

1994

John Fletcher Pendergrass v. Board of Pardons and
H. L. Haun, Curtis L. Garner, and M. R. Sibbett, as
members of the Utah Board of Pardons : Unknown

Utah Court of Appeals

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John Fletcher Pendergrass.

Jan Graham.

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IN THE SUPREME COURT OF UTAH

JOHN FLETCHER PENDERGRASS,
PETITIONER,

V.

CASE # ~~040322~~

UTAH BOARD OF PARDONS ;
H.L. HAUN, CURTIS L. GARDNER,
AND M.R. SIBBERT, AS MEMBERS
OF THE UTAH BOARD OF PARDONS,
RESPONDENTS.

94-0560-CA

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UTAH SUPREME COURT
K. J. DRIEF
45.9
.S9
DOCKET NO. 940560

UTAH COURT OF
APPEALS
UTAH
DOCKET NO.
K. J.
5J
.A10
DOCKET NO. _____

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IN THE SUPREME COURT OF UTAH

JOHN FLETCHER PENDERGRASS,
PETITIONER,

v.

LITAH BOARD OF PARDONS ;
H.L. HAUN, CURTIS L. GARDNER,
AND M.R. SIBBERT, AS MEMBERS
OF THE LITAH BOARD OF PARDONS,
RESPONDENTS.

CASE # 940333

JURISDICTION

JURISDICTION IS BROUGHT TO THIS HONORABLE COURT PURSUANT THE UTAH CODE ANNOTATED 78-2-2 ET. SEQ. AND THE PETITIONER NOW SEEKS AN EXTRAORDINARY WRIT PURSUANT TO RULE 65B(E) OF THE UTAH RULES OF CIVIL PROCEDURE AND RULE 19 OF THE UTAH RULES OF APPELLATE PROCEDURE.

STATEMENT OF THE ISSUES AND THE RELIEF THAT IS SOUGHT

THE ISSUES IN THIS CASE ARE AS FOLLOWS:

1. THE BOARD OF PARDONS WRONGLY CHANGED THE PETITIONER'S CRIMINAL SENTENCE OF CONCURRENT TO CONSECUTIVE WHICH WAS GIVEN TO THE PETITIONER BY JUDGE LOW OF THE FIRST DISTRICT COURT.
2. THE BOARD OF PARDONS ERRONEOUSLY WENT OVER THE PAROLE GUIDELINES BY FIVE YEARS.
3. THE BOARD OF PARDONS FAILED TO NOTIFY THE PETITIONER OF THE CRITERIA USED IN HEARINGS TO DETERMINE ELIGIBILITY FOR PAROLE.
4. THE BOARD OF PARDONS FAILED TO ALLOW THE PETITIONER TO EXAMINE THE COMPLETE CONTENTS OF HIS FILE PRIOR TO THE PAROLE

BOARD'S HEARINGS TO VERIFY THE ACCURACY OF THE INFORMATION THAT WAS USED AGAINST HIM.

5. THE BOARD OF PARDONS FAILED TO PROVIDE A PROCEDURE TO REFUTE INACCURATE OR FALSE MATERIAL AND BY LIMITING RELEVANT MATERIAL THAT CAN BE CONSIDERED.

6. THE BOARD OF PARDONS FAILED TO GIVE A DETAILED WRITTEN DECISION STATING, WITH SPECIFICITY, THE EXACT REASON THAT PAROLE HAS DENIED.

7. THE BOARD OF PARDONS WRONGFULLY ALLOWED THE VICTIM'S MOTHER TO BE ALLOWED TO ADDRESS THE BOARD.

THE PETITIONER REQUESTS THE FOLLOWING RELIEF:

1. FOR AN ORDER FROM THIS COURT DIRECTING THE BOARD OF PARDONS TO DISCLOSE ITS ENTIRE FILE ON PETITIONER OR AT LEAST A SUMMARY OF THE FILE'S CONTENTS TO PETITIONER BEFORE PETITIONER'S PAROLE DETERMINATION HEARING IN A TIMELY MANNER THAT AFFORDS PETITIONER A REASONABLE CHANCE TO PREPARE FOR THE HEARING.

2. FOR AN ORDER FROM THIS COURT DIRECTING THE BOARD OF PARDONS TO GIVE PETITIONER A REASONABLE OPPORTUNITY TO REBUT ANY MISINFORMATION IN ITS FILES THAT THE BOARD EARLIER RELIED UPON.

3. FOR AN ORDER FROM THIS COURT DIRECTING THE BOARD OF PARDONS TO VACATE ITS DETERMINATION ON PETITIONER'S PAROLE AND AN ORDER TO GIVE A DEFINITE PAROLE DATE IN ACCORDANCE WITH THE GUIDELINES.

