

1993

Kirk W. Dall v. State of Utah : Brief of Petitioner

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

KIRK W. DALL,

Petitioner,

v.

STATE OF UTAH, THE UTAH STATE
BOARD OF PARDONS, and THE UTAH
STATE PSYCHIATRIC SECURITY
REVIEW BOARD,

Respondents.

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DOCKET NO. 930722-CA

Case No. 930722-CA

Priority No. 3

BRIEF OF PETITIONER

Appeal from denial of petition for writ of habeas corpus,
in the Third Judicial District Court in and for Salt Lake County,
the Honorable Leslie A. Lewis, Judge, presiding. The habeas corpus
petition stemmed from orders of the Psychiatric Security Review
Board dated April 24, 1991 and July 2, 1991 seeking to transfer
petitioner from the custody of the Utah State Hospital to the
jurisdiction and custody of the Board of Pardons.

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KIRK W. DALL, :
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v. :
STATE OF UTAH, THE UTAH STATE :
BOARD OF PARDONS, and THE UTAH :
STATE PSYCHIATRIC SECURITY : Case No. 930722-CA
REVIEW BOARD, : Priority No. 3
: Respondents.

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(2)(g) (Supp. 1993).

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

The following statutes, rules, and constitutional provisions are relevant to a determination of this matter, and are set forth in Addendum F:

U.S. Const. art. I, § 10, cl. 1
U.S. Const. amend. V
U.S. Const. amend. VI
U.S. Const. amend. VIII
U.S. Const. amend. XIV, § 1
Utah Const. art. I, § 7
Utah Const. art. I, § 9
Utah Const. art. I, § 12
Utah Const. art. I, § 18
Utah Const. art. V, § 1
Utah Const. art. VIII, § 5
Utah Code Ann. § 17-5-89 (1991)
Utah Code Ann. § 62A-12-209(1) (Supp. 1992)
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Utah Code Ann. § 62A-12-223 (1989)
Utah Code Ann. § 62A-12-240 (Supp. 1992)
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Utah Code Ann. § 77-38-2(6) (1989)
Utah Code Ann. § 77-38-2(6) (effective March 13, 1990)
U.R.Cr.P. 21.5 (1989) (effective until July 1, 1989)
U.R.Cr.P. 21.5 (1993) (effective July 1, 1989)

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

The procedural posture of this case is in the nature of an appellate review of an administrative agency's determination.

The following standard applies to this appeal as a whole:

Under Rule 65B, this court looks at the administrative proceeding as if the petition were brought here directly, even though technically it is the district court's decision that is being appealed. Since the review performed by the district court under Rule 65B is a review of the entire record, it is the same review that would have been afforded if the matter were raised as a direct appeal. We give no deference to the district court's initial appellate review since it is a review of the record, which this court is just as capable of reviewing as the district court.

Tolman v. Salt Lake County Attorney, 818 P.2d 23, 26 (Utah App. 1991) (citations omitted).

The following individual issues and standards are presented:

1. Whether the PSRB's transfer of Mr. Dall under a "maximum benefit from treatment" standard operates as an illegal application of an *ex post facto* law in violation of Article I, section 18 of the Utah Constitution and Article I, section 10, clause 1 of the United States Constitution, and whether that standard is arbitrary and capricious?

Standard of review. This is a legal question and should be determined by the court without deference. Maxwell v. Maxwell,

796 P.2d 403, 404 (Utah App. 1990); Olwell v. Clark, 658 P.2d 585, 586 n. 1 (Utah 1982).

2. If the "maximum benefit" standard applies to Mr. Dall, whether the PSRB's finding that Mr. Dall had received maximum benefit from treatment is adequately supported by the record?

Standard of Review. To challenge a finding of an administrative body, appellant must marshal the evidence in support of the finding and show that the challenged finding is so lacking in support as to be against the clear weight of the evidence, thus making it erroneous. Smallwood v. Board of Review, 841 P.2d 716, 718-9 (Utah App. 1992).

3. Whether transfer of Mr. Dall to the Board of Pardons would not constitute cruel and unusual punishment in violation of Article I, section 9 of the Utah Constitution and the eighth amendment to the United States Constitution?

Standard of review. See standard for issue no. 1 (question of law reviewed for correctness).

4. Whether the PSRB's transfer of Mr. Dall to the jurisdiction of the Board of Pardons constitutes an executive branch exercise of a power reserved to the judicial branch of government in violation of Article V, section 1 of the Utah Constitution?

Standard of review. See standard for issue no. 1 (question of law reviewed for correctness).

5. Whether the lack of the right to appeal from orders of the PSRB violates Mr. Dall's right to due process under Article

I, section 7 of the Utah Constitution and the fifth and fourteenth amendments to the United States Constitution, and his right to appeal under Article I, section 12 and Article VIII, section 5 of the Utah Constitution?

Standard of review. See standard for issue no. 1 (question of law reviewed for correctness).

6. Whether denying Mr. Dall compulsory process and monies to present his case through expert witnesses violates Mr. Dall's rights under Article I, sections 7 and 12 of the Utah Constitution and the fifth, sixth, and fourteenth amendments to the United States Constitution?

Standard of review. See standard for issue no. 1 (question of law reviewed for correctness).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

Mr. Dall pled guilty and mentally ill to Forcible Sexual Abuse, a second degree felony, and Kidnapping, a second degree felony, on May 9, 1989. Judge Timothy R. Hanson sentenced Mr. Dall by order dated August 10, 1989 to concurrent terms of 1 to 15 years, ordered him to the State Hospital and, as required by recent statutory changes, committed him to the jurisdiction of the Psychiatric Security Review Board ("PSRB").

Effective March 13, 1990 the legislature enacted the "maximum benefit" standard of Utah Code Ann. § 77-16a-5. At the same time, the legislature eliminated appeals from PSRB orders except for those found not guilty by reason of insanity. Utah Code Ann. § 77-38-2(6).

In April and June of 1991, the PSRB held hearings to determine if Mr. Dall had received the maximum benefit of treatment, and entered orders finding that he had. See Exhibits 9 (May 24 order, attached as Addendum B) and 10 (July 2, 1991 order, attached as Addendum C). Mr. Dall appealed¹ and simultaneously filed this petition for writ of habeas corpus. R. 1a-5.² The trial court denied the petition. See R. 492-500 (signed minute entry), R. 568-575 (findings and conclusions). The court denied Mr. Dall's post judgment motion for stay pending appeal, id., as did this Court. Mr. Dall is incarcerated in general population at the prison.

STATEMENT OF FACTS³

CHARGES

On July 12, 1988, Kirk Dall was charged by way of Information with Aggravated Sexual Assault, a first degree felony, Aggravated Kidnapping, a first degree felony, and Aggravated Robbery, a first degree felony. The information alleged that Mr. Dall kidnapped, raped, and robbed a woman on July 4 and 5, 1988.

¹Subsequently dismissed for lack of jurisdiction. See R. 68 (remittitur).

²With leave of court, R. 71, an amended petition was filed March 31, 1992. R. 72-113.

³Mr. Dall's criminal file in Third District Court, No. 881991695, before the Honorable Timothy R. Hanson, was separately paginated and is referred to here as "Crim.". This file was not reviewed by the PSRB or the district court in this matter, but it provides useful background information on Mr. Dall, his mental health status, and the factual predicate to this case. Parts of this file were entered as Exhibits at the evidentiary hearing before Judge Lewis, and were reviewed by her.

Crim. 6-8. On December 12, 1988, Mr. Dall was bound over for trial on all counts. Crim. 2-3.

ARRAIGNMENT

On January 9, 1989, Mr. Dall was arraigned in Third District Court before the Honorable Timothy R. Hanson. Mr. Dall entered his plea of not guilty to all counts. Crim. 23.

PSYCHIATRIC EXAMINATION

On December 28, 1988, Mr. Dall filed a notice of intent to rely on a defense of diminished mental capacity. Crim. 29. On January 17, 1989, Judge Hanson ordered that Mr. Dall be evaluated. Crim. 31. Evaluations were performed by Dr. John Malouf and Dr. Breck LeBegue. Evaluations from both examiners were considered by Judge Hanson at the time of Mr. Dall's sentencing, and are contained in the file in a manila envelope.

(a) Dr. Malouf evaluated Kirk Dall on February 3, 1989. Dr. Malouf also relied on psychological testing, interviews with Mr. Dall's family members, jail mental health workers, and review of Mr. Dall's jail mental health records.

Dr. Malouf reported Mr. Dall's Intelligence Quotient to be in the dull normal range and that his intellectual functioning was limited by certain cognitive processes. He also noticed evidence of a disorder in "the schizophrenic spectrum likely with organic involvement." Mr. Dall's performance on testing suggested "organic impairments of significant level." The disorder was one that had been with Mr. Dall since early childhood. Report at 3.

Dr. Malouf described Mr. Dall as a person who is socially isolated, resistant to change, and who has an idiosyncratic, very personalized view of the world. He reported that a Dr. Mike Stevens had diagnosed Mr. Dall as being either autistic or suffering from a pervasive developmental disorder. Dr. Malouf's impressions of Mr. Dall were consistent with those diagnoses. Dr. Malouf stated that "Mr. Dall displays manifestations of a disorder which first appeared in childhood or possibly at birth." Id. at 4.

Dr. Malouf expressed concern over the possibility of victimization and concluded by stating, in part, "Mr. Dall is a man with considerable deficiencies in personal and interpersonal functioning His idiosyncratic and very personalized way of viewing the world and his potential for being victimized suggest that he be involved in some type of therapeutic program."

(b) Dr. Breck LeBegue, M.D. submitted two reports to Judge Hanson. The first of these reports is dated March 9, 1989 and is based on Dr. LeBegue's evaluations of Mr. Dall on February 20 and March 3 of 1989, interviews with various family members and mental health workers, and reviews of mental health records.

Dr. LeBegue opined that Mr. Dall "experiences substantial impairment from a serious mental illness," Report at 2, and diagnosed Mr. Dall as having Pervasive Developmental Disorder (present since childhood) and Schizotypal Personality Disorder. Dr. LeBegue noted that jail mental health workers and unit psychiatrists had diagnosed a psychosis and had treated Mr. Dall with anti-psychotic medications.

The "Diagnostic Discussion" portion of the report states:

The defendant has a clear history of a broad developmental failure in many areas, dating from childhood. He was odd, had significant learning disabilities in school, profound disturbance in ability to relate to others, and intermittent bizarre behavior for many years. This massive disturbance in many areas of mental function is probably best diagnosed as Pervasive Developmental Disorder. This diagnostic category is not well described in the present diagnostic manual; but is akin to, but less severe, than childhood autism. Further, it is similar to, and perhaps a predecessor of, adult schizophrenia; in fact, it was previously called childhood schizophrenia.

Id. at 5.

Dr. LeBegue continued, "The features of psychotic thinking and extreme social withdrawal seen in pervasive developmental disorder do not usually respond to anti-psychotic medications, in contrast to adult onset schizophrenia. This pattern is consistent with Mr. Dall's lack of response to treatment over the last eight months in jail. He is unlikely to improve to any significant degree." Id.

Dr. LeBegue concluded his March 9, 1989, report by stating that Mr. Dall qualified for a finding of guilty and mentally ill. He recommended additional testing to determine Mr. Dall's ability to function in a structured halfway house. He closed by stating that Mr. Dall would "be at a significant risk to be harmed or to harm himself if incarcerated at prison." Id. at 7.

