

1994

William Lettig v. Scott V. Carver, Warden, Utah
State Prison - Draper; M. R. Sibbett, Chairman of
the Utah Board of Pardons; Fred Trujillo, Hearing
Officer for the Utah Boards of Pardons; and All
Other Board of Pardons Members Not Presently
Known to Petitioner : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

WILLIAM LETTIG, :
Petitioner-Appellant, :
v. :
SCOTT V. CARVER, Warden, Utah :
State Prison - Draper; M. R. :
SIBBETT, Chairman of the Utah : Case No. 940380-CA
Board of Pardons; FRED : Priority No. 14
TRUJILLO, Hearing Officer for :
the Utah Board of Pardons; :
and ALL OTHER BOARD OF :
PARDONS MEMBERS NOT PRESENTLY :
KNOWN TO PETITIONER, :
Respondents-Appellees. :

BRIEF OF APPELLEES

Appeal from a Final Order of
Dismissal of the Third Judicial
District Court, Salt Lake County,
State of Utah, the Honorable David
Young presiding

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UTAH COURT OF APPEALS
BRIEF

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1ST OF APPEAL

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KNOWN TO PETITIONER,	:	
Respondents-Appellees.	:	

BRIEF OF APPELLEES

STATEMENT OF JURISDICTION

Jurisdiction over this appeal is conferred on the Court of Appeals by section 78-2a-3(2)(h) of the Utah Code, which grants appellate jurisdiction over appeals from orders on petitions for extraordinary writs challenging Board of Pardons decisions, except cases involving a first degree or capital felony. Utah Code Ann. § 78-2a-3(2)(h) (Supp. 1994). This case involves Mr. Lettig's convictions of Theft, a second degree felony, and Failure to Stop at Officer's Command, a third degree felony.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Whether Lettig has waived any challenge to the trial court's findings by failing to marshal the evidence supporting those findings?

Standard of Review: This Court has "shown no reluctance to affirm when the appellant fails adequately to marshal the evidence." Interiors Contracting, Inc. v. Smith, Halander & Smith Assocs., 881 P.2d 929, 933 (Utah Ct. App. 1994).

2. Whether, by failing to raise the issue below, Lettig waived any challenge to the trial court's judgment based on contents of the Board's file that Lettig now alleges were not previously disclosed to him?

Standard of Review: Absent plain error or exceptional circumstances, this Court will not review a claim of error raised for the first time on appeal. State v. Brown, 856 P.2d 358, 359 (Utah Ct. App. 1993).

3. Whether the trial court correctly dismissed Lettig's petition for extraordinary writ where Lettig failed to demonstrate that the Board denied him any procedural protections in his post-revocation parole grant hearing?

Standard of Review: When reviewing the dismissal of a petition for extraordinary relief, the appellate court accords no deference to the conclusions of law that underlie the dismissal. Neel v. Holden, 886 P.2d 1097, 1100 (Utah 1994). However, "while [the court] must review the fairness of the process by which the

Board undertakes its sentencing function, . . . [it] does not sit as a panel of review on the result.'" Id.

DETERMINATIVE OR IMPORTANT PROVISIONS

The following provisions are set forth in Addendum B to this Brief:

Utah Code Ann. § 77-27-5 (3) (1995)
Utah R. Civ. P. 59 (1994)

STATEMENT OF THE CASE

Nature of the Case

This appeal is from a final order of the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable David S. Young presiding, dismissing Lettig's petition for extraordinary relief against members of the Utah State Board of Pardons ("the Board"). Lettig, who was incarcerated on convictions of several second and third degree felony offenses, challenged the Board's decision to revoke his parole and not to set a new parole date, but to reconsider Lettig's case in September 1996. Lettig contended that the Board's decision improperly exceeded the Utah Sentence and Release Guidelines.

After an evidentiary hearing, the district court granted the Board's motion for summary judgment on the ground that the Board had sufficient cause to exceed the guidelines based upon Lettig's prior unsuccessful paroles and other considerations identified in the Board's written rationale. Lettig contends on appeal that the district court's findings are not supported by the record, that the

Board failed to disclose portions of the file to Lettig before the January 1994 rehearing, and that the trial court failed to adequately review the evidence on which the Board based its decision. In response, the Board urges this Court to affirm the district court's decision on the grounds (1) that Lettig has failed to properly marshal the evidence in challenging the trial court's findings, (2) that Lettig failed to raise below any concerns based on the alleged nondisclosure of the Board's file to him, and (3) that Lettig's claims of error fall outside the limited scope of judicial review of parole decisions.

