

1993

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

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

IN THE COURT OF APPEALS OF THE STATE OF UTAH

KIRK W. DALL,	:	5
Petitioner,	:	DOCKET NO. <u>930722-CA</u>
v.	:	
STATE OF UTAH, THE UTAH STATE BOARD OF PARDONS, and THE UTAH STATE PSYCHIATRIC SECURITY REVIEW BOARD,	:	Case No. 930722-CA Priority No. 3
Respondents.	:	

REPLY 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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FILED
Utah Court of Appeals

SEP 06 1994

Marilyn M. Branch
Clerk of the Court

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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

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 to Mr. Dall's opening brief:

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
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Utah Code Ann. § 62A-12-223 (1989)
Utah Code Ann. § 62A-12-240 (Supp. 1992)
Utah Code Ann. § 62A-12-241 (Supp. 1992)
Utah Code Ann. § 76-2-305(4) (1990)
Utah Code Ann. § 77-16-5 (1990) (enacted 1980)
Utah Code Ann. § 77-16a-5 (effective March 13, 1990)
Utah Code Ann. § 77-16a-203(3)(a) (effective July 1, 1992)
Utah Code Ann. § 77-38-2(6) (1989)
Utah Code Ann. § 77-38-2(6) (effective March 13, 1990)

§§ 62A-12-241, 77-16-5, and 77-16a-5 are attached as Addendum D here.

CORRECTION OF ERRATA

The State asserts that Utah Code Ann. §§ 77-16-1 and -5 were repealed in 1992. State's Brief at 6. This statute has never been repealed.¹

The correct citation for In re Estate of Bartell, cited in State's Brief at 4, is 776 P.2d 885 (Utah 1989).

STANDARD OF REVIEW

Although the State sets forth a bifurcated standard of review (no deference to PSRB, but deference to trial court findings based on live testimony), it fails to specify any fact findings which were based on testimony at the evidentiary hearing.

In its brief, the only evidence from the evidentiary hearing cited by the State concerns the testimony of Mr. Verville about the clinical standards used for transfer of people from the hospital to the prison. State's Brief at 15-17. Mr. Dall is not challenging Mr. Verville's opinions on this matter. Whether his opinion is legally correct is a question of law accorded no deference. Thus, for all practical purposes this Court's review is entirely non-deferential.

¹Petitioner accurately noted that § 77-16-5 is still in effect in his prehearing memorandum at p. 10 n.9 (R. 288-323 at 297 n.9), and again in his trial brief at 30 n.10 (R. 375-461 at 411 n.10). The trial court erroneously indicated that this section was repealed in 1990 in its signed minute entry decision at p. 3 (R. 492-500 at 494). In his post judgment motion at p. 8 ¶2 (R. 503-511 at 510 ¶2), petitioner again pointed out that § 77-16-5 has never been repealed.

ARGUMENT

POINT I. BURGESS DOES NOT DISPOSE OF ANY OF MR. DALL'S CLAIMS.

(Responding to State's Brief at Point I, pp. 11-18.)

State v. Burgess, 870 P.2d 276 (Utah App. 1994), while tangentially relevant to the instant proceedings, is not determinative of any claim raised by Mr. Dall.

Mr. Burgess pled guilty and mentally ill to three counts of sexual abuse of a child. Id. at 277. In Burgess, This Court decided the narrow question of whether Utah Code Ann. § 77-16a-203 (enacted July 31, 1992; still in effect) or § 77-16a-8(4) (Supp. 1990) (enacted March 13, 1990; repealed July 1, 1992) governed the review of his commitment and possible transfer to the prison. Mr. Dall's claim concerns whether § 77-16-5 (enacted 1980; still in effect) or § 77-16a-5 (enacted March 13, 1990; repealed July 1, 1992), or § 62A-12-241 (enacted 1988; still in effect as amended) controls his review of commitment and possible transfer to the prison. The question presented here was not presented in Burgess.²

The Burgess Court found that application of § 77-16a-203 was not retroactive, as the placement dispute did not occur until the end of 1992; the statutes in question were merely procedural, and did not affect vested substantive rights; and, in any event,

²Mr. Dall falls squarely within the terms of § 77-16-5, as he pled guilty and mentally ill to forcible sexual abuse, an offense specifically enumerated in § 77-16-1. While a possible argument could be made that §§ 77-16-1 et seq. should also apply to the offense of sexual abuse of a child, no such claim was presented to the Burgess court, and the opinion fails to address the issue. Any claim concerning § 62A-12-241 was likewise not raised or addressed in Burgess.

Mr. Burgess was not prejudiced because the later statute is more beneficial to him. 870 P.2d at 280 and n.6. In contrast, Mr. Dall claims *ex post facto* application because both § 77-16-5 and § 62A-12-241 are more beneficial to him, and he has been prejudiced.

