

1993

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

Utah Court of Appeals

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Jan Graham; Utah Attorney General; James H. Beadles; Assistant Attorney General; Attorneys for Appellees.

Mark R. Moffat; Robert K. Heineman; Salt Lake Legal Defender Association; Attorneys for Appellant.

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UTAH COURT OF APPEALS
BRIEF

IN THE UTAH COURT OF APPEALS

KIRK W. DALL,

Plaintiff and Appellant,

v.

STATE OF UTAH, UTAH STATE
BOARD OF PARDONS AND PAROLE, and
the PSYCHIATRIC SECURITY REVIEW
BOARD,

Defendants and Appellees.

DOCKET NO.

930722-CA

Case No. 930722-CA

Priority No. 13

BRIEF OF APPELLEES

MARK R. MOFFAT
ROBERT K. HEINEMAN
SALT LAKE LEGAL DEFENDER ASSN
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

JAN GRAHAM (1231)
Utah Attorney General
JAMES H. BEADLES (5250)
Assistant Attorney General
4120 State Office Building
Salt Lake City, Utah 84114
Telephone: (801) 538-9500

Attorneys for Appellees

COURT OF APPEALS

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ROBERT K. HEINEMAN
SALT LAKE LEGAL DEFENDER ASSN
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

JAN GRAHAM (1231)
Utah Attorney General
JAMES H. BEADLES (5250)
Assistant Attorney General
4120 State Office Building
Salt Lake City, Utah 84114
Telephone: (801) 538-9500

Attorneys for Appellees

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Case No. 930722-CA

Priority No. 13

BRIEF OF APPELLEES

JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

This appeal arises from the district court's refusal to grant Dall's request for relief in a petition for extraordinary relief. Pursuant to Utah Code Ann. § 78-2a-3(2)(g) (Supp. 1993), this Court has jurisdiction because Dall was convicted of a second-degree felony.

Dall's petition requested the trial court to overturn the Psychiatric Security Review Board's (PSRB's) order discharging him from the Utah State Hospital and transferring him to the Board of Pardons. Dall has conceded in his opening brief that the trial court proceeding was a quasi-appellate review of the

agency hearing. This Court acts as a second level of appellate review, primarily reviewing the record of the administrative proceedings as well as the evidence placed into the record at the trial court.

ISSUES PRESENTED FOR REVIEW

1. Does State v. Burgess, 870 P.2d 276 (Utah App. 1994) dispose of Dall's claims that the PSRB violated the constitutional prohibition on "ex post facto" laws and the statutory prohibition on retroactivity?
2. Was the PSRB's decision that Dall had reached "maximum benefit" supported by substantial evidence?
3. Was Dall's claim that transfer to the prison constituted cruel and unusual punishment ripe for adjudication?
4. Did the PSRB unlawfully exercise judicial power by transferring Dall from the state hospital to the prison?
5. Did Dall have a constitutional right to appeal directly from the PSRB's decision, which was violated by the legislature's failure to statutorily provide for direct appeal?
6. Did the PSRB transfer hearing constitute a part of the criminal prosecution, thus entitling him to compulsory process.

STANDARD OF APPELLATE REVIEW

When reviewing a trial court decision in a petition for extraordinary relief, the appellate court "looks at the administrative proceeding as if the petition were brought here [to the appellate court] directly, even though technically it is the district court's decision that is being appealed. Tolman v. Salt Lake County Attorney, 818 P.2d 23, 26 (Utah App. 1991).

Under this standard, this Court gives no deference to the district court's initial appellate review because it was a review of the record, "which this court is just as capable of reviewing as the district court." Id; Bennion v. State Bd. of Oil, Gas & Mining, 675 P.2d 1135, 1139 (Utah 1983).

However, if the trial court took evidence other than the administrative record and based its decision, in part, on that testimony, this Court defers to the trial court on findings of fact resulting from that evidence. Davis County v. Clearfield City, 756 P.2d 704, 710 (Utah App. 1988) ("Therefore, insofar as the trial court's decision turns on the administrative record, we give no particular deference to the trial court. But insofar as it turns on the testimony of witnesses, we defer to the trial court's advantaged position.").

Thus, in terms of the appellate standard of review, this case presents an unusual bifurcation: reviewing the administrative agency record directly without giving deference to the trial court¹, but reviewing the trial court's findings of fact based on evidence other than the administrative record by a deferential standard. Id.

In making that review of the PSRB's hearing, the Court upholds the agency decision if it based on any evidence of substance. Utah Department of Administrative Services v. Public Service Com'n, 658 P.2d 601, 607-12 (Utah 1983).² In reviewing the evidence from the trial court, the Court applies a clearly-erroneous standard. In re Estate of Bartell, 776 P.2d 191, 193 (Utah 1987).

¹ Nevertheless, as this Court recognized in Davis County, the statement that an appellate court gives no deference to a trial court's analysis is "a bit of an overstatement." Though deference is not required, the appellate court derives "great benefit from the trial judge's views on the issue and may be persuaded by those views." Id. citing Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 654 (Utah 1988).

² Administrative Services discussed the appropriate standards of judicial review pre-UAPA. Because this kind of hearing before the PSRB was not subject to UAPA, the review standard in Administrative Services applies. For more discussion on this issue, see Point III.

Additionally, the appellant's requirement to marshal the evidence applies, Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc. 236 Utah Adv. Rep. 24, 25 (Utah App. April 1, 1994), although appellant must marshal his evidence from different sources than the evidence marshalled by the appellee. If, based on the administrative record, then it is from the administrative record that appellant marshalls the evidence. On the other hand, if the evidence is marshalled by the appellee, then, based on the trial court's evidentiary hearing, the evidence is from that record that the evidence need not be marshalled.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following authorities are included in addendum A.

U.S. Const. art. I, § 10, cl. 1.

U.S. Const. art. I, § 9.

U.S. Const. art. I, § 8.

U.S. Const. amend. VIII.

U.S. Const. amend. VII.

Utah Const. art. I, § 7.

Utah Const. art. I, § 9.

Utah Const. art. I, § 10.

Utah Const. art. VIII, § 5 (amended 1981).

Utah Code Ann. § 77-16-1 (repealed 1992).

Utah Code Ann. § 77-16-5 (repealed 1992).

Utah Code Ann. § 77-16a-5 (repealed 1992).

Utah Code Ann. § 77-16a-203 (Supp. 1993).

Utah Code Ann. § 77-35-21.5 (repealed 1990).

Utah R.Crim.P. 21.5 (1994)³

STATEMENT OF THE CASE

Procedural History

This case is an appeal from the trial court's quasi-appellate review of a July 28, 1991 hearing before the PSRB, at the conclusion of which the PSRB decided that Dall had reached maximum benefit from the services available at the Utah State Hospital and should be transferred to the Utah State Board of Pardons. (R. at 568). The PSRB ordered Dall held in the

³ When the legislature deleted court rules from the statutory code in 1989, the Judicial Council adopted most of the then-existing rules without change. Rule 21.5, Utah Rules of Criminal Procedure is identical then to Utah Code Ann. § 77-35-21.5 (repealed 1990) except that subsections (c) and (d) were not approved by the Supreme Court on the basis of State v. Copeland, 765 P.2d 1266 (Utah 1988). Because the rule has not been amended to keep up with the various changes in the statutory procedures for treatment of the mentally ill, such as the dissolution of the PSRB, much of the rule as presently written is meaningless. For purposes of this brief, appellee will cite to the statutory version of this language as it existed before its repeal.

physical custody of the hospital until the Board of Pardons held a hearing and formally assumed jurisdiction (R at 91).