Dr. LeBegue's second report, dated July 18, 1989, was prepared at the request of Judge Hanson as a means of providing an update of Mr. Dall's condition. Dr. LeBegue concluded at that time that Mr. Dall did not qualify for a finding of guilty and mentally

ill because he did not "pose an immediate danger." Report at 1. Dr. LeBegue continued in his diagnosis of Pervasive Developmental Disorder and noted that Mr. Dall had responded to anti-psychotic medication. Dr. LeBegue also noted that the psychotic features of the disorder returned once the anti-psychotic medication was discontinued. Dr. LeBegue stated that "[f]rom a medical perspective, his illness may be safely managed in a corrections halfway house under constant observation and long term psychiatric treatment with anti-psychotic medication and intensive psychotherapy to help correct his considerably deviant sexual fantasies." Id. at 3. Dr. LeBegue warned, however, that "[i]f he discontinues his medication he does pose a danger to himself and others in the foreseeable future (2-4 months), regardless of where he is housed. Even on medication, he is at risk of victimization if imprisoned, due to his continuing oddities of behavior and poor social skills and judgement." Id. (emphasis added).

PLEA BARGAIN

On May 9, 1989, Mr. Dall entered a plea of guilty and mentally ill to one count of Forcible Sexual Abuse, a second degree felony, and one count of Kidnapping, a second degree felony. Crim. 42-48. A diagnostic evaluation at the Utah State Hospital was ordered. Crim. 49.

SENTENCING HEARING

On July 28, 1989, a sentencing hearing was conducted before the Honorable Timothy Hanson. Crim. 61. Prior to the hearing Judge Hanson reviewed the reports submitted by Dr. Malouf

and Dr. LeBegue. See transcript of Proceedings of July 28, 1989 (Exhibit 2, hereafter "Sent.") at 3-4. Dr. Breck LeBegue and Monica Ebert testified at the hearing. Agent Kathy Shepherd of Adult Probation and Parole likewise testified.

(a) TESTIMONY OF DR. BRECK LeBEGUE

Dr. LeBegue was called on behalf of Mr. Dall. The State stipulated to Dr. LeBegue's qualifications. Sent. at 6. Dr. LeBegue testified that he reviewed several sources of information including psychological assessments, statements of mental health professionals, statements of family members, reports of jail mental health professionals, and police records.

Dr. LeBegue testified that Kirk Dall was suffering from a mental disease or defect as defined in Utah Code Ann. § 76-2-305 and diagnosed Mr. Dall as having a Pervasive Developmental Disorder, a "major impairment of thinking and mood and behavior." Sent. at 8. He also diagnosed Mr. Dall as having a withdrawn personality. Dr. LeBegue described Pervasive Developmental Disorder as follows:

It is first a severe mental illness. It's manifested usually in childhood, usually before school age, and the symptoms are impairment in mental function in many, many areas. There's usually impairment in the development and use of language. There is impairment in social development such that people do not develop the usual, easy, normal, social relationships with other people, either with other boys or girls. They have odd mannerisms, odd behavior that may at times seem irrational, and totally unrelated to fads, or to choice. They have odd thinking styles. They have unusual moods, or changes of mood, from one mood to another. And this persists throughout life. That is, it usually starts young, persists into the teen years, and on into adult years.

Sent. at 9-10.

Dr. LeBegue testified that the diagnosis was reached through examinations and evaluation of Mr. Dall's behavior and mannerisms throughout his life time. Mr. Dall was not a person who suddenly became psychotic, but was rather a person who had exhibited "a whole history of deficits in a variety of areas for a long period of time." Sent. at 11. Mr. Dall also exhibited behaviors characteristic of brain damage which, by his estimate, had been present a long time. Sent. at 12.

Dr. LeBegue also observed characteristics in Mr. Dall consistent with the existence of Savantism, which he described as "an unusual pattern of surprising mental ability in contrast to the rest of the academic or intellectual achievement." Sent. at 13. Savantism is an organic disorder of brain structure and function.

Mr. Dall came to the attention of jail mental health workers within four days of being booked into jail. Dr. LeBegue reported a disturbance of mood and indicated that Mr. Dall behaved in ways so irritating to inmates around him that he provoked a "potential assault upon himself." Sent. at 18. Dr. LeBegue described Mr. Dall as "confused" and clearly delusional. Dr. LeBegue reported that Mr. Dall banged on his cell, thought he was at the cafe where he had worked, assaulted and threatened jail personnel, and tried to dig out of his cell. Sent. at 19. Mr. Dall improved "to some extent" with anti-psychotic medication, but his thinking "did not normalize, did not return to clear, rational, sequential, logical thinking." Sent. at 20. Dr. LeBegue stated

that Kirk Dall "clearly decompensated" in the jail and stated that "off medication in another correctional setting, the behavior in the jail . . . can accurately predict behavior in prison if he's off medication or on inadequate doses or in a heavy stress situation." Sent. at 21.

Dr. LeBegue reiterated his concern about the potential for victimization in a correctional setting. Dr. LeBegue testified that it was likely that Mr. Dall would be victimized in prison:

He provokes others without knowing it. He does odd, or unusual, provocative things that make other people angry. He doesn't intend to do so and in a correctional setting, he'll be at risk to be assaulted. It's already been documented that he was. They had to move him to keep him from being assaulted previously in jail.

Sent. at 21. Dr. LeBegue opined that even with treatment consisting of anti-psychotic medication and psychotherapy, Mr. Dall would be at risk for victimization.

Q [by Mr. Bradshaw] Also fair to say without treatment he has the potential for being victimized in the prison setting?

A [Dr. LeBegue] Well, yes, without treatment, and perhaps even with treatment, because the medication will not change his basic style, ineptness, his reading of special cues. He does not use language well. He doesn't interpret the language and meaning of others well. And I think even with treatment, anti-psychotic medication, in general population in prison he'd be victimized.

Sent. at 25-6.

Dr. LeBegue stated that Mr. Dall could be managed in a prison setting designed for those people with chronic mental illness. Such a facility would necessarily provide 24 hour observation to monitor the presence of symptoms, the response to treatment, and side effects. Sent. at 26. In addition, the

"observation" would have to be of a supportive nature rather than threatening, frightening, or posing risk of victimization. The facility must also assure that Mr. Dall continues to take adequate doses of anti-psychotic medication and mood stabilizing medication. Sent. at 27.

If, however, the prison setting failed to provide a nurturing environment or provided an environment that was as confrontational as the rest of the prison, Dall would likely be able to decompensate perhaps even on medication." The same would be true in Dr. LeBegue's opinion if Mr. Dall were housed in an area that did not provide 24 hour monitoring or therapy. Dr. LeBegue stated that the potential for decompensation was "greater at the prison if in general population, not in a supportive environment," than at the State Hospital. Sent. at 34.

(b) TESTIMONY OF MONICA EBERT

Monica Ebert, a Ph.D. intern at the Utah State Hospital, also testified. Ms. Ebert testified that she had evaluated Mr. Dall by way of a clinical interview and administration of a battery of psychological tests. Based on her observations and testing, Ms. Ebert believed that Mr. Dall had the "potential" to be a danger because of his "tendency to act impulsively, and act on . . . beliefs he has that might be persecutory in nature." Sent. at 36-7. Ms. Ebert diagnosed Mr. Dall as having a "delusional disorder" which includes "paranoid features." Sent. at 38. Ms. Ebert further testified that "[t]here's a possibility of decompensation if placed in [prison]" as well as a possibility of victimization.

Id. This was due, in her opinion, to "the nature of his personality, it's possible that he may invoke irritation in others. It's possible that he may not be aware of that, because sometimes he has trouble understanding the impact he has on others." Sent. at 39.

Following the testimony of Dr. LeBegue and Monica Ebert, Judge Hanson began to discuss the placement options available to him. In weighing the various options Judge Hanson stated:

And I am pretty much convinced of one thing[,] that Mr. Dall is not an appropriate candidate for general population in the Utah State Prison for obvious reasons. Not the least of which he wouldn't survive in that setting.

Sent. at 43.

(c) TESTIMONY OF AP&P AGENT KATHY SHEPHERD

Judge Hanson thereafter heard from Agent Kathy Shepherd of Adult Probation and Parole. Ms. Shepherd was asked to comment on programs available at the State Prison. Ms. Shepherd noted that while the prison could maintain Mr. Dall on medication, sex offender treatment for Mr. Dall was virtually non-existent in the prison setting. Ms. Shepherd discussed the "revamp" program at the prison as being "very similar to that offered by Bonneville." Sent. at 48. Ms. Shepherd noted, however, that "[t]he person has to be reasonably well functioning to participate successfully in that. And I don't believe given the problems in this situation I would consider him as an appropriate candidate in any fashion for that" Id.

(d) STATEMENT OF KIRK W. DALL

Following argument from Mr. Bradshaw and Mr. Vuyk, the trial court granted Mr. Dall the benefit of the record to make a statement. Sent. 54-61. This statement is quite illuminating with respect to Mr. Dall's mental health, and petitioner would refer the court to that portion of the transcript.

SENTENCE

Based on the testimony presented at the sentencing hearing, Judge Hanson ordered that Kirk W. Dall be sentenced to concurrent terms of incarceration of 1 to 15 years for the crime of Forcible Sexual Abuse and 1 to 15 years for the crime of Kidnapping. Crim. 61; Sent. at 64. Judge Hanson ordered that Mr. Dall be sent to the Utah State Hospital for treatment. Judge Hanson based his order on findings that Mr. Dall was mentally ill, and that the State Hospital was the only appropriate facility in existence to care for Mr. Dall's unique needs. Sent. 63-70. Judge Hanson specifically found that "there is no other place besides the Utah State Hospital," Sent. at 66 and "that commitment to the State Hospital is the only appropriate facility." Sent. at 67.

Judge Hanson also made the following findings with respect to victimization at the State Prison:

It may be that there will be a new program that will be available by then. But until that time, I'm satisfied that Mr. Dall needs assistance, and the only place that can be properly rendered at the present time is the Utah State Hospital.

I'm absolutely convinced that if I sent him to the Utah State Prison that he'd last--if he lasted three weeks, I'd be surprised. He's susceptible to influence. The evidence is clear that he does things to annoy people, and that he doesn't understand it, and knowing the general population at the Utah State Prison, he'd be

subjected to all kinds of things that would be [in]appropriate, many of them life threatening.

And while Mr. Dall has broken the law, I do not believe that our society has reached the point that we don't care about people that have problems like his. We do. I'm not going to throw him into that den of in[iquity] out there. And so--I think we all agree on that.

Sent. at 68. In addition, in his order of August 10, 1989, Judge Hanson found "that because of the defendant's mental condition, there is a serious risk that he will be harmed or killed if he is put in the Utah State Prison." See Exhibit 8 (Order dated August 10, 1989; Crim. 65-66; attached as Addendum A).

REVIEW OF SENTENCE

Judge Hanson scheduled review dates to monitor Mr. Dall's progress and treatment and to determine "whether there is some less restrictive facility or less expensive facility that provides the same treatment for Mr. Dall." Sent. at 67. On January 22, 1990, Judge Hanson conducted a review of Mr. Dall's sentence. As a result of statutory changes, see Utah Code Ann. § 77-38-1 et seq., jurisdiction of Mr. Dall's case had vested with the Psychiatric Security Review Board ("PSRB"). Judge Hanson was so advised, and took no further action. Crim. 69.

FIRST PSRB HEARING

On April 17, 1991,⁴ a hearing was conducted before the PSRB to determine whether it was appropriate to transfer Mr. Dall

⁴ It is not clear from the record whether the first hearing before the PSRB was held on April 17, 1991. Findings of Fact and Conclusions of Law dated April 24, 1991, list the date as April 19, 1991. Findings of Fact and Conclusions of Law dated July 2, 1991, list the date as April 17, 1991.

from the jurisdiction of the PSRB and the Utah State Hospital to the Utah Board of Pardons and potentially, the Utah State Prison. The standard of transfer applied by the PSRB was that of "maximum benefit of treatment."