Course of the Proceedings and Disposition Below

Lettig commenced this action in November 1993, by filing a petition for extraordinary relief challenging the Board's August 1993 decision to revoke Lettig's parole and to not reconsider Lettig for parole until September 1996. On December 14, 1993, the trial court ordered the Board to grant Lettig a new parole grant hearing in accordance with the procedural due process requirements established by the December 6, 1993 decision in Labrum v. Utah Board of Pardons, 870 P.2d 902 (Utah 1993). The Board reheard Lettig's case in January 1994, and reaffirmed its prior decision. Lettig then amended his petition to challenge the Board's January 1994 decision. In April 1994, the court held an evidentiary hearing on Lettig's claims. On May 23, 1994, the court granted the Board's motion for summary judgment, dismissing Lettig's entire petition with prejudice. Lettig filed his notice of appeal on June

21, 1994.

Statement of Facts

In June 1993, Lettig was convicted of Failure to Stop at Officer's Command, a third degree felony, for which he was sentenced to imprisonment for up to five years. R. 197 (First Amended Petition for Extraordinary Relief ¶ 3 & Exhibit A). At the time he committed that offense, Lettig was on parole from the Utah State Prison for a May 1986 conviction of Theft, a second degree felony for which he was sentenced to imprisonment for one to fifteen years. R. 197 (First Amended Petition ¶ 5 & Exhibit B).

In July 1993, based upon the recent felony conviction and several other admitted or uncontested parole violations, the Board revoked Lettig's parole from the Theft sentence. R. 282 (Findings, Conclusions and Final Order ¶¶ 8, 10). The Board then decided not to consider Lettig for further parole until September 1996. R. 283 (Findings ¶ 14). In November 1993, Lettig filed a petition for "habeas corpus" challenging the Board's decision as exceeding the Utah Sentence and Release Guidelines. R. 2-7.

In December 1993, in Labrum v. Utah Board of Pardons, 870 P.2d 902, 911 (Utah 1993), the Utah Supreme Court held that the Board must afford inmates timely disclosure of their files before conducting original parole grant hearings. Based upon the Labrum decision, the trial court ordered the Board to disclose its file to Lettig and rehear Lettig's case. R. 160-62. In January 1994, the Board provided Lettig a copy of its parole file in accordance with its interpretation of Labrum and reheard Lettig's case. R. 286

(Findings ¶¶ 32-33). Based on the rehearing, the Board reaffirmed its prior decision not to consider Lettig for parole until September 1996. R. 222.

Lettig amended his petition to challenge the Board's new decision, again contending that the Board had improperly exceeded the Utah Sentence and Release Guidelines. R. 196. In April 1994, the trial court held an evidentiary hearing at which it received in evidence the Board's original parole file and heard testimony from Board member Curtis Garner, parole officer James Furner, and Lettig, among others. R. 277.

Following the evidentiary hearing, the trial court entered its findings and conclusions. The court found that Lettig's claims "go directly against the substance of the Board's ultimate parole decision, attacking the Board's ability to deviate from the guidelines in his case, not against the procedural protections afforded by the Board." R. 288. Concluding that the Board "had sufficient cause in this case to exceed those guidelines based upon Petitioner's prior paroles and other circumstances of his case that were identified by the Board in its written rationale," the court granted summary judgment for the Board. R. 289.

SUMMARY OF THE ARGUMENT

Lettig has failed to raise an appropriate issue for this Court's review. Lettig claims that the evidence was insufficient to support the trial court's findings, but has failed to marshal the evidence supporting those findings. Lettig complains that

documents that were not disclosed to him before the evidentiary hearing below provided new or additional evidence to support his petition, but failed to raise that issue in the trial court. Finally, Lettig attacks the trial court for failing to adequately review the evidentiary basis for the Board's decision not to consider him for parole until September 1996. This attack, however, raises an issue outside the proper scope of judicial review of parole decisions, which extends only to the process by which parole decisions are made and does not reach the substance of those decisions. This Court should accordingly affirm the trial court's decision denying Lettig's petition for extraordinary relief.