The State erroneously asserts that "[s]tatutory language when Dall committed his crime contained no guidance to steer either the hospital's discretion in discharging him or the Board's discretion in committing him to prison." State's Brief at 15, see also id. at 17 ("pre-1990 transfer provision (which contained no standards)"). Counsel for the State inexplicably ignores § 77-16-5 and § 62A-12-241, despite extensive discussion of these statutes in Mr. Dall's Opening Brief at 30-33.

The State's assertion that a guilty and mentally ill plea does not invoke § 77-16-5, State's Brief at 17-18 n.6, demonstrates a fundamental misunderstanding of the guilty and mentally ill statutory scheme by the State. See Utah Code Ann. § 77-16a-1(3) ("The defendant shall be advised that a plea of guilty and mentally ill is a plea of guilty . . .") (repealed July 1, 1992); Utah Code Ann. § 77-16a-103(3)(a) (same) (effective July 1, 1992). The guilty and mentally ill scheme focuses on the defendant's mental state at sentencing, and triggers an automatic assessment of the defendant's mental state. For all other purposes, a guilty and mentally ill plea is the functional equivalent of a guilty plea. State v. Young, 853 P.2d 327, 384-5 (Utah 1993) (opinion of Durham, Zimmerman, and Stewart, JJ.). In fact, defendants are free to

raise mental illness as late as the sentencing hearing. State v. Murphy, 872 P.2d 480, 482-3 (Utah App. 1994).

Mr. Dall's guilty and mentally ill plea serves to bring him within the ambit of § 77-16-1 and -5. The trial court so held, R. 753, as should this court. The State has failed to even discuss § 62A-12-241, and it is likewise by its terms applicable. The PSRB failed to consider whether Mr. Dall was sufficiently recovered, instead applying the improper *ex post facto* maximum benefit standard. The PSRB likewise failed to address whether incarceration at the State Hospital was aggravating Mr. Dall's condition, or whether Mr. Dall had failed to comply with his specified written treatment plan, as required by § 62A-12-241(2)(a). Because the State did not show that Mr. Dall meets the requirements of § 77-16-5 and § 62A-12-241, he should not have been transferred.

Finally, the State cites Smith v. Batchelor, 832 P.2d 467, 470 n.4 (Utah 1994) as support that Mr. Dall has waived his claims that § 77-16-5 (and presumably § 62A-12-241) govern transfer. State's Brief at 17-8 n.6. In Batchelor, the Supreme Court held that failure to brief an issue on appeal resulted in waiver of that issue. Here, Mr. Dall has fully briefed his claims on appeal, and they are not waived pursuant to Batchelor.

POINT II. MR. DALL HAS FULLY MARSHALLED THE EVIDENCE.

(Responding to State's Brief at Point II, pp. 18-9)

The State relies on a blanket marshalling argument to dismiss Mr. Dall's sufficiency of the evidence claim. Significantly, the State fails to give a single example of any scrap of evidence that Mr. Dall has failed to marshal.³ The evidence here is fully marshalled, and Mr. Dall's claim should be addressed on the merits.

Mr. Dall properly cited the marshalling requirement, Opening Brief at 3, and complied with its mandate. It is undisputed that the State called no witnesses at the June 28, 1991 PSRB hearing, as correctly found by the trial court. R. 569 (Findings ¶9). There is thus no evidence presented by the State to be marshalled.

Looking at the evidence presented by Mr. Dall's witness, Dr. Philip Washburn, the only evidence supporting the State's position is testimony concerning the "plateau" that had been reached in Mr. Dall's treatment. Mr. Dall marshalled this evidence presented by this (the only) witness. See Opening Brief at 18-25. Mr. Dall discussed Dr. Washburn's discussion of how Mr. Dall had reached a plateau in his treatment, and has demonstrated on appeal that the PSRB's finding of maximum benefit is so lacking in support as to be against the clear weight of the evidence.

³The reason is simple: there is no unmarshalled evidence.

Mr. Dall did his utmost to get the trial court to state what evidence supported the PSRB's determination. Although not required to, he filed post judgment motions requesting, *inter alia*, as follows:

Petitioner feels that specific findings on the following points are necessary:

1. What evidence in the record created before the PSRB supports the PSRB's determination that Mr. Dall had received "maximum benefit."² Petitioner is unaware of any evidence that supports this determination.

²See Petitioner's Brief at Point II, pp. 34-5, arguing that the evidence adduced at the PSRB hearing utterly failed to support a finding of maximum benefit. See also id. at 18-26, summarizing the testimony at the PSRB hearing and indicating that there was no testimony that Mr. Dall had received maximum benefit.

R. 506. When asked to present the trial court with proposed findings, R. 542 (minute entry), Mr. Dall submitted his proposed findings, R. 546-554, which again included a request that the court set forth what evidence supported the PSRB's finding as conclusion of law number 17, R. 553. A copy of Mr. Dall's proposed findings is attached as Addendum A.

