

1992

# Kendall Q. Northern v. N. Eldon Barnes : Brief in Opposition to Certiorari

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

920116

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

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BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

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UTAH

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                                                          :                   
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BRIEF IN OPPOSITION TO PETITION  
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QUESTIONS PRESENTED FOR REVIEW

I. Does the petition present special reasons for certiorari review, as required by Rule 46 of the Utah Rules of Appellate procedure?

- A. Does the Court of Appeals' decision below conflict with decisions of this Court?
- B. Did the Court of Appeals address the question of whether the Board of Pardons violated its own procedural and substantive rules?

OPINION BELOW

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

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(a) (Supp. 1991), which grants the Utah Supreme Court appellate jurisdiction over Court of Appeals'

judgments.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes, or rules pertinent to the resolution of the issue presented is contained in the body of this brief.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case involves an appeal from the trial court's denial of a petition for habeas corpus or other extraordinary relief.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On March 30, 1990, Northern sought to have certain actions of the Board of Pardons declared unlawful and to have the trial court order his immediate release. The court held a hearing on July 27, 1990, at which time it accepted documentary evidence and heard counsel's arguments. The court took the matter under advisement at the conclusion of the hearing, and on September 26, 1990, dismissed the petition. On December 7, 1990, the court entered Findings of Fact and Conclusions of Law and Order of Dismissal (attached as Exhibit "B").

STATEMENT OF FACTS<sup>1</sup>

On July 30, 1980, at age eighteen, Northern pleaded guilty to

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<sup>1</sup> The following statement of facts is taken from both the Court of Appeals' opinion at 179 Utah Adv. Rep. 15 (attached as Exhibit "A") and Judge Hanson's Findings of Fact and Conclusions of Law and Order of Dismissal, dated December 7, 1990 (attached as Exhibit "B").

second degree murder and aggravated robbery for his participation in the shooting death of a cab driver. On July 8, 1981, the Utah Board of Pardons granted Northern a May 10, 1988 parole date. During the summer of 1984, the Board of Pardons received information from the Utah State Prison which established that Northern had abused drugs heavily during the first two years of his incarceration, and that he had a serious drug problem. This information was not available to the Board of Pardons on July 8, 1981 when it granted Northern a parole date. The Board of Pardons also reconsidered Northern's status in 1984, upon Northern's request. At that time, Northern did not express any remorse about the crimes he committed or the affected victims.

Northern was transferred to the Duchesne County Jail in March of 1988. Northern subsequently gained trustee status and worked outside the jail, unsupervised, during the next two years. In February of 1988, Utah State Prison authorities discovered that Northern was again using drugs. This information was forwarded to the Board of Pardons sometime prior to May 10, 1988, Northern's scheduled parole date, but was not available to the Board of Pardons on July 8, 1981 when it granted Northern's parole date. On March 24, 1988, the Board of Pardons requested that the Utah State Prison perform a psychological assessment on Northern.

The Board of Pardons received a psychological evaluation on May 5, 1988, which indicated that Northern had been a heavy drug user, and had been unable to cope with life's stresses without drugs. The report also noted that Northern admitted being high on



LSD at the time he committed the offense, and acknowledged that his drug dependency was a major factor contributing to his antisocial behavior. The information contained in the May 5, 1988 report was not available to the Board of Pardons on July 8, 1981.

On May 9, 1988, the Board rescinded Northern's May 10th parole date, pending further review, and ordered another psychological evaluation. Prior to this rescission, Northern was not notified of any allegations relating to the revocation, and no hearing occurred prior to the Board's May 9th decision. The documented basis for the rescission was to "continue for another psychological evaluation and complete prison progress report." (Finding of Fact 13). The second psychological report, prepared May 11, 1988, focused on potential problems affecting Northern's adjustment into society posed by his relationship with his father.

On June 23, 1988, the Board scheduled a hearing for July 8, 1988, to review Northern's status. Northern was notified of the hearing by June 28, 1988. At the July 8, 1988 hearing, Northern was allowed to address and present information to the Board, and to respond to the Board's questions. At the conclusion of the hearing, the Board determined that Northern continued to be a risk to society, and refused to grant Northern parole at that time. The Board scheduled a rehearing for May 1990, and Northern was returned to the Duchesne County Jail.