ARGUMENT

I.

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S FINDINGS BECAUSE LETTIG HAS FAILED TO MARSHAL THE EVIDENCE IN CHALLENGING THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THOSE FINDINGS

Lettig's contention that the trial court's findings are unsupported by the evidence should be rejected because Lettig has utterly failed to comply with this Court's marshaling requirement for challenges to the sufficiency of evidence. This Court has not hesitated to affirm a trial court's findings where the appellant has failed to adequately marshal the evidence supporting the findings. "It is the appellant's burden to marshal the evidence, citing the appellate court to all the evidence in the record that would support the determination reached by the trial court and then

demonstrate why, even when viewed in the light most favorable to the court below, it is insufficient to support the finding under attack." Interiors Contracting, Inc. v. Smith, Halander & Smith Assocs., 881 P.2d 929, 933 (Utah Ct. App. 1994).

To properly marshal the evidence, "the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1313 (Utah Ct. App. 1991) (emphasis in original). Thus, in Interiors Contracting, this Court declined to entertain a challenge to the trial court's findings concerning an estoppel claim where the appellant's briefs "merely re-emphasize[d] evidence it deem[ed] supportive of its position, while ignoring evidence supportive of the trial court's findings." 881 P.2d at 933.

Here, Lettig has made no pretense of marshaling the evidence in attacking the trial court's findings. In fact, Lettig's brief is nearly bereft of the record citations that would accompany an adequate marshaling effort. The only finding Lettig specifically attacks is Finding No. 40, which recounts the testimony of Board member Curtis Garner that the Board's decision was "affected by [Lettig's] . . . lack of remorse at the parole hearings." R. 287.

Claiming that Garner's testimony actually contradicted this finding, Lettig selectively emphasizes portions of Garner's testimony, removes them from their context, and then ignores other portions of his testimony. Rather than testifying that Lettig was

remorseful, Garner acknowledged that Lettig expressed remorse, but indicated that he disbelieved those expressions, given Lettig's record of several unsuccessful prior paroles. R. 363 (" [A]t prior hearings, [Mr. Lettig] displayed himself well, indicated appropriate remorse and so forth and as a result I think I, as the person conducting the hearing this time, tended to discount those things at this hearing." (emphasis added)). Moreover, Garner also testified that one of the aggravating factors for the Board's decision was Lettig's "minimization" of his responsibility for the incident that led to his conviction of evading arrest. R. 385. Certainly, the trial court could have reasonably interpreted this evidence as showing Lettig's "lack of remorse."

Lettig has failed to marshal the evidence in support of his attack on Finding No. 40 or any other finding of the trial court. His failure to marshal the evidence thwarts appellate review of his claims. Therefore, this Court should reject Lettig's contention that the trial court's findings were inadequately supported by the evidence.

II.

LETTIG SHOULD NOT BE PERMITTED TO CHALLENGE THE JUDGMENT BELOW BASED ON INFORMATION NEVER BROUGHT TO THE TRIAL COURT'S ATTENTION

This Court should reject Lettig's attempt to overturn the trial court's judgment based on contents of the Board's file that Lettig now claims were not disclosed to him before the January 1994 rehearing. As a general rule, Utah appellate courts "will not

consider an issue, raised for the first time on appeal, unless the trial court committed plain error or the case involves exceptional circumstances." State v. Brown, 856 P.2d 358, 359 (Utah Ct. App. 1993) (declining to review challenges initially raised on appeal to constitutional validity of statute and procedures by which defendant was convicted of exhibiting harmful material to a minor).

Appellate courts normally decline to consider issues and arguments not raised below because the "trial court is considered 'the proper forum in which to commence thoughtful and probing analysis of issues.'" Id. (quoting State v. Bobo, 803 P.2d 1268, 1273 (Utah Ct. App. 1990)). Moreover, "failing to argue an issue and present pertinent evidence in [the trial court] denies the trial court 'the opportunity to make any findings of fact or conclusions of law' pertinent to the claimed error." State v. Brown, 856 P.2d at 360 (quoting LeBaron & Assoc. v. Rebel Enter., 823 P.2d 479, 483 n.6 (Utah Ct. App. 1991)).