Neither the State nor the trial court has been of any assistance in pointing out any evidence that supports the PSRB's findings. Mr. Dall has discussed the only evidence that can plausibly be asserted to tangentially support such a finding, namely the "plateau" testimony of Dr. Washburn, and shown it to be insufficient. A copy of this evidence is attached as Addendum B for this Court's review and independent determination.

POINT III. THE STATE'S PROPOSED DEFINITION OF
"MAXIMUM BENEFIT" IS UNSUPPORTED BY ANY
PRECEDENT, AND IS MERELY A POST HOC
JUSTIFICATION OF THE PSRB'S ACTION.

(Responding to the State's Brief at Point III, pp.
20-22)

The State asserts, without any citation to the record, that "[t]he evidence at the PSRB hearing, repeated at the trial court, was that Dall had received all the help from the state hospital that he could receive from the hospital and that the state prison could provide him the same treatment." State's Brief at 21. This is a mischaracterization of the evidence. In its fact statement, the State cites PSRB at 41 for this proposition. The State's discussion of the evidence at the PSRB hearing in total is as follows:

Dr. Washburn testified that Dall had reached a plateau and his condition had stabilized to the point that he no longer required the services of the hospital. (*Id.* at 41). However, Dr. Washburn made it clear that Dall would continue to need treatment, although the treatment would be of a stabilizing, rather than a curative, nature. Indeed, Dr. Washburn stated that were it not for Dall's criminal sentence, the hospital probably would have already discharged him from the hospital to another setting. (*Id.* at 50).

State's Brief at 9.⁴

A review of this testimony is underwhelming. Dr. Washburn's testimony was that Mr. Dall had been stabilized, but that he had not received maximum benefit. PSRB at 39-45 (Addendum B). The hospital was recommending transfer for economic reasons,

⁴Pages 41 and 50 are both cited and discussed in Mr. Dall's Opening Brief. *See id.* at 24. The State's marshalling argument is a baseless attempt to avoid the merits.

despite Mr. Dall's not having received maximum benefit. PSRB at 21-22, 49-51 (Addendum C).

Now, for the very first time, the State has proposed its definition of maximum benefit:

(1) the patient has received medication and other forms of treatment at the hospital and his mental functioning has improved; (2) the patient's condition has remained stable for a reasonable time; and [sic] (3) the state hospital has no additional medications or therapeutic forms of treatment that will further improve the patient's mental condition; and (4) another institution, such as the prison, can provide treatment suitable to maintain the patient's current condition.

State's Brief at 21. This self serving description of the treatment afforded Mr. Dall is wholly unrelated to the statutory standard of maximum benefit codified in § 77-16a-5 (now § 77-16a-203(3)(a)). While perhaps the statutes should speak in terms of stabilization rather than maximum benefit, see PSRB at 23-4, 34-5, they do not. The plain language of the statute does not permit "maximum benefit" to be stretched to the lengths suggested by the State.

POINT IV. MR. DALL'S EIGHTH AMENDMENT AND
ARTICLE I, SECTION 9 ARGUMENTS ARE RIPE
AND MERITORIOUS.

(Responding to State's Brief at Point IV, pp. 22-24)

Contrary to the State's assertion that Mr. "Dall has never been at the prison," State's Brief at 22, Mr. Dall is currently at the prison, and has been there since this Court denied his motion for stay by order dated January 14, 1994.

Counsel has visited Mr. Dall at the prison (May 4, 1994), spoken to him on the phone, and received correspondence from him. Mr. Dall reports that he is housed in the general prison population, and is currently receiving no mental health treatment at all. His requests to see Dr. Van Austin have been denied, citing the State Hospital's determination that Mr. Dall is no longer mentally ill. Correspondence received from Mr. Dall suggests that he is far from being mentally healthy.

Regardless of whether it would be cruel or unusual or constitute unnecessary rigor to house Mr. Dall at the prison while keeping him on proper medication, the State has failed to achieve even this. Mr. Dall is not receiving any treatment at all, see also R. 565 (letter to Judge Lewis), despite his need for such treatment. Despite the prison's apparent ability to provide mental health treatment to Mr. Dall, as a result of administrative convenience, whim, or caprice the prison is refusing to provide any treatment to him.

In light of the present circumstances, if this Court declines to reverse on a different basis it would be appropriate to remand to the district court for an evidentiary hearing concerning Mr. Dall's current condition and lack of necessary treatment at the prison.

POINT V. NO JUDICIAL OFFICER HAS EVER DETERMINED THAT MR. DALL SHOULD BE SENT TO PRISON.

(Responding to State's Brief at Point V, pp. 24-26)

The State glosses over the fact that Judge Hanson never determined that Mr. Dall should go to prison. To the contrary, he specifically found that prison would not be appropriate. Sent. at 63-70. Rather than being a mere "administrative placement process," the determination that an offender should go to prison is a core judicial function that to date has not been performed in Mr. Dall's case.