Before the Board could hold that hearing, however, Dall filed this petition and received a stay of the PSRB's order (R at 7). The trial court, at the trial court level, the stay was in effect and Dall remained at the hospital. On June 14, 1993, the trial court convened an evidentiary hearing and, on August 4, 1993, heard closing arguments (R at 571). The court issued a memorandum decision on August 11, 1993, denying Dall's request for relief and lifting the stay. (R at 492-500).

Shortly afterward, Dall filed a motion to vacate the judgment or, in the alternative, for a new trial (R at 511). Dall received another stay preventing execution of the 1991 PSRB order until ruling on the post-judgment motions (R at 517). The trial court denied the post-judgment motions and issued Findings of Fact and Conclusions of Law on November 16, 1993. (R at 518).

On December 22, 1993, the Board of Pardons held a hearing and formally assumed jurisdiction over Dall. Before the prison could transfer him, however, this Court stayed transfer until oral argument on the motion for stay for January 11, 1994, after

oral argument on Dall's motion, this Court lifted the stay it had imposed on December 23, 1993.

Statement of Facts

Dall pled guilty and mentally ill in 1989 to two second-degree felonies: one count of forcible sexual abuse and one count of kidnapping. Third District Court Judge Timothy Hanson ordered Dall sent to the Utah State Hospital for a mental evaluation. On August 10, 1989, Judge Hanson issued an order transferring Dall to the jurisdiction of the PSRB. After hearing from Dall's treating physician at the hospital, Dr. Philip Washburn, the PSRB decided that Dall had reached maximum benefit and should be transferred to the Board. Before the Board of Pardons could formally assume jurisdiction, however, Dall obtained a stay from Third District Court Judge Scott Daniels and filed this petition. Dall also filed an appeal in this Court from the PSRB's decision. (Dall v. State of Utah, Case No. 910273-CA). The appeal was later dismissed due to lack of subject-matter jurisdiction. (R. at 571).

The PSRB initially considered Dall's transfer on April 19, 1991 and determined that he should be transferred to the jurisdiction of the Board. However, the recording equipment malfunctioned and, in order to perfect Dall's appeal, this Court

ordered the PSRB to hold the hearing again. Thus, on June 28, 1991 the PSRB held a rehearing that both parties agreed to conduct as closely as possible to the original hearing. (See Dall v. Utah State Board of Pardons and PSRB, Case No. 910272 Tr. of Hearing before PSRB 11/1/91, 11/2/91, 11/3/91, 11/4/91, 11/5/91, 11/6/91, 11/7/91, 11/8/91, 11/9/91, 11/10/91, 11/11/91, 11/12/91, 11/13/91, 11/14/91, 11/15/91, 11/16/91, 11/17/91, 11/18/91, 11/19/91, 11/20/91, 11/21/91, 11/22/91, 11/23/91, 11/24/91, 11/25/91, 11/26/91, 11/27/91, 11/28/91, 11/29/91, 11/30/91, 12/1/91, 12/2/91, 12/3/91, 12/4/91, 12/5/91, 12/6/91, 12/7/91, 12/8/91, 12/9/91, 12/10/91, 12/11/91, 12/12/91, 12/13/91, 12/14/91, 12/15/91, 12/16/91, 12/17/91, 12/18/91, 12/19/91, 12/20/91, 12/21/91, 12/22/91, 12/23/91, 12/24/91, 12/25/91, 12/26/91, 12/27/91, 12/28/91, 12/29/91, 12/30/91, 1/1/92, 1/2/92, 1/3/92, 1/4/92, 1/5/92, 1/6/92, 1/7/92, 1/8/92, 1/9/92, 1/10/92, 1/11/92, 1/12/92, 1/13/92, 1/14/92, 1/15/92, 1/16/92, 1/17/92, 1/18/92, 1/19/92, 1/20/92, 1/21/92, 1/22/92, 1/23/92, 1/24/92, 1/25/92, 1/26/92, 1/27/92, 1/28/92, 1/29/92, 1/30/92, 1/31/92, 2/1/92, 2/2/92, 2/3/92, 2/4/92, 2/5/92, 2/6/92, 2/7/92, 2/8/92, 2/9/92, 2/10/92, 2/11/92, 2/12/92, 2/13/92, 2/14/92, 2/15/92, 2/16/92, 2/17/92, 2/18/92, 2/19/92, 2/20/92, 2/21/92, 2/22/92, 2/23/92, 2/24/92, 2/25/92, 2/26/92, 2/27/92, 2/28/92, 2/29/92, 2/30/92, 3/1/92, 3/2/92, 3/3/92, 3/4/92, 3/5/92, 3/6/92, 3/7/92, 3/8/92, 3/9/92, 3/10/92, 3/11/92, 3/12/92, 3/13/92, 3/14/92, 3/15/92, 3/16/92, 3/17/92, 3/18/92, 3/19/92, 3/20/92, 3/21/92, 3/22/92, 3/23/92, 3/24/92, 3/25/92, 3/26/92, 3/27/92, 3/28/92, 3/29/92, 3/30/92, 3/31/92, 4/1/92, 4/2/92, 4/3/92, 4/4/92, 4/5/92, 4/6/92, 4/7/92, 4/8/92, 4/9/92, 4/10/92, 4/11/92, 4/12/92, 4/13/92, 4/14/92, 4/15/92, 4/16/92, 4/17/92, 4/18/92, 4/19/92, 4/20/92, 4/21/92, 4/22/92, 4/23/92, 4/24/92, 4/25/92, 4/26/92, 4/27/92, 4/28/92, 4/29/92, 4/30/92, 5/1/92, 5/2/92, 5/3/92, 5/4/92, 5/5/92, 5/6/92, 5/7/92, 5/8/92, 5/9/92, 5/10/92, 5/11/92, 5/12/92, 5/13/92, 5/14/92, 5/15/92, 5/16/92, 5/17/92, 5/18/92, 5/19/92, 5/20/92, 5/21/92, 5/22/92, 5/23/92, 5/24/92, 5/25/92, 5/26/92, 5/27/92, 5/28/92, 5/29/92, 5/30/92, 5/31/92, 6/1/92, 6/2/92, 6/3/92, 6/4/92, 6/5/92, 6/6/92, 6/7/92, 6/8/92, 6/9/92, 6/10/92, 6/11/92, 6/12/92, 6/13/92, 6/14/92, 6/15/92, 6/16/92, 6/17/92, 6/18/92, 6/19/92, 6/20/92, 6/21/92, 6/22/92, 6/23/92, 6/24/92, 6/25/92, 6/26/92, 6/27/92, 6/28/92, 6/29/92, 6/30/92, 7/1/92, 7/2/92, 7/3/92, 7/4/92, 7/5/92, 7/6/92, 7/7/92, 7/8/92, 7/9/92, 7/10/92, 7/11/92, 7/12/92, 7/13/92, 7/14/92, 7/15/92, 7/16/92, 7/17/92, 7/18/92, 7/19/92, 7/20/92, 7/21/92, 7/22/92, 7/23/92, 7/24/92, 7/25/92, 7/26/92, 7/27/92, 7/28/92, 7/29/92, 7/30/92, 7/31/92, 8/1/92, 8/2/92, 8/3/92, 8/4/92, 8/5/92, 8/6/92, 8/7/92, 8/8/92, 8/9/92, 8/10/92, 8/11/92, 8/12/92, 8/13/92, 8/14/92, 8/15/92, 8/16/92, 8/17/92, 8/18/92, 8/19/92, 8/20/92, 8/21/92, 8/22/92, 8/23/92, 8/24/92, 8/25/92, 8/26/92, 8/27/92, 8/28/92, 8/29/92, 8/30/92, 8/31/92, 9/1/92, 9/2/92, 9/3/92, 9/4/92, 9/5/92, 9/6/92, 9/7/92, 9/8/92, 9/9/92, 9/10/92, 9/11/92, 9/12/92, 9/13/92, 9/14/92, 9/15/92, 9/16/92, 9/17/92, 9/18/92, 9/19/92, 9/20/92, 9/21/92, 9/22/92, 9/23/92, 9/24/92, 9/25/92, 9/26/92, 9/27/92, 9/28/92, 9/29/92, 9/30/92, 10/1/92, 10/2/92, 10/3/92, 10/4/92, 10/5/92, 10/6/92, 10/7/92, 10/8/92, 10/9/92, 10/10/92, 10/11/92, 10/12/92, 10/13/92, 10/14/92, 10/15/92, 10/16/92, 10/17/92, 10/18/92, 10/19/92, 10/20/92, 10/21/92, 10/22/92, 10/23/92, 10/24/92, 10/25/92, 10/26/92, 10/27/92, 10/28/92, 10/29/92, 10/30/92, 10/31/92, 11/1/92, 11/2/92, 11/3/92, 11/4/92, 11/5/92, 11/6/92, 11/7/92, 11/8/92, 11/9/92, 11/10/92, 11/11/92, 11/12/92, 11/13/92, 11/14/92, 11/15/92, 11/16/92, 11/17/92, 11/18/92, 11/19/92, 11/20/92, 11/21/92, 11/22/92, 11/23/92, 11/24/92, 11/25/92, 11/26/92, 11/27/92, 11/28/92, 11/29/92, 11/30/92, 12/1/92, 12/2/92, 12/3/92, 12/4/92, 12/5/92, 12/6/92, 12/7/92, 12/8/92, 12/9/92, 12/10/92, 12/11/92, 12/12/92, 12/13/92, 12/14/92, 12/15/92, 12/16/92, 12/17/92, 12/18/92, 12/19/92, 12/20/92, 12/21/92, 12/22/92, 12/23/92, 12/24/92, 12/25/92, 12/26/92, 12/27/92, 12/28/92, 12/29/92, 12/30/92, 12/31/92, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014,

