

1992

# Kendall Q. Northern v. N. Eldon Barnes : Brief of Respondent

Utah Supreme Court

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Jan Graham; Utah Attorney General; James H. Beadles; Lorenzo K. Miller; Assistant Attorneys General; Attorneys for Respondents.

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

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BRIEF

CKET NO. 920116

IN THE SUPREME COURT OF THE STATE OF UTAH

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KENDALL Q. NORTHERN,

Petitioner,

v.

N. ELDON BARNES, et al.,

Respondents.

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Case No. 920116

Priority No. 3

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BRIEF OF RESPONDENTS

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On a Writ of Certiorari to the Utah Court of Appeals

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

ATTORNEYS FOR PETITIONER

JAN GRAHAM (1231)  
Utah Attorney General  
JAMES H. BEADLES (5250)  
LORENZO K. MILLER (5761)  
Assistant Attorneys General  
330 South 300 East  
Salt Lake City, Utah 84111  
Telephone (801) 575-1600

ATTORNEYS FOR RESPONDENTS

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UTAH

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Assistant Attorneys General  
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Telephone (801) 575-1600

ATTORNEYS FOR RESPONDENTS

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Case No. 920116

Priority No. 13

BRIEF OF RESPONDENTS

JURISDICTIONAL STATEMENT

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

ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly conclude that the Board did not violate the law, i.e., its own Rule 310, and that therefore Petitioner was not entitled to extraordinary relief?

2. Did the Court of Appeals correctly conclude that a court cannot judicially review the Board of Pardons' substantive discretionary decision to rescind a parole date based on circumstances set forth in Rule 310?

### STANDARD OF APPELLATE REVIEW

In reviewing a denial of a habeas corpus petition, the court examines the record "in the light most favorable to the findings and judgment . . . and will not reverse if there is a reasonable basis in the record to support the trial court's denial of the writ." Hall v. Utah Board of Pardons, 806 P.2d 217 (Utah App. 1991 (citations omitted)). A lower court's factual findings will be set aside only if they are clearly erroneous. State v. Ramirez, 817 P.2d 774 (Utah 1991). However, the lower court's "conclusions of law are accorded no deference but are reviewed for correctness." Termunde v. Cook, 786 P.2d 1341, 1342 (Utah 1990) (citing Fernandez v. Cook, 783 P.2d 547 (Utah 1989)); see generally Stewart v. State, 830 P.2d 306, 308 (Utah App. 1992).

Likewise, in reviewing by writ of certiorari a decision of the Utah Court of Appeals, this Court examines the legal conclusions of the intermediate appellate court for correctness. Landes v. Capital City Bank, 795 P.2d 1127 (Utah 1992); Garrish v. Barnes, 202 Utah Adv. Rep. 7, 9 (Utah 1992).

### CONSTITUTIONAL PROVISIONS, STATUTES, AND OTHER RULES

The following provisions are included in Addendum A to this brief. Other relevant pleadings and documents, including the judgment of the trial court and the opinion of the Utah Court of Appeals are also included in the Addenda.

Utah Const. art. V, § 12 (1896, amended 1992)

Utah Const. art. V.

Utah Const. art. VIII, § 1 (1896, amended 1984).

Utah Code Ann. § 77-27-5 (3) (Supp. 1992).

Utah Admin. Code R270-310 (Board of Pardons Policies and Procedures Manual Number 3.10) (1986).

#### STATEMENT OF THE CASE

This is a review on certiorari of a decision of the Utah Court of Appeals, which affirmed the order of the district court denying Northern's petition for an extraordinary writ. Northern v. Barnes, 825 P.2d 696 (Utah App. 1992). (Addendum B).

On July 30, 1980, petitioner was convicted of criminal homicide-murder in the second degree, a first degree felony, and aggravated robbery, a first degree felony. Petitioner was sentenced to serve two five-to-life sentences at the Utah State Prison (R. at 90). After a hearing before the Board of Pardons on July 8, 1981, petitioner received a prospective parole date of May 10, 1988 (R. at 90). (Order of Parole, Addendum C).

Petitioner was transferred to the Duchesne County Jail in March 1986 (R. at 91). On February 25, 1988, jail authorities discovered petitioner using marijuana (R. at 91). (Violation Report of February 25, 1988, Addendum D). The incident was reported to officials at the Utah State Prison, and the Board of Pardons obtained the information sometime prior to May 10, 1988 (R. at 91).

On March 24, 1988, the Utah Board of Pardons requested that the Utah State Prison perform a psychological assessment on petitioner (R. at 91). The Board did not receive the results of

this psychological assessment until May 5, 1988, five days before Northern's proposed parole date (R. at 91). (Psychological Assessment of May 5, 1988, Addendum E). While the authors recommended that the report be regarded favorably, they also discussed Northern's drug problem in depth (R. at 92). More specifically, the report said that Northern viewed his drug dependency as a major factor in his anti-social behavior (R. at 92). It also noted that Northern admitted being high on LSD at the time he committed his crimes and that he had used LSD, cocaine, amphetamines, and marijuana (R. at 91-92). This information was not available to the Board in 1981 (Finding of Fact, Conclusions of Law, and Order of Dismissal No. 10, Addendum F). The report indicated that Northern's major problem was his inability to deal with life's stresses without the use of illegal substances (R. at 92).

In light of the information it had, the Board of Pardons had concerns regarding petitioner's fitness for parole release. Therefore, on May 9, 1988, the Board of Pardons rescinded Northern's parole release date of May 10, 1988 and continued the matter pending a second psychological evaluation and complete prison progress report (R. at 93).

The second psychological report was prepared on May 11, 1990. It considered the issue of how Northern would react under stress in an unstructured setting. It considered how his relationship with his father might affect his success as he was planning to live with

his parents, at least for a short time, while on parole (R. at 94). The report recommended that petitioner be paroled to Arizona. (R. at 94). The report recommended that "due to his extensive drug history and continued problem with drugs, drug therapy on an outpatient basis should be required as well as therapy to assist him in adjusting to the social demands of a new lifestyle."

On June 23, 1988, the Board of Pardons scheduled a hearing for July 8, 1988, to review petitioner's status (R. at 94). Petitioner received notification of that hearing by June 28, 1988 (R. at 94). At the July 8, 1988 hearing, petitioner was permitted to address the Board, present information, and respond to the Board's questions (R. at 94). At the conclusion of the hearing, the Board of Pardons affirmed the rescission of petitioner's May 10, 1988 parole release date, stating: "[T]he board is extremely concerned about first of all, the risk that you present to society from the overall record, from the nature of the crime, and specifically also including the information which the board has received since that time and in comparing it with the overall record." R. at 94.

On October 9, 1988, Northern escaped from the Duchesne County Jail (R. at 94). As a result, the Board of Pardons rescinded the May 1990 scheduled rehearing (R. at 94-95). He was subsequently captured in Canada and returned to Utah on October 6, 1989 (R. at 5).

On March 30, 1990, Northern filed in Third District Court a document entitled Complaint and Petition for Writ of Habeas Corpus



and Alternatively a Writ of Mandamus or Declaratory Judgement, requesting the court to 1) declare the post-May 10, 1988 confinement illegal; 2) order the Board to release Northern on parole to Arizona; and 3) award attorneys' fees, damages for contract breach, and other appropriate relief. (R. at 2) (Petition, Addendum G). Based on an evidentiary hearing and oral argument, the district court denied the petition for an extraordinary writ. (Findings of Fact, Conclusions of Law, and Order of Dismissal, R. at 89, Addendum F).

Northern appealed the denial of his petition to the Utah Court of Appeals, which issued an opinion affirming the decision of the district court on January 24, 1992. (R. at 104) (Addendum B). While this case was being appealed to the Utah Court of Appeals, the Board paroled Northern to the State of Arizona. (1991 Order of Parole, Addendum H).

#### STATEMENT OF FACTS

The facts pertinent to this appeal are set out in the Statement of the Case.

#### SUMMARY OF THE ARGUMENT

Northern sought from the district court extraordinary relief in the nature of mandamus under Rule 65B of the Utah Rules of Civil Procedure. To be entitled to extraordinary relief, he must show that the Board did not regularly pursue its authority, which is limited by the statutes and rules pertinent to the Board when the

harm occurred, specifically Rule 310 of the Board's Policies and Procedures.

Northern is not entitled to extraordinary relief because the Board did comply with the law. Contrary to Northern's arguments, Rule 310 did not require a pre-rescission hearing. Indeed, Rule 310 allowed the Board to temporarily rescind a parole date solely on the basis of information that there was new evidence that, if released, Northern would present a serious risk or danger to the community. When the Board temporarily rescinded the parole release date, it had information in the form of a psychological report and a report of recent drug use in a county jail indicating that Northern had previously lied to the Board about his serious and ongoing abuse of drugs, and, more importantly, was still willing to violate the law in order to abuse drugs.

In its opinion affirming the district court's denial of the petition, the Court of Appeals correctly decided that the Board's subjective and substantive decision pertaining to an individual's fitness for parole was not subject to judicial review. This decision is not in conflict with Foote v. Board of Pardons, 809 P.2d 734 (Utah 1991), which dealt with the Court's authority to review alleged procedural violations by the Board, not the Board's substantive parole decisions. The appellate court's conclusion that the Board's exercise of its discretionary authority is not subject to judicial review is required not only by Utah statute but

also by the Utah Constitution, which expressly delegates the parole power to the Board of Pardons.

A court, considering a petition for extraordinary writ, may not substitute its judgment of a person's risk or dangerousness for the Board's judgment. A court that did so would improperly exercise an executive function and violate the separation of powers provision of the Utah Constitution. The appellate court properly avoided this constitutional conflict and interpreted Foote to extend judicial review via Rule 65B to alleged procedural violations only. Because the Board did not violate its procedures when it rescinded Northern's parole date, Northern is not entitled to extraordinary relief and the Court of Appeals' decision should be affirmed.

### ARGUMENT

#### Introduction

In his original petition for extraordinary relief, Northern asserted two causes of action: 1) the Board violated its own policies and procedures when it rescinded his parole date in 1988; and 2) the Board's 1988 rescission of Northern's parole date breached his 1981 parole "contract" .<sup>1</sup> Complaint and Petition for Writ of Habeas Corpus and Alternatively a Writ of Mandamus or

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<sup>1</sup>Northern does not challenge on certiorari the Court of Appeals' legal ruling that a Rule 65B action is not an appropriate vehicle for litigating claims for breach of contract.

Declaratory Judgement, Case No. 90090125, Third District Court, filed March 30, 1990 (Petition, Addendum G).

Northern's first cause of action essentially is a request for relief under the mandamus provision of Rule 65B -- a complaint that the respondent has failed to act in accordance with law, thereby harming him. Utah R. Civ. P. 65B(e) (1992).<sup>2</sup> Where the extraordinary relief requested is in the nature of mandamus, a court is limited to determining whether the respondent has "regularly pursued its authority," Utah R. Civ. P. 65B(e)(4), which is defined by the statutes and by agency rules in place when the alleged harm occurred. See Preece v. House, No. 920726-CA (Utah App. Feb. 17, 1993) (appropriate extraordinary relief under Rule 65B(e) for Board of Pardons' failure to follow its own procedural rule is to order Board to comply with its rule) (Addendum I).