POINT VI. EXTRAORDINARY WRITS ARE NOT THE TYPE OF REVIEW CONTEMPLATED BY THE SEPARATION OF POWERS DOCTRINE.

(Responding to State's Brief at Point VI, pp. 26-27)

Extraordinary writs are fundamentally different than the type of judicial review contemplated by the separation of powers doctrine. "[T]he writ can neither substitute for, nor perform the function of, regular appellate review." Parsons v. Barnes, 871 P.2d 516, 519 (Utah 1994) (citing Codianna v. Morris, 660 P.2d 1101, 1104 (Utah 1983)). The writ of habeas corpus has always been available. See U.S. Const. art. I, section 9, clause 2; Utah Const. art I, section 5. The separation of powers doctrine requires direct appellate review when the executive branch exercises judicial functions. Allowing writs to substitute for direct review writes the separation of powers doctrine out of existence.

The PSRB exercised a judicial function. Mr. Dall's appeal was dismissed for want of jurisdiction. An unconstitutional delegation of judicial power has occurred. The order of the PSRB must be vacated.

POINT VII. THE PSRB HEARING WAS A CRITICAL STAGE
OF THE CRIMINAL PROCEEDINGS AGAINST MR. DALL.


(Responding to State's Brief at Point VII, pp. 27-28)

Because the PSRB was performing a sentencing function, and made the first and only determination that Mr. Dall should go to prison, the PSRB hearing was a critical stage in the proceedings against Mr. Dall.

CONCLUSION

Based on the foregoing and his Opening Brief, Mr. Dall respectfully requests that this Court reverse the order of the PSRB transferring him to the jurisdiction of the Board of Pardons.

RESPECTFULLY SUBMITTED this 6th day of September, 1994.




ROBERT K. HEINEMAN
Attorney for Petitioner/Appellant



MARK R. MOFFAT
Attorney for Petitioner/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 6th day of September, 1994.



Robert K. Heineman

DELIVERED/MAILED this _____ day of September, 1994.

ADDENDUM A

Petitioner's proposed Findings of Fact and Conclusions of Law
(R. 546-554)

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*Original (Propo.
(with
Corrections)*

E. Matheson

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

KIRK W. DALL,	:	PETITIONER'S PROPOSED FINDINGS
	:	OF FACT AND CONCLUSIONS OF LAW
Petitioner,	:	
	:	
v.	:	
	:	
STATE OF UTAH, THE UTAH STATE	:	
BOARD OF PARDONS, and THE UTAH	:	Case No. 910902993-HC
STATE PSYCHIATRIC SECURITY	:	
REVIEW BOARD,	:	The Honorable LESLIE A. LEWIS
	:	
Respondents.	:	

Petitioner KIRK W. DALL, through his attorneys Mark R. Moffat and Robert K. Heineman, respectfully submits his proposed findings of fact and conclusions of law. These findings are drafted in accordance with the Court's minute entry dated August 13, 1993, and are intended to accurately reflect the Court's actual ruling. Petitioner intimates no opinion as to the correctness of any of these findings and conclusions, and reserves all issues for appeal. Findings and conclusions not actually included in the Court's minute entry or enclosed in brackets.

FINDINGS OF FACT

1. Petitioner's request for extraordinary relief was originally filed May 10, 1991, and was subsequently amended.

2. Petitioner seeks relief under Rule[s] 65B [(b), (c), and] (e). Petitioner challenges the finding of the Psychiatric Security Review Board ("PSRB") that Mr. Dall has received "maximum benefit from treatment" and should be transferred to the jurisdiction of the Board of Pardons.

3. On May 9, 1989, Mr. Dall entered a plea of guilty and mentally ill to one count of Forcible Sexual Abuse and one count of kidnapping, both second degree felonies. Judge Timothy R. Hanson ordered that Mr. Dall be transported to the Utah State Hospital for diagnostic evaluation.

4. On August 10, 1989 Judge Hanson issued an order transferring Mr. Dall to the jurisdiction of the PSRB.

[5. The PSRB held a hearing on April 19, 1991, and entered its order dated April 24, 1991, finding that Mr. Dall had received maximum benefit, and should be transferred to the jurisdiction of the Board of Pardons.]

6. Petitioner filed his petition on May 10, 1991. An appeal to the Court of Appeals was also filed. A stay was obtained from Judge Scott Daniels. Upon Judge Daniels' retirement, Judge Iwasaki was assigned. He recused himself, and this Court was appointed.

[7. Due to a problem with the recording equipment used, no record was made of the April hearing.]

8. An additional hearing was held on July 28, 1991

and has been transcribed.

The Court of Appeals ordered the PSRB to hold the hearing. All parties to the hearing expressed their understanding that the

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[9. 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 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.]

10. On July 2, 1991 the PSRB issued a second order finding that Mr. Dall had received maximum benefit and should be transferred to the jurisdiction of the Board of Pardons.