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 testified that the treatment was 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.

At the conclusion of the hearing, the PSRB found that Dall had reached a plateau in his treatment" and "for all practical purposes had reached maximum benefit from his stay." (Id. at 65) On those grounds, PSRB ordered Dall transferred to the Federal House of Detention in New York to stay in the physical custody of the Board pending further action. (Id.)

Three individuals testified before the trial court at the June 4, 1993 evidentiary hearing: Dr. Washburn; Dr. Robert Howell; a psychologist who had evaluated Dall; and Robert Verville, formerly superintendent of the state hospital and current associate director of the Utah Division of Mental Health. Dr. Washburn testified to the statements he made at the PSRB hearing in 1991. Additionally, Dr. Washburn gave his opinion that based on his interview with Dall the week before, and review of the medical notes, Dall's condition had not changed since the time of the evidentiary hearing in 1991. (R. at 636-37).

Verville discussed the state hospital's clinical standards in deciding whether a patient should be transferred to the Board. He testified that the legislative codification of the term "maximum benefit" did not change hospital policy, as it had been practiced in 1988 or 1989. (R. at 697-99). Verville stated that throughout Dall's time in the hospital, the practice had remained the same. Id. Verville also testified about the mental health conditions at the state prison and the effect of a recent federal consent decree on continuing improvements at the prison. (R. 691-95).

SUMMARY OF THE ARGUMENT

Dall makes numerous challenges to the PSRB's decision to transfer him to the Board, including ex post facto, retroactivity, lack of sufficient evidence, cruel and unusual punishment, separation of powers, and violation of sixth amendment rights. None of these claims have merit. Due to the doctrine of stare decisis, the claims regarding ex post facto and retroactivity have already been answered in the case of State v. Burgess, 870 P.2d 276 (Utah App. 1994).

Additionally, the PSRB's was based on substantial evidence that Dall had reached maximum benefit and should be placed in the Utah State Prison system instead of the hospital. There was evidence before the PSRB, reiterated at the trial level, showing that Dall had reached a plateau in his condition that warranted transfer.

ARGUMENT

I. THIS COURT'S DECISION IN STATE V. BURGESS, 870 P.2D 276 (UTAH APP. 1994) DISPOSES OF DALL'S CHALLENGE TO THE PSRB BASED UPON THE PROHIBITIONS ON EX POST FACTO AND RETROACTIVE LAWS.

On February 15, 1994, this Court issued a decision in State v. Burgess, 870 P.2d 276 (Utah App. 1994), in which it held that application of Utah Code Ann. § 77-16a-203 did not violate the ex

post facto clause or an illegal application of a statute retroactively. Burgess was convicted of a criminal offense and sent to the Utah State Training School. When he was committed, Utah Code Ann. § 77-16a-8(4) (repealed 1992) simply stated that the Board of Pardons would decide whether a defendant, proposed to be discharged from the hospital, should be placed on parole or committed to prison. Burgess, 870 P.2d at 278. During Burgess' commitment at the school, the legislature repealed section 77-16a-8 and enacted in its place Utah Code Ann. § 77-16a-203.

Section 77-16a-203 establishes a detailed process for review of individuals criminally committed to the state hospital. That review requires both the hospital and the prison to create teams of clinicians who evaluate the patient and make a recommendation. Id. n. 1. Because section 77-16a-8 had been repealed, the training school was unclear as to the procedure that had to be followed to transfer Burgess to the prison. Thus, the county attorney went before the Court seeking an order stating the appropriate procedure to follow.⁴

⁴ Apparently, the school sought Burgess' transfer because he could not be securely maintained at the facility and was not accepting treatment. Burgess, 870 P.2d at 276.

The trial court in Burgess ruled that the current statute, section 77-16a-203, governed Burgess' placement and ordered him maintained at the school pending proceedings consistent with that law. Id. Burgess appealed from the order. On appeal, Burgess argued that the application of section 77-16a-203 was ex post facto illegally retroactive. This Court denied both claims, for three different reasons.