Prior to the April 1991 hearing, James C. Bradshaw, attorney for Mr. Dall, requested that the PSRB delineate the guidelines used to determine transfer. Mr. Bradshaw also requested permission to appear before the PSRB on Mr. Dall's behalf. See Exhibit 6 (letter from James Bradshaw dated January 17, 1991, attached as Addendum D).

On February 25, 1991, Mr. Bradshaw sent a second letter to the PSRB, requesting the appointment of experts to testify on Mr. Dall's behalf. Mr. Dall was, at that point, indigent. Mr. Bradshaw expressed concern as to the independence of State Hospital experts and requested that the State pay all costs "associated with the retention of independent experts." See Exhibit 7 (letter dated February 25, 1991; attached as Addendum E). Mr. Bradshaw's request for appointment of independent experts was denied.

Mr. Dall was represented by James C. Bradshaw at the hearing. The State was represented by Assistant Attorney General Jeff Hunt. Dr. Philip Washburn testified on behalf of the Utah State Hospital. Following testimony from Dr. Washburn and argument, the PSRB found that Mr. Dall had received the "maximum benefit from treatment" from treatment and programs at the Utah State Hospital and ordered that Mr. Dall "be discharged from the Utah State Hospital and that he be remanded to the custody and

jurisdiction of the Utah State Board of Pardons." See Exhibit 9 (April 24, 1991 Order of the PSRB, attached as Addendum B). The PSRB's sole recommendation to the Board of Pardons regarding Mr. Dall was that his "psychotropic medication be continued." Id.

SECOND PSRB HEARING

The recording equipment used to preserve the record of the April 1991 proceedings malfunctioned and the record was destroyed. A second hearing before the PSRB was scheduled for June 28, 1991. As of that time, the PSRB had already concluded that Mr. Dall had received the "maximum benefit from treatment" as set forth in Utah Code Ann. § 77-16a-5.

On June 28, 1991, Mr. Dall was represented by Mr. Bradshaw, and the State was again represented by Assistant Attorney General Jeffrey Hunt. Dr. Washburn was called by Mr. Bradshaw and once again testified on behalf of the State Hospital. Mr. Dall was denied the appointment of experts and compulsory process. Evidence and testimony were presented to determine whether Mr. Dall had received the "maximum benefit of treatment" even though there had been a prior finding of maximum benefit in April of 1991.

(a) TESTIMONY OF DR. PHILIP WASHBURN

As of the time of the June 28, 1991, hearing before the PSRB, Dr. Washburn was the clinical director at the Utah State Hospital. Dr. Washburn participated in evaluations of Mr. Dall. Dr. Washburn and Dr. Delyse participated jointly in the treatment of Mr. Dall. See Transcript of June 28, 1991 Hearing before PSRB, (Exhibit 1, hereafter PSRB) at 7. During the course of Mr. Dall's

treatment and prior to the June 28 hearing, Dr. Washburn reviewed reports prepared by Dr. LeBegue and Dr. Gregory.

(1) Diagnosis

Dr. Washburn diagnosed Mr. Dall as having what he termed to be a "schizo-affective disorder with depressive features." He also diagnosed paraphilia. PSRB at 8. Dr. Washburn noted that Mr. Dall's personality difficulties extended back into childhood and, and there had been a variety of personality diagnoses. He felt it necessary to "emphasize the complex, difficult, long-term nature of his mental disorder." Id. Mr. Dall's mental health problems consisted of a "major mental disorder of a . . . more recent adult onset" and "ongoing personality problems" that extended into Mr. Dall's childhood. PSRB at 9.

Dr. Washburn testified that his diagnosis and Dr. LeBegue's diagnosis of pervasive developmental disorder were somewhat related. Pervasive Developmental Disorder is also known as "Childhood Schizophrenia." Dr. Washburn concluded that Mr. Dall suffers from "some type of schizophrenia spectrum disease or a range of diseases that would fit into the category of schizophrenia." PSRB at 9.

(2) Symptoms Exhibited

Mr. Dall was treated for a schizo-affective disorder and a schizoid personality. In addition to his difficulty relating to and understanding others, Mr. Dall was isolated emotionally and socially and demonstrated an "affective disturbance in terms of some depression." PSRB at 10. Dall's mood and affect have been

"blunted." There was also a serious suicide attempt where Mr. Dall placed a plastic bag over his face. Id. Mr. Dall also demonstrated "a kind of fantasy, delusional kind of thinking which reflected a thought disorder" which Dr. Washburn found to be "quite disturbing." PSRB at 11. Mr. Dall's delusional thinking included thoughts that through continued imprisonment, Mr. Dall's victim would come to love him and develop normal relations with him and thought that Mr. Dall could treat himself.

(3) Treatment

Mr. Dall had been exposed to a number of treatment regimens that included various medications and therapy. Dr. Washburn characterized Mr. Dall's response to the treatment as "limited, not as good as we would like." PSRB at 12. Dr. Washburn explained that the reason Mr. Dall's response was limited was because of the "long-term nature of his problem." Mr. Dall's problems were more ingrained because of their long-term nature. As a result, the remission of Mr. Dall's symptoms and problems had not been good. PSRB at 26.

Mr. Dall had been prescribed a variety of medications which included neuroleptic (anti-psychotic) medication and anti-depressants. Dall was started on Haldol in October of 1989 and was switched to Navine in November of 1989. Both are anti-psychotic medications. During the time he was on Navine, examiners noticed depression and prescribed Prozac. Mellaril was tried for a period of time, but was "rather sedating." PSRB at 11. Mellaril was discontinued on May 10 of 1991 and Mr. Dall was placed on Serentil.

PSRB at 16. According to Dr. Washburn, the Serentil was more effective in treating Mr. Dall than previous medications. The Serentil was less sedating and is better for people who have an "underlying organic brain impairment." Id. Dr. Washburn felt that the Serentil "works best for him." PSRB at 17.

Dr. Washburn testified that finding the correct medication for any given person takes time and must be determined individually. PSRB at 15. It is sometimes necessary to try a number of different medications, particularly "with a person who has this long term, more deeply ingrained kind of difficulty that does extend back into childhood and adolescent years." PSRB at 15. Ironically, it was not until May 10, 1991, some 2 1/2 weeks after Mr. Dall's first hearing before the PSRB that Dr. Washburn discovered that Serentil was a better medication for Mr. Dall. This improvement in Mr. Dall's treatment occurred after the PSRB had found that he had received "maximum benefit of treatment." In fact, Dr. Washburn testified that Dall improved between May of 1991, and June 28, 1991. PSRB at 37.

People such as Mr. Dall who are prescribed anti-psychotic and anti-depressant medication need to be monitored. Serious side effects can develop. PSRB at 18. The medications must be checked regularly, no longer than every two to three months. PSRB at 19. Where there is additional stress, such as the stress presented by a prison setting, medication must be reviewed and perhaps increased. PSRB at 19.

Dr. Washburn acknowledged that Mr. Dall lacked insight into his mental illness. He indicated that a lack of insight is quite common for people who have mental disorders, particularly with those who have a schizophrenic spectrum disease. PSRB at 35. Mr. Dall's ideas that he can cure himself are also symptoms or products of his mental illness. PSRB at 36.

(4) Prognosis

Dr. Washburn testified that the treatment of individuals with life-long psychiatric thinking disorders is focused on the reversal of symptoms and preventing decompensation, rather than on "curing" or "fixing" the individual. PSRB at 23, 24, 34-35. To accomplish this treatment goal it is necessary to administer a regimen of properly monitored medication and continuing counseling and therapy. PSRB at 24-25. Dr. Washburn indicated that if medication were either improperly monitored or discontinued or if therapy were discontinued, Mr. Dall would decompensate. PSRB at 27, 28. With schizophrenic patients, the recurrence of major symptoms can be as high as 60% in one year if they are away from medication. PSRB at 24.

Dr. Washburn stated that there is "a chance or likelihood" that Mr. Dall would decompensate if sent to prison. PSRB at 29. He testified that the State Hospital has had a number of mentally ill patients go to the prison and decompensate. PSRB at 30. Dr. Washburn has seen patients become "really psychotic" in the prison setting even though they may have been only slightly ill before prison incarceration. PSRB at 61-62. Dr. Washburn listed

several reasons. Initially, the individual environment changes, as do stress levels. PSRB at 29. In addition, a prison is not a hospital and does not have the resources of a hospital. PSRB at 29-30. The monitoring of medication is more difficult and the standards of monitoring medication are lower than at a hospital. PSRB at 30-32. Resources for therapy and counseling are severely limited. In addition, inmates at the prison are permitted to refuse medication, whereas patients at the hospital are required to take medication. PSRB at 30. Dr. Washburn testified that very few individuals in Mr. Dall's situation benefit from transfer from a hospital setting (with support, residential programs, follow-up programs and treatment programs), to the Utah State Prison. PSRB at 48.

Dr. Washburn concluded that prison treatment of mentally ill offenders is unacceptable. Prison is a stress-filled environment that can adversely effect mentally ill offenders. PSRB at 19, 29, 39, 31, 54, 56. Prison is more difficult for mentally ill offenders to cope with. PSRB at 61. Dr. Washburn stated that presently prison treatment of mentally ill offenders suffers from many problems. PSRB at 62. Because of the lack of resources and lack of understanding, prison permits non-treatment to occur. PSRB at 62. Dr. Washburn also agreed with Dr. LeBegue that there was a substantial risk that Mr. Dall would be harmed in prison or would harm himself.

(5) Maximum Benefit from Treatment

Dr. Washburn testified that while Mr. Dall had benefited from his stay at the hospital, he had not received the maximum benefit from treatment available at the hospital. In fact, Dr. Washburn testified that "he can still benefit from being at the Hospital. But we have to weigh the costs and benefits." PSRB at 51.

Dr. Washburn testified that to receive maximum benefit from treatment, the treatment must be ongoing. Mr. Dall needs treatment for the rest of his life. Maximum treatment for people such as Mr. Dall has to be ongoing treatment. PSRB at 39, 40. If economics and resources were not a consideration and if Mr. Dall were in a secure facility, Dr. Washburn would conclude that Mr. Dall had not received maximum benefit from treatment. PSRB at 39. Dr. Washburn did not say that Mr. Dall had received maximum benefit. PSRB at 44. Instead, Mr. Dall had reached a "plateau" where the need for bedspace outweighed the perceived potential benefit of continued treatment at the hospital. PSRB at 41. Dr. Washburn stated that as a professional, he strives not to make decisions based on economics alone. PSRB at 50.

Dr. Washburn testified that in his opinion guilty and mentally ill individuals need a system different from the prison. That system would have a hospital for the acute cases and then residential treatment programs where they could be transferred when acute treatment is not needed. PSRB at 41. "The prison system, to my way of thinking, would not be the best system." Id.

Dr. Washburn expressed concern over the maximum benefit of treatment standard. His initial concern was that the standard carried with it the connotation or implication of "Okay, now we're cured," when in fact "curing" is not the goal of psychiatric treatment for individuals such as Mr. Dall. PSRB at 23, 24, 34. Dr. Washburn stated that the maximum benefit from treatment model does not fit his way of thinking regarding the treatment of mentally ill psychiatric patients. PSRB at 42, 43. The standard does not take into account that an individual's treatment needs may change over time or that an individual such as Mr. Dall may require future hospitalizations. PSRB at 43. In addition, caseloads at the prison are so high that they exceed what Dr. Washburn would consider an acceptable manageable professional standard. PSRB at 54. Dr. Washburn expressed concern over the size of the prison caseload and the ability of the prison staff to provide treatment. Id.

Following the hearing the PSRB ruled again that Mr. Dall had received the "maximum benefit from treatment at the Utah State Hospital." PSRB at 65. The PSRB entered an order dated July 2, 1991, directing that "Kirk Wesley Dall be discharged from the Utah State Hospital and that he be remanded to the custody and jurisdiction of the Utah State Board of Pardons." The order directed that Kirk Dall remain in the custody of the State Hospital "until such time as the Board of Pardons conducts a hearing and custody is assumed by the Board of Pardons." See Exhibit 10 (July 2, 1991 Order of the PSRB; attached as Addendum C). The order made

no recommendations to the Utah Board of Pardons regarding treatment or placement of Mr. Dall. Id.