In Preece, the Court of Appeals reviewed an order of the Third District Court which granted a petition for habeas corpus and ordered a prisoner's release. At issue in the petition was the Board's alleged failure to comply with its own rules, specifically its responsibility to provide a written explanation for a denial of parole. The Court of Appeals found that the district court

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<sup>2</sup> Rule 65B was substantially reorganized in 1991 although the language pertaining to mandamus was only technically amended. In 1990, when this petition was filed, the then existing mandamus provision was codified at Utah R. Civ. P. 65B(b)(2) through (4), and (e). Because of the substantive similarities between the 1990 version of the rule and the current version as it pertains to mandamus, Respondents will cite to the current version in this brief.

exceeded its authority by ordering the Petitioner's release as a remedy for the Board's failure to comply with its procedural rules. Preece, slip op. at 2 (Addendum I). The appellate court remanded the case to the district court with instructions to treat the petition under Rule 65B(e) and to order the Board to comply with its rules and "expeditiously . . . provide the district court and petitioner with a written explanation of its reasons for the parole decision." Id.

In the district court, Petitioner Northern made a challenge very similar to that in Preece. He claimed that the Board violated its own rule governing rescission of a set parole date, namely Rule 310, in two ways: (1) by failing to hold a hearing before acting on May 9, 1988, to stay the release on parole on May 10, 1988, pending further investigation; and (2) by rescinding his parole date based on information that purportedly did not constitute "new evidence" under Rule 310. He also vaguely asserted that these violations of Rule 310 denied him his constitutional rights.

In oral argument before the district court, Northern's counsel described the issues presented by his claims as follows:

It seems to me, Your Honor, that there are really three critical issues, perhaps, I think the court may need to decide in order to fairly adjudicate this matter. One of them is simply did the Board of Pardons follow its own policies and procedures under Rule 3.10 which we have discussed previously at length with you . . . . I think the next issue the court would look at is was it exempted from following 3.10 by this introductory language of 655-101 . . . . I think the final issue would be if the Board violated 3.10, and is not saved under section 655-101, what is the appropriate remedy?

(Tr. of Hearing before Judge Timothy Hanson, July 27, 1990, at 34, 35, R. at 102). Faced with these issues and arguments, Judge Hanson concluded that Rule 310's requirements for a hearing were not violated. He found that there was adequate information before the Board on May 9 when it blocked the May 10 release on parole: first, Northern had throughout his seven-year incarceration--indeed, until his psychological evaluation on May 5, 1988--lied about his serious drug abuse before, during, and after commission of the murder; second, there was evidence of ongoing drug use and violation of drug laws and prison rules as late as February 1988. Judge Hanson concluded that this information constituted "new evidence" not available to the Board in July 1981. Since no violation of Rule 310 had occurred, the trial court rejected the secondary claim that violation of Rule 310 had also denied him constitutional rights. (Findings of Fact and Conclusions of Law, Addendum F).

Northern's brief to the Utah Court of Appeals framed the issue in this two-part manner: "Did the Board of Pardons violate its own procedural and substantive rules as set forth in Board of Pardons Rule 3.10 ["Rule 3.10"], thereby denying Northern due process of law?" Brief of Petitioner at 1, Northern v. Barnes, No. 900566-CA.

In affirming Judge Hanson's denial of extraordinary relief, the Court of Appeals did not expressly decide whether any violation of Rule 310 occurred. Instead, the court held that any procedural deficiencies were cured by the hearing held in July 1988, before

Northern's petition for extraordinary relief was filed. Northern v. Barnes, 825 P.2d at 699.

The Court of Appeals saw that other arguments on appeal challenged the substance of the Board's decision to rescind the parole based on the new evidence before it. But the court rejected this "suggestion" that courts may second-guess the Board of Pardons and essentially reweigh the evidence before the Board and determine anew whether an inmate's parole date should be rescinded. It is this latter ruling that Northern challenges on certiorari.<sup>3</sup>

Before this Court, Northern claims once again that the conditions in Board Rule 310 for rescinding the May 10, 1988 parole date were not satisfied either on May 9 or after the July 1988 hearing. In addition, he claims that Rule 310 required the Board to hold a rescission hearing before it acted on May 9. These questions are addressed in Point I, below.

Secondly, Northern asserts that the Court of Appeals erroneously declined to evaluate the "reasonableness" of the Board's rescission of his parole based on that evidence. This issue is addressed in Point II, below.

**I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT  
PETITIONER WAS NOT ENTITLED TO EXTRAORDINARY**

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<sup>3</sup>For the first time in his Brief on Certiorari, Northern suggests at page 30 that Rule 310, even if the Board complied with its requirements, violates due process. This issue was not raised in either the district court or the Court of Appeals. Accordingly, it should not be addressed by this Court. Smith v. Batchelor, 832 P.2d 467, 470 n.4, (Utah 1992); Pixton v. State Farm Mutual Auto Ins. Co., 809 P.2d 746, 751 (Utah App. 1991).

RELIEF SINCE THE BOARD OF PARDONS HAD NOT VIOLATED RULE 310.

- A. Although Rule 310 did require a hearing, it did not require the Board to hold a hearing before staying the 1981 parole order. Rule 310 permitted temporary rescission of Northern's May 10 parole date, based on information received a few days earlier about his current risk to the community, ongoing drug abuse, and his lies about drug abuse at the time of the crime.

Northern asserts that Rule 310 required the Board to hold a hearing before it acted on May 9 to rescind the May 10, 1988 parole date set in 1981. This Court should reject this contention based on the plain language of the rule itself.

Rule 310, which in 1988 governed the Board's rescission of a parole release date, provided:

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.



(Addendum A). Under the clear mandate of this rule, the 1981 order setting Northern's parole release date of May 10, 1988 was to remain in effect unless the Board received either: (a) a written referral about his violation of law or prison rule; or (b) new evidence that his release would present a serious risk or danger to the community.

In this case, the Board received information shortly before May 10 that satisfied both prongs of this part of the rule. The Board had received a referral from the Duchesne County Jail (Addendum D) stating that Northern had been found using drugs, a violation of prison rules and state law, in February 1988, only three months before his scheduled parole release date. The Board also received the May 5, 1988 psychological evaluation (Addendum E), in which the Board learned that Northern had since 1980 lied about his lack of drug use and abuse. The Board learned for the first time that Northern had been a serious drug abuser (of LSD, cocaine, amphetamines, and marijuana) since the age of 16 and that he was, in fact, high on LSD at the time of his crime.

Given this information, on May 9, 1988 the Board acted in accordance with the rule by temporarily rescinding the May 10, 1988 release date. At the same time, the Board requested an additional psychological evaluation to answer questions raised by the May 5, 1988 evaluation. (Notification of Parole Decision, dated May 9, 1988, Addendum J) (R. at 10). The Board then scheduled a hearing for July 8, 1988 at which Northern would have the opportunity to

respond.<sup>4</sup> Even Northern admits that at this hearing, he was permitted to address the Board of Pardons, present information, and respond to questioning from the Board.<sup>5</sup> Brief of Petitioner at 12.

Rule 310 does not require a hearing before an order setting a release date is temporarily rescinded. Petitioner's tortured construction of the rule would prevent the Board from protecting the public in those instances when a soon-to-be paroled inmate engages in unlawful activity or is found to be dangerous shortly before the original parole release date. As a matter of public policy, this Court should reject his distortion of the plain meaning of the rule.

- B. The Board had before it "new" evidence, within the meaning of that term in Rule 310, that release of Northern in May 1988 would have presented a serious risk of danger to the community.

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<sup>4</sup> Had the Board reversed its rescission at this hearing, instead of affirming it, Petitioner still would have had a remedy. The Board could have granted him credit for the time he had served in prison since May 10, 1988.

<sup>5</sup> Under the rules, a rescission hearing is classified as a "full hearing" at which the inmate is guaranteed a personal appearance "in which all the facts of the case are reviewed, evidence is presented and statements are taken from involved parties." Utah Admin. Code R270-306-2 (1987-88). As Petitioner admitted, he received these rights at the July hearing. Just because the July 8 hearing was labelled a "special appearance" rather than "rescission" hearing does not constitute a violation of the rule. Both rescission and special appearance hearings are "full hearings" under Rule 306 and the same opportunities of notice, personal appearance, and ability to present evidence are guaranteed. Additionally, Petitioner has not alleged that he was misled or confused by the designation "special appearance." He knew the Board was going to discuss the rescission.

In his Findings of Fact, Judge Hanson found that the use of marijuana at the Duchesne County Jail in February 1988 and information contained in a psychological evaluation dated May 5, 1988 was "new information in that it was not available to the Board of Pardons on July 8, 1981." Findings of Fact 6, 10 (R. at 90, 92) (Addendum F). Under the standard of review adopted by this Court, factual findings will be set aside only if they are clearly erroneous. State v. Thurman, 203 Utah Adv. Rep. 18 (Utah 1992) (quoting State v. Ramirez, 817 P.2d 774, 778 (Utah 1991)).

Petitioner does not contend that these factual findings are clearly erroneous but he (a) protests their designation as "new evidence;" and (b) states that they are not the "best" evidence of his dangerousness or risk to society.

The district court defined "new evidence" as information arising between the time the Board initially set the release date, in this case July 1981, and the scheduled release date. This is the obvious meaning of the term in the context of Rule 310. The Board should not be bound by facts frozen in time. In order to fulfill its constitutional and statutory responsibilities and determine if an inmate is ready for release, the Board must be able to consider all conduct indicative of a person's dangerousness that occurs, or becomes known, since the Board's initial setting of a release date. This essential flexibility is provided by Judge Hanson's commonsense interpretation of Rule 310.

In his brief before this Court, Northern seems to agree that this is the appropriate definition of "new evidence." He states that the "plain and literal meaning of the term 'new evidence' [in Rule 310] 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." Brief of Petitioner at 29.

In the psychological evaluation, which was received on May 5, 1988, only five days before the scheduled release date, the Board learned that Northern had previously concealed and lied about his drug history. The evidence available to the Board in 1981 overwhelmingly indicated that Petitioner had no drug problem and that drugs were not involved in the crime. In the June 13, 1980 report that was before the Board in 1981 when the May 10, 1988 release date was originally set, the diagnostic agent stated: "Mr. Northern reports only one prior arrest as a juvenile and no history whatsoever of drug or alcohol abuse. There is no available information to suggest that either alcohol or drugs played a part in the current crime . . . ." (June 1980 Diagnostic Report, Addendum K) (emphasis added). In a 90-day diagnostic report prepared two weeks later, the investigator likewise reported that Northern had no significant drug use problem. (July 28, 1980 90-day Diagnostic Report, Addendum L). The 1988 psychological report, in startling language, made it clear to the Board that Northern had, in fact been deeply involved in drug abuse.

At 16 Mr. Northern left home to wander the western states and became more deeply involved with drugs and people using drugs. He stated that he was high on LSD at the time he committed [sic] his crime. Among drugs that Mr. Northern admitted to using were LSD, cocaine, amphetamines, and marijuana. He has tried other drugs such as downers, but stated he found them unsatisfactory.

(Addendum E).

This information of concealment of his drug abuse was indisputably "new evidence," under either Northern's formulation or under the more simple definition used by Judge Hanson. Thus, the Board complied with Rule 310.

The report of Northern's February 1988 use of marijuana at the Duchesne County Jail constituted additional "new evidence" under both Judge Hanson's definition and Northern's own formulation as a "specific or affirmative [act] that occurred . . . subsequent to [Northern's] last review."

Significantly, besides constituting new evidence, this information of drug use in February 1988 also separately satisfied the alternative basis in Rule 310 permitting rescission of a release date based on a "written referral" indicating a violation of law or prison rules. This information alone gave the Board a lawful reason to temporarily rescind the parole date of May 10, 1988. Thus, the Board's actions on May 9 did not violate Rule 310.