No plain error or exceptional circumstances exist to justify Lettig's failure to bring the allegedly undisclosed documents to the attention of the trial court. Lettig claims that he first had access to unspecified portions of his file when it was admitted into evidence at the April 1994 evidentiary hearing on his extraordinary writ petition.¹ Assuming this is true, Lettig offers

¹Lettig never specifically identifies what file contents he claims he first saw at or after the evidentiary hearing below. Attached to his brief, however, are two documents on which he apparently relies. Addendum B contains handwritten comments from a February 1992 parole hearing that characterize Lettig's conduct as "snivelling." Lettig contends this document evidences the Board's alleged animosity and prejudice toward him. While the

no explanation of why he failed to raise any concern about previously undisclosed file contents either immediately at the time of the hearing or even within a reasonable time after the hearing.

Contemplating circumstances such as this, Rule 59 of the Utah Rules of Civil Procedure expressly confers discretion on the trial court to "open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." Grounds for such action include "[a]ccident or surprise, which ordinary prudence could not have guarded against" and "[n]ewly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." Utah R. Civ. P. 59(a)(3) & (4) (1994). Cf. Utah R. Civ. P. 60(b)(1) & (2) (1994) (court may set aside judgment on ground of "surprise" and "newly discovered

comments may be offensive, their significance is highly questionable since the Board released Lettig on parole in November 1992. Nevertheless, Lettig has waived this issue by failing to bring the document to the attention of the trial court via a Rule 59 motion or otherwise.

Addendum C contains "Board Action Routing Sheet" for Lettig's July 1993 revocation hearing, which Lettig claims inaccurately refers to his "sixth parole violation." Since Lettig admits this was his fourth parole revocation proceeding, and since he either admitted or failed to contest five separate parole violations at that proceeding alone, R. 282, it is difficult understand Lettig's objection. Lettig also contests the accuracy of the statement contained in Addendum C that Lettig placed citizens' lives in peril in the incident that led to his third degree felony conviction of Failure to Stop at Officer's Command. As discussed in Point III below, the issues of the accuracy of this statement and the impact it may have had on the Board's decision are outside the limited scope of judicial review of parole decisions. Even if such issues were within the appropriate scope of review, however, Lettig waived them by failing to raise them below.

evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)").

This Court is not the appropriate forum in which to make an initial determination of (1) whether Lettig in fact first discovered portions of his file at the April 1994 evidentiary hearing; (2) if so, whether Lettig could, with reasonable diligence, have obtained that evidence before the hearing; and (3) whether the alleged newly discovered evidence was "such as to render a different result probably on the retrial of the case." See State v. Goddard, 871 P.2d 540, 545 (Utah 1994) (construing Utah R. Civ. P. 59(a)(4)). See also Barnard v. Sutliff, 846 P.2d 1229, 1235 n.2 (Utah 1992) (stating trial court should have the first opportunity to consider whether to set aside judgment on Rule 60(b) grounds); Meyer v. Bartholomew, 690 P.2d 558, 559 (Utah 1984) (rejecting claim of surprise never brought to the attention of trial court by objection, motion to strike, motion for new trial or otherwise).

Once the Board's file was received in evidence below, it remained available for review by Lettig and his counsel. Lettig failed to move the trial court for a new trial based on any previously undisclosed portions of the file and therefore waived any claim he may have had based on the allegedly undisclosed documents. This Court should reject Lettig's belated challenge to the trial court's judgment based on the allegedly undisclosed contents of the Board's file.

III.

THE TRIAL COURT CORRECTLY DETERMINED THAT
LETTIG FAILED TO DEMONSTRATE ANY DENIAL OF
PROCEDURAL DUE PROCESS IN LETTIG'S POST-
REVOCATION PAROLE GRANT HEARING

Lettig's contention that the trial court erred in failing to adequately determine the basis of the Board's decision ignores the limited scope of judicial review of Board of Pardons decisions concerning parole. Both this Court and the Utah Supreme Court have repeatedly emphasized that judicial review of Board of Pardons decisions

is limited to the 'process by which the Board undertakes its sentencing function.' '[W]e do not sit as a panel of review on the result, absent some other constitutional claim.' Furthermore, so long as the period of incarceration decided upon by the board of pardons falls within an inmate's applicable indeterminate range, e.g., five years to life, then that decision, absent unusual circumstances, cannot be arbitrary and capricious.

