

2004

Michael Whiteman v. Clint Friel, Warden, Utah Board of Pardons : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MICHAEL WHITEMAN,

Appellant,

vs.

**CLINT FRIEL, WARDEN and UTAH
BOARD OF PARDONS,**

Appellees.

Case No. 20040~~X~~407-CA

Priority No. 2

BRIEF OF APPELLANT

Appeal from the Final Judgment of the
Third Judicial District Court, Salt Lake County
State of Utah, by the Honorable L.A. Dever

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* Published Opinion Requested *

** Oral Arguments Requested **

FILED
UTAH APPELLATE COURTS

OCT 25 2004

IN THE UTAH COURT OF APPEALS

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STATUTES

None cited.

RULES

None cited.

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IN THE UTAH COURT OF APPEALS

MICHAEL WHITEMAN,)	
)	
Petitioner and Appellant,)	BRIEF OF APPELLANT
)	
vs.)	
)	
CLINT FRIEL, WARDEN and UTAH)	Court of Appeals No. 200400407-CA
STATE PRISON BOARD OF PARDONS,)	
)	Docket No. 040900113
Respondents and Appellees.)	
)	Priority No. 2
)	

This is an appeal of the trial court's failure to grant a Writ of Extraordinary Relief concerning a Board of Pardon's imposition of a sentence at an original parole hearing. Petitioner asks this Court, de novo, to end the illegal activity of the Board of Pardons

STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court by *Utah Code Ann.* § 78-2-2(4) (1953, as amended) (2)(e) (appeals transferred from the Utah Supreme Court). Mr.

Whiteman appeals the final order and judgment of the Honorable L.A. Dever, Third Judicial District Court, in and for Salt Lake County involving a review of Board of Pardons procedures concerning its sentencing duties.

STATEMENT OF ISSUES

Whether the ruling on *Labrum v. Utah State Bd. Of Pardons*, 870 P.2d 902, 910 (Utah 1993) violates the Sixth Amendment to the U.S. Constitution pursuant to *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967).

STANDARDS OF REVIEW

The appropriate standard of review is for correctness.

When reviewing an appeal from a dismissal of a petition for a writ of habeas corpus, we accord no deference to the conclusions of law that underlie the dismissal. There are reviewed for correctness. However, while “we must review the fairness of the process by which the Board undertakes its sentencing function, . . . we do not sit as a panel of review on the result.”

Neel v. Holden, 886 P.2d 1097, 1103-1104 (Utah 1994) (internal citations omitted).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

[Included herewith in Addendum A.]

STATEMENT OF THE CASE

I. Nature of the Case:

This case arises from an appeal of a dismissal of a Petition For Writ Of Extraordinary Relief. (R. at 143-149) (Addendum B). The order was entered on May

24, 2004. A notice of appeal was entered on May 17, 2004 following the court's minute entry of April 23, 2004.

II. Course of the Proceedings:

This matter commenced on January 6, 2004 when Mr. Whiteman filed a Petition For Writ of Extraordinary Relief challenging the board of pardon's decision regarding errors brought to its attention by Mr. Whiteman, who was not represented by counsel at the original parole hearing nor at the special attention hearing following. (R at 1-29). On March 17, 2004, Friel opposed the petition by a motion to dismiss claiming that the Board exercised a discretionary function and that any other outcome regardless of errors is only tenuous. (R. at 70-120).

III. Disposition in Trial Court:

No trial was conducted, nor was an evidentiary permitted even though requested. (R. at 1-8). This matter was disposed of by notice to submit for decision without a hearing. (R. at 130-132). Mr. Whiteman did not challenge the findings of the court.

IV. Statement of Facts:

A jury convicted Petitioner of murder, a first degree felony. On November 22, 1993, he was sentenced to a maximum mandatory term of five-years-to-life. On

November 12, 1996, the Board held an original hearing which resulted in a rehearing set for April 2003. On April 5, 1999, Petitioner's sentence was amended, showing a change from a "maximum mandatory term of five years and which may be for life" to a "not less than five years and which may be for life." In preparation for the April 5, 1999 hearing, a new Presentence Investigation Report was prepared. Petitioner requested a redetermination hearing. The Board conducted a Special Attention Review. After considering the information Petitioner provided, the Board determined not to change the previously scheduled April 2003 rehearing. Petitioner was informed that in assessing the guidelines/matrix, the Board "considers sentences imposed on convictions in other states, not whether the other state calls the offense a misdemeanor or felony. This is based on the fact that felonies and misdemeanors differ from state to state. An offense Utah might classify as a felony, California may classify as a misdemeanor. So, if the sentence imposed by California corresponds to a Utah felony sentence, the offense is counted as a felony on the matrix. Your matrix/guidelines have been configured with the new presentence investigation report, but no change was made in the final guideline time." On April 10, 2003, the Board conducted a rehearing and decided to parole Petitioner on April 6, 2004. The Board also ordered two special conditions of parole: (1) cooperate with transitional services which may include a Community Correctional Center as directed by Adult Probation and Parole; (2) successfully complete mental health therapy to address substance abuse and cognitive restructuring issues. (R. at 144-145).

SUMMARY OF THE ARGUMENT

In this matter, Mr. Whiteman was deprived of counsel at the original hearing of the Board of Pardons. Had counsel been afforded, at that time consistent with *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967), no error would have resulted. The necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is appropriate. *Id.*

At the time of Mr. Whiteman's original hearing, no one aided Mr. Whiteman to correctly present mitigating evidence concerning the sentence enhancement stemming from his California misdemeanor offenses.

ARGUMENT

MR. WHITEMAN WAS NOT AFFORDED COUNSEL AT THE ORIGINAL HEARING BEFORE THE BOARD OF PARDONS, IN VIOLATION OF MEMPA v. RHAY.

In this matter, Mr. Whiteman presented his challenge of Board of Pardons practice of enhancing out-of-state misdemeanors to felony status for the purpose of imposing a sentence. (R. at 2). The only defense to that claim raised by Friel is that the practice is a discretionary function. (R. at 74-75). The practice is apparently unchecked due to the absence of defense counsel when consideration is being weighed.

Since 1913, Utah has employed an indeterminate sentencing system under which trial courts do not sentence offenders to a determinate term but impose a statutorily prescribed range of years. Act of March 24, 1913, ch. 100. 1913 Utah Laws 192; *Labrum v. Utah St. Board of Pardons*, 870 P.2d 902 (Utah 1993). Under Utah's current system, "the board of pardons determines the actual number of years a defendant is to serve." *Labrum*, 870 P.2d at 907. "For all intents and purposes, adoption of this indeterminate sentencing system transformed the Board from an agency having the ability to shorten a prisoner's judge-determined sentence into an agency with power analogous to that of a court to actually impose a sentence." *Neel v. Holden*, 886 P.2d 1097 (Utah 1994).

Due to the fact that the Board has taken on a judicial function, it is undisputed that a Board's decision of whether to grant parole does implicate the offender's liberty interest because at the time an offender first comes before the Board, no term of incarceration has been fixed. *Neel*, at 1101. Because of the reasoning offered in *Neel* that a liberty interest is at risk before the Board on an original hearing, the practices of the Board must include the right of an offender to have counsel consistent with the reasoning by the U.S. Supreme Court in *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967).

In *Mempa*, the Court extended the right of counsel language to include the right to sentencing hearings. *Mempa*, a board of prison terms and paroles case itself,

challenged to the State of Washington's practice of considering sentencing entered into without counsel after probation had been revoked. After Mr. Mempa was convicted, he filed a petition for habeas corpus, which the State Supreme Court denied.

At issue in that case was that a hearing, a probation officer presented hearsay evidence to the effect that Mr. Mempa had committed the acts alleged in 14 separate counts of forgery and 14 separate counts of grand larceny that had been charged against petitioner previously at the time of his arrest. The court thereupon revoked probation and imposed the maximum sentence of 15 years—apparently a fixed determined sentence.