At page 29 of his brief to this Court, Northern argues that, even if this evidence is new it is not "the best evidence" of Northern's threat to the community. In essence, as the Court of Appeals recognized, this is actually an argument, premised on Footnote

v. Board of Pardons, 808 P.2d 734 (Utah 1991), that a court can substitute its judgment about whether to parole an inmate for the Board's judgment. As discussed below under Point II, Foote does not sanction such second-guessing of the Board's substantive decisions about parole, which is, in any event, barred by the state constitution and statute.

The actions of the Board in rescinding Northern's parole date comported not only with the procedural requirements of Rule 310 but with notions of common sense. The Board is charged by law not just with the obligation to determine an individual's fitness for parole but also with the duty to protect the public. In May 1988, the Board came upon new evidence that Northern had previously withheld information from the Board and that he had recently violated the law. Using its experience and expertise, the Board decided that this new evidence indicated that Northern would present a serious risk or danger to the community if he were released on May 10, 1988.

**II. THE COURT OF APPEALS CORRECTLY CONCLUDED  
THAT THE BOARD'S SUBSTANTIVE PAROLE  
DECISIONS ARE NOT SUBJECT TO JUDICIAL  
REVIEW IN AN ACTION FOR EXTRAORDINARY  
RELIEF.**

In addition to his claim that Rule 310 was violated by the Board in his case, Northern contends that, even if Rule 310's requirements were satisfied, a court can reweigh the evidence and redetermine whether it warranted rescission of his May 10, 1988 parole date. Brief of Petitioner at 29-30. Northern asserts that

this Court's decision in Foote subjects this discretionary decision of the Board to such judicial review. Id. at 21.

This is the same argument he made unsuccessfully to the Utah Court of Appeals. That court disagreed with Northern's interpretation of Foote, stating that Foote dealt solely with procedural due process issues. Northern, 825 P.2d at 699. In addition, the Court of Appeals interpreted Utah Code Ann. § 77-27-5(3) (Supp. 1992) to prohibit judicial review of the Board's exercise of its discretionary authority to determine whether or not an inmate should be released to the community. See Northern, 825 P.2d at 699; see also Foote, 808 P.2d at 735 (the number of years a defendant will spend in prison is left to the "unfettered discretion of the board of pardons"); State v. Mondragon, 107 N.M. 421, 759 P.2d 1003, 1004 (N.M. App. 1988) ("While there may be regulations on the manner of the exercise of the power, the ultimate right to pardon is unrestrained by any consideration other than the conscience, wisdom, and sense of public duty of the governor.").

Foote was brought as an original Petition for a Writ granting Extraordinary Relief directly in this Court, challenging the procedures used by the Board of Pardons. Foote, an inmate, contended "that the manner in which his parole hearings [had] been conducted [had] deprived him of procedural due process." Foote, 808 P.2d at 734. Because the facts relating to the conduct of parole hearings were undocumented, this Court remanded the case to

the district court to flush out the "facts concerning the procedures followed by the board," Id. at 735 (emphasis added), and to obtain a ruling on what is procedurally required.<sup>6</sup> Because the Utah Constitution guarantees inmates due process protection during original parole grant hearings before the Board, this Court declared that habeas corpus review of the Board's actions in conducting those hearings is available via an extraordinary writ, notwithstanding the fact that section 77-27-5(3) bars a direct appeal from the substantive parole decisions of the Board. Id.

In the instant case, the Utah Court of Appeals recognized that Northern's substantive claims went not to the "procedural due process issues outlined in Foote, but to the reasonableness of the Board's decision . . . ." Northern, 825 P.2d at 699. Thus, the Northern court found that the language in Foote, stating that habeas corpus review of Board actions was available to challenge the manner in which parole hearings were conducted, did not apply to Northern insofar as he was not challenging the manner in which the rescission hearing was held, but the result that was reached.

This is a correct interpretation of Foote, not just because the Foote Court spoke in terms of procedural due process, but, more fundamentally, because limiting the appropriate scope of judicial review of Board actions to allegations of procedural violations,

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<sup>6</sup>The issue of what procedural protection is required by the Utah Constitution at parole grant hearings is currently before this Court in Labrum v. Board of Pardons, No. 920022.



rather than substantive decisions, is mandated by the state constitution and statute.

In perhaps the central, and most controversial, paragraph of the opinion, the Court of Appeals stated in Northern that state law barred judicial review of the Board's subjective and substantive decisions.

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.

Northern, 825 P.2d at 699; accord Preece v. House, No. 920726-CA, (Utah App. Feb. 17, 1993) (Appendix I). The Court tied this statement to section 77-27-5(3), which states that decisions of the Board of Pardons are final and are not subject to judicial review.

However, the unreviewability of the Board's substantive parole decisions is not just a creature of the legislature. It is instead mandated by the interplay of two separate provisions of the Utah Constitution. Article VII, section 12 specifically creates a Board of Pardons and Parole to make these substantive decisions about parole. Article V explicitly divides the powers of the government into three distinct departments and prohibits one of those departments from exercising functions appertaining to another.

A. Article VII, section 12 of the Utah Constitution grants the Board of Pardons exclusive authority to make parole decisions.

The Board of Pardons and Parole was initially created as a Board of Pardons, composed of the Governor, the Attorney General, and the Justices of the Utah Supreme Court. Utah Const. art. VII, § 12 (1896, amended 1992). This entity had the sole authority to remit fines, commute punishments, and grant pardons after convictions. Id. An early Utah Supreme Court case held the Board of Pardons had exclusive authority to grant paroles, the legal equivalent to a commutation. State ex rel. Bishop v. State Board of Corrections, 16 Utah 478, 52 P. 1090 (1898); accord Cardisco v. Davis, 91 Utah 323, 64 P. 216, 218 (1937).

Since the Supreme Court's decision in Bishop, the parole system has been administered by the Board of Pardons. In many states and in the federal government, the power of executive clemency is administered by the chief of the executive branch, that is, by the governor or the president, and the parole system is administered by a separate, legislatively created entity. As the very term suggests, executive clemency, which includes pardons, commutations<sup>7</sup>, and remissions is inherently an executive function.

The constitutional grant of exclusive authority to the Board to decide when and if an inmate is ready to return to the community

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<sup>7</sup> As previously stated, parole also is a part of executive clemency, being in legal effect a commutation. Bishop, 57 P. at 1090.

before the end of his sentence makes good sense in light of the discretionary, predictive nature of that decision. From a policy perspective, an executive body, rather than the judiciary, is better able to make this determination. As stated by Justice Folland in Cardisco, the Board "has better facilities and better opportunity than the trial court to learn about the offender, and as to his character, experience, training, the past criminal record, if any, former associations, family connections, condition of his health, etc." Cardisco, 64 P.2d at 222 (Folland, J., concurring).

The Court of Appeal's holding in the instant case is in accord with the constitutional delegation of authority, prior Utah decisions, and the historical purposes and functions of the Board of Pardons. As the Board was better able to look at a person's character and reformation than a trial court in 1937 when Cardisco was determined, so the Board is still better able today to make that determination. As the United States Supreme Court has pointed out, the parole-release decision is not a factual determination like those made by courts.

The parole-release decision, however, is more subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release . . . .

Greenholz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 10 (1979) (quoting Kadish, The Advocate and the Expert-

-Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 813 (1961)). Finally, because the Board administers the entire parole system, thus specializing in prisoner rehabilitation issues, it is better able than a court in an isolated case to develop the necessary expertise and to make parole decisions for all inmates that are consistent with each other.

In sum, the people of this state have given the Board of Pardons the constitutional authority to determine whether an inmate has been rehabilitated sufficiently to return to the community without presenting a serious risk or danger. In rescinding Northern's parole date based on new evidence and evidence of his recent violation of drug laws, the Board exercised this authority.

- B. The separation of powers provision in article V of the Utah Constitution precludes the judiciary from exercising functions delegated to the executive branch, including parole decisions by the Board of Pardons.

In light of the Board's exclusive constitutional authority to make parole decisions, a court's reweighing of the evidence would violate the separation of powers provision of the Utah Constitution. The article VII, section 12 power to grant parole is meaningless if it is just the ministerial power to sign the release order. The Board's authority, to be meaningful, must also embrace the power to determine what factors are relevant in the parole release decision, their relative importance in each case, and what weight to give each item of evidence. If the judiciary takes that power on itself, it would effectively be making the parole decision

delegated to the Board of Pardons, an agency of the executive branch. See Kimball v. Grantsville City, 19 Utah 368, 57 P. 1 (1899) (delegation of power to one branch implies inhibition against its exercise by another branch).

As noted under Point I, the Board of Pardons does not claim to be above the law. The Board recognizes that this Court can constitutionally compel it to follow the law by issuing an extraordinary writ. However, the state constitution and section 77-27-5(3) preclude judicial review of the substantive decisions of the Board concerning parole, even if that review is sought by way of a Rule 65B(e) petition. As the Court of Appeals correctly concluded here, a court faced with such a petition for extraordinary relief is limited to determining whether the Board "has regularly pursued its authority." Utah R. Civ. P. 65B(e) (1992). The purpose of mandamus is not to interfere with the "functions or the policies of other departments of government," or allow a court to substitute its judgment for that of an agency by telling the agency how to decide. Wright Development, Inc. v. City of Wellsville, 608 P.2d 232, at 233 (Utah 1980); See also Olson v. Salt Lake City School District, 724 P.2d 960 (Utah 1986).

#### CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the decision of the Utah Court of Appeals.

RESPECTFULLY SUBMITTED this 5th day of March 1993.

JAN GRAHAM  
Utah Attorney General

James H. Beadles  
James H. Beadles  
Assistant Attorney General

James H. Beadles

CERTIFICATE OF MAILING

I certify that on the 5th day of March 1993, a true and correct copy of the foregoing BRIEF OF RESPONDENT AND APPELLEE was mailed, postage prepaid to:

JO CAROL NESSET-SALE  
HALEY & STOLEBARGER  
Tenth Floor, Walker Center  
175 South Main Street  
Salt Lake City, Utah 84111

James H. Beadles  
James H. Beadles

Tab A

Sec. 12. [Board of Pardons and Parole - Appointment - Powers and procedures - Governor's powers and duties - Legislature's powers.]

(1) There is created a Board of Pardons and Parole. The Governor shall appoint the members of the board with the consent of the Senate. The terms of office shall be as provided by statute.

(2) (a) The Board of Pardons and Parole, by majority vote and upon other conditions as provided by statute, may grant parole, remit fines, forfeitures and restitution orders, commute punishments, and grant pardons after convictions, in all cases except treason and impeachments, subject to regulations as provided by statute.

(b) A fine, forfeiture, or restitution order may not be remitted and a commutation, parole, or pardon may not be granted except after a full hearing before the board, in open session, and after previous notice of the time and place of the hearing has been given.

(c) The proceedings and decisions of the board, the reasons therefor in each case, and the dissent of any member who may disagree shall be recorded and filed as provided by statute with all papers used upon the hearing.

(3) (a) The Governor may grant respites or reprieves in all cases of convictions for offenses against the state except treason or conviction on impeachment. These respites or reprieves may not extend beyond the next session of the board. At that session, the board shall continue or determine the respite or reprieve, commute the punishment, or pardon the offense as provided in this section.

(b) In case of conviction for treason, the Governor may suspend execution of the sentence until the case is reported to the Legislature at its next annual general session, when the Legislature shall pardon or commute the sentence, or direct its execution. If the Legislature takes no action on the case before adjournment of that session, the sentence shall be executed.



ARTICLE V  
DISTRIBUTION OF POWERS

Section 1. [Three departments of government.]

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Section 1. [Judicial powers - Courts.]

The judicial power of the state shall be vested in a supreme court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish. The Supreme Court, the district court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute.

77-27-5. Board of Pardons authority.