First, this Court ruled that the statute governing the placement process in the repealed statute, section 77-16a-8, was not a "vested" right in which Burgess had a protectible interest. Id. at 278. As stated by the Court, the transfer process was not part of Burgess' sentence but merely a placement procedure that was not "ripe until the recommendation for transfer was submitted."⁵ Id.

Second, the Court also ruled that application of current law would not violate the constitutional prohibition on ex post facto laws. Id. at 279, n. 3. The ex post facto clause prohibits the state from imposing a harsher or more burdensome punishment than could have been imposed when the crime was committed. Id.

⁵ The recommendation for Burgess' transfer was not submitted until October 1992, after section 77-16a-203 became law.

Burgess' sentence did not increase as a result of the change in the transfer process: both before and after the enactment of the law, Burgess was subject to three consecutive one-to-fifteen year sentences.

Finally, the Court also ruled that even accepting Burgess' retroactivity claim, application of the new law still would not be unlawfully retroactive because it changed only procedure. Id. Statutes that make only procedural changes in the law, i.e., in the "judicial machinery for enforcing rights," are not improper. See State v. Abeyta, 852 P.2d 993, 995 (Utah 1993) (per curiam). Thus, the trial court's decision to apply current law in Burgess' case did not violate either the ex post facto or retroactivity prohibitions.

Although non-material facts are different, the legal analysis and conclusions here parallel those in Burgess. In 1988, when Dall committed his crime, and in 1989, when he was sentenced, Utah Code Ann. § 77-35-21.5 (repealed 1990) allowed transfer when the hospital "proposes to discharge" a person who had been adjudicated guilty and mentally ill. As recognized in Burgess in its interpretation of similar language in section 77-16a-8, this provision did not require discharge into the community but only discharge from the hospital to the

jurisdiction of the Board of Pardons. Burgess, 870 P.2d at 279, n. 6.

Statutory 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. As a result of the 1990 amendment, which added the term "maximum benefit," both the state hospital and the PSRB were obligated to find that Dall had reached a certain level of stability to transfer. Thus, as in Burgess, application of the 1990 "maximum benefit" statute did not harm Dall's case or make his transfer more likely. Due to the imposition of the maximum benefit standard, the state was statutorily obligated to meet a higher burden to effect transfer than under the old statute.

Neither the legislature's addition of the term "maximum benefit" nor the PSRB's application of it to Dall, violated the ex post facto or retroactivity proscriptions, namely because use of the standard did not disadvantage Dall. The testimony before the trial court at the evidentiary hearing showed that indeed the maximum benefit codification essentially adopted the hospital's practice before 1990. The following colloquy contains Mr. Verville's testimony on the matter:

Q [Mr. Beadles] In the review process that you oversaw, and transferring somewhat to the PSRB, or making that recommendation, what was the standard, what clinical standard, in your opinion, was used and looked at in 1989?

[Objection omitted]

THE WITNESS Again, as I tried to indicate earlier, it was a clinical standard wherein the treating psychiatrist and his clinical team would review the progress of the inmate, or excuse me, the patient, and determine whether or not he had received everything that the hospital had to offer for opportunities for improvement with his condition.

Q [BY MR. BEADLES] Were those the same criteria that were used in 1991?

A Yes.

Q Are you familiar with the term "maximum benefit"?

A Yes.

Q Do you know where that term came from?

A My understanding of where that term came from was out of the creation of the guilty-mentally ill law, and it's a standard that is currently being used at the hospital now for referral. It, however, maintains, to my understanding, that same definition that I gave you. It's not a written, defined term. It's simply the clinical team, including the psychiatrist and his clinical team making the recommendations that this person has benefitted as much as they can offer.

Q As you see it [unintelligible] looking back over the years that you've been involved in this process, the term "maximum benefit" is a codification of policy and practice of the Utah State Hospital from 1989 to the present?

A Right. If anything, it's becoming more stringent in that there's more review now than there was in 1989.

* * *

Q All right. Going back to 1989-1991, differentiating those two standards, in your opinion, was the standard used in 1991 harsher than the 1989 standard?

A I would see them as being very similar at that time.

Q And that is in the sense that it puts the same type of burden on the State Hospital and the PSRB to make that determination?

[Objection omitted]

THE WITNESS: Yes.

(R. at 697-99).

Thus, the evidence at trial established that the hospital's pre-1990 policy corresponded with the "maximum benefit" standard in 1990. Even if the hospital had used the pre-1990 transfer provision (which contained no standards), the result would have been no different.⁶

⁶ In an attempt to circumvent this problem in the case, two weeks before the evidentiary hearing, Dall argued in his pre-trial brief that the state hospital and the PSRB were obligated to use a different standard: Utah Code Ann. § 77-16-5 (1990), which prohibits transfer of certain offenders unless the director of the state hospital certifies that they have "sufficiently recovered" from their mental illness. Utah Code Ann. § 77-16-5 (1990). Not only was this claim never raised at the PSRB hearing (and thus waived pursuant to Smith v. Batchelor, 832 P.2d 467, 470 n.4 (Utah 1992)) or in either the original or amended

In State v. Thurman, 846 P.2d 1256 (Utah 1993), the Utah Supreme Court ruled that stare decisis applied to the several panels of this Court. Therefore, "the first decision by a court on a particular question of a law governs later decisions by the same court." Thurman, 846 P.2d at 1269. This case is identical in fact and law to Burgess; thus, under the doctrine of stare decisis, Dall's claims must be answered similarly to those in Burgess. See State v. Shoulderblade, 858 P.2d. 1049, 1051 (Utah App. 1993) (co-defendant separately appealed his conviction on same issues and facts; therefore, decision in co-defendant's appeal served as binding precedent under doctrine of stare decisis).

II. BECAUSE DALL FAILED TO MARSHALL THE EVIDENCE IN SUPPORT OF EITHER THE PSRB'S OR THE TRIAL COURT'S DECISION, THIS COURT SHOULD ACCEPT BOTH SETS OF FINDINGS AS VALID.

Dall challenges the PSRB's decision to transfer Dall and the trial court's affirmance of that agency decision. However, he has failed to carry the "heavy burden appellants must bear when

petitions, this claim is simply wrong. Judge Hanson clearly stated that he was sentencing Dall pursuant to the guilty and mentally ill provisions of section 77-35-21.5. (Tr. Hearing before Judge Timothy Hanson, Third District Court, State v. Dall, Case Number 8819911695, July 28, 1989, at 63-64; Petitioner's Exhibit No. 5). Section 77-16-5 applies to individuals who are found **guilty**, a plea separate from guilty and mentally ill.

challenging factual findings." Oneida/SLIC, 236 Utah Adv. at 25. This Court has repeatedly emphasized the need for appellants, in general, to marshall the evidence adequately. Dall, in particular, also has failed to meet that obligation.