EVIDENTIARY HEARING

An evidentiary hearing in petitioner's case was held before the trial court on June 14, 1993. Testimony was taken from Dr. Philip Washburn, Dr. Robert J. Howell, and Mr. Robert Verville. See transcript, R. 603-721. The following exhibits were introduced:

- 1 - Transcript of PSRB hearing of June 28, 1991, with exhibits (referred to herein as "PSRB").
- 2 - Sentencing hearing transcript (July 28, 1989) (referred to herein as "Sent.").
- 3 - Settlement Stipulation in Henry v. DeLand, case No. 89-C-1124J in the United States District Court for the District of Utah.
- 4 - [Not received into evidence]
- 5 - Transcript of January 22, 1990 review hearing conducted by Judge Hanson.
- 6 - Letter dated January 17, 1991 from Mr. Bradshaw to PSRB.
- 7 - Letter dated February 25, 1991 from Mr. Bradshaw to PSRB.
- 8 - Sentencing order in State v. Dall, case no. 881991695, dated August 10, 1989.
- 9 - PSRB order dated April 24, 1991.
- 10 - PSRB order dated July 2, 1991.
- 11 - Application and order for stay in this case.

SUMMARY OF THE ARGUMENT

The "maximum benefit" standard was enacted after Mr. Dall's offense and sentencing. Application of that standard to Mr. Dall increases the severity of his punishment, and is thus an illegal application of an *ex post facto* law. The "maximum benefit" standard is also arbitrary and capricious.

The evidence at the PSRB hearing did not support the PSRB's finding that Mr. Dall had received maximum benefit from treatment. To the contrary, the evidence showed that Mr. Dall would continue to need treatment for the rest of his life.

Transfer of Mr. Dall to the prison would constitute cruel and unusual punishment, and unnecessary rigor. The prison is not adequately equipped to deal with persons such as Mr. Dall.

The PSRB'S action is an unlawful exercise of judicial power by the executive branch of government in violation of Article V, section 1 of the Utah Constitution. The failure to provide judicial review of PSRB actions renders the delegation of power to the PSRB unconstitutional. Additionally, Mr. Dall's constitutional right to appeal has been infringed.

Finally, Mr. Dall was denied compulsory process and financial access to expert testimony to present his case.

The order of the trial court denying the petition for writ of habeas corpus should be reversed. The order of the PSRB should be reversed and vacated.

ARGUMENT

POINT I. THE PSRB'S APPLICATION OF THE MAXIMUM BENEFIT STANDARD TO MR. DALL IS AN ILLEGAL APPLICATION OF AN EX POST FACTO LAW.

The PSRB applied the "maximum benefit from treatment" standard of Utah Code Ann. § 77-16a-5 to Mr. Dall in making its determination that he should be transferred to the jurisdiction and custody of the Board of Pardons. This standard was not adopted until March 13, 1990.⁵ The PSRB's attempted application of this new substantive standard to Mr. Dall is an illegal application of an *ex post facto* law in violation of Article I, section 18 of the Utah Constitution, and Article I, section 10, clause 1 of the United States Constitution.

It has been generally held and is well settled that:

any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

State v. Schreuder, 726 P.2d 1215, 1218 (Utah 1986) (quoting Beazell v. Ohio, 269 U.S. 167, 169-70, 46 S.Ct. 68, 70 L.Ed.2d 216 (1925)).

"[O]ne is not barred from challenging a change in the penal code on *ex post facto* grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old." Dobbert v. Florida, 432 U.S. 282, 300, 97 S.Ct. 2290, ___, 53 L.Ed.2d 344, 360 (1977); accord

⁵Utah Code Ann. § 77-16a-5 was repealed effective July 1, 1992. The "maximum benefit" standard is currently codified in Utah Code Ann. § 77-16a-203(3)(a) (Supp. 1993).

Miller v. Florida, 482 U.S. 423, 432, 107 S.Ct. 2446, ___, 96 L.Ed.2d 351, 361 (1987).

The correct inquiry here is whether there was fair notice and governmental restraint shown with respect to Mr. Dall, not whether he had a vested right to be incarcerated at the hospital rather than the prison:

The presence or absence of an affirmative right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Weaver v. Graham, 450 U.S. 24, 30-1, 101 S.Ct. 960, ___, 67 L.Ed.2d 17, 24 (1981) (finding statute reducing "gain time credits" available to inmates for good behavior while incarcerated to be *ex post facto* as applied to a prisoner whose crime was committed before effective date). Although Mr. Dall concedes he has no vested right to incarceration at the hospital, he is entitled to fair notice and governmental restraint when the State changes the substantive legal standard under which such transfers are evaluated.

This case must be distinguished from State v. Burgess, 870 P.2d 276 (Utah App. 1994). Burgess concerned whether application of the review procedures of Utah Code Ann. § 77-16a-203 was *ex post facto* as to Burgess when § 77-16a-1 et seq. were in

force at the time of his offense. No change in standard occurred; maximum benefit is utilized under both these transfer procedures. In fact, Burgess conceded that he is better off under the new statute. Id. at 280 n.6. In the instant case, the change was substantive and worked to Mr. Dall's detriment. Burgess sheds no light on the inquiry here.

At the time of Mr. Dall's offense, plea, and sentencing, the codified standard in effect for transfer of mentally ill offenders from the hospital to the prison is found in Utah Code Ann. § 77-16-5:

77-16-5. Recovery of committed person -- Certification to Board of Pardons.

(1) A person committed to the state hospital after sentence who has sufficiently recovered from his mental disease or defect shall be certified to the Board of Pardons by the clinical director.

Upon certification, jurisdiction over the person shall be transferred to the Board of Pardons and he shall be pardoned, paroled, or confined in the state prison for the unexpired term of the offense as provided by law with credit for time served while confined at the hospital. The certification of the clinical director of the hospital shall specify with particularity the medical facts justifying his certification.

(2) The provisions of law and the rules and regulations promulgated pursuant thereto, regarding parole shall apply to persons paroled from the state hospital.

(Emphasis added). This standard contemplates recovery, rather than maximum benefit, as the standard triggering transfer from the state hospital. In some cases, offenders will "sufficiently recover" to allow transfer to the prison. In Mr. Dall's case, such recovery is an extremely remote possibility. It certainly had not occurred by April 1991, by June 28, 1991, or even as of the present date.

Under the appropriate standard, Mr. Dall's transfer was inappropriate as of the present date and any date in the past. Judge Hanson's original order of commitment expressly found that Mr. Dall would be victimized if placed in prison, and may be subject to physical harm or even death. Nothing has changed as of the present time. Transfer to the prison under a different, less stringent standard subjected Mr. Dall to "more burdensome punishment" for his crime, in violation of his constitutional right to be free from *ex post facto* legislation.

The maximum benefit standard also irreconcilably conflicts with the codified standard for discharge of patients from the Utah State Hospital:

62A-12-229. Release from commitment.

. . . .
(3) When the patient has been committed to the division under judicial proceedings, the division shall use the procedures described in Sections 62A-12-240 and 62A-12-241.

Utah Code Ann. § 62A-12-229 (Supp. 1992).

62A-12-240. Periodic review and discharge.

The director or his designee shall, as frequently as practicable, examine or cause to be examined every person committed to the division. Whenever the director or his designee determines that the conditions justifying involuntary commitment no longer exist, he shall discharge the patient. If the patient has been committed through judicial proceedings, a report describing that determination shall be sent to the clerk of the court where the proceedings were held.

Utah Code Ann. § 62A-12-240 (Supp. 1992).

(1) The director or his designee may release an improved patient to less restrictive treatment as may be specified by the director or his designee, and agreed to in writing by the patient. Whenever the director or his

designee determines that the conditions justifying commitment no longer exist, the patient shall be discharged. If the patient has been committed through judicial proceedings, a report describing that determination shall be sent to the clerk of the court where the proceedings were held.

- (2) (a) The director or his designee is authorized to issue an order for the immediate placement of a patient not previously released from an order of commitment into a more restrictive environment, if the director or his designee has reason to believe that the less restrictive environment in which the patient has been placed is aggravating the patient's mental illness as defined in Subsection 62A-12-234(10), or that the patient has failed to comply with the specified treatment plan to which the patient had agreed in writing.

. . . .

Utah Code Ann. § 62A-12-241 (Supp. 1992).

Mr. Dall is still mentally ill. The "conditions justifying involuntary commitment" still existed, so discharge was not appropriate.⁶ Mr. Dall had not improved and had not agreed in writing to transfer to a less restrictive environment, so no such transfer was appropriate. The State has not shown that "the less restrictive environment in which the patient has been placed is aggravating [Mr. Dall's] mental illness," so transfer to a more restrictive environment was not appropriate. Mr. Dall should have stayed at the hospital.

At the evidentiary hearing, the State elicited testimony indicating that the State Hospital transferred prisoners from the

⁶The Court is referred to the testimony of Dr. Washburn at the evidentiary hearing, to the effect that (except for being somewhat less depressed) Mr. Dall is much the same person as when originally committed. R. 630-36.

Utah State Hospital to the prison under a clinical standard⁷ that in fact is similar to the "maximum benefit" standard that was later codified in Utah Code Ann. § 77-16a-5. Nevertheless, this *de facto* clinical maximum benefit standard conflicts with the well established law at that time under Utah Code Ann. § 77-16-5 and Title 62A. The State Hospital's ignorance of the law and utilization of its own arbitrary standard in the past in no way legitimizes application of *ex post facto* legislation to Mr. Dall.

Finally, the "maximum benefit standard is arbitrary and capricious. It bears no rational relation to the State's legitimate interests of penal facility security and treatment of mentally ill offenders. In State v. Copeland, 765 P.2d 1266 (Utah 1988), the Utah Supreme Court declared subsections (4)(c) and (4)(d) to be unconstitutional:

Because the criteria serve a wholly different function in the guilty and mentally ill statute than they serve in the involuntary commitment statute, some of the criteria now contained in section 77-35-21.5(4) are irrelevant to an evaluation of whether a defendant should be hospitalized instead of imprisoned. We believe that subsections (c) and (d) of section 77-35-21.5(4) are not rationally related to the sentencing process as opposed to civil commitment.

Id. at 1271.

Similarly, the "maximum benefit" standard is not rationally related to the sentencing process. A significant

⁷Mr. Verville, witness for the State, repeatedly confirmed that he was unaware of the applicable legal standard for transfer. R. 683, 699. Indeed, the State has adduced no evidence that indicates the PSRB was aware of the correct legal standard. Actions taken by a quasi-judicial administrative agency without reference to the applicable law are *per se* arbitrary and capricious.

portion of those sent to the State Hospital require ongoing care. Serious mental illnesses are not generally capable of being "fixed." A more rational inquiry would focus on the individual treatment needs of each patient/inmate, and what facilities within the correctional system are adequate to meet the medical needs of the person.

The "maximum benefit" standard is divorced from this proper inquiry, and instead may lead to a revolving door policy where inmates are shipped back and forth between the prison and the hospital for continuing cycles of stabilization at the hospital and decompensation at the prison. See PSRB at 30 (testimony of Dr. Washburn).

The "maximum benefit" standard is *ex post facto* with respect to Mr. Dall, and is arbitrary and capricious. The order of the PSRB, as reached under the "maximum benefit" standard, may not stand.

POINT II. EVEN IF THE "MAXIMUM BENEFIT" STANDARD APPLIES TO MR. DALL, THE EVIDENCE ADDUCED AT THE PSRB HEARING FAILS TO SUPPORT A FINDING THAT MR. DALL HAS RECEIVED THE MAXIMUM BENEFIT OF TREATMENT.