(1) (a) The Board of Pardons shall determine by majority decision when and under what conditions, subject to this chapter and other laws of the state, persons committed to serve sentences in class A misdemeanor cases at penal or correctional facilities which are under the jurisdiction of the Department of Corrections, and all felony cases except treason or impeachment or as otherwise limited by law, may be released upon parole, pardoned, restitution ordered, or have their fines, forfeitures, or restitution remitted, or their sentences commuted or terminated.

(b) The board may sit together or in panels to conduct hearings. The chairperson shall appoint members to the panels in any combination and in accordance with rules promulgated by the board, except in hearings involving commutation and pardons. The chairperson may participate on any panel and when doing so is chairperson of the panel. The chairperson of the board may designate the chairperson for any other panel.

(c) No restitution may be ordered, no fine, forfeiture, or restitution remitted, no parole, pardon, or commutation granted or sentence terminated, except after a full hearing before the board or the board's appointed examiner in open session. Any action taken under this subsection other than by a majority of the board shall be affirmed by a majority of the board.

(d) A commutation or pardon may be granted only after a full hearing before the board.

(2) (a) In the case of original parole grant hearings, rehearings, and parole revocation hearings, timely prior notice of the time and place of the hearing shall be given to the defendant, the county attorney's office responsible for prosecution of the case, the sentencing court, law enforcement officials responsible for the defendant's arrest and conviction, and whenever possible, the victim or the victim's family.

(b) Notice to the victim, his representative, or his family shall include information provided in Section 77-27-9.5, and any related rules made by the board under that section. This information shall be provided in terms that are reasonable for the lay person to understand.

(3) Decisions of the Board of Pardons in cases involving paroles, pardons, commutations or terminations of sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review. Nothing in this section prevents the obtaining or enforcement of a civil judgment.

(4) This chapter may not be construed as a denial of or

limitation of the governor's power to grant respite or reprieves in all cases of convictions for offenses against the state, except treason or conviction on impeachment. However, respites or reprieves may not extend beyond the next session of the Board of Pardons and the board, at that session, shall continue or terminate the respite or reprieve, or it may commute the punishment, or pardon the offense as provided. In the case of conviction for treason, the governor may suspend execution of the sentence until the case is reported to the Legislature at its next session. The Legislature shall then either pardon or commute the sentence, or direct its execution.

(5) In determining when, where, and under what conditions offenders serving sentences may be paroled, pardoned, have restitution ordered, or have their fines or forfeitures remitted, or their sentences commuted or terminated, the Board of Pardons shall consider whether the persons have made or are prepared to make restitution as ascertained in accordance with the standards and procedures of Section 76-3-201, as a condition of any parole, pardon, remission of fines or forfeitures, or commutation or termination of sentence.

Utah Admin. Code R270-310 (Board of Pardons Policies and Procedures Manual Number 3.10) (1986)

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

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

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

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

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

The hearing officer shall conduct the hearing and make an interim decision to be reviewed, along with a summary report of the hearing, by the Board members. Any decision by a hearing officer shall be binding and in full force and effect until reviewed by Board members, who

will make the final decision by approving, modifying, or overturning a hearing officer's decision. The decision is then entered into the record at a regular scheduled Board meeting and the offender is then informed by mail of the results. He is not afforded a personal appearance for this review.

Tab B

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

**v.**

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

**No. 900566-CA.**

**Court of Appeals of Utah.**

**Jan. 24, 1992.**

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

**Affirmed.**

**Billings, J., concurred in the result.**

**See also 814 P.2d 1148.**

#### **1. Courts ⇐207.1**

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

#### **2. Courts ⇐207.1**

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

#### **3. Habeas Corpus ⇐826(2)**

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

#### **4. Declaratory Judgment ⇐84**

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

#### **5. Criminal Law ⇐1216.1(2)**

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

#### **6. Prisons ⇐15(1)**

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

#### **7. Pardon and Parole ⇐59**

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

#### **8. Habeas Corpus ⇐516**

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

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

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

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



OPINION

BENCH, Presiding Judge:

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

FACTS

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

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

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

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

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

On May 9, 1988, the Board rescinded Northern's May 10 parole date, pending further review, and ordered another psychological evaluation. The need for another psychological evaluation and complete prison progress report was listed in the written notice by the Board as the ground for rescinding Northern's original parole date. The supplemental assessment focused on potential problems affecting Northern's adjustment into society posed by his relationship with his father. A full rescission hearing was then scheduled for July 8, 1988.<sup>1</sup>

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.<sup>2</sup> The petition prayed for (1) declaratory relief as to the unlawfulness of Northern's confinement since May 10, 1988, (2) a demand for his immediate release, and (3) damages in excess of \$10,000 for "breach of contract" on the ground that

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

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

a parole date created a legally binding agreement on the State. After a hearing, the trial court denied the petition, and Northern filed a notice of appeal. The Board subsequently set a July 1991 parole date, and required restitution of \$26,850 by Northern as a condition of parole. Northern agreed to the new conditions, and was paroled on July 9, 1991, while this appeal was pending.

#### ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

### CONCLUSION

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

GARFF, J., concurs.

BILLINGS, J., concurs in the result.



STATE of Utah, Plaintiff and Appellee,

v.

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

No. 910275-CA.

Court of Appeals of Utah.

Jan. 24, 1992.

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

Affirmed.

Orme, J., concurred in result only.

Tab C



BEFORE THE BOARD OF PARDONS OF THE STATE OF UTAH  
IN THE MATTER OF THE APPLICATION OF \_\_\_\_\_ ORDER OF PAROLE

KENDALL NORTHERN  
PAROLE

**PRIVATE**

UTAH STATE PRISON NO. 15009

The matter of application for parole, termination of sentence, or expiration of sentence having come before the Utah State Board of Pardons in a regularly scheduled hearing on the 8th day of July 1981, and the applicant appearing in person or having waived in writing the right to appearance and the Board having heard the case, issues the following order:

It is hereby ordered that Kendall Northern be paroled from the punishment and sentence heretofore imposed upon him by a judge of the 3rd Judicial District Court in and for the County of Salt Lake for the crime of Criminal Homicide, Murder in the 2nd degree, 1st degree felony (5 years - life) Aggravated Robbery, 1st degree (5 years - life) Consecutively

The parole shall not become effective until the 10th day of May 1981. The applicant agrees to the following conditions of parole and evidences his agreement by signing the certificate. The parole agreement or contract shall be administered by the duly authorized agent of the Utah State Adult Probation and Parole Department in and for the Utah State Board of Pardons.

It is further ordered that if and in the event the above named applicant shall be guilty of any infractions of the rules and regulations of the Utah State Prison or shall fail or refuse to perform duties as assigned by the Utah State Prison or is found to be in violation of any other law of the State of Utah prior to the effective date of said parole, then the Order of Parole or Termination of Sentence is revoked and becomes null and void.

Dated this 8th day of July 1981.

By Order of the Board of Pardons of the State of Utah, I have this 9th day of July 1981 reduced its decision in this matter to writing and hereby affix my signature as Executive Secretary for and on behalf of the State of Utah, Board of Pardons.

GARY L. WEBSTER, Executive Secretary

**PAROLE AGREEMENT**

I, KENDALL NORTHERN Hereby agree to abide by the following conditions of my parole:

1. I will make a written report, in person, to my Supervising Officer by the fifth day of each and every month or more often if requested to do so.
2. I will follow my Supervising Officer's instructions.
3. I will submit to a search of my person, auto, place of residence of any other property under my control any time of the day or night, without a warrant, upon reasonable cause, as ascertained by an agent of Adult Probation and Parole, to insure compliance with the conditions of parole.
4. I will seek and maintain legitimate employment and/or participate in a program approved by my Supervising Officer.
5. I will obey all local, State and Federal laws, and at all times conduct myself as a responsible, law-abiding citizen. I further agree to report any arrests or citations to my Supervising Officer within 72 hours of occurrence.
6. I will abstain from the illegal use, possession or distribution of narcotics, dangerous drugs, controlled substances or related paraphernalia. I further agree to submit to urinalysis or other tests for narcotics or chemical agents upon the request of my Supervising Officer.
7. I will not receive, possess, transport, or have under my control any firearm, explosive or other dangerous weapon.
8. I will obtain written consent from Utah Adult Probation and Parole before leaving the State of Utah. I expressly acknowledged that should I leave the State of Utah without written authority from Adult Probation and Parole that I hereby waive extradition, from any state in which I may be found, to the State of Utah.
9. I will inform my Supervising Officer of my intent to change employment/residence.
10. To avoid association with any person who has been convicted of a felony.
11. I will abide by the following special conditions:

I understand and agree that should I violate any of the above conditions, falsify reports required of me, or fail to follow the orders of my Supervising Officer, I shall be subject to arrest as provided by law.

Tab D

DUCHESNE COUNTY JAIL  
INMATE INFRACTION REPORT

TYPE OF INFRACTION                      RULE #                      INMATES NAME  
Using Controlled Substance                      Ken Northern  
#15009

DATE AND TIME OCCURRED                      LOCATION OF OCCURRENCE  
2-25-88                      Duchesne County Jail

TO:                      DATE & TIME REPORTING                      HOUSING  
Sheriff Clair Poulson                      2-25-88                      #9

DETAILS:                      # OF PRIORS

On 2-25-88 Marijuana was brought into the Duchesne County Jail by a County Inmate. Upon further investigation it was found that inmate William Byrd obtained a drug and gave some of it to inmate Ken Northern. Inmate Northern admitted to using the drug.

REPORTING OFFICERS: Sgt Veldon Lefler

FOLLOW UP INVESTIGATION:                      DATE:                      TIME:  
2-25-88

Inmate Northern admitted to smoking the Marijuana and was placed on dead lock down for 5 days with the loss of visiting and phone privileges.

DISPOSITION: MINOR INFRACTION (CLASS C)

-----  
SIGNATURE                      DATE

DISPOSITION: CRIMINAL VIOLATIONS (CLASS A) AND/OR MAJOR  
INFRACTION (CLASS B)

Northern was placed on lock down for 5 days.

  
-----  
SIGNATURE                      DATE

Tab E



PSYCHOLOGICAL EVALUATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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



E. Ted Brandhurst, Ph.D.  
Associate Psychologist



Al Carlisle, Ph.D.  
Chief Clinical Psychologist

Tab F

DEC - 7 1990

SALT LAKE COUNTY  
By Evelyn Thompson  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY                      STATE OF UTAH

FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW  
AND  
ORDER OF DISMISSAL

CASE NO. 900901925HC

(Judge Timothy R. Hanson)

1

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**

  
JO CAROL NESSET-SALE  
Attorney for Plaintiff/Petitioner

By   
Deputy Clerk

Tab G

FILED  
DISTRICT COURT

JO CAROL NESSET-SALE (2398)  
HALEY & STOLEBARGER  
175 South Main Street  
10th Floor, Walker Center  
Salt Lake City, Utah 84111  
Telephone: (801) 531-1555  
Attorney for Defendant

MAY 31 10 22 PM '90

*Carla Little*

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

---

KENDALL Q. NORTHERN,	:	COMPLAINT AND PETITION FOR
	:	WRIT OF HABEAS CORPUS AND
Plaintiff & Petitioner,	:	ALTERNATIVELY A WRIT OF
	:	MANDAMUS OR DECLARATORY
v.	:	JUDGEMENT
	:	
N. ELTON BARNES, WARDEN,	:	
UTAH STATE PRISON AND THE	:	
DEPARTMENT OF CORRECTIONS	:	
THROUGH THE BOARD OF PARDONS	:	

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Case No. 900901925 *HC*

**JUDGE TIMOTHY R. HANSON**

The Petitioner Kendall Q. Northern by and through his attorney Jo Carol Nasset-Sale of Haley & Stolebarger hereby files this petition for the issuance of a Writ of Habeas Corpus, and/or Writ of Mandamus and/or Declaratory Judgment and complains that for reasons set forth below he is illegally restrained of his liberty by the Defendants:

Jurisdiction

1. This action is made pursuant to Rule 65B(b)(2,4) and (f) of the Utah Rules of Civil Procedure, Article I, Sections 5, 7, 9, 8, 11, and 18 of the Utah Constitution, the Fifth, Eighth, and Fourteenth Amendments of the Constitution of the United States, Sec. 78-33-1 et seq. (Utah Code Ann., 1953 as amended), and Sec. 78-12-25(1), (Utah Code Ann. 1953 as amended).