As stated in Oneida/SLIC, the first step in marshalling the evidence is to present "'every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists.'" Id; citing West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991). After appellant has marshalled the supporting evidence, he must then show why the court's findings are clearly against the weight of the evidence, i.e., the "fatal flaw." Oneida/SLIC, 236 Utah Adv. Rep. at 25. When an appellant has failed to marshall the evidence *in support of the trial court's factual findings*, this Court has consistently refused to review the findings and has accepted them as valid. As in Oneida/SLIC, Dall's recitation of the evidence from both the agency and trial court hearings, are merely "carefully selected facts and excerpts of trial testimony in support of [his] position." Id. Dall has not marshalled the evidence in support of the PSRB's or trial court's findings; therefore, this Court should accept both sets of findings as valid.

III. THE PSRB HAD BEFORE IT SUBSTANTIAL EVIDENCE TO SUPPORT ITS OPINION THAT DALL HAD REACHED MAXIMUM BENEFIT FROM THE SERVICES AVAILABLE AT THE STATE HOSPITAL; THEREFORE, THE AGENCY'S DECISION WAS CORRECT AND SHOULD BE UPHELD.

In reviewing an administrative agency action, this Court affirms the decision if based on substantial evidence. SEMECO Industries, Inc. v. Utah State Tax Com'n, 849 P.2d 1167, 1172-1173 (Utah 1993) (Durham, J. dissenting); Utah Department of Administrative Services v. Public Service Com'n, 658 P.2d 601, 607-12 (Utah 1983). Administrative Services was the Supreme Court's leading interpretation of the standards by which a court reviewed agency actions before enactment of the Utah Administrative Procedures Act (UAPA).

Because the PSRB was exempted from UAPA, the standard of review set forth in Administrative Services should also govern this Court's review of the PSRB hearing. The pre-UAPA "substantial evidence test" provided less latitude for judicial review than the current UAPA standard of the same name. SEMECO, 849 P.2d at 1173. In Administrative Services, the Court interpreted the test to mandate affirmance of an agency finding whenever "evidence of any substance whatever" supports the findings of fact." Id. citing Administrative Services, 658 P.2d at 609. Thus, just as the trial court was bound to afford

significant deference to the PSRB, so this Court is similarly bound.

The 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. Although Dall points out that he will need treatment for the rest of his life, chronological duration is not the focus of the maximum benefit test. That test is met if the facts show the following: (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 (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.

Any other definition makes a mockery of the guilty and mentally ill laws. As the state conceded, from the layman's viewpoint any person would "benefit" more from serving his entire sentence at the state hospital rather than prison. However, this suggested interpretation, if made law, would transform the state

hospital into the permanent warehouse for all individuals who have been convicted as guilty and mentally ill. The PSRB's interpretation better balances the conflicting interests in the guilty and mentally ill placement process: administering punishment appropriate for the offense while also enabling the mentally ill to receive medication and treatment that will lead to a stable mental condition. This interpretation also reflects the most logical intent of the legislation, and conforms with the agency's past practice.

The PSRB's decision to transfer Dall appropriately met the definition of "maximum benefit." The trial elicited additional evidence supporting the PSRB's transfer decision that Dall had reached maximum benefit: Dr. Washburn stated his opinion that Dall's condition had not changed since the PSRB hearing in 1991. (R. at 636-37).

IV. DALL'S CLAIM THAT HE WOULD BE SUBJECT TO CRUEL AND UNUSUAL PUNISHMENT IF THE TRANSFER WERE ALLOWED TO PROCEED IS NOT RIPE FOR ADJUDICATION AND IS SPECULATIVE; THEREFORE, IT IS NOT A GROUND FOR OVERTURNING THE PSRB'S DECISION.

Dall's cruel and unusual punishment claim is not ripe for adjudication. Dall has never been at the prison; therefore, the prison simply never has subjected Dall to any type of punishment. Even if the ripeness issue could be overcome, the claim that the

prison is going to subject Dall to cruel and unusual punishment is speculative at best. In essence, Dall asked the trial court to give him a declaratory judgment that the prison is unable, as a matter of law, to confine him in a manner consistent with the cruel and unusual punishment clause.

The "unnecessary rigor" provision of the state constitution does not lend support to Dall's argument. When the constitution was drafted, the word "rigor" meant "sternness, harshness, cruelty," "that which is harsh or severe; especially an injustice, oppression or cruelty." The Century Dictionary of the English Language 5181 (1890-1891). This definition does not create a separately enforceable standard but merely adds strength to the "cruel and unusual" language contained in the balance of the provision. Utah Const. art. I, § 9.

More fundamentally though, Dall's basic claim that the prison could not treat him properly also is without merit. All the witnesses who testified stated their opinion, based on experience from working at the prison, that it had a commendable program that recently had been significantly improved. Dall himself introduced a copy of a settlement agreement and consent decree from the United States District Court for the District of Utah in which the prison agreed to significantly improve its

mental health unit, even beyond constitutional minima. Henry v. Deland, Civil No. 89-C-1124J, April 1, 1993, Order and Stipulation; Petitioner's Exhibit No. 3).

In its Findings of Fact and Conclusions of Law, the trial court stated that it had reviewed the settlement agreement and concluded that "the facilities at the mental health unit are neither inadequate, nor cruel and unusual." (R. at 573). Again, Dall has not marshalled the evidence in support of this finding and, therefore, this Court should consider it valid. Oneida/SLIC, 236 Utah Adv. at 25.

V. THE PSRB DID NOT ENCROACH UPON JUDICIAL FUNCTIONS; THEREFORE, THE DECISION TO TRANSFER DALL WAS NOT A VIOLATION OF THE SEPARATION OF POWERS CLAUSE OF THE UTAH CONSTITUTION.

Article V of the Utah Constitution divides the powers of state government into three separate departments -- the legislative, executive, and judicial. Utah Const. art. V. It provides that no person charged with the exercise of powers belonging to one department can exercise the functions appertaining to another. Thus, article V is violated only if action of one branch encroaches upon the constitutionally guaranteed power or authority of another. Mutart v. Pratt, 51 Utah 246, 170 P. 67 (1917).

In Mutart, the Utah Supreme Court ruled that the indeterminate sentencing law did not violate the separation of powers clause. In that decision, the Court stated:

The right of the court to inflict any punishment at all is given it by the Legislature, and without some act on the part of the lawmaking power no such power or duty would be vested therein; and for that reason I fail to see wherein the act in question [enactment of the indeterminate sentencing law] deprives the court of any power or authority guaranteed to it by the Constitution of this state.

Mutart, 170 P. at 68. Although the power to impose a sentence is statutorily vested in the courts, the power to create a sentencing system is not. Were a court to impose a sentence not authorized by law, that imposition of sentence would violate the legislature's sole authority under article V.

The PSRB did not exercise a judicial function when it transferred jurisdiction to the Board of Pardons.⁷ Judge Hanson already had carried out the judicially-authorized function of imposing sentence. The PSRB was merely carrying out that sentence pursuant to its lawful powers and authority. Judge Hanson expressly committed Dall to the jurisdiction of the PSRB.

⁷ This conclusion logically follows from this Court's decision in Burgess that the transfer procedure was not part of the sentence, but merely an administrative placement process. Thus, this part of Dall's claim also can be resolved via Burgess pursuant to the doctrine of stare decisis.