The evidence adduced at the PSRB hearing fails to support the PSRB finding that Mr. Dall has received maximum benefit from treatment. To the contrary, the evidence shows that Mr. Dall will continue to need treatment for the rest of his life, and continued to benefit from treatment at the hospital. The "maximum benefit" standard does not make sense as applicable to persons in Mr. Dall's

situation. Treatment must be ongoing, and the State Hospital is best suited to provide that treatment.

Even viewing all of the evidence presented to the PSRB in the light most favorable to its finding of maximum benefit, the challenged finding is so lacking in support as to be against the clear weight of the evidence, thus making it erroneous. See Smallwood v. Board of Review, 841 P.2d 716, 718-9 (Utah App. 1992).

The trial court made the following finding with respect to the evidence at the PSRB hearing:

The State called no witnesses at the June 28 hearing. Dr. Philip Washburn was called and examined by counsel for Mr. Dall, and cross-examined by the State. Dr. Washburn testified that Mr. Dall had not received maximum benefit from treatment, and that Mr. Dall must receive some treatment for the rest of his life. Dr. Washburn testified that Mr. Dall had reached a "plateau" in his treatment and was not progressing as rapidly as the Hospital would like, but that Mr. Dall would still benefit from further treatment at the Hospital.

R. 569 (Findings ¶9). This finding accurately summarizes the testimony presented. Dr. Washburn's testimony is described in detail supra at 18-25. The medical reports also reviewed by the PSRB do not address "maximum benefit" and whether Mr. Dall has received "maximum benefit."

This evidence fails to support a finding that Mr. Dall has received "maximum benefit." When asked directly whether Mr. Dall had received "maximum benefit," Dr. Washburn indicated that he had not. Instead, Dr. Washburn indicated that Mr. Dall had reached a plateau, where he was not progressing as rapidly as desired. The testimony indicates that the transfer decision, rather than being

based on "maximum benefit," was based on economic considerations and the need for more bed space for other mentally ill persons.

The testimony of Dr. Washburn states directly that Mr. Dall has not received "maximum benefit." The testimony concerning reaching a plateau, even viewed in the light most favorable to the State, does not contradict this conclusion. Only one witness testified, and his testimony is directly contrary to the finding reached by the PSRB. The PSRB's finding that Mr. Dall has received maximum benefit is against the clear weight of evidence, and is clearly erroneous.

The order of the PSRB must be reversed.

POINT III. TRANSFER OF MR. DALL TO THE
JURISDICTION OF THE BOARD OF PARDONS
CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The eighth amendment's cruel and unusual punishment provision originated in the English Bill of Rights of 1689. See Gregg v. Georgia, 428 U.S. 153, 169, 96 S.Ct. 2909, ___, 49 L.Ed.2d 859, 872 (1976). Its purpose in our constitution is to prohibit "infliction of uncivilized and inhuman punishments." Furman v. Georgia, 408 U.S. 238, 268, 92 S.Ct. 2726, ___, 33 L.Ed.2d 346, 367 (1972) (Brennan, J., concurring).

Article I, section 9 of the Utah Constitution parallels the federal constitution but goes one step further: "[p]ersons arrested or imprisoned shall not be treated with unnecessary

rigor." At least three other state constitutions contain a similar unnecessary rigor provision: Wyoming,⁸ Indiana,⁹ and Tennessee.¹⁰

The other states with an unnecessary rigor provision generally apply it to abuses which occur during pretrial incarceration. See Suter v. State, 88 N.E.2d 386 (Ind. 1949); Saunders v. State, 392 S.W.2d 916 (Tenn. 1965).

Of the four states with unnecessary rigor provisions, only Utah's provision appears in the same section as the cruel and unusual punishment section. The constitution's drafters, by including unnecessary rigor and cruel and unusual punishment in the same section, presumably intended that these provisions be interpreted as part of the cruel and unusual punishment proscription, and not as a separate provision regulating jail conditions. The unique development of Utah constitutional law supports this theory.

⁸Article I, section 16 of the Wyoming constitution states that "[n]o person arrested and confined in jail shall be treated with unnecessary rigor. The erection of safe and comfortable prisons, and inspection of prisons, and the humane treatment of prisoners shall be provided for." The Wyoming Constitution includes a separate provision to address cruel and unusual punishments. Wyoming Const. art. I, § 14.

⁹The Indiana Constitution protects persons arrested and confined in jail: "[n]o person arrested, or confined in jail, shall be treated with unnecessary rigor." Indiana Const. art. I, § 15. Indiana's Article I, section 16 addresses cruel and unusual punishments.

¹⁰Tennessee provides that "[n]o person arrested and confined in jail shall be treated with unnecessary rigor." Tennessee Const. art. I, § 13. Tennessee's Article I, section 14 addresses cruel and unusual punishment.

The inclusion of the unnecessary rigor provision in Utah's constitution is probably in some part a result of the early Mormon persecutions of the 1830's. See L. Arrington & D. Bitton, The Mormon Experience, 76-77 (1979).¹¹ The arrest and murder of Joseph and Hyrum Smith by vigilantes in 1844 had a profound effect on the remaining church members and initiated the Mormon exodus to Utah. Id.

Persecution of the Mormons continued in Utah. The territory made six unsuccessful bids for statehood between 1849 and 1887. R. Poll and T. Alexander, Utah's History, p. 243. The primary obstacle to statehood was the Mormons' practice of polygamy. Id. Many of the Mormon leaders who moved from Nauvoo to Utah were tried and jailed for violations of the Morrill Act of 1862¹² and Edmunds Act of 1882.¹³ The conditions of incarceration were described as wretched. Wallentine, supra at 17. It was not uncommon for judges to jail women with small children and place several prisoners in one cell. Id.

¹¹Joseph Smith was a self-taught constitutional scholar and spent countless hours teaching constitutional principles to church subordinates. His students later became ecclesiastical and political leaders that undoubtedly made significant contributions in drafting Utah's numerous constitutions. See Wallentine, Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I, Section 14, 17 Utah J. Contemp. L. 13 & n.57 (1991).

¹²The Morrill Act prohibited plural marriages, disincorporated the Mormon church, and restricted church ownership of property to \$50,000. Utah's History, p. 244.

¹³The Edmunds Act declared polygamy a felony and defined polygamous living or unlawful cohabitation as a misdemeanor. Utah's History, 259.

When Utah finally achieved statehood in the late 1890's, the drafters of the Utah constitution considered deleting the unnecessary rigor language in Article I, section 9. Those who criticized the provision pointed out that no other state had that language in its constitution. See Official Report of the Proceedings and Debates of the Convention to Adopt a Constitution for the State of Utah, pp. 267-8 (1898). After returning from committee, the provision was retained. Its inclusion is a strong indication that the drafters felt a need for protections greater than those found in the federal constitution. Indeed, the history of Mormon persecution from the 1830's until 1896 provides ample evidence that the constitutional drafters were well aware of improper treatment of accused and incarcerated persons, and were committed to insuring that it did not continue to occur in Utah.

A review of Utah's history reveals a longstanding recognition of the need for humane treatment of mentally ill persons and mentally ill offenders. Prior to achieving statehood, the early settlers established laws and facilities to ensure appropriate treatment for the mentally ill. Salt Lake City was the site of the first hospital for the mentally ill in the western United States. McKell, History of the Utah State Hospital, Univ. of Utah Library Archives (unpublished masters thesis). Twenty-four years prior to passage of the state constitution, territorial governor George C. Woods spoke of the need for government to address the problems of the mentally ill:

We now number about one hundred thousand souls with a steady and rapid increase from every quarter. We ought

to have an asylum for the insane. Humanity requires it. There is no public institution where these poor unfortunates can be kept. I should fail to do my duty were I to omit to urge you to take such steps immediately as will meet this great public want.

Message of Governors 1850-1876, pp 159-60 (Bound volume, Utah Historical Society).

The laws of the territory provided for humane treatment of mentally ill offenders:

Every person guilty of any unnecessarily harsh, cruel, or unkind treatment of, or any neglect of duty towards, any idiot, lunatic or insane person is guilty of a misdemeanor.

Laws of Utah, 1876, Ch. XI, Sec. 193. Current law codified in Utah Code Ann. § 62A-12-223 (1989) is to the same effect:

Anyone having care of a mentally ill person who unduly restrains that person, either with or without authority, or who treats that person with wanton severity or cruelty, or in any way abuses that person, is guilty of a class B misdemeanor, in addition to liability in an action for damages, or subject to other criminal charges.

Recognition of the treatment needs of the mentally ill continues to the present day. Utah Code Ann. § 17-5-89 (1991) provides "[t]he board of county commissioners of each county shall provide mental health services in accordance with Chapter 12, Title 62A, and substance abuse services in accordance with Chapter 8, Title 62A."

The objectives of the state hospital and other mental health facilities shall be to care for all persons within this state who are subject to the provisions of this part; and to furnish them with the proper attendance, medical treatment, seclusion, rest, restraint, amusement, occupation, and support that is conducive to their physical and mental well-being.

Utah Code Ann. § 62A-12-209(1) (Supp. 1992).

This statutory scheme requires that the State do more than stabilize mentally ill offenders and ship them off to prison. "The moral test of government is how it treats those who are in the dawn of life, the children; those who are in the twilight of life, the aged; and those who are in the shadows of life, the sick, the needy and the handicapped." Arnold v. Dep't of Health Services, 775 P.2d 521, 537 (Ariz. 1989) (quoting Hubert Humphrey). Arnold was a class action challenging breaches of statutory duties by the state and county in providing mental health care to indigent chronically mentally ill citizens. The Arizona Supreme Court affirmed a judgment in favor of the class.¹⁴

Utah has fared no better than Arizona in providing mental health care to its citizens:

This state has failed dramatically in its moral obligation to provide adequate support systems for adults disabled by mental retardation, as well as by mental illness, who enter the criminal justice system. I wish to underscore the point made by Justice Stewart in referring to the 1965 report of the Governor's Advisory Committee on Mental Retardation. Our laws in this area are useless and archaic, and our policies do not prevent injustice. It is hoped that the legislature will respond to this need.

State v. Murphy, 760 P.2d 280, 289 (Utah 1988) (Durham, J., concurring).

Finally, it is unfortunate, as Justice Durham suggests, that the state has largely ignored the problems presented by the fact that a significant number of people entering the criminal justice system suffer from mental illness or retardation. While mandatory incarceration and ever-longer sentences are politically popular,

¹⁴The Court is referred to the Appendix in Arnold, 775 P.2d at 538-9, which describes Arizona cases demonstrating the cost to society of inadequate mental health care.

spending money to adequately house those confined, much less treat those suffering from mental problems, is not. Until we as a society face up to the true consequences of the penal policies adopted in our name, the courts will continue to be confronted with agonizingly difficult cases such as this one.

Id. at 290 (Zimmerman, J., concurring).¹⁵

Mr. Dall is seriously at risk for decompensating if transferred to the prison. As a sex offender with odd behavior and irrational thinking that impacts negatively on his ability to interact and relate with others, he is an unusual risk for victimization at the prison. Mr. Dall does not respond to others in a logical fashion, and unwittingly provokes others to the point of anger. Sent. at 21, 39.

While antipsychotic medication may favorably impact on Mr. Dall, it does not impact his pronounced inability to interact with others. The State has not shown that the prison can adequately meet Mr. Dall's needs, or protect Mr. Dall from other

¹⁵The Settlement Stipulation in Henry v. DeLand indicates that, when forced, the State has made some progress. The Court should note that the settlement doesn't contemplate compliance until at least the fall of 1994. See Settlement at 22 (two year compliance from court approval), 31 (settlement entered by parties on September 8, 1992). The settlement does allow for early compliance, but the State has presented no evidence that full compliance has yet been achieved.

inmates.¹⁶ Under these circumstances, the order of the PSRB would inflict cruel and unusual punishment on Mr. Dall.