[11. At the time Mr. Dall was committed to the jurisdiction of the PSRB, Utah Code Ann. § 77-38-2(6) provided for judicial review of determinations of the PSRB.]

[12. Effective March 13, 1990, § 77-38-2(6) was amended to provide appeal only for persons found not guilty by reason of insanity.]

[13. Effective March 13, 1990, § 77-16a-5 was enacted, providing a maximum benefit standard for transfer from the hospital. (This section was repealed July 1, 1992, but the same standard is currently codified in § 77-16a-203(3)(a)(ii).)]

[14. Mr. Dall appealed the PSRB's decision to the Court of Appeals, but the appeal was dismissed for lack of

jurisdiction. The Court of Appeals found that Mr. Dall had no right of appeal from the PSRB's decision.]

15. An evidentiary hearing before this Court was held on June 14, 1993, with closing arguments heard on August 4, 1993.

21
16. At the evidentiary hearing, Mr. Verville testified on behalf of the State that the hospital did not interpret the maximum benefit standard as relaxing the standard for transfer of a person to the Board of Pardons. ~~He stated that the "maximum benefit" standard is commensurate, in application, with the clinical criteria for the "sufficiently recovered" standard, i.e., a clinical team recommends when a patient has received as much clinical services as can be of benefit to that patient at the hospital.~~

LH
[17. Mr. Verville testified that the hospital ~~is and was at all times unaware of the correct legal standard for transfer of patients from the state hospital, and merely applied~~ ^a ~~their own clinical~~ ^{in assessing Petitioner's} ~~standard regardless of the legal standard in effect.~~ ^{mental condition}]

[18. This Court issued its minute entry decision on August 13, 1993.]

[19. Petitioner filed post judgment motions pursuant to Rules 52(a), 59(e), and 62(b) and (d) on August 19, 1992. In this Court's absence, an ex parte stay order was signed by Presiding Judge Michael R. Murphy, pending further order of this Court.]

CONCLUSIONS OF LAW

1. Petitioner's request for relief is denied.

[2. This action is properly analyzed under Rule 65B(e) ("where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion"). To the extent petitioner relies on Rule 65B(b) (wrongful imprisonment) and Rule 65B(c) (other wrongful restraints on personal liberty), such claims are found to be inappropriate and are dismissed with prejudice.]

3. Utah Code Ann. § 77-16-5 [(enacted 1980, still in effect¹)] provides, "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.

[4. "Sufficiently recovered from his mental disease or defect" means _____

_____.]

[5. "Maximum benefit from treatment" means _____

_____.]

¹The Court's minute decision incorrectly stated that this statute was repealed in 1990. It is in fact still in effect.

6. There is no substantive difference, at least in their application, between the ^{hospital's Clinical Practice} phrases "maximum benefit" and "sufficiently recovered," ^{in transferring guilty and mentally ill individuals before} as codified in the statute.

1990 and after the statutory adoption of the
[7. The state hospital's transfer policies and ^{more} procedures for transfer under the ^{Applicable Statutes} "sufficiently recovered" ^{benefit} standard were not arbitrary and capricious, and were in ^{therefore,} conformity with the ^{law.} requirements of § 77-16-5. ^{in 1990}]

1
AL
[8. Because transfer under the ^{Applicable} "sufficiently ^{statutes at the time of Mr. Dall's commitment to the PSRB in} recovered" standard and the "maximum benefit" standard is for all ^{And at the time of 1991 PSRB hearing, were for all not} intents and purposes identical, application of the "maximum

benefit" standard to Mr. Dall does not make imposition of Mr.

Dall's punishment more burdensome, and thus does not violate the ex post facto clauses of the federal or Utah constitutions.]

9. The conditions at the Utah State Prison do not constitute cruel and unusual punishment. The mental health unit at the Utah State Prison is capable of meeting Mr. Dall's medical and mental health needs, as they presently exist.

[10. ~~The Utah State Prison~~ ^{This Court.}
~~is~~ ^{Can not find that} the conditions
~~is not~~ ^{at the prison} constitute cruel and
~~unusual punishment.~~
capable of meeting Mr. Dall's safety needs, and protecting Mr.

Dall from predation and harm from other inmates.]

11. A review of the 30 page settlement reached between the parties in Henry v. Deland, Civil No. 89-C-1124J (D. Utah) convinces the Court that the facilities at the mental health unit

are ~~[will be]~~ neither inadequate, nor cruel and unusual.
~~[at such time as the prison achieves full compliance with the~~
~~settlement] .~~

12. The treatment issues and Mr. Dall's mental condition, and the appropriateness of his transfer from the state hospital to the jurisdiction of the state's Board of Pardons, are all issues that are particularly within the expertise of the PSRB.

13. The Board was not exercising a clearly judicial function when it transferred jurisdiction of Mr. Dall to the Board of Pardons. Judge Hanson had already carried out the judicially-authorized function of imposing sentence in 1989. The Board was merely carrying out that sentence in accordance with their lawful powers and authority.