Preece v. House, 886 P.2d 508, 512 (Utah 1994) (quoting Lancaster v. Utah Bd. of Pardons, 869 P.2d 945, 947 (Utah 1994)). See also Utah Code Ann. § 77-27-5(3) (1995) ("Decisions of the Board of Pardons and Parole in cases involving paroles . . . are final and are not subject to judicial review."); Neel v. Holden, 886 P.2d 1097, 1100 (Utah 1994); Preece v. House, 848 P.2d 163, 164 (Utah Ct. App. 1993), vacated on other grounds, 886 P.2d 508 (Utah 1994); Northern v. Barnes, 825 P.2d 696, 699 (Utah Ct. App. 1992).

Here, the Board decided to reconsider Lettig for parole in September 1996. That date was well within the March 2003 expiration date for Lettig's indeterminate sentence of one to fifteen years for his second degree felony offense of Theft.

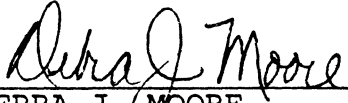
Lettig failed to present evidence to the trial court of any unusual circumstances warranting judicial review of the evidentiary basis of the Board's decision. Therefore, this Court should reject Lettig's claim that the trial court improperly failed to review the decision. Accordingly, the trial court's determination that Lettig failed to demonstrate any procedural due process violation in his post-revocation parole grant hearing should be affirmed.

CONCLUSION

Lettig has failed to marshal the evidence to enable proper appellate review of his claims that the evidence is insufficient to support the trial court's findings. Lettig has waived any challenge to the trial court's findings based on newly discovered contents of the Board's file by failing to bring the matter to the trial court's attention by Rule 59 motion or otherwise. Finally, in challenging the trial court for failing to adequately review the basis of the Board's decision, Lettig misconstrues the appropriate scope of judicial review. Lettig failed to demonstrate any procedural deficiency in the Board's proceedings and his petition for extraordinary writ was therefore properly denied. This Court should affirm the decision below in its entirety.

RESPECTFULLY SUBMITTED this 8th day of March, 1995.

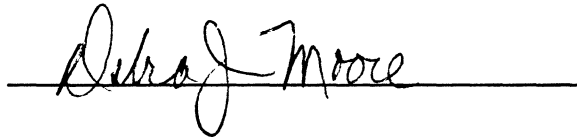
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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing **BRIEF OF APPELLEES** were mailed this 8th day of March, 1995, to:

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A handwritten signature in cursive script, reading "Debra J. Moore", is written over a horizontal line.

ADDENDA

ADDENDUM A

MAY 13 1994

Chen

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

WILLIAM M. LETTIG,

Plaintiff,

v.

SCOTT V. CARVER, et al.,

Defendants.

**FINDINGS, CONCLUSIONS
and FINAL ORDER**

Case No. 930906342 HC

Judge David S. Young

The above-entitled matter came before this Court on April 18, 1994, for an evidentiary hearing on Petitioner's Petition for extraordinary relief. The Respondents were represented by Lorenzo K. Miller, Assistant Attorney General, and Petitioner was present and represented by Rosemond G. Blakelock. The Court having taken testimony and evidence in this case, having been fully briefed by the parties, having carefully considered the facts and evidence of this case, and having heard the arguments, issued its final judgment. Based upon the above, the Court now makes the following findings:

00280

FINDINGS OF FACT

1. Petitioner William M. Lettig is presently incarcerated at the Utah State Prison and serving two valid indeterminate sentences of imprisonment: the first for Theft, a second degree felony, and the second for Evading Arrest\Failure to Stop, a third degree felony.