That grant of jurisdiction brought with it all the lawful powers and authority that the legislature gave to the PSRB. One of those powers was to decide when Dall was subject to discharge from the hospital. Utah Code Ann. § 77-35-21.5 (repealed 1990).

VI. THE LEGISLATURE'S FAILURE TO PROVIDE DIRECT APPELLATE REVIEW OF THE PSRB DECISION DOES NOT VIOLATE DALL'S RIGHT TO AN APPEAL.

Article VIII of the state constitution creates and defines the jurisdictional authority of the courts. Utah Const. art. VIII, § 8 (1984). The constitution gives district courts "original jurisdiction in all matters except as limited by this constitution or by statute. . . ." Id. Further, that same provision states that all other courts shall have original and appellate jurisdiction only as provided by statute. Id. The constitution itself only grants courts the power to issue extraordinary writs. Id. Except for extraordinary writs then, the legislature has the constitutional authority to establish the jurisdiction of the courts.

Before the PSRB hearing at issue here, the legislature chose to withdraw the right to appeal a decision of the PSRB in this type of case.⁸ That right was completely within the

⁸ To the extent Dall claims his inability to directly appeal the PSRB's action violated his rights under article I,

legislature's power and, contrary to Dall's argument, did not leave him without a remedy. In DeBry v. Salt Lake County Board of Appeals, 764 P.2d 627 (Utah App. 1988), this Court held that an administrative agency action can be appealed only if a statute explicitly creates the right of appeal. Otherwise, a person must seek review through the "traditional means" of extraordinary writ. DeBry, 764 P.2d at 628. As discussed previously in this brief, this case provided Dall with precisely that type of review.

VII. THE PSRB'S HEARING WAS NOT A CRITICAL STAGE IN THE CRIMINAL PROCEEDINGS AND, THEREFORE, DOES NOT REQUIRE COMPULSORY PROCESS.

By the time the PSRB decided to transfer Dall, he already had pled guilty and been sentenced to two terms of one to fifteen years incarceration. Tr. Hearing before Judge Hanson, Third District Court, State v. Dall, Case No. 881991695, July 28, 1989, at 64).

section 12, this claim too is met by Burgess. The PSRB simply is not a part of the criminal process; thus, none of its actions involve the class of persons, i.e., those accused of criminal offenses, entitled to the rights granted by article I, section 12. Additionally, if Dall believed that this Court's decision to dismiss the direct appeal due to lack of subject-matter jurisdiction was unconstitutional, he should have filed a petition for certiorari with the Utah Supreme Court.

As part of that sentence, Dall was committed to the jurisdiction of the PSRB to be placed in the state hospital for appropriate treatment. Again, as clarified in Burgess, the PSRB did not create a new sentence; it simply carried out the judge's order and the legislature's sentencing system. This process does not constitute a part of sentencing. In Gardner v. Florida, 430 U.S. 349, 358 (1977), the United States Supreme Court stated that a 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." (emphasis added).

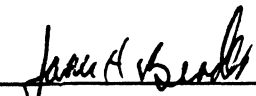
Because the PSRB hearing did not impose sentence, but merely executed a lawfully imposed sentence, the hearing before the PSRB was not a critical stage entitling him to compulsory process.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court affirm the decision of the trial court.

RESPECTFULLY SUBMITTED THIS 57 day of August 1994.

JAN GRAHAM
Utah Attorney General



James H. Beadles
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on the 5th day of August 1994, I caused to be mailed, by U.S. Mail, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF APPELLEES** to:

Robert K. Heineman
Mark R. Moffat
SALT LAKE LEGAL DEFENDERS' ASSN
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

James H. Beardsley

ADDENDA

ADDENDUM A

Sec. 10. [Powers denied the states.]

[1.] 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, as post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

[2.] No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

[3.] No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreements or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

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AMENDMENT V

[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 offence 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.

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AMENDMENT VI

[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 defence.

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Sec. 7. [Due process of law.]

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

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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.

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Sec. 12. [Rights of accused persons.]

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

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objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.

(d) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(e) Arguments of the respective parties shall be made after the court has instructed the jury. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court. 1980

77-35-20. Rule 20 — Exceptions unnecessary [Repealed effective July 1, 1990].

Exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party state his objections to the actions of the court and the reasons therefor. If a party has no opportunity to object to a ruling or order, the absence of an objection shall not thereafter prejudice him. 1980

77-35-21. Rule 21 — Verdict [Repealed effective July 1, 1990].

(a) The verdict of the jury shall be either "guilty" or "not guilty," "not guilty by reason of insanity," "guilty and mentally ill," or "not guilty of the crime charged but guilty of a lesser included offense," or "not guilty of the crime charged but guilty of a lesser included offense and mentally ill" provided that when the defense of mental illness has been asserted and the defendant is acquitted on the ground that he was insane at the time of the commission of the offense charged, the verdict shall be "not guilty by reason of insanity."

(b) The verdict shall be unanimous. It shall be returned by the jury to the judge in open court and in the presence of the defendant and counsel. If the defendant voluntarily absents himself, the verdict may be received in his absence.

(c) If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to any defendant as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(d) When the defendant may be convicted of more than one offense charged, each offense of which the defendant is convicted shall be stated separately in the verdict.

(e) The jury may return a verdict of guilty to the offense charged or to any offense necessarily included in the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein.

(f) When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or may be polled at the court's own instance. If, upon the poll, there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged. If the verdict is unanimous, it shall be recorded.

(g) If judgment of acquittal is given on a verdict or the case is dismissed and the defendant is not detained for any other legal cause, he shall be discharged as soon as the judgment is given. If a verdict of guilty is returned, the court may order the defendant to be taken into custody to await judgment on the verdict or may permit the defendant to remain on bail. 1983

77-35-21.5. Rule 21.5 — Plea claiming mental illness or insanity — Expenses of

examination and treatment — Procedures — Verdict — Sentence — Commitment — Discharge — Prison sentence — Parole — Commitment to Psychiatric Security Review Board — Probation [Repealed effective July 1, 1990].

(1) Upon a plea of guilty and mentally ill being tendered by a defendant to any charge, the court shall hold a hearing within a reasonable time to determine the claim of mental illness of the defendant. Mental illness, for this purpose, is determined by the definition stated in Subsection 76-2-305(4). The court may order the defendant to be evaluated at the Utah State Hospital or any other suitable facility, and may receive the evidence of any private or public expert witness whose evidence is offered by the defendant or the prosecutor. A defendant who tenders a plea of "guilty and mentally ill" shall be examined first by the trial judge in compliance with the standards for taking pleas of guilty. The defendant shall be advised that a plea of guilty and mentally ill is a plea of guilty and not a contingent plea. If the defendant is later found not to be mentally ill, a guilty plea otherwise lawfully made remains a valid plea of guilty. The defendant shall be sentenced as any other offender. If the court concludes that the defendant is currently mentally ill, applying the standards set forth in this section, the defendant's plea shall be accepted and he shall be sentenced as a mentally ill offender. Expenses of examination, observation, or treatment, excluding travel to and from any mental health facility, shall be charged to the county. When the offense is a state offense, the state shall pay all of the expense. Travel expenses shall be charged to the county where prosecution is commenced. Examination of defendants charged with municipal or county ordinance violations shall be charged to the municipality or county commencing the prosecution.