In this matter, it is clear that Petitioner and others similarly situated would benefit substantially from having counsel represent them in the Board's original hearing. In example, the Board's records show Mr. Whiteman was not credited any mitigating damages. (R. at 85). Certainly, it is indisputable that prior misdemeanor convictions in California rather than felony status offenses in Utah is a clear mitigating factor that should have been considered and likely would have if counsel was afforded before the Board. Also, Mr. Whiteman's alleged felony status offenses in California, there is no evidence in the record that they were truly felony status in Utah nor is there record evidence that like in *Mempa*, if the alleged conduct was the acceptance of a plea, whether counsel was afforded at that time, or whether the conviction was the result of a revocation. (R. at 95-100).

CONCLUSION

Mr. Whiteman has been unjustly treated in this matter. This trial court should have granted Mr. Whiteman is requested relief, including an evidentiary hearing. Clearly, the Utah Board of Pardon's abused its discretion by assuming facts not in evidence. It was an abuse of discretion to **assume** the facts relevant to the California misdemeanors were in deed felony status offenses. Meanwhile, as argued hereinabove, Mr. Whiteman has raised a substantial issue on appeal that warrants a reversal by this Court and direction for the future. Counsel should be permitted to appear, provided, or otherwise afforded at Board original hearings because a liberty interest is at issue.

FEDERAL HABEAS CORPUS NOTICE.

Notice is hereby given that this appeal is to exhaust his state remedies, before presenting the matter to U.S. District Court.

RESPECTFULLY SUBMITTED this 25th day of October, 2004.



D. BRUCE OLIVER

CERTIFICATE OF MAILING

I, D. Bruce Oliver, hereby certify that on this 25th day of October, 2004, I served a copy of the foregoing **BRIEF OF APPELLANT** upon the counsel for the Appellee in this matter, by mailing it to the State of Utah by first class mail with sufficient postage prepaid to the following address:

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Salt Lake City, Utah 84114-0854



D. BRUCE OLIVER

ADDENDUM A

(Constitutional Provisions, Statutes)

53 Am. Jur. Proof of Facts 3d 249, Proof of Defense of Entrapment by Estoppel.

41 Am. Jur. Trials 349, Habeas Corpus: Pretrial Rulings, §§ 16–24 (Double jeopardy)

Amendment VI. Jury trial for crimes and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Cross References

Right to jury trial, criminal cases, see U S C A Const Art III, § 2

Library References

Criminal Law ¶106 to 114, 577 1 to 577 16(11), 641, 662

Jury ¶9 to 37

Witnesses ¶2

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C J S Criminal Law §§ 177 to 186, 277, 578 to 608, 610 to 621, 1115, 1120

C J S Declaratory Judgments § 155

C J S Federal Civil Procedure §§ 943 to 952, 954

C J S Juries §§ 6 to 279, 284, 286, 292, 299, 302 to 303, 306, 310, 354 to 356, 367, 396, 409, 443 to 447, 450 to 456, 459 to 461

C J S Witnesses § 6

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Accused's right, under 28 U S C A sec 1654 and similar predecessor statutes, to represent himself in federal criminal proceeding, 27 A L R Fed 485

Accused's right to represent himself in state criminal proceeding—modern state cases, 98 A L R 3d 13

Adequacy of defense counsel's representation of criminal client—Issues of incompetency, 69 A L R 5th 1

Adequacy of defense counsel's representation of criminal client—Pretrial conduct or conduct at unspecified time regarding issues of insanity, 72 A L R 5th 109

Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies, 15 A L R 4th 582

Adequacy of defense counsel's representation of criminal client regarding entrapment defense, 8 A L R 4th 1160

Adequacy of defense counsel's representation of criminal client regarding guilty pleas, 10 A L R 4th 8

Adequacy of defense counsel's representation of criminal client regarding hypnosis and truth tests, 9 A L R 4th 354

Adequacy of defense counsel's representation of criminal client regarding plea bargaining, 8 A L R 4th 660

Adequacy of defense counsel's representation of criminal client regarding post-plea remedies, 13 A L R 4th 533

Adequacy of defense counsel's representation of criminal client regarding prior convictions, 14 A L R 4th 227

Adequacy of defense counsel's representation of criminal client regarding right to and incidents of jury trial, 3 A L R 4th 601

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues, 12 A L R 4th 318

Appealability of federal court order denying motion for appointment of counsel for indigent party, 67 A L R Fed 925

Appointment of counsel, in civil rights action, under forma pauperis provisions (28 U S C A sec 1915(d)), 69 A L R Fed 666

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel—federal cases, 53 A L R Fed 140

Closed-circuit television witness examination, 61 A L R 4th 1155

Comment Note —Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution, 93 A L R 2d 747

Condition interfering with accused's view of witness as violation of right of confrontation, 19 A L R 4th 1286

DECLARATION OF RIGHTS

Art. 1, § 12

1953, 78-12-25.5, Const. Art 1, § 11. Klatt v. Thomas, 1990, 788 P.2d 510 Appeal And Error ☞ 1177(1)

Sec. 12. [Rights of accused persons]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Laws 1994, S J.R 6, § 1, adopted at election Nov 8, 1994, eff. Jan. 1, 1995.

Cross References

Rights of defendant, criminal procedure, see § 77-1-6

Law Review and Journal Commentaries

- Confrontation Rights and Preliminary Hearings, Allred, 1986 Utah L Rev 75 (1986)
- Death Qualification and the Right to an Impartial Jury Under the State Constitution Capital Jury Selection in Utah after *State v Young Knapp*, 1995 Utah L Rev 625 (1995)
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- Divining the Framers' Intentions The Immunity Standard for Criminal Proceedings Under the Utah Constitution, Bowers, 2000 Utah L Rev 135 (2000)
- Hansen v Owens*-Expansion of the Privilege Against Self-Incrimination to Unknown Limits, Young, 1981 Utah L Rev 447 (1981)
- Judicial Jabberwocky or Uniform Constitutional Protection *Strickland v Washington* and National Standards for Ineffective Assistance of Counsel Claims, O'Brien, 1985 Utah L Rev 723 (1985)
- KUTV v Wilkinson* Another Episode in the Fair Trial/Free Press Saga, Hagen, 1985 Utah L Rev 739 (1985)
- Restraints on Defense Publicity in Criminal Jury Cases, Swift 1984 Utah L Rev 45 (1984)
- State v Herrera* The Utah Supreme Court Rules in Favor of Utah's Controversial Insanity Defense Statute, 22 J Contemp L 221 (1996)
- State v Thomas* and the *McDonough* Test A Safety Net Proposal to Cure the Square Peg-Round Hole Dilemma, Joner, 1993 B Y U L Rev 1347 (1993)
- Toward a Framework for Assessing When a Defendant is Capable of Knowingly and Intelligently Waiving the Right to Counsel 1994 Utah L Rev 325 (1994)
- Utah Supreme Court and the Utah State Constitution, Marsden, 1986 Utah L Rev 319 (1986)
- Victims of Child Sexual Abuse in the Courtroom New Utah Rules and Their Implications, Michie 15 J Contemp L 81 (1989)