14. Where there is no statute specifically authorizing judicial review, review may be had by "traditional means" of extraordinary writ.

15. The PSRB's action does not violate the separation of powers provision of the Utah Constitution.

[16. The lack of an appeal right from decisions of the PSRB for persons other than those found not guilty by reason of insanity does not violate Mr. Dall's right to appeal under Article I, §§ 7 and 12, and Article VIII, § 5 of the Utah Constitution.]

17. The actions of the PSRB were neither arbitrary, capricious, nor unlawful. ~~[The PSRB's decision is supported by the following evidence:~~

~~_____~~
~~_____~~
~~_____~~
~~_____~~
~~_____~~
~~_____~~
~~_____~~

18. The PSRB's transfer decision was not the imposition of a sentence, but merely the execution of a lawfully imposed sentence. The hearing before the PSRB was not a critical stage of the proceedings entitling petitioner to compulsory process [or financial access to expert testimony] .

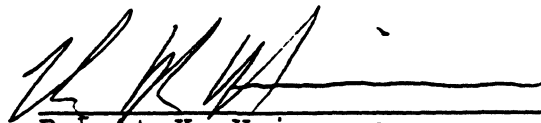
19. The petitioner's request that the decision of the PSRB be set aside is denied.

[20. This Court's order *of stay is lifted, the foregoing*
~~[] is based upon~~
~~[] is not~~
~~stayed pending determination of petitioner's post judgment motions.~~

~~[21. This Court's order~~
~~[] is~~
~~[] is not~~
~~stayed pending appeal.~~

Respectfully submitted this 20th day of September,
1993.

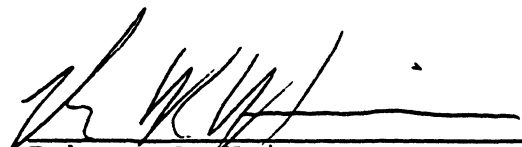
Mark R. Moffat



Robert K. Heineman
Attorneys for Petitioner, Mr. Dall

CERTIFICATE OF DELIVERY

I, Robert K. Heineman, hereby certify that I have caused a true and correct copy of the foregoing PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW to be delivered to Lorenzo K. Miller and James H. Beadles, the Attorney General's Office, 330 South, 300 East, Salt Lake City, Utah 84111, this 20th day of September, 1993.



Robert K. Heineman

DELIVERED/MAILED this _____ day of September, 1993.

ADDENDUM B

"Plateau" testimony of Dr. Philip Washburn at June 28, 1991 PSRB hearing. (PSRB at 39-45, 60)

perhaps in a well-structured halfway house with regulating his medications from that setting. With a person who has his kind of disorder and illness, then with charges, we have the extra problem of the danger that comes from that part of his personality and his illness, the paraphilia. That makes it a management problem in terms of safety to the community and to him.

Bradshaw: Let me change it a bit. Let me add to my hypothetical world if I can. Not only are we not dealing with management decisions because of overcrowding in the Hospital, but we are also assuming in my hypothetical that Mr. Dall is in a secure setting where he is not released to the community, where the threat to the community is not an issue. And my question to you would be, given that hypothetical world, whether or not, in your opinion, strictly as a psychiatrist, whether or not he has received the maximum benefit that treatment can provide to him?

Washburn: Maximum hospital benefit?

Bradshaw: Maximum benefit from treatment?

Washburn: No. No. Again, when we talk about maximum or we talk about ongoing treatment, I think we have trouble in terms of our thinking, the maximum in a way has to be ongoing. He

must stay on the medication. It would be like a diabetic would needs to be on insulin, keep a diet, keep all those things good and stable and if they do not they can have a reoccurrence of their illness obviously.

Bradshaw: Is it fair to say that this goes back to my questions about curing and fixing as opposed to maintaining?

Washburn: That's part of it, right.

Bradshaw: That the nature of your profession is such that when you speak of treatment it doesn't mean cure or fix it means...

Washburn: Certainly not, in these kinds of illnesses. Now there may be some people we can cure and fix, but that have very limited kinds of emotional disorders that might "cured" in terms of the situation or the event that is occurring right at the time; but these kind of major mental illnesses, their natural history is one of continued symptoms, particularly under stress. It's a continually ongoing treatment, it's a maximum treatment. I mean continuing treatment has to be part of it. The question gets to be in what setting. Obviously, in this day and age there's getting to be more pressures to not have people in expensive hospital settings. So part of the one is economics, get this person out of the hospital as soon

as possible, get them into another setting and continue the treatment there. This is what we would be doing with Kirk if he didn't have this sentence and the other complications of his disorders. Ideally, my way of thinking would be that the people who are guilty but mentally ill ought to have a system different from the prison system in which we could have a hospital

for the acute, more severe. A secure place for them at the time of needing the treatment. Secure residential programs where they could be transferred when the acute, more intense treatment was not needed, but where there would be security for both the client/patient/inmate. I don't want to call that name and society. But, it would be one system and the prison system to my way of thinking would not be the best system. The reality is that's the alternative we have at this point and we've made the recommendation. Not that Kirk can't benefit from someone continuing to follow him with the medication, making adjustments over a period of a number of months and years, but that he's reaching some sort of plateau and that our resources are limited.