(2) (a) If a defendant at trial asserts a defense of "not guilty by reason of insanity," the court shall instruct the jury that it may find the defendant guilty, not guilty, not guilty by reason of insanity, guilty and mentally ill, guilty of a lesser offense, or guilty of a lesser offense due to mental illness but not an illness which would warrant full exoneration.

(b) Upon a verdict of guilty and mentally ill to the offense charged, or any lesser offense, the court shall hold a hearing as provided in this section, and if the court finds that the defendant is currently mentally ill, it shall sentence the defendant as a mentally ill offender.

(3) If the defendant is found guilty and mentally ill, the court shall impose any sentence which could be imposed under law upon a defendant who is convicted of the same offense. Before sentencing, the court shall conduct a hearing to determine the defendant's present mental state.

(4) The court shall, in its sentence, order commitment to the jurisdiction of the Psychiatric Security Review Board established under Section 77-38-2 and hospitalization at the Utah State Hospital if, upon completion of the hearing and consideration of the record, the court finds by clear and convincing evidence that:

(a) the defendant has a mental illness as defined by Subsection 76-2-305(4);

(b) because of his mental illness the defendant poses an immediate physical danger to others or self, which may include jeopardizing his own or others' safety, health, or welfare if placed in a

correctional or probation setting, or lacks the ability to provide the basic necessities of life, such as food, clothing, and shelter, if placed on probation;

(c) the defendant lacks the ability to engage in a rational decision-making process regarding the acceptance of mental treatment as demonstrated by evidence of inability to weigh the possible costs and benefits of treatment;

(d) there is no appropriate treatment alternative to a court order of hospitalization; and

(e) the Utah State Hospital is able to provide the defendant with treatment, care, and custody that is adequate and appropriate to the defendant's conditions and needs.

(5) The period of commitment to the jurisdiction of the Psychiatric Security Review Board under this section may in no circumstance be longer than the maximum sentence imposed by the court.

(6) (a) When the Psychiatric Security Review Board proposes to discharge a defendant from the Utah State Hospital prior to the expiration of sentence, it shall transmit to the Board of Pardons a report on the condition of the defendant, including the clinical facts, the diagnosis, the course of treatment, the prognosis for the remission of symptoms, the potential for recidivism and for the danger to himself or the public, and recommendations for future treatment. 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.

(b) If the Board of Pardons, under law or administrative rules, considers for parole any defendant who has been adjudged guilty and mentally ill, the Board of Pardons shall consult with the Psychiatric Security Review Board. An additional report on the condition of the defendant may be filed with the Board of Pardons. 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.

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

(8) 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 initiating parole violation hearings. The period of parole may not be for fewer than five years or until the expiration of the defendant's sentence, whichever comes 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.

(9) (a) A defendant who pleads or is found guilty and mentally ill who is placed on probation by the sentencing court shall be placed under the jurisdiction of the Psychiatric Security Review Board. The Psychiatric Security Review Board shall make treatment a condition of probation if the defendant is shown to be treatable and facili-

ties exist for treatment of the offender in a probation status. Reports as specified by the trial judge shall be filed with the probation officer and the sentencing court.

(b) Failure to continue treatment or other condition of probation, except by agreement with the treating agency and the Psychiatric Security Review Board, is a basis for the initiation of probation violation hearings. The period of probation may not be for fewer than five years or until the expiration of the defendant's sentence, whichever comes first, and may not be reduced by the sentencing court without consideration of a current report on the mental health status of the offender.

(c) Treatment or other care may be provided by or under contract with the Division of Mental Health, a local mental health authority, or, with the approval of the Psychiatric Security Review Board, any other mental health provider. A report shall be filed with the probation officer and the sentencing court every three months during the period of probation. If a motion on a petition to discontinue probation is made by the defendant, the probation officer shall request a report. A motion on a petition to discontinue probation may not be heard more than once every six months.

(10) (a) With regard to persons committed by the court to the Utah State Hospital or other facility under this section prior to July 1, 1989, the effective date of this act, the superintendent of the Utah State Hospital, or his designee, shall petition the court within 60 days after that date for review of those orders. The court shall review and modify those orders to include commitment to the jurisdiction of the Psychiatric Security Review Board established under Section 77-38-2.

(b) With regard to persons who have been placed on probation by the sentencing court under Subsection (9) prior to July 1, 1989, the effective date of this act, the executive director of the Department of Corrections, or his designee, shall petition the court within 60 days after that date for review of those orders. The court shall review and modify those orders to include placement under the jurisdiction of the Psychiatric Security Review Board established under Section 77-38-2.

1989

77-35-22. Rule 22 — Sentence, judgment and commitment [Repealed effective July 1, 1990].

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 30 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in his absence, he may likewise be sentenced in his absence. If a defendant fails to appear for sen-

Rule 21.5. Plea claiming mental illness or insanity - Expenses of examination and treatment - Procedures - Verdict - Sentence - Commitment - Discharge - Prison sentence - Parole - Commitment to Psychiatric Security Review Board - Probation.

(1) Upon a plea of guilty and mentally ill being tendered by a defendant to any charge, the court shall hold a hearing within a reasonable time to determine the claim of mental illness of the defendant. Mental illness, for this purpose, is determined by the definition stated in Subsection 76-2-305(4). The court may order the defendant to be evaluated at the Utah State Hospital or any other suitable facility, and may receive the evidence of any private or public expert witness whose evidence is offered by the defendant or the prosecutor. A defendant who tenders a plea of "guilty and mentally ill" shall be examined first by the trial judge in compliance with the standards for taking pleas of guilty. The defendant shall be advised that a plea of guilty and mentally ill is a plea of guilty and not a contingent plea. If the defendant is later found not to be mentally ill, a guilty plea otherwise lawfully made remains a valid plea of guilty. The defendant shall be sentenced as any other offender. If the court concludes that the defendant is currently mentally ill, applying the standards set forth in this section, the defendant's plea shall be accepted and he shall be sentenced as a mentally ill offender. Expenses of examination, observation, or treatment, excluding travel to and from any mental health facility, shall be charged to the county, except when the offense is a state offense, the state shall pay all of the expense. Travel expenses shall be charged to the county where prosecution is commenced. Examination of defendants charged with municipal or county ordinance violations shall be charged to the municipality or county commencing the prosecution.

(2) (a) If a defendant at trial asserts a defense of "not guilty by reason of insanity," the court shall instruct the jury that it may find the defendant guilty, not guilty, not guilty by reason of insanity, guilty and mentally ill, guilty of a lesser offense, or guilty of a lesser offense due to mental illness but not an illness which would warrant full exoneration.

(b) Upon a verdict of guilty and mentally ill to the offense charged, or any lesser offense, the court shall hold a

hearing as provided in this section, and if the court finds that the defendant is currently mentally ill, it shall sentence the defendant as a mentally ill offender.

(3) If the defendant is found guilty and mentally ill, the court shall impose any sentence which could be imposed under law upon a defendant who is convicted of the same offense. Before sentencing, the court shall conduct a hearing to determine the defendant's present mental state.