## VENUE

2. Venue is properly in the Third Judicial District Court as Petitioner/Plaintiff (hereinafter "Petitioner") is incarcerated in the Utah State Prison and the acts complained of by the Board of Pardons occurred in Salt Lake County; in addition the damage as a result of Defendant's breach of contract exceeds \$10,000. No other complaint for this relief has been considered by another court or is pending in another court.

3. On July 28, 1980, Petitioner, then aged eighteen, was committed to the Utah State Prison for the following terms, based upon Petitioner's pleas of guilty to the following offenses: Second Degree Murder - five year to life, and Aggravated Robbery - five years to life, the terms to run consecutively.

4. On July 8, 1981, Petitioner appeared before the Board of Pardons of the State of Utah and was given a parole date of May 10, 1988.

5. In January 1986 Petitioner requested a transfer to a county jail, given his protective status at the Utah State Prison, and was recommended by his Unit Management Team for transfer, the team noting that Petitioner had not been a management problem. He was denied transfer on January 23, 1986.

6. In March 1986 the Unit Management team again recommended his transfer, with a specific recommendation of the Duchesne County Jail. On March 27, 1986, Petitioner was transferred to the Duchesne County Jail.

7. Petitioner acquitted himself well at the Duchesne County Jail, earning trustee status that permitted him to be on



assignments outside of the jail facility, and in March, April, and early May of 1988 provided valuable assistance in setting up a photography lab for Lt. Ralph Stansfield.

8. The inmate report on Petitioner submitted to the Utah State Prison by the Duchesne County Jail Commander for March and April 1988 noted Petitioner's "excellent job" on the photography lab, that he "gets along well with others", and his anxious anticipation of his May 10, 1988, release date.

9. On March 29, 1988, Petitioner's Social Service Worker recommended Early Release, with Petitioner requiring no special parole conditions and having no special problems.

10. On April 9, 1988, the Board of Pardons, through its Hearing Officer Paul Larsen, reviewed a written statement of Petitioner in which he requested parole to Arizona, his home state, where his parents and employment awaited him, and made an Interim Decision that added to Petitioner's general terms and conditions of parole the following special conditions:

- a) that he complete Intensive Supervision Parole ("ISP") if available in Utah;
- b) that the following additional special conditions of supervision be added in the receiving state (if he were paroled out of Utah)
  - 1. random urinalysis;
  - 2. complete mental health therapy;
  - 3. maintain full-time employment or have full-time student status;
  - 4. maintain nighttime (7:00 p.m.) curfew for the

first six months.

11. On May 9, 1988, without notice to Petitioner and without giving him an opportunity to be present or be heard; and without the convening of a hearing; and without a record having been made; the Board of Pardons rescinded by minute entry Petitioner's parole date that was to have become effective the following day.

12. On July 8, 1988, the Board of Pardons conducted a Special Attention hearing. Petitioner, who requested and was denied permission to have counsel, was present and made a statement. The Board affirmed its rescission of his May 10 parole date, based upon Petitioner's risk to society and the members' concern that Petitioner's punishment by appropriate for his crime. He was given a May 10, 1990, rehearing date.

13. On October 9, 1988, Petitioner left the Duchesne County Jail without permission. He was captured in Canada and returned to Utah on or about October 6, 1989.

#### First Cause of Action

14. The Utah Board of Pardons violated its written policies and procedures when on May 9, 1988, it rescinded Petitioner's parole date of May 10, 1988; to wit:

- a. The Board's written policy 3.10, dated July 14, 1986, part of the Utah Administrative Code, mandated that an inmate's release date established by the Board of Pardons shall remain in effect unless: 1) the Board receives a written referral of the inmate's violation of prison regulations or criminal laws or 2) the Board

receives new evidence that the inmate is a danger to the community. Neither exception was the basis for Petitioner's rescission.

- b. The procedural section of 3.10 requires that before the Board rescinds a parole, it must have received information that can form the basis for rescission. No such information was received in Petitioner's case.
- c. The same section requires that the inmate be given at least seven days notice of the rescission hearing, except under extraordinary circumstances. Petitioner was given no notice, no hearing was held, and no extraordinary circumstances existed. The nature of his offense had been known by the Board for at least seven years.
- d. The same section requires the Board, and not a single hearing officer, to hear all rescission proceedings involving crimes against persons. Yet Paul Larsen alone conducted the April 9, 1988, hearing, which was designated a Special Attention hearing, but appears to have been treated by the Board as a rescission hearing under 3.10, as the Board itself never met on May 9, 1988, when Petitioner's parole date was rescinded. Consequently the Board violated its own procedures by treating Larsen's interim decision as part of a rescission procedure (rather than a Special Attention procedure), thereby circumventing the requirement that the Board hear all rescissions involving crimes against

persons, and by failing to meet as a Board to conduct its own hearing.

- e. That same section permits the Board to review a hearing officer's interim decision and approve, modify, or overturn it only when the "violation consists of a new complaint or conviction for a non-violent felony, misdemeanor, or an adjudicated violation of rules or regulations." The Board had received no information of such a basis for rescission, so the predicate violation was the felony offense that had brought Petitioner to the prison eight years earlier. Consequently, the Board could not review the interim decision of a hearing officer but had to conduct its own hearing.
- f. Under this same section, whim of the Board is not a lawful basis for rescission of an inmate's parole date; yet the Board's July 9, 1988, action states its rescission was based upon its perception that Petitioner had simply not been punished enough for his crime.

#### Second Cause of Action

15. On July 8, 1981, the Board of Pardons entered into a contract with Petitioner.

16. The terms of the contract were that Petitioner would be paroled on May 10, 1988, subject to certain terms and conditions, in consideration for which Petitioner would not violate certain rules and regulations of the prison.

17. During the period of the contract, Petitioner never

received notice that he had engaged in any conduct that nullified or revoked his parole date, and the Petitioner's inmate record does not indicate any misconduct that the Board determined to have revoked or nullified the contract.

18. According to the record of its July 8, 1988, hearing the Board rescinded Petitioner's parole date for factors that existed at the time of his 1981 parole hearing and were related exclusively to the nature of the crime committed.

19. Consequently, the Board breached its contract with Petitioner by not paroling Petitioner on May 9, 1988.

WHEREFORE, Petitioner prays that the Court declare his post-May 10, 1988, confinement in the Utah State Prison unlawful, order the Utah Board of Pardons to direct the warden to forthwith release him on parole with transfer to Arizona for his 1980 convictions, that he be awarded attorney's fees, damages in an amount to be proven at trial but not less than \$10,000.00 and any other appropriate relief in equity or in law that the Court may determine.

Petitioner further prays that the Court schedule a hearing on his claims as soon as the matter can be heard.

DATED this 30<sup>th</sup> day of March, 1990.

  
Jo Carol Nesset-Sale

CERTIFICATE OF SERVICE

I hereby certify that on the 30<sup>th</sup> day of March 1990 a true and correct copy of the foregoing Complaint and Petition for Writ of Habeas Corpus and Alternatively a Writ of Mandamus or Declaratory Judgment was mailed, postage prepaid to the following:

Dane Olsen  
Utah State Board of Pardons  
6100 South 300 East  
Salt Lake City, Utah 84117

A handwritten signature in cursive script, appearing to read "Janet Burri", is written over a horizontal line.

Tab H

Norman H. Bengtson  
Governor  
H.L. (Pete) Haun  
Chairman



Members  
Donald E. Stanchard  
Michael R. Sibbett  
William L. Peters  
Heather N. Cooke

**BEFORE THE BOARD OF PARDONS OF THE STATE OF UTAH**  
**ORDER OF PAROLE**

IN THE MATTER OF THE APPLICATION OF NORTHERN, KENDALL QUINN  
UTAH STATE PRISON NO. 15009

This matter of application for parole, termination of sentence, or expiration of sentence having come before the Utah State Board of Pardons in a regularly scheduled hearing on the 9th day of July, 1991, and the applicant appearing in person or having waived in writing the right to appearance and the Board having heard the case, issues the following order:

It is hereby ordered that NORTHERN, KENDALL QUINN be paroled from the punishment and sentence heretofore imposed upon him/her by a judge of the Third Judicial District Court in and for the County of Salt Lake for the crime(s) of MURDER II, 1st degree felony, Expiration LIFE; AGGRAVATED ROBBERY, 1st degree felony, Expiration LIFE; ESCAPE FROM CUSTODY, 2nd degree felony, Expiration 07/19/06.

The parole shall not become effective until the 9th day of July, 1991. The applicant agrees to the conditions of parole and evidences his agreement by signing the parole agreement. The parole agreement or contract shall be administered by duly authorized agents of the Utah State Department of Corrections for the Utah State Board of Pardons.

It is further ordered that if and in the event the above named applicant shall be guilty of any infractions of the rules and regulations of the Utah State Prison or shall fail or refuse to perform duties as assigned by the Utah State Prison or is found to be in violation of any other law of the State of Utah prior to the effective date of said parole, then this Order of Parole is revoked and becomes null and void.

Dated this 9th Day of July, 1991.

By Order of the Board of Pardons of the State of Utah. I have this 8th day of July, 1991, reduced its decision in this matter to writing and hereby affix my signature as Chairman for and on behalf of the State of Utah, Board of Pardons.



Norman H. Bangerter  
Governor  
H.L. (Pete) Haun  
Chairman



Members  
Donald E. Blanchard  
Michael R. Sibbett  
William L. Peters  
Heather N. Cooke

## BEFORE THE BOARD OF PARDONS OF THE STATE OF UTAH

### PAROLE AGREEMENT

NORTHERN, KENDALL QUINN, agree to be directed and supervised by Agents of the Utah State Department of Corrections and be accountable for my actions and conduct to Utah State corrections, according to this Agreement.

Further agree to abide by all conditions of parole as set forth in this Agreement and any additional conditions as set forth by the Utah State Board of Pardons, consistent with the laws of the State of Utah. I fully understand that the violation of this Agreement and/or any conditions thereof or any new conviction for a crime may result in action by the Board causing parole to be revoked or my parole period to start over.

### CONDITIONS OF PAROLE

- RELEASE:** On the day of my release from the institution or confinement, I will report to my assigned Parole Agent, unless otherwise approved in writing.
- RESIDENCE:** I shall establish a residence of record and shall reside at such residence in fact and on record and shall not change my place of residence without prior knowledge of my Parole Agent. I shall not leave the State of Utah without prior written authorization from my Parole Agent. It is hereby acknowledged that should I leave the State of Utah without written authorization from my Parole Agent, that I hereby waive extradition from any state in which I may be found, to the State of Utah.
- CONDUCT:** I shall obey all State and Federal laws and municipal ordinances at all times.
- REPORT:** I shall make written or in person reports to my Parole Agent by the fifth of each and every month or as directed and I shall permit visits to my place of residence as required by my Parole Agent for the purpose of insuring compliance with the conditions of parole.
- EMPLOYMENT:** I will seek and maintain full-time employment unless I am participating in an educational or therapy program approved by my Parole Agent.
- SEARCH:** I agree to allow a Parole Agent to search my person, residence, vehicle, or any other property under my control, without a warrant, any time day or night, upon reasonable suspicion as ascertained by a Parole Agent, to insure compliance with the conditions of my parole.
- WEAPONS:** I shall not own, possess, or have under my control any explosives, firearms, or any dangerous weapons as defined in Utah Code Annotated, Section 76-10-501, as amended.
- ASSOCIATION:** I shall not associate with any known criminal in any manner which can reasonably be expected to result in, or which has resulted in criminal or illegal activity.