CHAPTER 27

PARDONS AND PAROLES

Section

- 77-27-1. Definitions.
- 77-27-2. Board of Pardons and Parole—Creation—Compensation—Functions.
- 77-27-3. Repealed.
- 77-27-4. Chairperson and vice chairperson.
- 77-27-5. Board of Pardons and Parole authority.
- 77-27-5.3. Meritless and bad faith litigation.
- 77-27-5.5. Review procedure—Commutation.
- 77-27-6. Payment of restitution.
- 77-27-7. Parole or hearing dates—Interview—Hearings—Report of alienists—Mental competency.
- 77-27-8. Record of hearing.
- 77-27-9. Parole proceedings.
- 77-27-9.5. Victim may attend hearings.
- 77-27-9.7. Victim right to notification of release—Notice by board.
- 77-27-10. Conditions of parole—Rulemaking—Intensive early release parole program.
- 77-27-10.5. Special condition of parole—Penalty.
- 77-27-11. Revocation of parole.
- 77-27-12. Parole discharge, sentence termination.
- 77-27-13. Board of Pardons and Parole—Duties of the judiciary, the Department of Corrections, and law enforcement—Removal of material from files.
- 77-27-14. Repealed.
- 77-27-15. Repealed.
- 77-27-16, 77-27-17. Repealed.
- 77-27-18 to 77-27-21. Repealed.
- 77-27-21.5. Sex offender registration—Information system—Law enforcement and courts to report—Registration—Penalty—Effect of expungement.
- 77-27-22, 77-27-23. Repealed.
- 77-27-24. Out-of-state supervision of probationers and parolees—Compacts.
- 77-27-25. Amendments to interstate compact—Transfer of prisoners—Costs—Supplementary agreements.
- 77-27-26. Deputization of agents to effect return of parole and probation violators.
- 77-27-27. Retaking or reincarceration for parole or probation violations—Hearing and notice to sending state—Detention of parolee or probationer.
- 77-27-28. Hearing officer.
- 77-27-29. Rights of parolee or probationer—Record of proceedings.
- 77-27-30. Violation by parolee or probationer supervised in another state—Hearing in other state—Procedure upon receipt of record from other state.
- 77-27-31. Short title.

§ 77-27-1. Definitions

As used in this chapter:

- (1) “Board” means the Board of Pardons and Parole.
- (2) “Commission” means the Commission on Criminal and Juvenile Justice.
- (3) “Commutation” is the change from a greater to a lesser punishment after conviction.
- (4) “Department” means the Department of Corrections.

PARDONS & PAROLES

§ 77-27-1

Note 1

(5) "Expiration" occurs when the maximum sentence has run.

(6) "Family" means persons related to the victim as a spouse, child, sibling, parent, or grandparent, or the victim's legal guardian.

(7) "Panel" means members of the board assigned by the chairperson to a particular case.

(8) "Pardon" is an act of grace by an appropriate authority exempting a person from punishment for a crime.

(9) "Parole" is a release from imprisonment on prescribed conditions which, if satisfactorily performed by the parolee, enables the parolee to obtain a termination of his sentence.

(10) "Probation" is an act of grace by the court suspending the imposition or execution of a convicted offender's sentence upon prescribed conditions.

(11) "Reprieve or respite" is the temporary suspension of the execution of the sentence.

(12) "Termination" is the act of an appropriate authority discharging from parole or concluding the sentence of imprisonment prior to the expiration of the sentence.

(13) "Victim" means:

(a) a person against whom the defendant committed a felony or class A misdemeanor offense, and regarding which offense a hearing is held under this chapter; or

(b) the victim's family, if the victim is deceased as a result of the offense for which a hearing is held under this chapter.

Laws 1980, c. 15, § 2; Laws 1985, c. 198, § 6, Laws 1988, c. 172, § 1; Laws 1990, c. 195, § 1; Laws 1994, c. 13, § 31; Laws 1996, c. 100, § 3, eff. April 29, 1996.

Cross References

Pardon and parole board, governor's powers, see Const. Art. 7, § 12

Paroled persons, termination or discharge from sentence, see § 76-3-202

Law Review and Journal Commentaries

May, Victims' Rights and the Parole Hearing,
15 J. Contemp. L. 71 (1989)

Notes of Decisions

In general 1

1. In general

A "parole" is in the nature of a grant of partial liberty or a lessening of restrictions to a convicted prisoner, and the granting of a parole does not change the status of the prisoner but merely allows him greater freedom of movement while serving sentence, and he is still legally in custody. Utah Code 1943, §§ 67-0-7,

67-0-8. McCoy v. Harris, 1945, 108 Utah 407, 160 P.2d 721. Pardon and Parole ⇌ 41, Pardon and Parole ⇌ 24.

A parolee is still in custodia legis and under control of the state board, though outside prison walls, and until the sentence is terminated the judgment committing him to custody of prison authorities is still in effect. Utah Code 1943, §§ 67-0-7, 67-0-8. McCoy v. Harris, 1945, 108 Utah 407, 160 P.2d 721. Pardon and Parole ⇌ 24.

§ 77-27-2. Board of Pardons and Parole—Creation—Compensation—Functions

(1) There is created the Board of Pardons and Parole. The board shall consist of five full-time members and five pro tempore members to be appointed by the governor with the consent of the Senate as provided in this section. The members of the board shall be resident citizens of the state. The governor shall establish salaries for the members of the board within the salary range fixed by the Legislature in Title 67, Chapter 22, State Officer Compensation.

(2)(a)(i) The full-time board members shall serve terms of five years. The terms of the full-time members shall be staggered so one board member is appointed for a term of five years on March 1 of each year.

(ii) The pro tempore members shall serve terms of five years. The five pro tempore members added by Subsection (1) shall be appointed to terms that both commence on May 1, 1996, and respectively end on February 28, 1999, and February 29, 2000. These terms are reduced by two and one years respectively so that the appointment of one pro tempore member expires every year beginning in 1996. Terms previously set to expire will now expire the last day of February of their respective years.

(b) All vacancies occurring on the board for any cause shall be filled by the governor with the consent of the Senate pursuant to this section for the unexpired term of the vacating member.

(c) The governor may at any time remove any member of the board for inefficiency, neglect of duty, malfeasance or malfeasance in office, or for cause upon a hearing.

(d) A member of the board may not hold any other office in the government of the United States, this state or any other state, or of any county government or municipal corporation within a state. A member may not engage in any occupation or business inconsistent with his duties.

(e) A majority of the board constitutes a quorum for the transaction of business, including the holding of hearings at any time or any place within or without the state, or for the purpose of exercising any duty or authority of the board. Action taken by a majority of the board regarding whether parole, pardon, commutation, termination of sentence, or remission of fines or forfeitures may be granted or restitution ordered in individual cases is deemed the action of the board. A majority vote of the five full-time members of the board is required for adoption of rules or policies of general applicability as provided by statute. However, a vacancy on the board does not impair the right of the remaining board members to exercise any duty or authority of the board as long as a majority of the board remains.

(f) Any investigation, inquiry, or hearing that the board has authority to undertake or hold may be conducted by any board member or an examiner appointed by the board. When any of these actions are approved and confirmed by the board and filed in its office, they are considered to be the action of the board and have the same effect as if originally made by the board.

(g) When a full-time board member is absent or in other extraordinary circumstances the chair may, as dictated by public interest and efficient administration of the board, assign a pro tempore member to act in the place of a full-time member. Pro tempore members shall receive a per diem rate of compensation as established by the Division of Finance and all actual and necessary expenses incurred in attending to official business.

(h) The chair may request staff and administrative support as necessary from the Department of Corrections.

(3)(a) Except as provided in Subsection (3)(c), the Commission on Criminal and Juvenile Justice shall:

(i) recommend five applicants to the governor for appointment to the Board of Pardons and Parole; and

(ii) consider applicants' knowledge of the criminal justice system, state and federal criminal law, judicial procedure, corrections policies and procedures, and behavioral sciences.

(b) The procedures and requirements of Subsection (3)(a) do not apply if the governor appoints a sitting board member to a new term of office.

(4)(a) The board shall appoint an individual to serve as its mental health adviser and may appoint other staff necessary to aid it in fulfilling its responsibilities under Title 77, Chapter 16a, Commitment and Treatment of Mentally Ill Persons. The adviser shall prepare reports and recommendations to the board on all persons adjudicated as guilty and mentally ill, in accordance with Title 77, Chapter 16a.