Bradshaw: And someone else can more acutely use the bed than Mr. Dall?

Washburn: That's correct.

Bradshaw: But in terms, and I know you've responded to it, but let me just try and get you to respond again. In terms of whether he's received the maximum benefit, if we assume my hypothetical that we're not dealing with those economic issues, would it be your opinion that he has not received maximum benefit?

Washburn: If I had other resources he would be in the other resources like a well managed, well structured residential setting.

Bradshaw: And you would prefer to treat him in that setting?

Washburn: Oh yes, yea.

Bradshaw: In your opinion as a psychiatrist, this standard of maximum benefit from treatment, does it make, is that a difficult standard for you? Does it cause you difficulties?

Washburn: It causes me difficulty.

Bradshaw: Could you tell us why?

Washburn: For the very reasons I've been trying to talk around and to. It has the connotation or implication that okay, now we're cured. It's like okay we've given all the

chemotherapy to cure that cancer we can, or we've given all the antibiotic we need to do. Or we've done the surgery now and the surgery's done and we've gotten them through the post-op period and now they can go out and have received maximum hospital benefit. That's, I think, the place I have trouble.

The model just doesn't quite fit my way of thinking for a severe and mentally-ill psychiatric patients.

Bradshaw: You mentioned with Mr. Dall and with persons with similar diagnosis that there is a need for lesser treatments at times and more intensive treatments at times. I take it that's inherent with the type of illness?

Washburn: Yes, yes. There's exacerbations depending on the circumstances. Maybe extra stress that can cause it. Sometimes the exacerbations occur and we don't even know why.

Bradshaw: And so there are times when they can be out in the community or in a less-structured setting and there are times when they may need hospitalization?

Washburn: That's correct.

Bradshaw: Do you foresee in Kirk's future that there may come a time when he would need renewed hospitalization or hospitalization again?

Washburn: Well, it's possible.

Bradshaw: I think that's all I have Doctor, thank you.

Washburn: Thank you.

Chair: Do you have any questions, Mr. Hunt?

Hunt: Yes, I'd like you to just basically go through and give the reasoning you've given, bits and pieces, throughout your testimony so far; but I'd like you to tell the Board why you have come to the conclusion that at this point Kirk has received maximum benefits at the hospital, from his hospital stay.

Washburn: I don't think I've ever used the word maximum.

Hunt: Oh, okay. Why is it your recommendation at this point that Kirk is ready to be moved on to the Board of Pardons? If that's your recommendation?

Washburn: That was our recommendation. In terms of the thinking, with the charge and the seriousness of the charge obviously, we felt he was not, that he still presents a risk and a danger and that he does need a secure facility. And that with the sentence and the charges that would seem logical

that the facility would be the prison setting. They do have some resources. It is not a hospital, I'm mean we're not saying we're transferring him from one hospital to another, we're saying we're transferring him from a hospital to a prison secure setting. But they do have some resources there in terms of follow-up medications. In terms of the medication we have spent time, we've found what I think is a good combination of medications that if he is followed in that setting, where there is someone following him, then they should be able to do that. He's plateauing, he's coming to a point to where the amount of benefit coming from what we do is diminishing in terms of return.

Hunt: I see. Is it fair to say that Kirk in the past has been resistant to treatment?

Washburn: Yes, that's correct.

Hunt: Is it fair to say that in the past he has felt that he understands his needs better than the professionals treating him?

Washburn: Yes, he's made statements quite similar to that.

Hunt: Let me ask you a little bit more about the treatment that may be available at the Utah State Prison. I understand

unit of some I guess it was almost 30 patients. Dennis could tell us about that. Because of these other demands we've had to make a choice there too.

Chair: Would you say that Mr. Dall then, has, generally speaking, plateaued out as far as the benefits from hospital stay is concerned.

Washburn: Yes, I think that would be maybe a fair and accurate way to say it.

Chair: Okay, I believe that is all I have to question now. I turn the time back for should we say a brief rebuttal.

Bradshaw: A brief, a brief, very brief. You spoke of the number of people who are at the prison, and I don't think you specifically referred to them as mentally ill offenders, but I assume that's what you were talking about including organic and mental retardation that are at the prison.

Washburn: Organic mental retardation, people who are mentally ill, who may have been mentally ill and the crime was a direct product of that mental illness or who have "anti-social" personalities who become mentally ill and psychotic there.