### SPECIAL CONDITIONS: I shall:

- 1 Submit to random drug testing.
- 2 Successfully complete Substance Abuse Therapy.
- 3 Successfully complete Mental Health Therapy.
- 4 Successfully complete ISP if avail where residing.
- 5 Successfully complete CCC unless accepted for compact supervision.
- 6 Pay restitution of \$26,350.00 on case # CR80-264.

I have read, understand and agree to the above conditions and I hereby acknowledge receipt of copy of this Agreement.

WITNESSED BY: [Signature]

this 4th day of July, 1991

LE: Parole Officer

SIGNED: Kendall Q. Northern  
Parolee

ADDRESS: 11813 S. MAPLE AVE. NORTH

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Tab I

2. The second step is to gather relevant information and data. This may involve research, consultation with experts, or collection of primary data.

**FILED**  
Utah Court of Appeals

FEB 17 1993

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

IN THE UTAH COURT OF APPEALS

*Mary T. Noonan*  
Mary T. Noonan  
Clerk of the Court

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Robert D. Preece,

Petitioner and Appellee,

v.

Tom House, et al.,

Respondents and Appellants. )

OPINION  
(For Publication)

Case No. 920726-CA

**F I L E D**  
(February 17, 1993)

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Third District, Salt Lake County  
The Honorable David S. Young

Attorneys: Jan Graham, James H. Beadles and Lorenzo K. Miller,  
Salt Lake City, for Appellants  
Robert D. Preece, Draper, Appellee Pro Se

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Before Judges Jackson, Bench, and Garff (Law and Motion).

PER CURIAM:

This case is before the court on respondents' motion for a stay pending appeal of an order granting a petition for writ of habeas corpus and ordering the release of petitioner Robert D. Preece forthwith. In addition to opposing the stay, petitioner has moved this court for summary disposition of the appeal. In the interest of expediting a decision in this case, we deem it appropriate to address the merits of the appeal at this time. See Rule 2, Utah Rules of Appellate Procedure. We reverse the order of the district court, in part, and remand for further proceedings consistent with this decision.

The complaint filed by petitioner in the district court challenged the determination of his parole date by the Board of Pardons. The order of the trial court recites that the Board applied an internal guideline of 147 months in determining petitioner's release date of October 10, 1994. The Board subsequently learned that the actual guideline for the offenses was 111 months. Under that guideline, petitioner would have been entitled to release on parole on October 10, 1991. The district court continued proceedings on the petition to allow the Board "to correct the error or explain their reasons for deviating from

the guidelines." The Board held a special attention hearing and reaffirmed the release date at 147 months for October 10, 1994, without providing any written explanation for its decision, as required by its own internal rules. See R671-305-2, Utah Administrative Code (1992).

Based upon the preceding facts, the trial court granted the petition and ordered petitioner's release "forthwith," stating:

This court finds that under the circumstance of the error made as to the guidelines discussed with Petitioner that the Petitioner is entitled to an explanation of the error which the Board refuses to do. Further, due process requires fair process and a Petitioner is entitled to an explanation of why the error should be ignored and the longer term served. It is cruel and unusual punishment to do otherwise. The Petitioner has been denied due process and is being treated to cruel and unusual punishment when no correction or explanation is given as to the mistake and as to the time to be served by the Petitioner.

Respondents contend that the trial court exceeded its authority in ordering the release of the petitioner as a remedy for the due process violation found by the court, and that the court should have proceeded in accordance with Rule 65B(e), Utah Rules of Civil Procedure. Rule 65B(e)(2)(B) provides that relief may be granted "where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station." Respondents, accordingly, contend that the petition is not a proper petition for "wrongful imprisonment" under Rule 65B(b) because it is not a challenge to the validity of the original commitment, and because petitioner is serving a valid sentence that has not been set aside on by any court on appeal or otherwise.

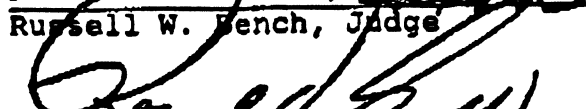
Although we agree that the petitioner was entitled to a written explanation of the parole determination following the special attention hearing, we hold that the district court exceeded its authority in ordering the unconditional release of petitioner based upon the failure of the Board to comply with the prior orders of the court and its own procedural rules. Under our indeterminate sentencing system, the authority to determine parole dates is vested in the Board of Pardons. See Foote v. Board of Pardons, 808 P.2d 734 (Utah 1991). While parole decisions are subject to habeas corpus review under Foote, this court has previously held that the scope of review is limited to

a review of procedural due process and does not extend authority for judicial review of the "reasonableness of the parole decision", which is not subject to judicial review under Utah Code Ann. § 77-27-5(3) (Supp. 1992). Northern v. Barnes, 825 P.2d 696, 699 (Utah App. 1992). We conclude 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. See also R671-305-2, Utah Administrative Code (1992). To the extent that the district court's ruling is based upon a determination that the Board's guidelines are mandatory, that conclusion is an incorrect statement of the law under State v. Hall, 806 P.2d 217, 218 (Utah App. 1991).

The order of the district court is reversed insofar as it provides for unconditional release of petitioner from the custody of the Department of Corrections. The case is remanded to the district court with instructions to treat the petition under Rule 65B(a).

  
Norman H. Jackson, Judge

  
Russell W. Bench, Judge

  
Reginal W. Garff, Judge

Tab J



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

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

PAUL W. SHEFFIELD,  
 Administrator

BEFORE THE BOARD OF PARDONS OF THE STATE OF UTAH

Consideration of the Status of KENDALL C. MORTIMER, Utah State Prison No. 1500

The above-entitled matter came on for a hearing before the Utah State Board of Pardons on the 10th day of May, 1988 for consideration as:

- |  |  |
|--|--|
| 1. <input type="checkbox"/> ORIGINAL HEARING                   | 5. <input type="checkbox"/> SPECIAL ATTENTION OF THE BOARD |
| 2. <input type="checkbox"/> REHEARING                          | 6. <input checked="" type="checkbox"/> RESCISSION          |
| 3. <input type="checkbox"/> REDETERMINATION                    | 7. <input type="checkbox"/>                                |
| 4. <input type="checkbox"/> TERMINATION OF SENTENCE AND PAROLE |  |

After the statement of \_\_\_\_\_ and the following witness(es)

1) \_\_\_\_\_ 2) \_\_\_\_\_  
 and good cause appearing, the Board made the following decision:

☒ Rescind May 10, 1988, 19\_\_\_\_ parole date, \_\_\_\_\_

☐ Parole to become effective \_\_\_\_\_, 19\_\_\_\_, with the following special conditions:

☐ Amend parole agreement to add the following special conditions:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_

☐ Rehearing for \_\_\_\_\_, 19\_\_\_\_, for the following reasons: \_\_\_\_\_

☐ Termination of sentence and parole to become effective \_\_\_\_\_, 19\_\_\_\_.

☐ Expiration of sentence \_\_\_\_\_, 19\_\_\_\_.

REMARKS: Continue for another psychological evaluation and complete prison progress report

	Crime	Sentence	Case No.	Judge	Expir. Date
1.	Criminal Homicide	5-life	CRFO-200	Paldrin	LIFE
2.	Aggravated Robbery	5-lifels	CRFO-200	Paldrin	LIFE
3.					
4.					
5.					
6.					
7.					

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

By order of the Board of Pardons of the State of Utah, I have this date May 9, 1988, 1988 affixed my signature as Administrator for and on behalf of the State of Utah, Board of Pardons.

Paul W. Sheffield, Administrator

Tab K



## PSYCHOLOGICAL EVALUATION

NAME: Kendall Quin Northern

DIAGNOSTIC NUMBER: 1768P

AGE: 18 OFFENSE: Aggravated Robbery (Criminal Homicide reportedly dropped)

DIAGNOSTIC AGENT: Larry Hafeli

COUNSELOR: Protective Custody, Utah State Prison

DATE RECEIVED: 4/24/80

INTERVIEWED: 6/13/80 (Utah State Prison)

REPORT WRITTEN: 6/16/80

DIAGNOSTIC INSTRUMENTS: Doppelt Wechsler Adult Intelligence Scale, Bender Gestalt, Rorschach, Sentence Completion Form, Clinical Interview

Ken Northern was not able to take our standard battery of tests because of his placement on Protection in the prison, but all available information indicates he commands above average intelligence and good literacy skills. Administration of a short-form WAIS yielded an I.Q. estimate of 128 in the Superior range, and Bender productions offered no indications of any organic impairment. Nothing in these test results or the interview situation suggested formal thought disorder, and Mr. Northern was well oriented in all three spheres. This data agrees generally with an earlier evaluation by Marcel C. Chappuis, with my somewhat higher obtained I.Q. being partially the result of a practice effect and perhaps partially the result of my using a shorter version of the test. In any case, we can confidently state that Mr. Northern is a bright young man in full control of his mental faculties.

I have no actual police arrest record available, but Mr. Northern reports only one prior arrest as a juvenile and no history whatsoever of drug or alcohol abuse. There is no available information to suggest that either alcohol or drugs played a part in the current crime, although I am curious what the two co-defendants were actually doing during the time they were "just riding around" prior to the commission of this offense.

A current MMPI is not available, but assuming the accuracy of the earlier reported 4-6 elevation, this would not be a typical or classic antisocial personality so much as an individual deeply involved in latent and very personal hostility. Rorschach responses corroborated the impression of paranoid-type ideation essentially supporting a highly explosive inner rage. Mr. Northern maintains that he did not shoot the victim and had no knowledge of any intent to shoot, yet this personality is such that an eruption of pent-up aggressive rage would be fully consistent. The Rorschach did not indicate any basically oppositional or antisocial features per se, but did suggest considerable internal distress with the father-figure -- which could certainly result in antisocial acting-out behaviors. Nothing could be elicited to explain this dynamic beyond Mr. Northern's saying he used to feel contempt for his businessman father's staid and conventional ways, but that now he feels very different and is thankful for parental support. I suspect that some problems between father and son extend far back into childhood, and wish we had more information on the history of this family.

Testing conditions on the Protection Unit did not allow as extensive an evaluation as we would have wished, yet there is enough information to indicate serious causes for distress. Perhaps the most alarming aspect of our interview was that not once did Mr. Northern ever express any concern over the death of the victim -- only exasperation over the "dumb" nature of the robbery, and considerable frustration that his agreeing to testify has not resulted in a "better deal" for himself. This in itself is diagnostic, since a good psychopath at this intellectual level would easily and automatically feign the expected remorse.

Mr. Northern is obviously not able to cope with the rigors of the Utah State Prison environment, yet he is a danger to society. He really belongs in the Public Offenders Program at Provo. If they refuse to accept him, however, incarceration may have to be considered with hopes that he can eventually be worked into the Youthful Offenders Program at the prison.

Diagnostic Impression: Superior intelligence; no evidence of organicity, psychosis or substance abuse; Paranoid-type Personality with highly explosive latent rage and antisocial acting-out features.