(b) The mental health adviser shall possess the qualifications necessary to carry out the duties imposed by the board and may not be employed by the Department of Corrections or the Utah State Hospital.

(i) The Board of Pardons and Parole may review outside employment by the mental health advisor.

(ii) The Board of Pardons and Parole shall develop rules governing employment with entities other than the board by the mental health advisor for the purpose of prohibiting a conflict of interest.

(c) The mental health adviser shall:

(i) act as liaison for the board with the Department of Human Services and local mental health authorities;

(ii) educate the members of the board regarding the needs and special circumstances of mentally ill persons in the criminal justice system;

(iii) in cooperation with the Department of Corrections, monitor the status of persons in the prison who have been found guilty and mentally ill;

(iv) monitor the progress of other persons under the board's jurisdiction who are mentally ill;

(v) conduct hearings as necessary in the preparation of reports and recommendations; and

(vi) perform other duties as assigned by the board.

Laws 1985, c. 198, § 7; Laws 1986, c. 22, § 1; Laws 1988, c. 122, § 28; Laws 1990, c. 195, § 2; Laws 1991, c. 114, § 26; Laws 1992, c. 171, § 16; Laws 1994, c. 13, § 32; Laws 1994, c. 223, § 17; Laws 1996, c. 117, § 1, eff. April 29, 1996; Laws 1997, c. 308, § 15, eff. July 1, 1997; Laws 1998, c. 13, § 91, eff. May 4, 1998; Laws 1998, c. 22, § 1, eff. May 4, 1998, Laws 2002, c. 176, § 80, eff. May 6, 2002.

Cross References

Corrections department, see § 64-13-1 et seq
Pardon and parole board, governor's powers, see Const Art 7, § 12

Administrative Code References

Pardons and parole, competency of offenders, see Utah Admin Code 671-206

Library References

Pardon and Parole ⌘55 1
Westlaw Key Number Search 284k55 1

Notes of Decisions

In general 1
Privilege or immunity 2

Turner, 1968, 20 Utah 2d 350, 437 P 2d 891
Pardon And Parole ⌘ 55 1

1. In general

The 1980 amendment to Const Art 7, § 12, which narrowed power of Board of Pardons does not require that the parole system be uniform U C A 1953, 76-5-403 1, 77-27-2 77-27-7 State v Bishop, 1986, 717 P 2d 261 Pardon And Parole ⌘ 41

The quoted phrase in constitutional provision that "until otherwise provided by law" the governor, justices of supreme court and attorney general shall constitute board of pardons does not mean only until changed by constitutional amendment but it also means until provided by Legislature in law-making procedure set forth in Constitution, and the authorization to "otherwise provide by law" was carried out by enactment of 1951 statute which created board of pardons in valid form Const art 7, § 12, art 23, §§ 1-3, U C A 1953, 77-62-2 Adriano v

2. Privilege or immunity

Utah Board of Pardons and Parole officials were immune from damages liability to parolee based on their entitlement to absolute or qualified immunity, in parolee's § 1983 action alleging that he was denied opportunity to appeal parole board's decisions, that he was denied access to parole board's standards and criteria, and that parole board failed to credit his sentence 42 U S C A § 1983 Malek v Haun, 1994, 26 F 3d 1013 Civil Rights ⌘ 1376(7), Pardon And Parole ⌘ 56

Claim by prisoner, under civil rights law, seeking monetary damages against member of Board of Pardons was barred as members of Board were absolutely immune from damages liability for actions taken in performance of their official duties regarding granting or denying of parole 42 U S C A § 1983 Houtz v Deland, 1989, 718 F Supp 1497 Civil Rights ⌘ 1376(7)

§ 77-27-3. Repealed by Laws 1985, c. 213, § 10

§ 77-27-4. Chairperson and vice chairperson

(1) The governor shall select one of the members of the board to serve as chairperson and board administrator at the governor's pleasure. The chairperson may exercise the duties and powers, in addition to those established by this chapter, necessary for the administration of daily operations of the board, including personnel, budgetary matters, panel appointments, and scheduling of hearings.

(2) The chairperson shall appoint a vice chairperson to act in the absence of the chairperson.

Laws 1985, c. 198, § 8; Laws 1989, c. 112, § 1; Laws 1990, c. 195, § 3.

Library References

Pardon and Parole ⇐55.1.

Westlaw Key Number Search: 284k55.1.

§ 77-27-5. Board of Pardons and Parole authority

(1)(a) The Board of Pardons and Parole 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 chair 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 chair may participate on any panel and when doing so is chair of the panel. The chair of the board may designate the chair 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.

(e) The board shall determine restitution in an amount that does not exceed complete restitution if determined by the court in accordance with Section 77-38a-302.

(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 or district 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 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, including restitution as provided in Section 77-27-6.

(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 Parole 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 shall consider whether the persons have made or are prepared to make restitution as ascertained in accordance with the standards and procedures of Section 77-38a-302, as a condition of any parole, pardon, remission of fines or forfeitures, or commutation or termination of sentence.

(6) In determining whether parole may be terminated, the board shall consider the offense committed by the parolee, the parole period as provided in Section 76-3-202, and in accordance with Section 77-27-13.

Laws 1985, c. 213, § 1; Laws 1986, c. 22, § 2; Laws 1988, c. 172, § 2; Laws 1990, c. 195, § 4; Laws 1993, c. 38, § 102; Laws 1994, c. 13, § 33; Laws 1995, c. 301, § 4, eff. May 1, 1995; Laws 1996, c. 100, § 4, eff. April 29, 1996; Laws 2002, c. 35, § 9, eff. May 6, 2002.

Cross References

Extradition, payment of costs, see § 77-30-24

Administrative Code References

Rescission hearings, see Utah Admin. Code 671-310.

Library References

Pardon and Parole	◊23 1, 28, 59, 62, 64 1, 85, 92.	C.J.S. Pardon and Parole §§ 1 to 2, 4 to 6, 11 to 16, 22 to 26, 29 to 30, 34 to 41, 55, 57, 75, 79 to 80, 87.
Westlaw Key Number Searches:	284k23.1; 284k28; 284k59; 284k62; 284k64.1; 284k85; 284k92	

Notes of Decisions

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 Authority of board 7
 Civil rights action 8
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 Conditions to paroles 10
 Construction of sentence imposed 11
 Double jeopardy 3

Due process 4
 Extraordinary relief 20
 Habeas corpus 21
 Judicial review 18
 Jurisdiction of parole board 15
 Mootness 14
 Pleadings 16

§ 77-27-5

Note 21

of Appeals from reviewing dismissal of petition for writ of habeas corpus challenging parole hearing determination by Board that alleged violation of state and federal constitutional rights; right to petition for habeas relief from constitutional rights violations was guaranteed by State Constitution. Const. Art. 1, § 5; U.C.A.1953, 77-27-5(3). *Padilla v. Utah Bd. of Pardons*, 1992, 839 P.2d 874. Habeas Corpus ⇨ 516.1, Habeas Corpus ⇨ 814

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). *Northern v. Barnes*, 1992, 825

P.2d 696, certiorari granted, affirmed 870 P.2d 914. Habeas Corpus ⇨ 516.1

Statute precluding review of decisions of Board of Pardons did not preclude prisoner from alleging, on appeal from dismissal of his petition for writ of habeas corpus, that manner in which his parole hearing was conducted denied him procedural due process and subjected him to double jeopardy, as prisoner did not dispute merits of parole decision itself. U.C.A. 1953, 77-27-5. *Hatch v. DeLand*, 1990, 790 P.2d 49. Habeas Corpus ⇨ 845

If conditional termination of sentence was void, convict had no complaint as to recommitment to prison, since compact pursuant to which he was released would be nudum pactum, and he could be afforded no relief on habeas corpus from recommitment. *Mansell v. Turner*, 1963, 14 Utah 2d 352, 384 P.2d 394. Habeas Corpus ⇨ 517

CODE OF CRIMINAL PROCEDURE

§ 77-27-5.3. Meritless and bad faith litigation

(1) For purposes of this section:

(a) "Convicted" means a conviction by entry of a plea of guilty or nolo contendere, guilty and mentally ill, no contest, and conviction of any crime or offense.