On October 9, 1988, Northern escaped from the Duchesne County jail and fled to Canada. Due to Northern's flight, the Board rescinded the scheduled May 1990 rehearing. Northern was captured

and returned to prison on October 6, 1989.

Northern filed for extraordinary and habeas corpus relief on March 30, 1990. The petition prayed for (1) declaratory relief as to the unlawfulness of Northern's confinement after 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 the parole date created a legally binding agreement on the State. See Northern v. Barnes, 179 Utah Adv. Rep. 15, 16 (Utah App. 1992). After a full evidentiary hearing, the Honorable Timothy R. Hanson denied the petition.

The Utah Court of Appeals affirmed the denial of the writ. In affirming Judge Hanson's denial of the petition, the Court of Appeals limited its review to the issue of the unlawfulness of Northern's confinement.<sup>2</sup>

### ARGUMENT

#### POINT I.

THE PETITION PRESENTS NO SPECIAL REASONS  
FOR CERTIORARI REVIEW, AS REQUIRED BY  
RULE 46 OF THE UTAH RULES OF APPELLATE  
PROCEDURE.

The appropriateness of certiorari review is governed by Rule 46 of the Utah Rules of Appellate Procedure. Rule 46 states, in pertinent part:

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<sup>2</sup> The court found no authority for extending the purposes of extraordinary relief to address contract claims. It further determined that petitioner's demand for immediate parole was moot as petitioner was granted parole subsequent to the filing of his appeal. See Northern v. Barnes, 175 Utah Adv. Rep. 15, 16 (Utah App. 1992).

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following . . . indicate the character of reasons that will be considered:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

Utah R. App. P. 46 (1953). Northern's claims do not fall within the confines of Rule 46, and therefore are improper for review by writ of certiorari.

A. THE COURT OF APPEALS' DECISION THAT HABEAS WAS INAPPROPRIATE IN NORTHERN'S CASE IS CORRECT, AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

Contrary to Northern's assertions, the Court of Appeals' holding that "habeas corpus is not available in this case as a post release remedy to modify the release date ordered by the Board [of

Pardons],"<sup>3</sup> does not contradict this Court's recent decision in Foote v. Utah Board of Pardons, 808 P.2d 734 (Utah 1991).

Section 76-3-202(5) of the Utah Code grants the Board of Pardons the authority to release an inmate "at any time within [its] discretion". Utah Code Ann. § 76-3-202(5) (1989). The Court of Appeals correctly determined that the Board of Pardons'

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 kind of issues that are not subject to judicial review under section 77-27-5(3).

Northern v. Barnes, 179 Utah Adv. Rep. 15, 17 (Utah App. 1992).

Section 77-27-5(3) states in pertinent part:

Decisions of the Board of Pardons in cases involving paroles, pardons, . . . are final and are not subject to judicial review.

Utah Code Ann. § 77-27-5(3) (1990). The Court of Appeals simply held that it would not review discretionary decisions of the Board of Pardons. Since Northern's claims related to the Board's discretion to grant him parole, they were inappropriate for judicial review as well as habeas corpus relief.

In Foote v. Utah Board of Pardons, 808 P.2d 734 (Utah 1991), this Court held that section 77-27-5(3) does not preclude all judicial review of Board of Pardons' proceedings. This Court held that under the Utah Constitution, an inmate is entitled to due

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<sup>3</sup>Northern v. Barnes, 179 Utah Adv. Rep. 15, 17 (Utah App. 1992) (emphasis added).

process at Board of Pardons' proceedings, and that such proceedings would be reviewed for *procedural* errors.  Foote  at 735 (emphasis added). However, the Court noted that the number of years a defendant will spend in prison is "left to the unfettered discretion of the board of pardons," and thus, is not subject to judicial review.  Foote  at 735. Exactly what due process demands of the board of pardons "cannot be determined in the abstract, but must be determined only after the facts concerning the procedures followed by the board are flushed out."  Foote  at 735. Therefore, the Court remanded the case to the trial court to determine what procedures the Board followed and to decide what is procedurally required in the context of parole hearings.  Id.