(4) The court shall, in its sentence, order commitment to the jurisdiction of the Psychiatric Security Review Board established under Section 77-38-2 and hospitalization at the Utah State Hospital if, upon completion of the hearing and consideration of the record, the court finds by clear and convincing evidence that:

(a) the defendant has a mental illness as defined by Subsection 76-2-305(4);

(b) because of his mental illness the defendant poses an immediate physical danger to others or self, which may include jeopardizing his own or others' safety, health, or welfare if placed in a correctional or probation setting, or lacks the ability to provide the basic necessities of life, such as food, clothing, and shelter, if placed on probation; and

(c) the Utah State Hospital is able to provide the defendant with treatment, care, and custody that is adequate and appropriate to the defendant's conditions and needs.

(5) The period of commitment to the jurisdiction of the Psychiatric Security Review Board under this section may in no circumstance be longer than the maximum sentence imposed by the court.

(6) (a) When the Psychiatric Security Review Board proposes to discharge a defendant from the Utah State Hospital prior to the expiration of sentence, it shall transmit to the Board of Pardons a report on the condition of the defendant, including the clinical facts, the diagnosis, the course of treatment, the prognosis for the remission of symptoms, the potential for recidivism and for the danger to himself or the public, and

recommendations for future treatment. 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.

(b) If the Board of Pardons, under law or administrative rules, considers for parole any defendant who has been adjudged guilty and mentally ill, the Board of Pardons shall consult with the Psychiatric Security Review Board. An additional report on the condition of the defendant may be filed with the Board of Pardons. Pending action of the Board of Pardons, the defendant shall remain under the jurisdiction of [the] Psychiatric Security Review Board of the Utah State Hospital.

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

(8) 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 initiating parole violation hearings. The period of parole may not be for fewer than five years or until the expiration of the defendant's sentence, whichever comes 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.

(9) (a) A defendant who pleads or is found guilty and mentally ill who is placed on probation by the sentencing court, shall be placed under the jurisdiction of the Psychiatric Security Review Board. The Psychiatric Security Review Board shall make treatment a condition of probation if the defendant is shown to be treatable and facilities exist for treatment of the offender in a probation status. Reports as specified by the trial judge shall be filed with the probation officer and the sentencing court.

(b) Failure to continue treatment or other condition of

probation, except by agreement with the treating agency and the Psychiatric Security Review Board, is a basis for the initiation of probation violation hearings. The period of probation may not be for fewer than five years or until the expiration of the defendant's sentence, whichever comes first, and may not be reduced by the sentencing court without consideration of a current report on the mental health status of the offender.

(c) Treatment or other care may be provided by or under contract with the Division of Mental Health, a local mental health authority, or, with the approval of the Psychiatric Security Review Board, any other mental health provider. A report shall be filed with the probation officer and the sentencing court every three months during the period of probation. If a motion on a petition to discontinue probation is made by the defendant, the probation officer shall request a report. A motion on a petition to discontinue probation may not be heard more than once every six months.

(10) (a) With regard to persons committed by the court to the Utah State Hospital or other facility under this section prior to July 1, 1989, the effective date of this act, the superintendent of the Utah State Hospital, or his designee, shall petition the court within 60 days after that date for review of those orders. The court shall review and modify those orders to include commitment to the jurisdiction of the Psychiatric Security Review Board established under Section 77-38-2.

(b) With regard to persons who have been placed on probation by the sentencing court under Subsection (9) prior to July 1, 1989, the effective date of this act, the executive director of the Department of Corrections, or his designee, shall petition the court within 60 days after that date for review of those orders. The court shall review and modify those orders to include placement under the jurisdiction of the Psychiatric Security Review Board established under Section 77-38-2.

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ADDENDUM B

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

| | | |
|------------------------|---|----------------------|
| KIRK W. DALL, | : | FINDINGS OF FACT AND |
| | : | CONCLUSIONS OF LAW |
| Petitioner, | : | |
| vs. | : | CASE NO. 910902993 |
| STATE OF UTAH, et al., | : | |
| Respondents. | : | |

The Court having heard this matter and ruled, and now reviewed petitioner's and respondent's proposed Findings of Fact and Conclusions of Law, and the Objections to them, now enters these Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

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

2. Petitioner requested relief under Rules 65B(b), (c) and (e), challenging the finding of the Psychiatric Security Review Board ("PSRB") that Mr. Dall had 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, 1991 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 new hearing was to correlate to the April 19, 1991 hearing.

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 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. Mr. Dall was returned to the State 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., Section 77-38-2(6) provided for judicial review of determinations of the PSRB.

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

13. Effective March 13, 1990, Section 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 Section 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.

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.

17. Mr. Verville testified that the Hospital applied a clinical standard in assessing petitioner's mental condition.

18. This Court issued a minute entry reflecting a 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. There is no substantive difference, at least in their application, between the Hospital's clinical practice in transferring guilty and mentally ill individuals before 1990 and after the statutory adoption of the maximum benefit standard in 1990.

4. The State Hospital's policies and procedures for transfer under the applicable statutes were not arbitrary and capricious, and therefore were in conformity with the law.

5. Because transfer under the applicable statutes at the time of Mr. Dall's commitment to the PSRB in 1989, and at the time of 1991 PSRB hearing were, for all 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.

6. This Court cannot find that the conditions at the Utah State Prison 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.

7. 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 neither inadequate, nor cruel and unusual.

8. 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 purview and expertise of the PSRB.

9. 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.

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

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

12. 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,

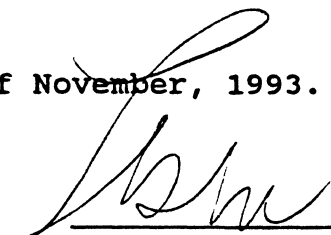
Sections 7 and 12, and Article VIII, Section 5 of the Utah Constitution.

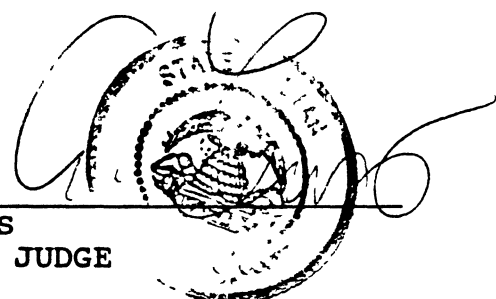
13. The PSRB's transfer decision does not constitute imposition of a sentence, but is merely reflective of the execution of a lawfully imposed sentence. The hearing before the PSRB was not a critical stage of the proceedings entitling petitioner to compulsory process (or financial access to expert testimony).

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

15. This Court's Order Of Stay is lifted, based upon the foregoing.

Dated this 16th day of November, 1993.


LESLIE A. LEWIS
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law, to the following, this 16th day of November, 1993:

Mark R. Moffat
Robert K. Heineman
Attorneys for Petitioner
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

James H. Beadles
Lorenzo K. Miller
Assistant Attorneys General
Attorney for Respondents
330 South 300 East
Salt Lake City, Utah 84111

E. Matheson