(b) "Prisoner" means a person who has been convicted of a crime and is incarcerated for that crime or is being held in custody for trial or sentencing.

(2) In any case filed in state or federal court in which a prisoner submits a claim that the court finds to be without merit and brought or asserted in bad faith, the Board of Pardons and Parole and any county jail administrator may consider that finding in any early release decisions concerning the prisoner. Laws 1996, c. 161, § 6, eff. April 29, 1996.

Library References

Pardon and Parole ⇨ 49.

Westlaw Key Number Search: 284k49.

§ 77-27-5.5. Review procedure—Commutation

(1) The Board of Pardons and Parole may consider the commutation of a death sentence only to life without parole.

(2) Only the person who has been sentenced to death or his counsel may petition the Board of Pardons and Parole for commutation.

(3) The petition shall be in writing, signed personally by the person sentenced to death, and shall include a statement of the grounds upon which the petitioner seeks review.

(4) The state shall be permitted to respond in writing to the petition as may be established by board rules.

(5) The board shall review the petition and determine whether the petition presents a substantial issue which has not been reviewed in the judicial process.

(6) The board shall not consider legal issues, including constitutional issues, which:

- (a) have been reviewed previously by the courts;
- (b) should have been raised during the judicial process; or
- (c) if based on new information, are subject to judicial review.

(7)(a) If the board does not find a substantial issue, the board shall deny the hearing to the petitioner.

(b) If the board finds a substantial issue, the board shall conduct a hearing in which the petitioner and the state may present evidence and argument as may be provided by board rules.

Laws 1992, c. 140, § 1, Laws 1994, c. 13, § 34.

Library References

Pardon and Parole ⇐28
Westlaw Key Number Search 284k28
C J S Pardon and Parole §§ 4, 34 to 41

United States Supreme Court

Clemency hearings,

Death sentences, clemency hearings, due process, self-incrimination, executive discretion, see Ohio Adult Parole Authority v Woodard, U S Ohio1998, 118 S Ct 1244, 523 U S 272

Commutation,

Commutation of death sentence to long term sentences, see Rose v Hodges, U S Tenn 1975, 96 S Ct 175, 423 U S 19, 46 L Ed 2d 162, rehearing denied 96 S Ct 888, 423 U S 1092, 47 L Ed 2d 104

Commutation of life sentence, due process, see Connecticut Bd of Pardons v

Dumschat, U S Conn 1981, 101 S Ct 2460, 452 U S 458, 69 L Ed 2d 158

Death or life imprisonment without possibility of parole, sentence commuted by governor, Briggs instruction, see California v Ramos, U S Cal 1983, 103 S Ct 3446, 463 U S 992, 77 L Ed 2d 1171, on remand 207 Cal Rptr 800, 37 Cal 3d 136, 689 P 2d 430

Habeas corpus, death penalty, inaccurate instruction on governor's power to commute life sentence without parole, harmless-error standard, see Calderon v Coleman, U S Cal 1998, 119 S Ct 500, 525 U S 141

Notes of Decisions

Due process 2

Retrospective and ex post facto laws 1

1. Retrospective and ex post facto laws

Application of statute creating new and higher substantive standard for obtaining commutation hearing, to petition for commutation hearing for crime which occurred before statute was enacted would violate state constitutional prohibition of ex post facto laws Const Art 1, § 18, Art 7, § 12, U C A 1953, 77-27-5 5(6, 7) Andrews v Utah Bd of Pardons, 1992, 836 P 2d 790 Constitutional Law ⇐ 203 Pardon And Parole ⇐ 22

Board of Pardons amended order denying request for second commutation hearing applied constitutionally correct criteria, rather than commutation hearing standard of statute enacted after commission of crime, therefore, Board did not violate constitutional prohibition of ex post facto laws in denying second commutation hearing Const Art 1, § 18, Art 7, § 12, U C A 1953, 77-27-5 5(6, 7) Andrews v Utah Bd of Pardons, 1992, 836 P 2d 790 Constitutional Law ⇐ 203, Pardon And Parole ⇐ 22

2. Due process

Board of Pardons did not deny petitioner due process of law in its reconsideration of his peti-

United States Supreme Court

Restitution,

In general,

Probation, revocation for failure of indigent defendant to pay fine and restitution, equal protection, see *Bearden v Georgia*, U S Ga 1983, 103 S Ct 2064, 461 U S 660, 76 L Ed 2d 221, on remand 167 Ga App 334, 308 S E 2d 63

Amount of restitution,

Restitution calculation, losses caused by offense of conviction, unauthorized use of credit card, see *Hughey v U S*, U S Tex 1990, 110 S Ct 1979, 495 U S 411, 109 L Ed 2d 408, on remand 907 F 2d 39

Restitution as condition of probation,

Bankruptcy, dischargeability of restitution obligations imposed as conditions of probation, see *Pennsylvania Dept of Public Welfare v Davenport* U S Pa

1990, 110 S Ct 2126, 495 U S 552, 109 L Ed 2d 588

Bankruptcy, restitution obligation discharge, condition of probation, see *Kelly v Robinson*, U S Conn 1986, 107 S Ct 353, 479 U S 36, 93 L Ed 2d 216

Consideration of alternatives to incarceration before revocation, see *Black v Romano*, U S Mo 1985, 105 S Ct 2254, 471 U S 606, 85 L Ed 2d 636, rehearing denied 105 S Ct 3548, 473 U S 921, 87 L Ed 2d 671

Failure of indigent defendant to pay fine and restitution, equal protection, see *Bearden v Georgia*, U S Ga 1983, 103 S Ct 2064, 461 U S 660, 76 L Ed 2d 221, on remand 167 Ga App 334, 308 S E 2d 63

Resentencing, drug possession, see *U S v Granderson*, U S Ga 1994, 114 S Ct 1259, 511 U S 39, 127 L Ed 2d 611

Notes of Decisions

In general 1

Effect of parole termination 2

1. In general

Board of Pardons and Parole had authority to order restitution for three robbery offenses as condition of parole even through original sentencing court had not ordered restitution as part of underlying sentence U C A 1953, 77-27-5 77-27-6 *Stilling v Utah Bd of Pardons and Parole*, 1997, 933 P 2d 391 308 Utah Adv Rep 39 Pardon And Parole ¶ 64 1

Authority of Board of Pardons and Paroles to impose restitution as condition of parole is not limited to instances in which sentencing trial court has failed to fulfill its statutory duty to consider and impose restitution unless court finds it inappropriate U C A 1953 77-27-5, 77-27-6 U C A 1953, 76-3-201 (1983) *Stilling v Utah Bd of Pardons and Parole* 1997 933 P 2d 391, 308 Utah Adv Rep 39 Pardon And Parole ¶ 64 1

2. Effect of parole termination

After parolee's sentence and parole were terminated, Board of Pardons and Parole lacked jurisdiction to issue restitution order that it then forwarded to sentencing court to be entered as a civil judgment U C A 1953, 77-27-5(1), 77-27-6(2, 4) *State v Schultz* 2002, 56 P 3d 974, 456 Utah Adv Rep 28 2002 UT App 297 Pardon And Parole ¶ 93

Board of Pardons and Parole's restitution order issued after parolee's sentence and parole were terminated was not a nunc pro tunc order that related back to Board's special attention hearing that was held when Board still had jurisdiction over parolee and thus civil judgment against parolee that sentencing court imposed pursuant to the order was invalid U C A 1953 77-27-5(1) 77-27-6(2 4) *State v Schultz*, 2002, 56 P 3d 974, 456 Utah Adv Rep 28, 2002 UT App 297 Pardon And Parole ¶ 93

§ 77-27-7. Parole or hearing dates—Interview—Hearings—Report of alienists—Mental competency

(1) The Board of Pardons and Parole shall determine within six months after the date of an offender's commitment to the custody of the Department of Corrections, for serving a sentence upon conviction of a felony or class A misdemeanor offense, a date upon which the offender shall be afforded a hearing to establish a date of release or a date for a rehearing, and shall promptly notify the offender of the date

(2) Before reaching a final decision to release any offender under this chapter, the chair shall cause the offender to appear before the board, its panel,

or any appointed hearing officer, who shall personally interview the offender to consider his fitness for release and verify as far as possible information furnished from other sources. Any offender may waive a personal appearance before the board. Any offender outside of the state shall, if ordered by the board, submit to a courtesy hearing to be held by the appropriate authority in the jurisdiction in which the offender is housed in lieu of an appearance before the board. The offender shall be promptly notified in writing of the board's decision.