The Court of Appeals' decision in this case does not conflict with  Foote . The court determined that Northern's claims involved the "reasonableness of the Board's decision in not granting Northern credit for the time served beyond his original parole date," not the manner in which the proceedings occurred.  Northern , 179 Utah Adv. Rep. at 16. Nevertheless, the Court of Appeals determined that Northern had been afforded procedural due process at his July 8, 1988 hearing and that therefore, his claims did not involve the type of issues addressed in  Foote .<sup>4</sup>  Northern , 179 Utah Adv. Rep. at 16. There is no conflict between the  Northern  and  Foote  decisions, as both cases hold that Utah courts will review alleged procedural deficiencies of Board of Pardons'

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<sup>4</sup> The Court heard arguments from both sides, after which it determined that Northern had been afforded procedural due process at the July 8, 1988 hearing.

actions, but will not review the reasonableness of the Board's discretionary decisions.

**B. THE COURT OF APPEALS ADDRESSED  
THE BOARD OF PARDONS' ACTIONS  
WITH RESPECT TO ITS OWN RULES  
AND REGULATIONS AND FOUND NO  
DUE PROCESS VIOLATION.**

Northern grossly misstates the Court of Appeals opinion by asserting that the court failed to decide important issues of due process presented to it. (See Petition for Certiorari at 9). Based on such, Northern claims that the Court of Appeals "departed from the accepted and usual course of judicial proceedings" which, if true would constitute a basis for certiorari review. Utah R. App. P. 46(c). (See Petition at 9). Contrary to Northern's assertions, the Court of Appeals heard oral arguments relating to the Board of Pardons' policies and rules, and thereafter determined that "Northern was afforded full procedural due process by the July 8, 1988 hearing." Northern, 179 Utah Adv. Rep. at 16.

Finding no procedural error, the Court of Appeals addressed Northern's allegations as to the reasonableness of the Board's decision in rescinding his original parole date. The court properly held that the Board's decision to rescind Northern's original release date was a valid exercise of its discretion conferred by U.C.A. § 76-3-202(5) (1989). Since judicial review exists only as to alleged procedural deficiencies, the court had no occasion to review the Board of Pardons' discretionary decision for reasonableness.

### CONCLUSION

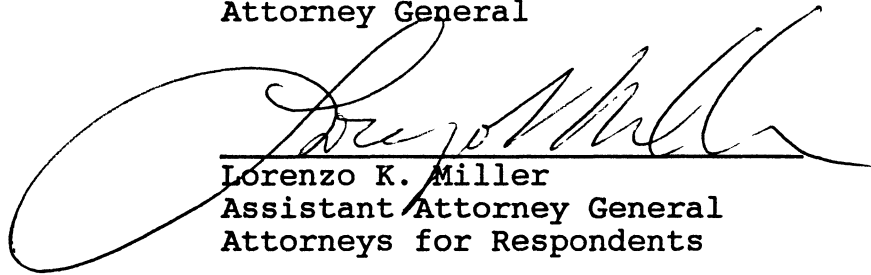
Northern's disappointment with the Board's decision does not make it violative of due process or any other right. The Court of Appeals found no procedural due process violation, and it is well settled that there is no substantive due process right to parole or early release. See Houtz v. DeLand, 718 F. Supp. 1497 (D. Utah 1989); Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465 (1981); Board of Pardons v. Allen, 482 U.S. 369 (1987); Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1 (1979). The Court of Appeals classified Northern's allegations as attacks on the reasonableness of the Board of Pardons' decision to rescind his original release date. Finding such decisions discretionary, and thus not subject to judicial review, the court held habeas relief inappropriate.

The foregoing establishes that the decision below does not conflict with Foote v. Utah Board of Pardons, 808 P.2d 734 (Utah 1991), and that the court in fact addressed Northern's claims. The court reviewed the record for procedural deficiencies, consistent with Foote, and simply found none. Northern's disappointment with the court's decision does not warrant review by writ of certiorari.

WHEREFORE, the Court should deny the Petition for Writ of Certiorari.

RESPECTFULLY submitted this 30<sup>th</sup> day of April, 1992.

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CERTIFICATE OF MAILING

I hereby certify that four (4) true and accurate copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, this 1<sup>st</sup> day of May, 1992, to:

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