POINT IV. THE PSRB'S ACTION IS AN UNLAWFUL
EXERCISE OF JUDICIAL POWER BY THE
EXECUTIVE BRANCH OF GOVERNMENT IN
VIOLATION OF ARTICLE V, SECTION 1 OF THE
UTAH CONSTITUTION.

Prior to creation of the PSRB, sentencing of mentally ill offenders was governed by U.R.Cr.P. 21.5 (1989).¹⁷ This rule provided the sentencing court with several options. The court could order hospitalization, with reviews at least every six months. In accordance with the law in effect prior to July 1, 1989, this is what Judge Hanson intended to do with Mr. Dall. See Sent. at 43, 63-70. "Upon a review hearing, to be commenced prior to the expiration of the previous order, an order of hospitalization may be made for an indeterminate period if the court finds by clear and convincing evidence that the required conditions of Subsection (4) will continue for an indeterminate period." Rule 21.5(5), U.R.Cr.P. (1989). If such an indeterminate

¹⁶Mr. Verville testified that individuals with Mr. Dall's specific diagnosis could be housed anywhere within the prison. R. 688. The acute care facility for mentally ill offenders, which provides separation from the general prison population, only has 28 beds. R.685. Mr. Verville also testified that the Utah State Hospital has a patient/staff ratio of 1.8. The Settlement Stipulation in Henry v. DeLand indicates total mental health staffing of 22 (Stipulation at 12-3) for a mentally ill inmate population of 300 (per Mr. Verville, R. 676) to 450 (per Stipulation at 3, 13 (15% of population mentally ill, inmate population of 3000)). The patient/staff ratio in the prison is thus somewhere in the range of 13.6 to 20.5, or 7 to 11 times greater than Mr. Verville testified.

¹⁷This was the law in effect at the time of commission of Mr. Dall's offense.

commitment is ordered by the Judge, then discharge from the hospital is governed by Rule 21.5(8) (providing for hospital recommendation of discharge to be transmitted to Board of Pardons). The sentencing court could decline to commit an offender to the jurisdiction of the hospital (with its concomitant possibility of transfer from the hospital to the Board of Pardons) by continuing semi-annual reviews.

In Labrum v. Utah State Board of Pardons, 227 Utah Adv. Rep. 30, 35 (Utah 1993), the Utah Supreme Court recognized that "the establishment of an original parole release date is inherently a sentencing function." The Supreme Court held that fundamental principles of due process thus apply. Similarly, the function performed by the PSRB was inherently a sentencing function properly within the ambit of the judicial branch of government.

In creating the PSRB, the legislature delegated this judicial function of monitoring, determining if hospitalization continues to be appropriate, and determining if an offender should be sent to prison from the judiciary to the PSRB.¹⁸ This improper delegation violates the doctrine of separation of powers:

[E]ver since Marbury v. Madison, 1 Cranch 137, 2. L.Ed. 60, it has been recognized that one department of the government cannot control the judgment or official acts of another department, acting within its proper sphere of governmental power, within the scope of its authority. . . . But an act which is not within the scope and duty of executive power, even though and when attempted or

¹⁸Now, Utah law again allows the trial court to retain jurisdiction over an offender sentenced to the State Hospital. Utah Code Ann. § 77-16a-202(1)(b) (Supp. 1993). Mr. Dall thus falls within a limited group of offenders where the judge was denied this discretion.

performed by an executive body, may be annulled or prohibited by the judicial branch. For the executive bodies, like the individual persons making up the sovereign people can lawfully exercise only the rights and powers recognized by law as existing in them.

Mulcahy v. Pub. Serv. Comm'n, 117 P.2d 298, 299-300 (Utah 1941).

In Berkey v. Psychiatric Sec. Review Bd., 670 P.2d 1061 (Or. App. 1983), a challenge was made to the constitutionality of the delegation of judicial power from the Oregon circuit courts to the Oregon PSRB. In affirming the delegation, the court stated:

Delegation of adjudicatory powers to administrative agencies is valid if judicial review is provided at some stage of the proceeding.

Id. at 1064. In this case, the delegation of power from Utah district courts to the PSRB cannot stand. Mr. Dall has been provided no opportunity for judicial review. He attempted to appeal the PSRB's decision, but the appeal was dismissed on jurisdictional grounds.

Asbury v. Lombardi, 846 S.W.2d 196, 200 (Mo. banc 1993) is to the same effect:

The exercise of judicial functions by executive agencies is consistent with traditional concepts of the separation of powers. The quintessential power of the judiciary is the power to make *final* determinations of questions of law. Marbury v. Madison, 1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803); [other cites]. This power is a nondelegable power resting exclusively with the judiciary. The legislature "has no authority to create any other tribunal and invest it with judiciary power." [cite] Thus, while the legislature may allow for judicial or quasi-judicial decision-making by legislative or executive (administrative) agencies, it may not preclude judicial review of those decisions. Nor may the legislature alter the principal power of the judiciary to make the *final* review. Short of these two considerations, however, there will not customarily be found a violation of the separation of powers clause.

(Footnote omitted.). Asbury held the provisions for appeal from decisions of the Personnel Advisory Board to be unconstitutional as violative of the separation of powers clause of the Missouri Constitution.

Utah case law is in accord. See White River Shale Oil Corp. v. Pub. Serv. Comm'n, 700 P.2d 1088, 1092 (Utah 1985) (procedures for rehearings and for application for writ of certiorari provided adequate procedural safeguards to sustain delegation of power); Carlsen v. State Dep't of Social Services, 722 P.2d 775, 778 (Utah 1986) ("When a quasi-judicial function has been delegated by statute to the administrative body charged with the responsibility of enforcing the statute, plaintiff does not have a constitutional right to insist that the agency may only bring an action in court. He was afforded an opportunity to present his claims and defenses to the district court judge [on appeal] . . .").

As originally enacted, Utah Code Ann. § 77-38-2(6) provided:

(6) When a person over whom the board exercises jurisdiction is adversely affected or aggrieved by a final order of the board, that person is entitled to judicial review of the final order by the Court of Appeals only if the court finds, based upon a review of the evidence contained in the record, that there is no substantial evidence that supports the conclusion of the board, or that the board's decision was arbitrary and capricious. If judicial review is granted, the person is entitled to counsel. If the person is indigent, counsel shall be appointed in accordance with Chapter 32 of this title.

This section was amended to provide "[w]hen a person over whom the board exercises jurisdiction, ~~who has been adjudicated and found to~~

be not guilty by reason of insanity, is adversely affected or aggrieved . . ." Utah Code Ann. § 77-38-2(6) (effective March 13, 1990) (red-lined form). This amendment completely eliminated Mr. Dall's right of judicial review.

No judicial officer has determined that the prison is appropriate for Mr. Dall. To the contrary, Judge Hanson expressly found that he was "not going to throw him into that den of in[iquity] out there." Sent. at 68. The PSRB sentenced Mr. Dall to prison for the first time, without opportunity for judicial review. A habeas corpus action under U.R.C.P. 65B is not the review the constitution contemplates. "It is not a substitute for and cannot properly be treated as a regular appellate review." Brown v. Turner, 440 P.2d 968, 969 (Utah 1968) (citing Price v. Johnson, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356); accord Codianna v. Morris, 660 P.2d 1101 (Utah 1983). Without regular appellate review, the PSRB runs afoul of the separation of powers clause in Article V, section 1 of the Utah Constitution. The PSRB's order cannot stand.

POINT V. THE LACK OF AN APPEAL RIGHT FROM ORDERS OF THE PSRB VIOLATES MR. DALL'S CONSTITUTIONAL RIGHTS UNDER ARTICLE I, SECTIONS 7 AND 12, AND ARTICLE VIII, SECTION 5 OF THE UTAH CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The lack of an appeal right from PSRB orders violates due process under federal and state constitutions, and the right to appeal under Article I, section 12 and Article VIII, section 5 of the Utah Constitution. The Utah Constitution mandates that Mr.

Dall be granted an appeal. As originally enacted, Utah Code Ann. § 77-38-2(6) did provide a right to appeal, complete with court appointed counsel if necessary. The March 13, 1990 amendments to § 77-38-2(6) eliminated this appeal right except for persons "found not guilty by reason of insanity." Absent this fundamental right of appeal, the PSRB procedures violate due process and the constitutional right to appeal. The order of the PSRB must be vacated.

POINT VI. THE PSRB'S DENIAL OF COMPULSORY
PROCESS AND FINANCIAL ACCESS TO EXPERT
TESTIMONY VIOLATED MR. DALL'S
CONSTITUTIONAL RIGHTS UNDER ARTICLE I,
SECTIONS 7 AND 12 OF THE UTAH
CONSTITUTION AND THE FIFTH, SIXTH, AND
FOURTEENTH AMENDMENTS TO THE UNITED
STATES CONSTITUTION.

Mr. Dall's PSRB hearing was a "critical stage" of his case. "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, ___, 51 L.Ed.2d 393, 402 (1977). The legislature itself recognized the importance of PSRB proceedings by requiring access to counsel when PSRB orders are appealed. Utah Code Ann. § 77-38-2(6) (prior to March 13, 1990 amendments). Obviously, if an appeal of a PSRB order is a critical stage, the hearing leading to that order is also a critical stage.

Fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system." Ross v. Moffitt, 417 U.S. 600, 612, 94 S.Ct.

2437, ___, 41 L.Ed.2d 341, 353 (1974). "[W]hen the State has made the defendant's mental condition relevant . . . to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." Ake v. Oklahoma, 470 U.S. 68, 80, 105 S.Ct. 1087, ___, 84 L.Ed.2d 53, 64 (1985).

The PSRB hearing was specifically addressed to the question of the proper facility to house Mr. Dall. The nature of his punishment and severity of his incarceration were directly implicated. As of that time, no judicial or other entity had determined that prison was appropriate for Mr. Dall. He was entitled to a fair opportunity to present his case. Mr. Dall wanted to call Dr. Breck LeBegue to testify on his behalf, but was not afforded the opportunity. Compare February 25, 1991 letter (requesting compulsory process and funding for expert testimony) (exhibit 7 at evidentiary hearing, attached as Addendum E) with June 28, 1991 PSRB hearing transcript (Exhibit 1; only Dr. Washburn called, Mr. Dall called no experts or other witnesses, as he could not afford to pay Dr. LeBegue for expert testimony). The failure of the PSRB to provide Mr. Dall the means of presenting his case require that the PSRB's order be vacated.

CONCLUSION

In making its order, the Psychiatric Security Review Board illegally applied an arbitrary and capricious and *ex post facto* "maximum benefit" standard, rather than the proper standards found in § 77-16-5 and § 62A-12-241. The lack of a right of appeal

violates Mr. Dall's constitutional right to an appeal, and causes the delegation of judicial power to the PSRB to violate the separation of powers provision of the Utah Constitution. Denial of compulsory process and financial means to obtain expert testimony likewise violates Mr. Dall's constitutional rights. The order of the PSRB cannot stand, and should be vacated. Mr. Dall should be returned to the State Hospital.¹⁹

¹⁹If Mr. Dall prevails here, a question is raised over who properly has jurisdiction. Appellant asserts that his case should be referred to Judge Hanson for a review of sentence. See petitioner's Pre-Hearing Memorandum at 6-7, R. 288-323 at 293-4:


Jurisdiction over Mr. Dall passed from the trial court to the PSRB pursuant to the judge's sentencing order dated August 10, 1989. The PSRB initiated transfer proceedings by holding its evidentiary hearings and entering its orders, but no transfer to the jurisdiction of the Board of Pardons was ever consummated. The order entered provided:

Until such time as the Board of Pardons conducts a hearing and custody is assumed by the Board of Pardons, Kirk Wesley Dall shall remain in the custody of the Utah State Hospital.