2. Prior to the sentences Petitioner is now serving, Petitioner was also serving sentences for the crimes of Carrying a Concealed & Dangerous Weapon, a third degree felony, Attempted Escape from Custody, a third degree felony, two separate charges of Attempted Robbery, a third degree felony, and Reckless Driving, a misdemeanor.

3. On November 10, 1992, Petitioner was released from the Utah State Prison under a parole agreement signed by the Utah Board of Pardons and Parole (hereinafter "Board").

4. As a condition of that parole, Petitioner agreed to abide by all the terms and conditions of the parole agreement as set by the Board, including obedience to federal, state and local laws.

5. This was Petitioner's fourth parole from the prison since his initial incarceration in December 1975; all prior paroles ended in revocation because Petitioner failed to abide by the parole agreements and continued criminal activity and misbehavior while on parole.

6. On July 21, 1993, Petitioner appeared before a single-member panel of the Board for a fourth parole revocation hearing.

7. Petitioner was represented by counsel at that time, and counsel participated throughout the revocation proceedings before the Board.

8. At the hearing, Petitioner pled "guilty" to having violated four separate conditions of his parole agreement, including having been convicted of a new felony offense while on parole; Petitioner also pled "no contest" to a fifth parole violation allegation.

9. Petitioner's counsel did not object to the Board's actions while conducting the hearing, and Petitioner submitted the case for the Board's final decision regarding revocation.

10. The board member conducting the hearing issued an interim decision revoking Petitioner's parole and ordering that Petitioner be re-incarcerated at the prison based upon Petitioner's guilty pleas.

11. Instead of giving Petitioner another parole date, the board member ordered that Petitioner's case be scheduled for rehearing in September of 1995 to consider the next possible parole date.

12. In addition to the above order, the board member issued a written rationale for his decision, and that rationale contained the reasons for giving a 1995 rehearing date.

13. On August 3, 1993, the full Board came together at a regularly scheduled meeting and considered Petitioner's case and the interim decision of July 21, 1993.

14. At that time, the Board adopted the interim decision to revoke Petitioner's parole date and to re-incarcerate him, but it modified the 1995 rehearing dated to be 1996.

15. Petitioner was not present at that meeting, and no new evidence or testimony was taken or considered by the Board at that time.

16. On November 2, 1993, Petitioner filed a petition for extraordinary relief, pursuant to Utah R. Civ. P. 65B(c) and (e) (1993), challenging the actions and decisions of the Board.

17. In that petition, Petitioner claimed that the Board had deprived him of his liberty by revoking his parole and ordering a rehearing for September of 1996 without an adequate explanation of its reasons for "denying parole and exceeding guidelines."

18. Petitioner asserted that by exceeding the guidelines, the Board violated the Cruel and Unusual Punishment Clause of the United States Constitution and the analogous clause of the state constitution.

19. Petitioner also claimed that the guidelines created an expectation of parole (or liberty interest) under Utah law which is protected under the due process clauses of both the state and federal constitutions and that the Board violated his rights by exceeding those guidelines.

20. Petitioner also claimed that the Board failed to allow Petitioner the right to present evidence in his behalf and that it failed to accept evidence in his favor at the parole revocation hearing.

21. Petitioner also challenged the ultimate decision of the Board to grant him a 1996 rehearing; he did not claim that the Board had failed to provide him access to the Board's files or the information considered at the hearing.

22. Petitioner requested that the court order "respondents to rehear petitioner's case and grant him parole within the stated Guidelines."

23. On December 14, 1993, the case came before the court for a scheduled evidentiary hearing to resolve the issues pending before the court.

24. At that hearing, Petitioner had no witnesses to call but instead offered a statement to the court raising issues that had never been raised and were not part of the record.

25. Petitioner did not refute the facts put forth by the Board but argued that the case of Labrum v. Utah Board of Pardons, 227 Utah Adv. Rep. 30 (Utah, Dec. 6, 1993), applied to his case and should be considered by the court.

26. Prior to that date, the Labrum case was not in issue and was not briefed by the parties.

27. Based upon discussion with the parties, the court concluded that Petitioner was entitled to a parole hearing on the new criminal conviction leading to the parole revocation hearing and Petitioner's recommitment.