Bradshaw: These people who suffer this mental illness who are

ADDENDUM C

Economic considerations testimony of Dr. Philip Washburn at June 28, 1991 PSRB hearing. (PSRB at 21-22, 49-51)

competent, they would be sent back for further treatment until they theoretically would become competent. And also those who were guilty and mentally ill, would be also treated here. So you can see that the increase in the demands on this resource have been significant. We have those pressures, those are realities. A person who is guilty and mentally ill who comes under the jurisdiction of the Psychiatric Security Review Board, if we feel the person is coming to some point where weighing the amount of resources we have, we have limited beds, and we feel that perhaps that person has reached a plateau of stability, then we come to the Board to request permission to have some management decision made. At this point with the limited resources we have here and with the structure of the system of the State, we need to do that. This past year our unit has been running 110% of occupancy. I think that figure tells you what the resources and the pressures on us are. You ask me on one individual person. Has he reached maximum hospital benefit? Ideally, a person who would be judged guilty and mentally ill, I feel, ideally should be in a hospital setting or an alternative in which there would be very close psychiatric medical supervision for the period of time they would be sentenced. Obviously, the numbers of people coming through the court system that would be adjudicated guilty and mentally ill could result in quite a number of beds that would be needed. There are alternatives to hospital beds, if you have the right structure, such as

half-way houses where the monitoring of the medications could be done with the right kind of structure and the right kind of resources. That is to say at this point if we did not have the sentence of the charge then perhaps Mr. Dall could be cared for in some very secure residential setting other than a hospital setting. But, obviously, it would need to be a very well-structured program with security for both the client or patient and society.

Bradshaw: Let me, if I can, direct you away from Mr. Dall for a minute and away from the hospital setting, and just ask generally in your field, in psychiatry. When we talk about a person who has this lifelong history of psychotic thinking, when we talk in terms of treatment, what generally do you as a psychiatrist envision in terms of treatment for someone with that type of problem?

Washburn: I don't know. Are you supposing this person does not have charge or a sentence?

Bradshaw: Yes, I am assuming that.

Washburn: If the person did not have a serious charge or sentence, there are many individuals I care for who have this diagnosis, I care for on an outpatient basis with medication checks as I indicated before, every four, six, eight weeks,

Hunt: So it would be fair then to say that very few of the patients that you have seen in here would actually benefit, if economics were not a factor, very few would actually benefit from a transfer to the State Prison?

Washburn: To the State Prison. That's an excellent and good question and I haven't kept that close of track of it. But as a general feeling I believe that of many, many of the people that come here, there are some exceptions, but many of the people that come here through the system have benefitted from the system. On the end of the evaluation process I think that there has been a fairly good selection and there's been a good reason to question if they were competent or not. So I think we've offered a good service there. In terms of the guilty but mentally ill, there is a percentage where I feel there needs to be a little tighter, better evaluation. Are they truly mentally ill and guilty? That there are some that do slip through, that if we broaden it too much then, of course, many personality disorders could fit into that kind of system. Then we would be overwhelmed and they would not benefit and they don't need hospitalization.

Hunt: Okay. Would it be fair to say that economics is an inherent part of the science that you practice in terms of you are always confronted as a professional with balancing the interest of the person against the resources that are

available? Is that a fair statement to make?

Washburn: We try to. I guess as professionals we try to not allow that to be the major reason why we're making a decision for hospitalization or certain kinds of treatment, but I think in the area of mental illness, it's more, more of a problem than in the other illnesses because in many other physical illnesses there can be "cures". There can be surgery that is short term and you have much better parameters to work with. Where as inherently in major mental illness particularly, it's something that takes time and that time seems to be the thing that creates costs.

Hunt: Would your conclusion that Kirk has reached his plateau be the same even if Kirk was not a criminal commitment here, even if for say he was a private individual and we did not have the criminal sentence to deal with and we did not have the sexual aspects? Would your conclusion that he has reached a plateau of treatment and that he is ready to move on to another facility be the same?

Washburn: Without those factors probably we could have moved him on sometime ago.

Hunt: Now there's been some talk of maximum treatment benefit or maximum hospital benefit. You have testified that the

treatment itself will have to continue probably for his entire life so he has not reached perhaps the pinnacle of his treatment. Is that correct? But in terms of maximum hospital benefit, would it be your conclusion that at this point he has reached a maximum hospital benefit that can be attained given resources available at the hospital?

Washburn: He can still benefit from being in the Hospital. But we have to weigh the costs and benefits.

Hunt: Okay, and that gets back to our ideal world situation. Is it your point, is it your conclusion at this point that we have reached the marginal return, a point of diminishing returns or declining marginal returns in terms of expectations?

Washburn: I'm not sure declining, but maybe diminishing.

Hunt: Okay. And is....I don't think I have any further questions.

Chair: Thank you, Mr. Hunt.

Bradshaw: I have a couple of quick follow-ups, if I might?

Chair: Could we wait until we're all through? Then I will

ADDENDUM D

Selected Statutory Provisions

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. § 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.

(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.