The order entered was an illegal application of an *ex post facto* law, and therefore can have no effect. . . . Utah R. Crim. P. 21.5(6) (1993) governed transfer from the PSRB. This section expressly provides that mentally ill offenders remain under the jurisdiction of the PSRB until the Board of Pardons takes action. Utah Code Ann. § 77-16a-5(e) (effective March 13, 1990) is to the same effect.

For all these reasons, the PSRB retained jurisdiction over Mr. Dall up to the time the PSRB ceased to exist on July 1, 1992. When the PSRB ceased to exist, it is unclear where jurisdiction in Mr. Dall reverted. Mr. Dall asserts that the only logical place for jurisdiction to revert is back to the sentencing trial court. The trial court is the only other entity that ever had jurisdiction over Mr. Dall, and is the entity that had jurisdiction immediately prior to the PSRB.

RESPECTFULLY SUBMITTED this 2nd day of June, 1994.



ROBERT K. HEINEMAN
Attorney for Defendant/Appellant



MARK R. MOFFAT
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Robert K. Heineman, hereby certify that I have caused four copies of the foregoing BRIEF OF APPELLANT to be delivered to James H. Beadles, Attorney General's Office, 330 South 300 East, Salt Lake City, Utah 84111, this 2nd day of June, 1994.



Robert K. Heineman

DELIVERED/MAILED this 2 day of June, 1994.



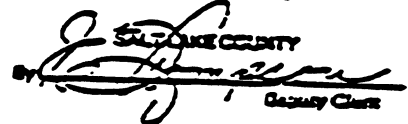
ADDENDUM A

August 10, 1989 Sentence

FILED DISTRICT COURT
Third Judicial District

JAMES C. BRADSHAW, #3768
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOCIATION
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Salt Lake City, Utah 84111
Telephone: 532-5444

AUG 10 1989

SALT LAKE COUNTY
by  Deputy Clerk

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

THE STATE OF UTAH,	:	ORDER
Plaintiff,	:	
v.	:	
KIRK W. DALL,	:	Case No. 881991695FS
Defendant.	:	JUDGE TIMOTHY R. HANSON

The above-entitled matter came on for hearing on the 28th of July, 1989. The defendant appearing with counsel, JAMES C. BRADSHAW, and the State represented by TOM VUYK.

After hearing the testimony of Dr. Breck LeBeque, Monica Ebert, and reviewing the written opinion letter of the Utah State Hospital the Court finds by clear and convincing evidence:

1) That the defendant, Kirk W. Dall, suffers from a mental disease or defect as defined in 576-2-305.

2) That because of his mental illness the defendant poses a danger to others if placed in a probational setting.

3) That because of the defendant's mental condition, there is a serious risk that he will be harmed or killed if he is put in the Utah State Prison.

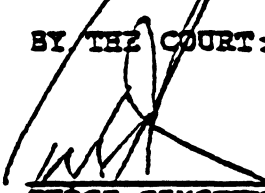
4) That the dangers outlined in paragraphs 2 and 3 above are immediate in the sense contemplated by the policies and goals of the Guilty and Mentally Ill statute and as articulated in State v. Copeland, 765 P.2d 1266 (Utah 1988).

5) That the Utah State Hospital is an adequate and appropriate facility to meet the defendant's care and treatment needs.

Based upon the foregoing findings the Court orders that the defendant be committed to the jurisdiction of the Psychiatric Security Review Board to be placed in the Utah State Hospital where he is to undergo any or all treatment that is deemed appropriate.

DATED this 10 day of August, 1989.

BY THE COURT:

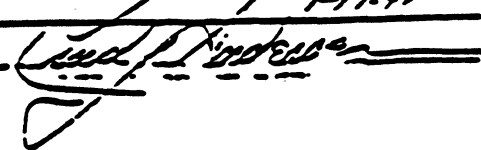

JUDGE TIMOTHY R. HANSON
Third District Court

Emily Thompson
Attest

DELIVERED a copy of the foregoing to the Office of the Salt Lake County Attorney, 231 East 400 South, Salt Lake City, Utah 84111 this _____ day of August, 1989.

~~I CERTIFY THAT THIS IS A TRUE COPY OF A
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY, STATE OF
UTAH.~~

DATE: 1-17-91



Copy to Bureau 8/16/89 ETL

Copy to Psychiatric Review Board 2/7/90

ETL

ADDENDUM B

April 24, 1991 PSRB Order

PSYCHIATRIC SECURITY REVIEW BOARD
Social Services Bldg.
Fourth Floor
Salt Lake City, Utah 84103
(801)538-4504

ORDER OF THE PSYCHIATRIC SECURITY REVIEW BOARD, STATE OF UTAH

Kirk Wesley Dall) Findings of Fact and Conclusions of Law

On August 10, 1989, the above-named defendant, having been found guilty and mentally ill, was committed by the Honorable Timothy R. Hanson, Judge in the Third Judicial District Court of Salt Lake County, State of Utah, to the Utah State Prison for a period of not less than one (1) or more than fifteen (15) years for forcible sexual abuse and for a period of not less than one (1) or more than fifteen (15) years for kidnapping to be served concurrently. On that date the defendant was ordered hospitalized at the Utah State Hospital and placed under the jurisdiction of the Psychiatric Security Review Board pursuant to Utah Code Annotated S77-35-21.5.

On December 17, 1990, the Utah State Hospital petitioned the Psychiatric Security Review Board to hold a statutory hearing on Kirk Wesley Dall to determine whether placement outside of the Utah State Hospital was appropriate. The hearing was set for January 18, 1991.

On January 17, 1991, Mr. Dall's defense attorney, requested a continuance. The hearing was rescheduled for February 15, 1991. On February 8, 1991, Mr. Dall's attorney informed the Board that he would not be able to make the hearing on February 15, 1991. The

hearing was continued to March 15, 1991. On March 15, 1991, a hospital staff witness necessary to Mr. Dall's case did not appear. The case was continued until April 19, 1991.

On April 19, 1991, Kirk Wesley Dall appeared before the Psychiatric Security Review Board. He was represented by James Bradshaw, from the Legal Defender's Office; the State was represented by Jeff Hunt. Upon a complete review of the records and an interview with Mr. Dall, the Board found by clear and convincing evidence that Mr. Dall had received maximum benefit from treatment at the Hospital and that custody should be transferred to the Utah State Board of Pardons.

THEREFORE, THE PSYCHIATRIC SECURITY REVIEW BOARD ORDERS THAT KIRK WESLEY DALL BE DISCHARGED FROM THE UTAH STATE HOSPITAL AND THAT HE BE REMANDED TO THE CUSTODY AND JURISDICTION OF THE UTAH STATE BOARD OF PARDONS.

Recommendation to the Board of Pardons: It is recommended by the Board that Mr. Dall's psychotropic medications be continued.

Until such time as the Board of Pardons conducts a hearing and custody is assumed by the Board of Pardons, Kirk Wesley Dall shall remain in the custody of the Utah State Hospital.

Dated this 24th day of April, 1991.



Psychiatric Security Review Board
Chairman

ADDENDUM C

July 2, 1991 PSRB Order

PSYCHIATRIC SECURITY REVIEW BOARD
Social Services Bldg.
Fourth Floor
Salt Lake City, Utah 84103
(801)538-4504

ORDER OF THE PSYCHIATRIC SECURITY REVIEW BOARD, STATE OF UTAH

Kirk Wesley Dall) Findings of Fact and Conclusions of Law

On August 10, 1989, the above-named defendant, having been found guilty and mentally ill, was committed by the Honorable Timothy R. Hanson, Judge in the Third Judicial District Court of Salt Lake County, State of Utah, to the Utah State Prison for a period of not less than one (1) or more than fifteen (15) years for forcible sexual abuse and for a period of not less than one (1) or more than fifteen (15) years for kidnapping to be served concurrently. On that date the defendant was ordered hospitalized at the Utah State Hospital until the completion of his sentence or until the Psychiatric Security Review Board deemed otherwise pursuant to Utah Code Annotated S77-35-21.5.

On December 17, 1990, the Utah State Hospital petitioned the Psychiatric Security Review Board to hold a statutory hearing on Kirk Wesley Dall to determine whether placement outside of the Utah State Hospital was appropriate. The hearing was set for January 18, 1991.

On January 17, 1991, Mr. Dall's defense attorney, requested a continuance. The hearing was rescheduled for February 15, 1991. Mr. Dall's attorney was unable to make the hearing in February and the hearing was rescheduled for March 15, 1991. On March 15, 1991,

a hospital staff witness necessary to Mr. Dall's case did not appear. The case was continued until April 17, 1991.

On April 17, 1991, Kirk Wesley Dall appeared before the Psychiatric Security Review Board. He was represented by James Bradshaw, from the Legal Defender's Office; the State was represented by Jeff Hunt. Upon a complete review of the records and an interview with Mr. Dall, the Board found by clear and convincing evidence that Mr. Dall had received maximum benefit from treatment at the Hospital and that custody should be transferred to the Utah State Board of Pardons.

Mr. Bradshaw appealed the findings of the Board on June 3, 1991. At that time it was discovered that the tape recorder had failed to record the hearing. The defense attorney and the attorney representing the State were unable to reach an agreement upon the content of the hearing. The hearing was rescheduled for June 28, 1991.

On June 28, 1991, after a complete review of the records and an interview with Mr. Dall, the Board found again by clear and convincing evidence that Mr. Dall had received maximum benefit from treatment at the Utah State Hospital and that custody should be transferred to the Utah State Board of Pardons.

THEREFORE, THE PSYCHIATRIC SECURITY REVIEW BOARD ORDERS THAT KIRK WESLEY DALL BE DISCHARGED FROM THE UTAH STATE HOSPITAL AND THAT HE BE REMANDED TO THE CUSTODY AND JURISDICTION OF THE UTAH STATE BOARD OF PARDONS.

Until such time as the Board of Pardons conducts a hearing and custody is assumed by the Board of Pardons, Kirk Wesley Dall shall remain in the custody of the Utah State Hospital.

Dated this 2nd day of July, 1991.



Psychiatric Security Review Board
Chairman

Copies sent to: Mr. Bradshaw, Mr. Hunt, the Board of Pardons, the Appellate Court

ADDENDUM D

January 17, 1991 letter

SALT LAKE LEGAL DEFENDER ASSOCIATION

424 EAST FIFTH SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111
532-5444

Established in 1965

JOHN HILL
Director

BOARD OF TRUSTEES

IMI MITSUNAGA
Chairman

I. GILBERT ATHAY
MARVIN W. DAVIS
IONEL H. FRANKEL
JOSEPH A. GETER
RAY GROUSSMAN
TEWART HANSON, JR.
RON HINDE
DO CAROL NESSET-SALE
JOHN O'CONNELL
FRANK H. PALMER

January 17, 1991

Ms. Cheryl Hansen
Administrative Assistant
Psychiatric Review Board
120 North 200 West
Salt Lake City, UT 84103

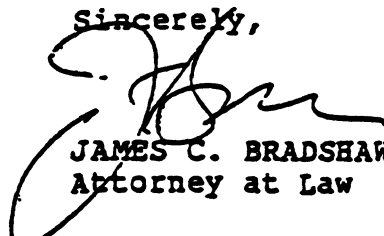
Dear Ms. Hansen:

I hereby request permission to appear before the Psychiatric Review Board on behalf of Mr. Kirk Dall. However, I would request that the matter set for January 18, 1991 be continued so that I might have adequate time to address the relevant issues. I have spoken with Mr. Dall and he is in full support of both my representation and my request to continue the matter.