28. The court also concluded that the Labrum protections should be applied to that new hearing.

29. The court ordered the Board to grant Petitioner a parole hearing to consider the possibility of a future parole date on the new conviction and to grant Petitioner access to his parole file in accordance with the Labrum decision.

30. The court stated that the new hearing was not intended to affect Petitioner's prior guilty pleas before the Board or to modify the Board's determination to revoke Petitioner's previous parole date.

31. The court's stated intention was that the Board hold an original parole-grant hearing (on Petitioner's new conviction) and to consider a possible early release date for that conviction.

32. Subsequently, the Board provided Petitioner a copy of its parole file, in accordance with its interpretation of the Labrum decision, and it reheard Petitioner's case.

33. The new hearing took place on January 19, 1994, in accordance with the court's order, the stipulations of the parties, and R671 of the Utah Administrative Code (1993).

34. Petitioner was present at the hearing and represented by his own counsel, Rosemond Blakelock.

35. On March 7, 1994, this matter again came before the court, and Petitioner requested to amend his complaint against the Board.

36. The Court granted Petitioner's motion to amend, over Respondents' objection, and ordered that the amended petition be filed on March 18, 1994.

37. Respondents were ordered to file an answer to the amended petition by April 1, 1994, and the case was set for an evidentiary hearing to be conducted on April 18, 1994.

38. On April 18, 1994, an evidentiary hearing was held in this matter, and at that time, the court heard testimony from numerous witnesses regarding the Board's procedural processes and actions in Petitioner's case.

39. Curtis Garner, the board member who conducted the January 1994 hearing, testified that the sentencing matrix contained in the

Utah Sentence and Release Guidelines is used to calculate minimum sentence terms and that numerous other factors must also be considered when setting a parole date.

40. Mr. Garner testified that Board's decisions in this case were affected by Petitioner's prior convictions, the number of previous paroles and Petitioner's lack of remorse at the parole hearings.

41. Mr. Garner testified that the Board routinely deviates from the guidelines and that the guidelines are only one of many factors used by the Board in determining an early-release date.

42. Mr. Garner also testified that the Board does not feel bound by the guidelines but merely considers the guidelines as a recommendation, not the actual sentence of imprisonment.

43. Witness James Furner, a parole officer for Adult Probation and Parole, testified that he never told Petitioner that he [Mr. Furner] intended to see Petitioner serve every year of his sentence.

44. Mr. Furner also denied Petitioner's allegations of altering the condition of any weapons taken from Petitioner's home during or of any other improprieties in the supervision of Petitioner's case.

45. The court finds that Mr. Garner and Mr. Furner's testimonies were convincing, and that they did not demonstrate any animosity or bias toward Petitioner as alleged in the complaint.

46. The court also finds that Petitioner has failed to prove that the Board acted inappropriately in this matter.

47. The Board's entire records on Petitioner was introduced as an exhibit, and those records indicate that Petitioner has been paroled from his sentence of incarceration on at least four separate occasions.

48. Petitioner testified that he did not dispute the fact that he violated his parole in this case or that the Board was authorized to revoke his parole based upon the five violations of the parole agreement.

49. When asked what proceedings the Board could give him to make the hearing in his case more fair, Petitioner referred to the guidelines but did not identify any additional procedural protections that should be afforded by the Board.

50. Accordingly, the court finds that Petitioner's claims in this case go directly against the substance of the Board's ultimate parole decision, attacking the Board's ability to deviate from the guidelines in his case, not against the procedural protections afforded by the Board. Based upon the above findings of fact, the court now makes the following conclusions:

CONCLUSIONS OF LAW

Petitioner has failed to prove that the Board failed to perform an act required by law or that the Board has exceeded its jurisdiction or abused its discretion in this case. Indeed the records of the Board show that the Board acted within its authority under state and federal law and properly applied the guidelines in Petitioner's case.

The court also concludes that the Board had adequate cause and justification to revoke Petitioner's parole, based upon his admitted violations of the parole agreement, and to deny him a parole date on the new crime of commitment, regardless of the guideline matrix.

Furthermore, the court concludes that Petitioner failed to establish that the Board violated his procedural due process rights under either state or federal law. The guidelines contained in the Utah Sentence and Release Guidelines are used as a tool to calculate minimum release dates, and the Board had sufficient cause in this case to exceed those guidelines based upon Petitioner's prior paroles and the other circumstances of his case that were identified by the Board in its written rationale.

