). Specifically, the Board was concerned with the fact that petitioner viewed his drug dependency as a major factor in his anti-social behavior (R. at 92). The Board was also concerned that petitioner admitted that he was high on LSD at the time he committed his crime, and that he had used LSD, cocaine, amphetamines, and marijuana (R. at 91-92). Finally, the Board indicated that petitioner's major problem was his inability to deal with life's stresses without the use of illegal substances (R. at 92).

Given the date that the Board received petitioner's first psychological evaluation, and given its concern regarding petitioners drug use, extraordinary circumstances existed which justified the rescission of petitioner's proposed parole date.

POINT V

THE BOARD OF PARDONS' ACTIONS DID NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Petitioner asserts that the Board of Pardons' actions constituted cruel and unusual punishment (Br. of App. at 28). The rescission of petitioner's May 10, 1988 proposed parole date did not violate the eighth amendment prohibition of cruel and unusual punishment under the federal constitution or petitioner's state constitutional right under Article I § 9.

Relying on Penry v. Lynaugh, 492 U.S. 302 (1989), petitioner asserts that the Board of Pardons' actions fell short of the evolving standards of decency that mark the progress of a maturing society. Petitioner fails, however, to recognize that the United States Supreme Court carefully explained what it meant by the "evolving standards" statement in Penry. "In discerning those 'evolving standards,' we have looked to objective evidence of how our society views a particular punishment today. The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Penry, 492 U.S. at 302 (citations omitted).

Significantly, Utah Code Ann. § 76-3-202 (Supp. 1988) gives the Board of Pardons the exclusive power to determine the length of time an inmate actually serves.

Nothing in this section shall preclude the board of pardons from the paroling or discharging an inmate at any time within the discretion of the board of pardons.

Utah Code Ann. § 76-3-202(5) (Supp. 1988) (emphasis added).

Because the Board is authorized by statute to permit or deny parole at any time, its actions did not constitute cruel and unusual punishment.

In his brief petitioner asks, in effect: What could be more cruel than rescinding his prospective parole date the day before it was to go into effect? The facts of Solem v. Helm, 463 U.S. 277 (1983), answer petitioner's question. In Solem, the defendant was convicted of "uttering" a "no account" check for \$100.00. Due to his prior record, he was subject to South Dakota's recidivist statute which enhanced the felony to a class one felony. The maximum penalty for such a felony was life imprisonment in the state penitentiary without possibility of parole and a \$125,000.00 fine. The United States Supreme Court held that under these facts the sentence was significantly disproportionate to the crime and therefore violative of the eighth amendment. Solem, 463 U.S. at 303.

By contrast, in Rummel v. Estelle, 445 U.S. 263 (1980), petitioner sought habeas corpus relief from his state confinement as he had received a life sentence under the Texas recidivist statute and claimed it violated the eighth amendment as grossly

disproportionate to the crimes. He had been convicted of two prior felonies for fraudulent use of a credit card to obtain \$80.00 worth of goods and passing a forged check in the amount of \$28.36. His third felony conviction was for obtaining \$120.75 by false pretenses. He was sentenced to a life sentence. The United States Supreme Court held that "the mandatory life sentence imposed upon this petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments." Petitioner's conviction was affirmed.

In comparing petitioner's case with Solem and Rummel, the Board of Pardon's action was appropriate given its concerns about petitioner's drug use and the risk to society if he was paroled. It is important to note however, that at the same time the Board affirmed the rescission of his parole date, it also ordered a rehearing in May of 1990 (R. at 94). This added two years to petitioner's sentence but also indicated that there was still a possibility for parole.

The clearest and most reliable objective evidence of contemporary values in Utah in 1988 was that the Board of Pardons could rescind a scheduled parole or termination date at any time prior to an inmates release without infringing upon any constitutional right of an inmate. See State v. Alvillar, 748 P.2d 207, 208-209 (Utah App. 1988). Because the Board received new evidence regarding petitioner's drug use and potential risk to the community, it had good cause for rescinding his May 10, 1988 proposed parole date on May 9, 1990. Its action fell within

legislatively prescribed limits and simply fails to "shock the moral sense of all reasonable men as to what is right and proper under the circumstances." State v. Russell, 791 P.2d 188, 190 (Utah 1990) (setting forth the test for determining whether punishment is cruel and unusual in specific applications).

The burden of showing that the Board of Pardon's action amounted to cruel and unusual punishment is on petitioner. He has failed to demonstrate that the Board's action violated his federal and state constitutional rights.

CONCLUSION

Based on the foregoing, appellees respectfully request that this court affirm the trial court's order denying petitioner's petition for writ of habeas corpus and deny any request to have his parole period reduced,

RESPECTFULLY submitted this 7th day of August, 1991.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Jo Carol Nasset-Sale, Attorney for appellant, 10th Floor Walker Center, 175 South Main, Salt Lake City, Utah 84111, the 7th day of August, 1991.