  
CAROL S. BACHSTETTER, M.A.  
Clinical Psychologist

CSB:js

Tab L

90-DAY DIAGNOSTIC EVALUATION  
STATE OF UTAH  
DIVISION OF CORRECTIONS

Date Referred: April 24, 1980 Date Due: July 23, 1980

JUDGE ERNEST F. BALDWIN THIRD DISTRICT COURT

SALT LAKE CITY SALT LAKE UTAH  
(CITY) (COUNTY)

NAME: NORTHERN, Kendall Quinn (Age 18) COURT CASE NO.: CR80-264  
PROSECUTOR: Michael Christensen  
OFFENSE: Aggravated Robbery, Felony I DEFENSE ATTORNEY: Robert Van Sciver  
Criminal Homicide, Murder in  
the 2nd Degree, Felony I

IDENTIFICATION OF PROBLEM AREAS:

- I. Kendall Northern has pleaded guilty to two violent offenses, Aggravated Robbery and Criminal Homicide. According to the Salt Lake City Police Department, the defendant along with Robert Alan Phillips robbed and murdered Everett Hamby, Jr., a taxi driver. Evidence indicates that it was the defendant, Kendall Northern, who purchased the gun used by Mr. Phillips as well as a gun he carried during commission of the Robbery. The defendant purchased these weapons with a forged check. Additionally, according to the Probable Cause Statement included in the Complaint, "Both suspects admitted that Phillips was holding the 'RG .357 Magnum' pistol when Hamby was shot first in the head by Phillips, and then at Northern's alleged insistence, Phillips shot Hamby a second and third time to make sure he was dead."
- II. According to the records of the Second District Juvenile Court in Salt Lake City, the defendant has a prior juvenile arrest record in Maricopa County, Arizona. At the time he was arrested in reference to the present charge, the defendant was wanted in Arizona in reference to charges of Receiving Stolen Property, Burglary, and Theft of a Vehicle. Additionally, the defendant had prior arrests as a juvenile for Probation Violation, Petty Theft, and Theft of a Vehicle.
- III. Mr. Northern was also charged with 13 Counts of Forgery according to the records of the Utah Bureau of Criminal Investigation. It is this agent's understanding that there was an agreement not to prosecute in reference to these charges as part of a plea agreement in the present case.
- IV. According to a psychological evaluation prepared by the staff psychologist at the Diagnostic Unit, the defendant was characterized as a "paranoid-type personality with highly explosive latent rage and antisocial acting-out features." Further testing suggested "considerable internal distress with the father figure which could certainly result in antisocial acting-out behaviors." According to a psychological evaluation prepared by Mr. Marcel Chappuis for the Juvenile Court, "It appears that Ken is functioning in the top ten percentile intellectually with specific strengths in the areas of comprehension and problem reasoning." According to Mr. Breck LeBeque, M.D., and director of Forensic Psychiatric Services at the University of Utah, the defendant is an antisocial personality and is basically untreatable. However, some individuals are treatable

90-DAY DIAGNOSTIC EVALUATION  
NORTHERN, Kendall Quinn  
July 28, 1980  
Page Two

IDENTIFICATION OF PROBLEM AREAS: (Continued)

and "this is possible only if they are held in custody in an extremely controlled and structured environment for a great many years, and may be accomplished only by an arduous process of restructuring the antisocial-criminal personality into a personality more socially acceptable."

- V. Possessing a tenth grade education, the records of the Second District Juvenile Court reflect that the defendant was a behavioral problem as early as elementary school. The defendant began having serious behavioral problems at age 14 and dropped out of high school in the tenth grade. An attempt was then made to send the defendant to a parochial school; however, that failed. Mr. Northern has worked periodically and there were some short periods of employment with his parents. It is important to note that the defendant came to Salt Lake City while in the employ of a moving firm, and established a residence in Salt Lake City utilizing an alias of Edward C. Duffany. The defendant did assume employment under the name of Mr. Duffany.

ADDITIONAL INFORMATION TO PRESENTENCE INVESTIGATION REPORT:

On April 24, 1980 Kendall Quinn Northern pleaded guilty to a charge of Aggravated Robbery, a First Degree Felony, and Criminal Homicide/Murder 2, also a First Degree Felony. The defendant did agree to testify against the co-defendant in this case, Robert Alan Phillips. The defendant was referred for a 90-Day Evaluation on April 24, 1980 without benefit of a Presentence Investigation Report; therefore, the following information is submitted for the Court's consideration.

INFORMATION:

COUNT I

That on or about the 1st day of January, 1980, in Salt Lake County, State of Utah, the said Kendall Quin Northern intentionally or knowingly caused the death of Everett Hamby, or acting with the mental state required for the commission of said offense, solicited, requested, commanded, encouraged, or intentionally aided Robert Alan Phillips to cause the death of Everett Hamby, Jr. while the defendant was engaged in the commission of or an attempt to commit, or flight after committing or attempting to commit Aggravated Robbery;

COUNT II

That on or about the 1st day of January, 1980, in Salt Lake County, State of Utah, the said Kendall Quin Northern unlawfully and intentionally took personal property in the possession of Everett Hamby Jr. at or near 2700 West 900 South, from the person or immediate presence of Everett Hamby Jr., against his will, by the use of force or fear, and in the commission of same did use a firearm;

NOTE: As was previously indicated, the defendant was also arrested for a number of counts of Forgery. As part of a plea agreement arrangement, the defendant will not be charged in reference to those Forgery counts.

90-DAY DIAGNOSTIC EVALUATION  
NORTHERN, Kendall Quinn  
July 28, 1980  
Page Three

OFFENSE:

A. OFFICIAL VERSION:

According to the records of the Salt Lake County Attorney's office as well as the Salt Lake City Police Department, Detective Carl Voyles was assigned to the criminal homicide investigation in reference to Everett Hamby, Jr. Mr. Hamby's body was found on January 1, 1980 at 9:30 p.m. at 2700 West 900 South in Salt Lake County. He was employed as a cab driver for City Cab Company. The body was found to contain three bullet holes and Mr. Hamby was pronounced dead at the scene.

According to an autopsy, the cause of death was three gunshot wounds any one of which would have caused death. One of the bullets found in the chest cavity was a .38 or .357 caliber. Further evidence indicated that barrel markings on the bullet were consistent with those of a barrel configuration found in the pistol production of an RG, Model 57, caliber .357.

Records further indicate that on January 9, 1980, while serving a Felony arrest warrant on Edward C. Duffany for Bad Checks, Officers made contact with Kendall Quinn Northern, the defendant. It was determined that Mr. Northern had been using the alias of Edward Duffany to pass bad checks. On December 23, 1979, the defendant, using the name of Duffany, had purchased an RG, Model 57 .357 Magnum pistol matching the description of the possible murder weapon. Mr. Northern was identified as passing that check to Gibson's by store employees.

Mr. Northern was advised of his rights per Miranda and stated that he was present on January 1, 1980 and observed the Robbery and shooting of Mr. Hamby. The defendant named Robert Alan Phillips, his roommate, as the individual responsible.

Salt Lake officers then went to American Auto Parts in South Salt Lake and arrested Mr. Phillips. Both suspects admitted and confessed to their respective involvement in the homicide of Mr. Hamby and both admitted that they intended to rob Hamby and, in fact, took \$26 before Hamby was shot. "Both suspects admitted that Phillips was holding the 'RG .357 Magnum' pistol when Hamby was shot first in the head by Phillips, and then at Northern's alleged insistence, Phillips shot Hamby a second and third time to make sure he was dead." After the shooting both suspects took Mr. Hamby's cab and money and drove to Trolley Square where they were observed abandoning the cab.

Subsequent search of the residence at 837 South 400 East, Apartment 1-B, belonging to the defendant and Mr. Phillips, disclosed a Rohm .357 pistol that Phillips and Northern stated Northern had used to force the cab driver Hamby from his cab for purposes of taking his money and cab.

CO-DEFENDANT'S DISPOSITION: (Please refer to attached.)

B. DEFENDANT'S STATEMENT:

When interviewed for purposes of this 90-Day Diagnostic Evaluation and questioned regarding his involvement in this offense, Mr. Northern steadfastly maintained that he was not responsible for the murder or robbery of Mr. Hamby on January 1, 1980. The defendant convincingly stated that he did not know Mr. Phillips was going to rob the victim nor shoot him. He further claimed that he could not prevent Mr. Phillips from committing these offenses as Phillips turned the gun toward him and warned him to allegedly back off. After the commission of the offense

90-DAY DIAGNOSTIC EVALUATION  
NORTHERN, Kendall Quinn  
July 28, 1980  
Page Four

OFFENSE:

B. DEFENDANT'S STATEMENT: (Continued)

Mr. Northern states that he was "in shock" and attempted to contact the police; however, Mr. Phillips kept him a "prisoner" in their apartment. Mr. Northern further maintains that he was attempting to contact the police but before he could do so, was arrested.

It is interesting to note that it was apparent to this agent that Mr. Northern expressed no remorse for what happened to the victim in this case. The only emotion the defendant seemed to portray was that of outrage for a legal system which apparently he feels had promised him a placement in the California Youth Authority with the actual result of his being placed at the Utah State Prison for a 90-Day Evaluation. Mr. Northern explained to this agent that he was testifying against Mr. Phillips and had, in fact, acted as a witness for the State at the preliminary hearing.

C. INVESTIGATIVE OFFICER'S STATEMENT:

Contact was made with Detective Carl Voyles of the Salt Lake City Police Department. Detective Voyles maintained that it was Mr. Northern who, in fact, initiated the Robbery. "He pulled a gun first and both he and Phillips were armed." The detective maintained that it was Mr. Northern who initiated the situation which ultimately resulted in Mr. Hamby's death. When arrested, it became apparent to the detective that Mr. Northern was cunning and very intelligent compared to Mr. Phillips who was rather slow. "I feel that Northern dominated Phillips. Also, Mrs. Hamby is a widow now with seven children." The detective pointed out that it was Mr. Northern who purchased the murder weapon with a forged check and also purchased a 9 mm pistol which was on his person at the time he was arrested. That particular gun was purchased at Guns Unlimited, Salt Lake City. "He is a macho kid who is most unpredictable. As a matter of fact, he was ready to leave the area and we arrested him just before he got away."

D. VICTIM'S STATEMENT:

Contact was made with Mrs. Everett Hamby, Jr., widow of the deceased. Mrs. Hamby indicated that she has no vengeful feelings against the defendants but feels that a prison commitment is appropriate, mostly, because Mrs. Hamby indicated that both individuals could do further harm in the community if they were released. Presently she is the sole support of her seven children, however, is receiving some money from social security and workmen's compensation. To supplement that income, however, Mrs. Hamby must take in other children for day care.

Mrs. Hamby stated that Mr. Phillips has written her a letter indicating that he is sorry for what has happened. She thought that was significant, but chose not to reply to Mr. Phillips' letter, as Mrs. Hamby described receiving that letter was "rubbing salt in the wounds."

PRIOR RECORD:

- A. JUVENILE: The following information was secured from the records of the Second District Juvenile Court and the records of Maricopa County, Arizona.

90-DAY DIAGNOSTIC EVALUATION  
NORTHERN, Kendall Quinn  
July 28, 1980  
Page Five

PRIOR RECORD:

A. JUVENILE: (Continued)

DATE	CHARGE	DISPOSITION
5/3/78	<u>Theft of a Vehicle</u>	Probation
6/19/78	<u>Petty Theft</u>	Nonjudicial handling
3/19/79	<u>Probation Violation</u>	Nonjudicial handling
8/31/79	<u>Probation Violation</u>	Nonjudicial handling
8/29/79	<u>Theft of a Vehicle</u>	Pending
9/12/79	<u>Burglary</u>	Pending
8/7/79	<u>Receiving Stolen Property</u>	Pending

} No dispos.