(3)(a) In the case of an offender convicted of violating or attempting to violate any of the provisions of Section 76-5-301.1, Subsection 76-5-302(1)(b)(vi), Section 76-5-402, 76-5-402.1, 76-5-402.2, 76-5-402.3, 76-5-403, 76-5-403.1, 76-5-404, 76-5-404.1, or 76-5-405, the chair may appoint one or more alienists who shall examine the offender within six months prior to a hearing at which an original parole date is granted on any offense listed in this Subsection (3).

(b) The alienists shall report in writing the results of the examination to the board prior to the hearing. The report of the appointed alienists shall specifically address the question of the offender's current mental condition and attitudes as they relate to any danger the offender may pose to children or others if the offender is released on parole.

(4) The parolee may petition the board for termination of lifetime parole as provided in Section 76-3-202 in the case of a person convicted of a first degree felony violation or convicted of attempting to violate Section 76-5-301.1, Subsection 76-5-302(1)(b)(vi), Section 76-5-402, 76-5-402.1, 76-5-402.2, 76-5-402.3, 76-5-403, 76-5-403.1, 76-5-404.1, or 76-5-405.

(5) In any case where an offender's mental competency is questioned by the board, the chair may appoint one or more alienists to examine the offender and report in writing to the board, specifically addressing the issue of competency.

(6) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the board shall make rules governing:

- (a) the hearing process;
- (b) alienist examination; and
- (c) parolee petitions for termination of parole.

Laws 1985, c. 213, § 3; Laws 1986, c. 22, § 4, Laws 1988, c. 150, § 1, Laws 1990, c. 195, § 5; Laws 1994, c. 13, § 36, Laws 1996, c. 100, § 5, eff. April 29, 1996, Laws 1998, c. 69, § 3, eff. May 4, 1998, Laws 2001, c. 301, § 8, eff. April 30, 2001, Laws 2001, 1st Sp. Sess., c. 4, § 3, eff. July 5, 2001

Administrative Code References

Pardons and parole, rules and regulations, see Utah Admin Code 671

Library References

Pardon and Parole ⌘59, 60 C J S Pardon and Parole §§ 52, 55
Westlaw Key Number Searches: 284k59,
284k60

§ 77-27-7

CODE OF CRIMINAL PROCEDURE

Note 15

tional rights U C A 1953, 77-27-7(1), U C A
1953, 77-27-7 (Repealed) Malek v Sawaya,
1986, 730 P 2d 629 Habeas Corpus ⇌ 506

§ 77-27-8. Record of hearing

(1) A verbatim record of proceedings before the Board of Pardons and Parole shall be maintained by a certified shorthand reporter or suitable electronic recording device, except when the board dispenses with a record in a particular hearing or a portion of the proceedings.

(2) When the hearing involves the commutation of a death sentence, a certified shorthand reporter, in addition to mechanical means, shall record all proceedings except when the board dispenses with a record for the purpose of deliberations in executive session. The compensation of the reporter shall be determined by the board. The reporter shall immediately file with the board the original record and when requested shall with reasonable diligence furnish a transcription or copy of the record upon payment of reasonable fees as determined by the board.

(3) When the party in interest affirms by affidavit that he is unable to pay for a transcript or copy of the record which is necessary for further proceedings available to him, and that affidavit is not refuted, the board may order the reporter to furnish to the party in interest a transcript, or a copy of the record, or so much of it as is reasonably applicable to any further proceedings, or a copy of the recording, at the expense of the state, to the party in interest.
Laws 1985, c 213, § 4, Laws 1994, c 13, § 37

Administrative Code References

Records and transcripts of hearings, see Utah Admin Code 671-304

Library References

Pardon and Parole ⇌ 59
Westlaw Key Number Search 284k59
C J S Pardon and Parole § 55

§ 77-27-9. Parole proceedings

(1)(a) The Board of Pardons and Parole may pardon or parole any offender or commute or terminate the sentence of any offender committed to a penal or correctional facility under the jurisdiction of the Department of Corrections for a felony or class A misdemeanor except as provided in Subsection (2).

(b) The board may not release any offender before the minimum term has been served unless the board finds mitigating circumstances which justify the release and unless the board has granted a full hearing, in open session, after previous notice of the time and place of the hearing, and recorded the proceedings and decisions of the board.

(c) The board may not pardon or parole any offender or commute or terminate the sentence of any offender unless the board has granted a full hearing, in open session, after previous notice of the time and place of the hearing, and recorded the proceedings and decisions of the board.

(d) The release of an offender shall be at the initiative of the board, which shall consider each case as the offender becomes eligible. However, a prisoner may submit his own application, subject to the rules of the board promulgated in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(2)(a) A person sentenced to prison prior to April 29, 1996, for a first degree felony involving child kidnapping, a violation of Section 76-5-301.1; aggravated kidnapping, a violation of Section 76-5-302; rape of a child, a violation of Section 76-5-402.1; object rape of a child, a violation of Section 76-5-402.3; sodomy upon a child, a violation of Section 76-5-403.1; aggravated sexual abuse of a child, a violation of Subsection 76-5-404.1(4); aggravated sexual assault, a violation of Section 76-5-405; or a prior offense as described in Section 76-3-407, may not be eligible for release on parole by the Board of Pardons and Parole until the offender has fully completed serving the minimum mandatory sentence imposed by the court. This subsection supersedes any other provision of law.

(b) The board may not parole any offender or commute or terminate the sentence of any offender before the offender has served the minimum term for the offense, if the offender was sentenced prior to April 29, 1996, and if:

(i) the offender was convicted of forcible sexual abuse, forcible sodomy, rape, aggravated assault, kidnapping, aggravated kidnapping, or aggravated sexual assault as defined in Title 76, Chapter 5, Offenses Against the Person; and

(ii) the victim of the offense was under 18 years of age at the time the offense was committed.

(c) For a crime committed on or after April 29, 1996, the board may parole any offender under Subsections (2)(b)(i) and (ii) for lifetime parole as provided in Section 77-27-9.

(d) The board may not pardon or parole any offender or commute or terminate the sentence of any offender who is sentenced to life in prison without parole except as provided in Subsection (6).

(e) On or after April 27, 1992, the board may commute a sentence of death only to a sentence of life in prison without parole.

(f) The restrictions imposed in Subsections 77-27-9(2)(d) and (e) apply to all cases that come before the Board of Pardons and Parole on or after April 27, 1992.

(3) The board may issue subpoenas to compel the attendance of witnesses and the production of evidence, to administer oaths, and to take testimony for the purpose of any investigation by the board or any of its members or by a designated hearing examiner in the performance of its duties. A person who willfully disobeys a properly served subpoena issued by the board is guilty of a class B misdemeanor.

(4)(a) The board may adopt rules consistent with law for its government, meetings and hearings, the conduct of proceedings before it, the parole and

pardon of offenders, the commutation and termination of sentences, and the general conditions under which parole may be granted and revoked.