In the short time I have considered this matter I have had some difficulty in finding the standards which will be applied at Mr. Dall's hearing. I would request that the guidelines the board will use in determining whether the defendant should remain in the hospital be provided to me prior to Mr. Dall's hearing.

Your cooperation in this matter is greatly appreciated.

Sincerely,



JAMES C. BRADSHAW
Attorney at Law

JCB:ejo

ADDENDUM E

February 25, 1991 letter

SALT LAKE LEGAL DEFENDER ASSOCIATION

**424 EAST FIFTH SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111
532-5444**

Established in 1965

F. JOHN HILL
Director

BOARD OF TRUSTEES

JIMI MITSUNAGA
Chairman

**D. GILBERT ATHAY
MARVIN W. DAVIS
LIONEL H. FRANKEL
JOSEPH A. GETER
RAY GROUSSMAN
STEWART HANSON, JR.
LON HINDE
JO CAROL NESSET-SALE
JOHN O'CONNELL
GRANT H. PALMER**

February 25, 1991

**Ms. Cheryl Hansen
Psychiatric Security Review Board
125 North 200 West
3rd Floor
Salt Lake City, UT 84103**

RE: Kirk Dall

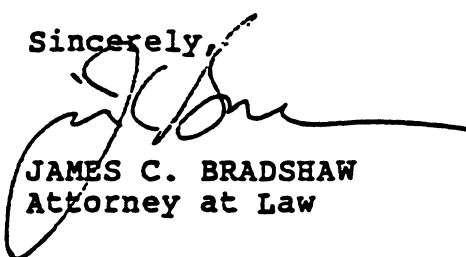
Dear Ms. Hansen:

In preparing for the upcoming hearing before the Psychiatric Security Review Board it appears to me that there will be a need for Mr. Dall to retain experts to testify on his behalf at the hearing. I would specifically request that Dr. Breck LeBegue and Dr. Vickie Gregory be appointed to offer independant evidence on the defendant's mental status and his prognosis. I am concerned about the independence of the hospital experts in light of the obvious overcrowding at the hospital.

It is my opinion that Mr. Dall's appearance before the Psychiatric Security Review Board is a "critical stage" in the proceedings against him and accordingly he should be entitled the fundamental rights guaranteed a criminal defendant under the Utah State and United States Constitutions. Accordingly, I am formally requesting appointment, and payment by the State, of all costs

associated with the retention of independant experts. Drs. Gregory and LeBegue both presented evidence at the time Kirk appeared before Judge Hansen for determination of whether he qualified as guilty and mentally ill. Your promptest response to this request would be greatly appreciated.

Sincerely,



JAMES C. BRADSHAW
Attorney at Law

JCB:ejo

ADDENDUM F

Statutory and Constitutional Provisions

Article I, section 10, clause 1 of the United States Constitution provides:

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

The fifth amendment to the United States Constitution provides:

[Criminal actions - Provisions concerning - Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The sixth amendment to the United States Constitution provides:

[Rights of accused.]

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 defense.

The eighth amendment to the United States Constitution provides:

[Bail -- Punishment.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the fourteenth amendment to the United States Constitution provides:

Section 1. [Citizenship -- Due process of law -- Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Emphasis added.

Article I, section 7 of the Utah Constitution provides:

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Article I, section 9 of the Utah Constitution provides:

Sec. 9 [Excessive bail and fines -- Cruel punishments]

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

Article I, section 12 of the Utah Constitution provides:

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 testify 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.

Article I, section 18 of the Utah Constitution provides:

Sec. 18. [Attainder -- Ex post facto laws -- Impairing contracts.]

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.

Article V, section 1 of the Utah Constitution provides:

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.

Article VIII, section 5 of the Utah Constitution provides:

**Sec. 5. [Jurisdiction of district court and other courts
-- Right of appeal.]**

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

Utah Code Ann. § 17-5-89 (1991) provides:

17-5-89. Mental health and substance abuse services.

The board of county commissioners of each county shall provide mental health services in accordance with Chapter 12, Title 62A, and substance abuse services in accordance with Chapter 8, Title 62A.

Utah Code Ann. § 62A-12-209(1) (Supp. 1992) provides:

62A-12-209. Objectives of state hospital and other facilities -- Persons who may be admitted to state hospital.

(1) The objectives of the state hospital and other mental health facilities shall be to care for all persons within this state who are subject to the provisions of this part; and to furnish them with the proper attendance, medical treatment, seclusion, rest, restraint, amusement, occupation, and support that is conducive to their physical and mental well-being.

Utah Code Ann. § 62A-12-229 (Supp. 1992) provides:

62A-12-229. Release from commitment.

. . .

(3) When the patient has been committed to the division under judicial proceedings, the division shall use the procedures described in Sections 62A-12-240 and 62A-12-241.

Utah Code Ann. § 62A-12-223 (1989) provides:

62A-12-223. Abuse of mentally ill persons -- Criminal and civil liability.

Anyone having care of a mentally ill person who unduly restrains that person, either with or without authority, or who treats that person with wanton severity or cruelty, or in any way abuses that person, is guilty of a class B misdemeanor, in addition to liability in an action for damages, or subject to other criminal charges.

Utah Code Ann. § 62A-12-240 (Supp. 1992) provides:

62A-12-240. Periodic review and discharge.

The director or his designee shall, as frequently as practicable, examine or cause to be examined every person committed to the division. Whenever the director or his designee determines that the conditions justifying involuntary commitment no longer exist, he shall discharge the patient. If the patient has been committed through judicial proceedings, a report describing that determination shall be sent to the clerk of the court where the proceedings were held.

Utah Code Ann. § 62A-12-241 (Supp. 1992) provides:

62A-12-241. Release of patient to receive other treatment -- Placement in more restrictive environment -- Procedures.

(1) The director or his designee may release an improved patient to less restrictive treatment as may be specified by the director or his designee, and agreed to in writing by the patient. Whenever the director or his designee determines that the conditions justifying commitment no longer exist, the patient shall be

discharged. If the patient has been committed through judicial proceedings, a report describing that determination shall be sent to the clerk of the court where the proceedings were held.

- (2) (a) The director or his designee is authorized to issue an order for the immediate placement of a patient not previously released from an order of commitment into a more restrictive environment, if the director or his designee has reason to believe that the less restrictive environment in which the patient has been placed is aggravating the patient's mental illness as defined in Subsection 62A-12-234(10), or that the patient has failed to comply with the specified treatment plan to which the patient had agreed in writing.

. . .

Utah Code Ann. § 76-2-305(4) (1990) provided:

(4) "Mental illness" means a mental disease or defect. A mental defect may be a congenital condition or one the result of injury or a residual effect of a physical or mental disease. Mental illness does not mean a personality or character disorder or abnormality manifested only by repeated criminal conduct.

Utah Code Ann. § 77-16-5 (1990) (enacted 1980) provides:

77-16-5. Recovery of committed person -- Certification to Board of Pardons.

(1) A person committed to the state hospital after sentence who has sufficiently recovered from his mental disease or defect shall be certified to the Board of Pardons by the clinical director.

Upon certification, jurisdiction over the person shall be transferred to the Board of Pardons and he shall be pardoned, paroled, or confined in the state prison for the unexpired term of the offense as provided by law with credit for time served while confined at the hospital. The certification of the clinical director of the hospital shall specify with particularity the medical facts justifying his certification.

(2) The provisions of law and the rules and regulations promulgated pursuant thereto, regarding parole shall apply to persons paroled from the state hospital.

Emphasis added.

(repealed July 1, 1992) provided:

77-16a-5. Discharge from psychiatric Security Review Board -- Board of Pardons -- Parole -- Review.

With regard to mentally ill but not mentally retarded persons:

(1) Every six months, the Psychiatric Security Review Board shall review the condition of each person under its jurisdiction at the state hospital, to determine whether custody should be transferred to the Board of Pardons.

(2) (a) If at any time after commitment of a person to the hospital under Section 77-16a-4 whose sentence has not expired, if the superintendent of the hospital, or his designee, is of the opinion that the person: (i) is no longer mentally ill, or (ii) is still mentally ill and continues to be a danger to himself or others, but can be controlled if proper care, medication, and treatment are provided, and, in either case, (iii) has reached maximum benefit from the programs at the hospital, the superintendent or his designee shall apply to the Psychiatric Security Review Board for a transfer of custody to the Board of Pardons.

(b) The application shall be accompanied by a report setting forth the facts supporting the opinion of the superintendent or his designee, which shall include the clinical facts, the diagnosis, the course of treatment received at the hospital, the prognosis of the remission of the symptoms, the potential for recidivism and the danger to himself or others, and the recommendations for future treatment. If the recommendations included in the application involve treatment in the community under conditions of parole or conditional release, the application must also be accompanied by a verified plan of treatment.

(3) (a) When the Psychiatric Security Review Board proposes to transfer custody of a defendant from the Utah State Hospital to the Board of Pardons prior to the expiration of sentence, it shall transmit to the Board of Pardons a report on the condition of the defendant, including all pertinent information supplied by the superintendent or his designee.

(b) The Psychiatric Security Review Board may make recommendations to the Board of Pardons as follows:

(i) that the defendant serve any or all of his unexpired term of sentence at the state prison;

(ii) that the defendant be placed on parole; or

(iii) that the defendant be recommitted to the jurisdiction of the Psychiatric Security Review Board for conditional release in accordance with Chapter 38 of this title.

(c) If the Psychiatric Security Review Board recommends to the Board of Pardons that a defendant be placed on parole or be placed under its jurisdiction for conditional release, it shall submit with that recommendation a specific program for the care, custody, and treatment of the defendant. If the defendant is placed under the jurisdiction of the Psychiatric Security Review Board by the Board of Pardons for conditional release, failure to complete that program shall be grounds for revocation of conditional release in accordance with Chapter 38 of this title.

(d) The Board of Pardons shall direct that the defendant serve any or all of the unexpired term of the sentence at the Utah State Prison, place the defendant on parole, or commit the defendant to the jurisdiction of the Psychiatric Security Review Board for conditional release in accordance with Chapter 38.

(e) Pending action of the Board of Pardons, the defendant shall remain under the jurisdiction of the Psychiatric Security Review Board at the Utah State Hospital.

(4) (a) If the defendant is placed on parole, treatment shall, upon the recommendation of the Psychiatric Security Review Board, be made a condition of parole. Failure to continue treatment or other condition of parole except by agreement with the designated mental health services provider and the Board of Pardons is a basis for initiation of parole violation hearings by the Board of Pardons.

(b) The period of parole may not be for fewer than five years or until the expiration of the defendant's sentence, whichever occurs first, and may not be reduced without consideration by the Board of Pardons of a

current report on the mental health status of the offender.

Emphasis added.

Utah Code Ann. § 77-16a-203(3)(a) (effective July 1, 1992) provides:

77-16a-203. Review of guilty and mentally ill persons committed to department -- Recommendations for transfer.

(3) (a) The executive director shall notify the UDC medical administrator, and the board's mental health adviser that a mentally ill offender is eligible for transfer to UDC if the review team finds that the offender:

- (i) is no longer mentally ill; or
- (ii) is still mentally ill and continues to be a danger to himself or others, but can be controlled if adequate care, medication, and treatment are provided, and that he has reached maximum benefit from the programs within the department.

Utah Code Ann. § 77-38-2(6) (as amended March 13, 1990)

(red-lined form) (repealed July 1, 1992) provided:

(6) When a person over whom the board exercises jurisdiction, who has been adjudicated and found to be not guilty by reason of insanity, is adversely affected or aggrieved by a final order of the board, that person is entitled to judicial review of the final order by the Court of Appeals only if the court finds, based upon a review of the evidence contained in the record, that there is no substantial evidence that supports the conclusion of the board, or that the board's decision was arbitrary and capricious. If judicial review is granted, the person is entitled to counsel. If the person is indigent, counsel shall be appointed in accordance with Chapter 32 of this title.