According to the records of the Second District Juvenile Court, Mr. Northern was first arrested in May of 1978 for Theft of a Vehicle. That involved a neighbor's dunebuggy. A Bench Warrant was subsequently issued because the defendant failed to report regularly to his probation officer and, in fact, violated the terms of his probation by getting arrested on June 19, 1978 for Petty Theft, when he attempted to switch price tags in a store. Further, on August 31, 1979, the defendant left the State of Arizona without permission. On August 29, 1979 the defendant was charged with Theft of a Vehicle wherein he took his parents' van and was subsequently arrested in Houston, Texas. The defendant was also charged with Burglary on 9/12/79 when he burglarized his parents' home. Also in August of 1979 the defendant was arrested for receiving stolen property and that matter is pending. According to the defendant's Juvenile Court probation officer in Arizona, probation was unsuccessful as the defendant was resistant to counseling and to change.

B. ADULT:

The following information was secured from the records of the Utah Bureau of Criminal Identification:

AGENCY	DATE	CHARGE	DISPOSITION
S.O. SLCo.	1/10/80	<u>Murder and Robbery</u>	Present offense; 90 Day Diag. Eval. ordered 4/24/80
		<u>18 counts Forgery, Fel. III</u>	<u>Prosecution declined as result of plea agreement.</u>

BACKGROUND INFORMATION:

Kendall Quinn Northern was born May 5, 1962, the youngest of four children born to Don and Clair Northern. The defendant's parents were both from Southern Utah and married in 1950. The defendant was born in Kaysville, Utah where his father was a high school teacher. When Kendall was approximately four, the family relocated to Southern California where Mr. Northern took a job with Litton Corporation. In 1972, when Kendall was ten, the defendant's parents became self-employed and moved to Arizona. The family is LDS (Mormon) and according to some reports, is a very cohesive family. However, Kendall began having personal problems at an early age and became a behavioral problem in



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BACKGROUND INFORMATION: (Continued)

grade school. He disobeyed his parents and described himself as being a "pansy" by being pushed around by other children.

The defendant began acting-out shortly after the family moved to Phoenix, Arizona and there appeared to be some family instability according to the records of the Second District Juvenile Court in Salt Lake City. According to the records of the Maricopa County Probation Department for Juvenile Offenders, the defendant's family had a difficult time in 1979 with Kendall. In February of 1979, Mrs. Northern contacted the probation officer because she feared Kendall would become violent. He was counseled and apparently there was a difference of opinion as to where Kendall should work. It was the probation officer's opinion that both the parents and Kendall were placing him in the middle. In July of 1979, according to the parents, Kendall left the state and bounced several checks on his employer as well as stealing some tools and cash. The probation officer made a comment, "I feel that Kendall and his parents have no regard for the Court or probation."

For a period of approximately four years, Kendall Northern was treated by Doctor Scoresby, a counseling psychologist. Doctor Scoresby classified the defendant as a "con artist."

At an early age, the defendant became independent and left home at age 16 and joined a local magazine crew. The defendant traveled a great deal between California, Arizona, and Florida.

The defendant dropped out of the tenth grade at Corona del Sol School in Tempe, Arizona. He had been involved in sports but failed to follow through. The defendant was then placed in the parochial school by his parents as they felt he needed the controls. However, the defendant shortly thereafter became involved in further problems with the Juvenile Court and quit school again. According to a Juvenile Court report, the parents "expressed their concern that Kendall's mature size, which he has no control over, and his exceptional social skill, which they reinforced as a family standard, would be used unjustly against their son." The defendant was labeled early as being both obnoxious and a troublemaker in school. According to one report from the Detention Center at the Second District Juvenile Court in Salt Lake City, the defendant lost his temper to the point that they thought he would become assaultive. The defendant has a tendency to exaggerate and in the past, the defendant's father has attempted to intercede in the Court process and both parents tend to minimize the defendant's problems.

MARITAL HISTORY:

The defendant is single.

EDUCATION:

Kendall Northern attended elementary schools both in Southern California and in the state of Arizona. He was last enrolled in a parochial school in Tempe after dropping out of Corona del Sol High School while in the tenth grade. Records of the Second District Juvenile Court indicate that the defendant was a behavioral problem while in school. He did get involved in sports while in high school, however, did not follow through with the regime. According to the attached Psychological Evaluation, the defendant is intellectually in the Superior range. Since housed at the Utah State Prison, the defendant has expressed what appears to be a sincere desire to receive his GED and ultimately to take college courses.

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HEALTH:

- A. PHYSICAL: The defendant is in good physical health and underwent a complete medical examination at the Utah State Prison. Having suffered from the usual childhood diseases, the defendant has no significant impairments.
- B. MENTAL AND EMOTIONAL: (Please refer to the attached Psychological Evaluation completed by the Division of Corrections as well as the Psychological Evaluation and Psychiatric Evaluation completed by the Second District Juvenile Court.)

ALCOHOL AND DRUG USE:

- A. ALCOHOL: The defendant acknowledges he is a social drinker; however, he has no prior arrests for alcohol-related offenses. Alcohol did not apparently play a part in the present offense.
- B. DRUGS: Again, the defendant has had no drug-related arrests and it does not appear that he has a significant problem in this area either.

EMPLOYMENT HISTORY:

Mr. Northern's employment record is sporadic. At the time of his arrest for the present offense he was working at Ute Cab Company and previous to that had worked at EMCO in Salt Lake City for approximately one and a half months. Prior to that, he worked for various moving and storage companies. As is indicated in the file material of the Second District Juvenile Court, the defendant did work for a period of time for his parents as a salesman.

MILITARY: The defendant has never been in the military.

COLLATERAL CONTACTS:

A collateral contact was made with Mr. Don Northern and Mrs. Clair Northern, the defendant's parents, at 11813 South Maze Court, Phoenix, Arizona. Both Mr. and Mrs. Northern met with this agent in Salt Lake City. They indicated that they are very concerned over their son's current situation and feel that he was threatened by the co-defendant to get involved in the present offense. Mr. Northern indicated that he has had some problems with his son in the past but they have not been of a serious nature. Specifically, Mr. Northern told this agent about the defendant's arrest for stealing a neighbor's dunebuggy and a subsequent arrest in Houston, Texas when the defendant had the family van. Mr. Northern indicated that at that time he decided to leave Kendall in jail to deal with the situation on his own. Mrs. Northern indicated that Kendall has always been a very large person and has been ridiculed by his peers. Mrs. Northern further stated that her son is a "good boy" and has been dealt with unfairly in his present Court matter. Mrs. Northern indicated that she feels her son should be placed in a program for youthful offenders so he could hopefully pursue his education.

Mr. and Mrs. Northern were upset to learn that their son had pleaded guilty to two First Degree Felonies. It was their impression that there was only one charge involved.

A collateral contact was made by letter with Jean Cotter, the defendant's sister residing in Tempe, Arizona. The letter indicates that the defendant had pretty much a normal upbringing and was a very bright individual.

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COLLATERAL CONTACTS: (Continued)

The defendant was also characterized as being very enterprising. It was his sister's belief that "Kenny just happened to be with the wrong person at the wrong time. You see, Kenny has always been big for his age and extremely overweight and so he has been constantly ridiculed and teased by other kids his age his whole life. Kenny felt he had no other choice but to be friends with the only kids that would accept him and unfortunately Bob was one of those friends." There was an indication in the letter that the defendant was not accepted completely by the family. "No one ever in Kenny's life has treated him with worth except on occasion his family, and I'm sad to say that that wasn't very often."

A collateral contact was made with Karen Fleming, the defendant's sister who resides in Mesa, Arizona. According to Mrs. Fleming, the defendant and his brother and sisters were raised by a very fine mother and father. The defendant and his family were very active in sports and picnicking and the defendant's sister indicated that because of his size, he has always had problems. Mrs. Fleming feels that her brother has attempted to get attention from the family and others by sometimes outrageous behavior. "He is full of love and has a heart big enough for three people and most important, does not belong in a prison. He is a kind person and I've heard it said that in prison they take kindness for weakness."

A collateral contact was made with Amy Black, the defendant's grandmother in Mesa, Arizona. Mrs. Black indicated that the defendant has always been a kind-hearted boy. "Ken comes from such a fine home with parents that have such love and concern for their children and have tried very hard to instill a love for God in each of them." Mrs. Black indicated that they are hopeful that the defendant will receive some help rather than being committed to prison.

RESPONSE TO 90-DAY EVALUATION:

The defendant arrived in the custody of the Division of Corrections shortly after appearing in Court on April 24, 1980 and being ordered to undergo a 90-Day Diagnostic Evaluation at the Utah State Prison. At his own request, the defendant was placed in protective custody as he was pending testifying in court against the co-defendant. As the Court is aware, the defendant was cooperative at the preliminary hearing stage in reference to giving evidence against the co-defendant. This agent has met with the defendant on numerous occasions in protective custody at the Utah State Prison. Mr. Northern has indicated to this agent that he did not know this particular offense was going to occur and did not shoot Mr. Hamby. The defendant maintained that he was basically held prisoner by the co-defendant until the time of his arrest. Mr. Northern maintained that he was going to contact the police.

Due to the fact that the defendant has been housed in protective custody, he has been involved in no negative activity. He remains in his cell almost 22 hours a day. The defendant has made inquiries as to whether he could work on his GED and seems very anxious to further his education. Mr. Northern has been cooperative with this agent and counselors at the institution and appears to be outgoing and congenial. However, much of the information the defendant supplied this agent contradicts previous information given the law enforcement agencies.

SUMMARY AND EVALUATION:

Kendall Quinn Northern is an 18 year old Caucasian male who has pleaded guilty to two First Degree Felonies. As the Court is aware, numerous Forgery counts will not be brought against the defendant as part of a plea arrangement. At the time of his arrest for the present offense

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SUMMARY AND EVALUATION: (Continued)

the defendant was wanted by Juvenile authorities in the state of Arizona in reference to three separate charges. It appears that early in 1979 the defendant went on a crime spree which involved various offenses in several different states. When the defendant came to Utah he had recently been released from jail in Houston, Texas after taking a family van to that jurisdiction and getting arrested in reference to a traffic charge. Utilizing an identification which he had either found or stolen, the defendant established a checking account in Salt Lake City under an assumed name. He wrote numerous checks including a check for the murder weapon in reference to the pending charge.


Mr. Northern assumed employment at EIMCO in September of 1979 and advised his employer that he was going to leave town. Instead, the defendant assumed employment at a local cab company where the victim in this case was also employed. The defendant maintains that he was going to contact the police after the commission of the present offense but according to Detective Voyles they were able to arrest the defendant as he was preparing to leave town.

According to the various psychological and psychiatric material in possession of the Division of Corrections, it appears that the defendant is basically untreatable. According to Dr. LeBeque, however, there is some recent information indicating individuals such as the defendant might be treated over a long term period with some success. Generally Northern appears to be motivated towards pursuing his education but he is basically an immature, confused young man who is certainly a threat to the community.


SENTENCING OPTIONS:

- OPTION I That the defendant be committed to the Utah State Prison in reference to the charge of Aggravated Robbery and that it be served on a consecutive basis with the sentence imposed in reference to the Criminal Homicide charge.
- OPTION II That the defendant be committed to the Utah State Prison on a concurrent basis in reference to both offenses.
- OPTION III That the defendant be committed to the Utah State Prison and that he be sentenced to the next lower offense, a Felony II.
- OPTION IV That the defendant be ordered to undergo a second 90-Day Evaluation to determine if he is an appropriate candidate for the Public Offender Program.

Respectfully submitted,

  
LARRY HAEFFEL, Dist. Investigator

APPROVED:

  
EUGENE PRESSETT, Supervisor

/eb  
Attach.