(b) The rules shall ensure an adequate opportunity for victims to participate at hearings held under this chapter, as provided in Section 77-27-9.5.

(c) The rules may allow the board to establish reasonable and equitable time limits on the presentations by all participants in hearings held under this chapter.

(5) The board does not provide counseling or therapy for victims as a part of their participation in any hearing under this chapter.

(6) The board may parole a person sentenced to life in prison without parole if the board finds by clear and convincing evidence that the person is permanently incapable of being a threat to the safety of society

Laws 1985, c 213, § 5, Laws 1986, c 22, § 5, Laws 1986, c 41, § 3, Laws 1988, c 172, § 3, Laws 1992, c 142 § 5, Laws 1994, c 13, § 38, Laws 1995, c 337, § 12, eff May 1, 1995, Laws 1995, 1st Sp Sess, c 10, § 12, eff April 29, 1996, Laws 1996, c 40, § 14, eff April 29, 1996, Laws 1996, c 100, § 6, eff April 29, 1996, Laws 2003, c 149, § 6, eff May 5, 2003

Cross References

Sex offenses, applicability of sentencing provisions, see § 76-5-406 3

Administrative Code References

News media and public access, see Utah Admin Code 671-302

Notification of hearings, see Utah Admin Code 671-202

Library References

Pardon and Parole 28 44 50 58, 59 C J S Pardon and Parole §§ 4 34 to 41 52 to
Westlaw Key Number Searches 284k28, 55
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United States Supreme Court

Parole,

Liberty interest in parole release, see Board of Pardons v Allen, U S Mont 1987, 107 S Ct 2415, 482 U S 369, 96 L Ed 2d 303

Parole release, expectation as protected liberty interest, see Jago v Van Curen, U S Ohio 1981, 102 S Ct 31, 454 U S 14 70 L Ed 2d 13

Preparole conditional supervision, due process protections, see Young v Harper, U S Okla 1997, 117 S Ct 1148 520 U S 143, 137 L Ed 2d 270

Parole hearings,

Deferral of parole hearings ex post facto, see California Dept of Corrections v Morales, U S Cal 1995, 115 S Ct 1597, 514 U S 499, 131 L Ed 2d 588, on remand 56 F 3d 46

Requisites of parole procedure, see Greenholtz v Inmates of Nebraska Pe-

nal and Correctional Complex, U S Neb 1979, 99 S Ct 2100, 442 U S 1 60 L Ed 2d 668 on remand 602 F 2d 155

Retroactive change in frequency of parole reconsideration hearings, significant risk of increased punishment, ex post facto, see Garner v Jones, U S Ga 2000, 120 S Ct 1362, 529 U S 244

Revocation of parole,

Habeas corpus, parole revocation, in-custody requirement, collateral consequences, see Spencer v Kemna, U S MO 1998, 118 S Ct 978, 523 U S 1

Right to parole,

Scope of agency authority, statute denying early release for prisoners convicted of violent offenses, regulation denying early release to prisoners convicted

Cross References

State prison, victim notification of offender's release, see § 64-13-14 7

Administrative Code References

Notification of Board decision, see Utah Admin Code 671-305

Library References

Pardon and Parole ⚖57 1

Westlaw Key Number Search 284k57 1

§ 77-27-10. Conditions of parole—Rulemaking—Intensive early release parole program

(1)(a) When the Board of Pardons and Parole releases an offender on parole, it shall issue to the parolee a certificate setting forth the conditions of parole which he shall accept and agree to as evidenced by his signature affixed to the agreement.

(b) A copy of the agreement shall be delivered to the Department of Corrections and a copy shall be given to the parolee. The original shall remain with the board's file.

(2) If an offender convicted of violating or attempting to violate Section 76-5-301.1, Subsection 76-5-302(1), Section 76-5-402, 76-5-402.1, 76-5-402.2, 76-5-402.3, 76-5-403, 76-5-403.1, 76-5-404, 76-5-404.1, or 76-5-405, is released on parole, the board shall order outpatient mental health counseling and treatment as a condition of parole. The board shall develop standards and conditions of parole under this subsection in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act. This subsection does not apply to intensive early release parole.

(3)(a) In addition to the conditions set out in Subsection (1), the board may place offenders in an intensive early release parole program. The board shall determine the conditions of parole which are reasonably necessary to protect the community as well as to protect the interests of the offender and to assist the offender to lead a law-abiding life.

(b) The offender is eligible for this program only if he:

- (i) has not been convicted of a sexual offense; or
- (ii) has not been sentenced pursuant to Section 76-3-406.

(c) The department shall:

(i) promulgate rules in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, for operation of the program;

(ii) adopt and implement internal management policies for operation of the program;

(iii) determine whether or not to refer an offender into this program within 120 days from the date the offender is committed to prison by the sentencing court; and

(iv) make the final recommendation to the board regarding the placement of an offender into the program.

(d) The department shall not consider credit for time served in a county jail awaiting trial or sentencing when calculating the 120 day period.

(e) The prosecuting attorney or sentencing court may refer an offender for consideration by the department for participation in the program.

(f) The board shall determine whether or not to place an offender into this program within 30 days of receiving the department's recommendation.

(4) This program shall be implemented by the department within the existing budget.

(5) During the time the offender is on parole, the department shall collect from the offender the monthly supervision fee authorized by Section 64-13-21.

Laws 1985, c. 213, § 6; Laws 1986, c. 22, § 6, Laws 1993, c. 35, § 1; Laws 1993, c. 220, § 4, Laws 1994, c. 13, § 41, Laws 1996, c. 100, § 7, eff. April 29, 1996

Cross References

Sentence, term and construction, see § 77-18-4

Library References

Pardon and Parole ⌘ 64 1, 69

Westlaw Key Number Searches 284k64 1, 284k69

C J S Pardon and Parole § 65

Notes of Decisions

In general 1

Acceptance or rejection by prisoner 3

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Enforcement 4

Restitution 6

Right to hearing 5

1. In general

Parolees do not enjoy absolute liberty to which every citizen is entitled but only conditional liberty properly dependent on observance of special parole restrictions U S v Lewis, 1995, 71 F 3d 358 Pardon And Parole ⌘ 64 1

Board of parole may, in its discretion attach conditions to paroles and termination of sentences Vrieze v Turner 1966 18 Utah 2d 233 419 P 2d 769 Pardon And Parole ⌘ 64 1

2. Due process

Once paroled, offenders have a liberty interest that is limited by the restrictions that govern parole it is nevertheless a liberty interest which is entitled to due process protection U S C A Const Amend 14 Linden v State, Dept of Corrections, 2003, 81 P 3d 802, 499 Utah Adv Rep 34, 2003 UT App 402 Constitutional Law ⌘ 272 5, Pardon And Parole ⌘ 64 1

3. Acceptance or rejection by prisoner

Authority of Board of Pardons under Constitution and statute to release prisoners on condition is plenary and while prisoner may reject

conditions and serve out term, he may not accept them, obtain release from confinement, and then blithely contend that his sentence is terminated Const art 1, §§ 3, 9, 26, art 7, § 12, U S C A Const Amends 5, 6, 14, U C A 1953, 77-62-3 Mansell v Turner, 1963, 14 Utah 2d 352, 384 P 2d 394 Pardon And Parole ⌘ 65

4. Enforcement

Board of Pardons did not violate fundamental fairness when it refused to credit inmate's time served in secured treatment program as condition of probation against inmate's prison sentence, when sentencing court grants probation, it must have adequate means of enforcing conditions of that probation and, without threat of potential future incarceration, conditions of probation become meaningless Const Art 1, § 7 Rawlings v Holden, 1994, 869 P 2d 958 Constitutional Law ⌘ 272 5, Pardon And Parole ⌘ 64 1

5. Right to hearing

Inmate who objected to restitution order imposed by Board of Pardons and Parole as condition of parole was not entitled to full hearing before Board on his objections, where he instead chose to seek extraordinary relief via petition for writ of habeas corpus U C A 1953, 76-3-201(4)(e), 77-27-5, Utah Admin Code 671-403-2 Monson v Carver, 1996, 928 P 2d

ADDENDUM B
(Order of the Court, dated 5-24-2004)

MAY 24 2004

SALT LAKE COUNTY

By

Deputy Clerk

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

MICHAEL BRIAN WHITEMAN,	:	ORDER OF THE COURT
Petitioner,	:	
vs.	:	Case No. 040900113
CLINT FRIEL, et. al.,	:	Judge L.A. DEVER
Respondents.	:	

Having carefully reviewed the pleadings submitted by both parties, being fully advised in the premises, and good cause appearing, the Court hereby enters the following Order of the Court.