Furthermore, the court concludes that Petitioner has failed to prove or even establish that the Board has abused its discretion, exceeded its jurisdiction or failed to perform a duty required by

law. Additionally, Petitioner has failed to demonstrate a basis that would entitle him to the judicial relief requested in his amended petition.

Based upon the above and the fact that Petitioner has failed to prove any wrongful conduct by the Respondents in this case, the court concludes that Petitioner's claims against the Respondents are without merit and should be dismissed as a matter of law.

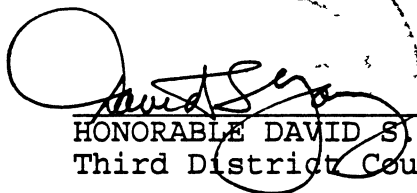
Having made the foregoing findings and conclusions, the court makes the following order:

FINAL ORDER

1. Respondents' motion for judgment is hereby granted.
2. The relief Petitioner seeks in his amended petition is denied as a matter of law.
3. This case is dismissed with prejudice.
4. Respondents' motion to seal the Board of Pardons' file and records from public disclosure is hereby denied.
5. Respondents' counsel (in the presence of Petitioner's counsel or representative) is hereby granted permission of the court to take the Board of Pardons' file, which was admitted as evidence, from the court for the sole purpose of making a copy of that record. Upon completion of copying, the file shall be immediately returned to the court in its original condition and organization.

Dated this 23^d day of May, 1994.

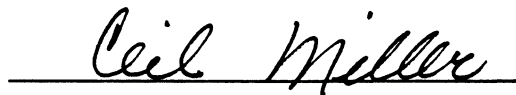
BY THE COURT:


HONORABLE DAVID S. YOUNG
Third District Court

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of May, 1994, I
caused to be mailed, postage prepaid, an exact copy of the attached
(proposed and unsigned) Findings, Conclusions and Final Order to:

ROSEMOND G. BLAKELOCK
ATTORNEY FOR PETITIONER
BLAKELOCK & STRINGER
37 EAST CENTER #200
PROVO, UTAH 84606



ADDENDUM B

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

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

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

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

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

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

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

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

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

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

History: C. 1953, 77-27-5, enacted by L. 1985, ch. 213, § 1; 1986, ch. 22, § 2; 1988, ch. 172, § 2; 1990, ch. 195, § 4; 1993, ch. 38, § 102; 1994, ch. 13, § 33.

Repeals and Reenactments. — Laws 1983, ch. 53, § 3 repealed a former § 77-27-5 (L. 1980, ch. 15, § 2), relating to per diem and expenses of board members, and enacted a new § 77-27-5.

Laws 1985, ch. 213, § 1 repealed former § 77-27-5 (L. 1983, ch. 53, § 3), relating to

compensation and expenses of board, and enacted the present section.

Amendment Notes. — The 1993 amendment, effective May 3, 1993, inserted "or district" near the middle of Subsection (2)(a).

The 1994 amendment, effective May 2, 1994, substituted "Board of Pardons and Parole" for "Board of Pardons" throughout the section and substituted "chair" for "chairperson" throughout Subsection (1)(b).

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am Jur 2d Judgments § 979 et seq judgment against one joint tort-feasor as release of others, 40 A L R 3d 1181
C.J.S. — 49 C J S Judgments §§ 574 to 584 **Key Numbers.** — Judgment ⇌ 891 to 899
A.L.R. — Voluntary payment into court of

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes, provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors

(3) Accident or surprise, which ordinary prudence could not have guarded against

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law

(7) Error in law

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Compiler's Notes. — This rule is similar to Rule 59 F R C P

Cross-References. — Harmless error not ground for new trial, Rule 61

Juror's competency as witness as to validity of verdict or indictment, Rules of Evidence, Rule 606

NOTES TO DECISIONS

ANALYSIS
 Abandonment of motion
 Accident or surprise
 Arbitration awards
 Caption on motion for new trial

Correction of insufficient or informal verdict
 Correction of record
 Costs
 Decision against law
 Discretion of trial court