ORDER

FINDINGS OF FACTS

1. A jury convicted Petitioner of murder, a first degree felony. On November 22, 1993, he was sentenced to a maximum mandatory term of five-years-to-life.
2. On November 12, 1996, the Board held an original hearing which resulted in a rehearing set for April 2003.
3. On April 5, 1999, Petitioner's sentence was amended, showing a change from a "maximum mandatory term of five years and which may be fore life" to a "not less than five years and which may be for life."
4. In preparation for the April 5, 1999 hearing, a new Presentence Investigation Report was prepared.
5. Petitioner requested a redetermination hearing.
6. The Board conducted a Special Attention Review. After considering the information Petitioner provided, the Board determined not to change the previously scheduled April 2003 rehearing.
7. Petitioner was informed that in assessing the guidelines/matrix, the Board "considers sentences imposed on convictions in other states, not whether the other state calls the offense a misdemeanor or felony. This is based on the fact that felonies and misdemeanors differ from state to state. An offense Utah might classify as a felony,

California may classify as a misdemeanor. So, if the sentence imposed by California corresponds to a Utah felony sentence, the offense is counted as a felony on the matrix. Your matrix/guidelines have been refigured with the new presentence investigation report, but no change was made in the final guideline time.”

8. On April 10, 2003, the Board conducted a rehearing and decided to parole Petitioner on April 6, 2004. The Board also ordered two special conditions of parole: (1) cooperate with transitional services which may include a Community Correctional Center as directed by Adult Probation and Parole; (2) successfully complete mental health therapy to address substance abuse and cognitive restructuring issues.

CONCLUSIONS OF LAW

1. The standard of review in Board cases is well established: while the Court “must review the fairness of the *process* by which the Board undertakes its sentencing function, . . . [the court does] not sit as a panel of review on the result.” *Neel v. Holden*, 886 P.2d 1097, 1100 (Utah 1994) (emphasis in original) (quoting *Lancaster v. Utah Bd. of Pardons*, 869 P.2d 945, 947 (Utah 1994) (citing *Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 910 (Utah 1993))).
2. Petitioner complains the Board of Pardons (Board) adjusted his California sentences to coincide with what the sentences would be in Utah when it prepared his Criminal History Assessment and Time Matrix Guidelines. The Board has the right to “rely on any factors

known . . . or later adduced . . . , and the weight to be afforded such factors in deciding whether [a prospective parolee] pose[s] a societal risk . . . are all matters within the discretion of the Board. They are precisely the kinds of issues that are not subject to judicial review” *Northern v. Barnes*, 825 P.2d 696, 699 (Utah App. 1992). *See also Walker v. State, Dept. of Corrections*, 902 P.2d 148, 150 (Utah App. 1995) (“[i]t is within the discretion of the Board to weigh all of the evidence . . .”).

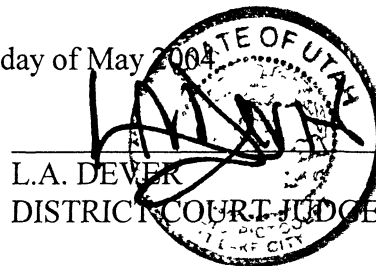
3. The Board properly exercised its discretion in weighing Petitioner’s California offenses. To maintain consistency, the Board “considers sentences imposed on convictions in other states, not whether the other state calls the offense a misdemeanor or felony. This is based on the fact that felonies and misdemeanors differ from state to state.” For example, in California, Petitioner was convicted of Attempted Grand Theft and sentenced to thirty-six months probation and 360 days in jail. Although California considered this offense a misdemeanor, in Utah the sentence imposed would make the offense a felony. Therefore, the Board treated this offense as a felony as the sentence comports with a felony in Utah. Five of Petitioner’s California offenses were determined to be felonies as the sentences constituted felonies in Utah. As a result, Petitioner was properly attributed with five prior felony convictions on his Criminal History Assessment. As noted previously, the Board has discretion in determining the weight to be afforded in such circumstances, and these “are precisely the kinds of issues that are not subject to judicial review” *Northern*,

825 P.2d at 699. The Board did not abuse its discretion when it weighed Petitioner's prior California sentences.

4. Petitioner complains that his incarceration was extended due to the Board's adjusting his California sentences to comport with Utah sentences. Petitioner fails to state a claim. Utah courts have consistently held that "the state sentencing guidelines do not have the force and effect of law." *Preece v. House*, 886 P.2d 508, 511 (Utah 1994) (citing *Labrum v. Utah State Board of Pardons*, 870 P.2d 902, 911-12 (Utah 1993)). Further, "any 'expectation of release' derived from the guidelines is at best tenuous." *Id.* "So long as the period of incarceration decided upon by the board of pardons falls within an inmate's applicable indeterminate range, then that decision, absent unusual circumstances, cannot be arbitrary and capricious." *Monson v. Carver*, 928 P.2d 1017, 1023 (Utah 1996) (quotation omitted).
5. In this case, Petitioner was sentenced to five-years-to-life. The Board, in exercising its discretion, could have denied Petitioner any parole date, resulting in the maximum term of life in prison. Petitioner's sentence has not expired. Petitioner requested a redetermination hearing based on his complaint that the Board adjusted his California sentences to reflect Utah convictions. The Board reviewed the request and determined not to change his status. The Board exercised its discretion; this is not arbitrary or capricious.

6. Petitioner requests the Court order his sentence and parole be terminated. These remedies are unavailable. The Utah Supreme Court has clearly held that a district court exceeds its authority when it orders an inmate released. *Preece v. House*, 886 P.2d 508, 512 (Utah 1994). “In our indeterminate sentencing scheme, the board of pardons acts as a sentencing entity, having exclusive authority to ‘determine the actual number of years a defendant is to serve.’” *Id.* (quoting *Labrum v. Utah State Board of Pardons*, 870 P.2d 902, 907 (Utah 1993) (citations omitted). Additionally, “not every circumstance that gives rise to extraordinary relief compels the immediate release of a petitioner from every aspect of physical imprisonment.” *Id.* (citing *Wickham v. Fisher*, 629 P.2d 896, 900 (Utah 1981) (holding that remedy for unlawful condition of confinement is elimination of that specific condition of physical imprisonment, not release from every aspect of physical imprisonment) (citations omitted). Petitioner requested a rehearing to consider the new presentence report and his claims that the Board improperly adjusted his California sentences. The Board conducted a Special Attention Review and decided not to change his April 2003 rehearing. Subsequently, on April 10, 2003, the Board conducted the rehearing at which time Petitioner had full opportunity to raise these issues. After the hearing, the Board decided to parole Petitioner on April 6, 2004. The Board properly used its discretion, and Petitioner received the necessary due process.

ORDERED by the Court this 20 day of May 2004



CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing **ORDER OF THE COURT**, postage prepaid, on this 26th day of April 2004 to the following:

Michael Brian Whiteman
USP #22588
Utah State Prison
P.O. Box 250
Draper, UT 84020

A handwritten signature in black ink, which appears to be "Michael Brian Whiteman", is written over a horizontal line.