4. FOR AN ORDER FROM THIS COURT DIRECTING THE BOARD OF PARDONS TO PROVIDE NOTIFICATION TO THE PETITIONER OF THE CRITERIA USED IN PAROLE HEARINGS AND, AFTER THE HEARING, TO PROVIDE A DETAILED WRITTEN DECISION STATING, WITH SPECIFICITY, THE PAROLE BOARD'S DECISION.

5. FOR AN ORDER FROM THIS COURT DIRECTING THE BOARD OF PARDONS TO VACATE ITS POLICY OF ALLOWING SECOND-HAND TESTIMONY

STATEMENT OF FACTS

ON THE 23RD DAY OF OCTOBER 1987 PETITIONER WAS CHARGED

IN THE FIRST DISTRICT COURT OF BOX ELDER COUNTY WITH FIRST DEGREE MURDER. THE CHARGES STEM FROM AN INCIDENT IN WHICH IT WAS ALLEGED THAT THE PETITIONER HAD MURDERED THE VICTIM MR. JENKINS. THE PETITIONER WAS FOUND GUILTY, OF A NOT FORMALLY PROSECUTED INFORMATION, OF THEFT. A SECOND DEGREE FELONY AND MURDER. A FIRST DEGREE FELONY. THE PETITIONER HAS NO RECOLLECTION OF THE EVENT AND THE COURT RECORD AFFIRMATIVELY SHOWS THAT THE PETITIONER DOES NOT REMEMBER.

THIS MATTER CAME BEFORE JUDGE GORDON J. LOW IN THE FIRST DISTRICT COURT FOR THE FIRST TRIAL IN OCTOBER 1988 AND RESULTED IN A MISTRIAL. THE MATTER AGAIN CAME BEFORE JUDGE LOW AND PETITIONER WAS FOUND GUILTY OF SAID CHARGES. PETITIONER WAS COMMITTED TO THE UTAH STATE PRISON ON THE 11TH DAY OF OCTOBER, 1989. THIS CASE IS PRESENTLY ON APPEAL TO THE UNITED STATES DISTRICT COURT CASE # 93-C-974.

THE PETITIONER'S FIRST HEARING BEFORE THE BOARD OF PARDONS OCCURRED ON FEBRUARY 16, 1993. THE PETITIONER WAS INCARCERATED 5 ³/₄ YEARS BEFORE EVER SEEING THE BOARD OF PARDONS. THE PETITIONER FILED A HABEAS CORPUS AGAINST THE BOARD OF PARDONS IN THE SIXTH DISTRICT COURT # 930600326.

AT THE BOARD OF PARDON'S HEARING, THE MEMBERS QUESTIONED THE PETITIONER EXTENSIVELY CONCERNING HIS MEMORY OF THE ALLEGED MURDER AND THEY USED INFORMATION FROM THE VICTIM'S FAMILY. DURING THE HEARING, THE VICTIM'S MOTHER WAS PRESENT AND SUBMITTED LETTERS AND POEMS FOR THE BOARD OF PARDONS TO REVIEW. IT IS THE PETITIONER'S BELIEF THAT THE VICTIM'S MOTHER WAS NOT SUPPOSED TO BE ALLOWED TO TESTIFY BEFORE THE BOARD IN BEHALF OF THE VICTIM. PETITIONER WAS UNAWARE THAT THE VICTIM'S MOTHER WAS ATTENDING, EVEN AFTER RECEIVING A FORM LETTER OF NOTICE FROM THE BOARD OF PARDONS.

THE UTAH BOARD OF PARDON'S ADMINISTRATIVE CODE CLAIMS AN INMATE HAS A RIGHT TO REVIEW WHATEVER EVIDENCE IS USED AGAINST HIM... YET, HOW CAN THE PETITIONER REVIEW ITEMS WHEN THEY WERE PRESENTED TO THE BOARD AT THE TIME OF THE HEARING AND PETITIONER WAS NOT GIVEN A CHANCE TO SEE WHAT THE ITEMS WERE BEFORE

THE ITEMS WERE GIVEN BACK TO THE VICTIM'S MOTHER. IN ANY EVENT, PETITIONER WOULD NOT HAVE BEEN ALLOWED TO EXAMINE THE ITEMS FROM THE ALLEGED VICTIM'S MOTHER OR OTHER UNNAMED SOURCES SINCE THEY ARE DEEMED CONFIDENTIAL AND THEREFORE CAN NOT BE SEEN BY THE PETITIONER. WHEREUPON THE BOARD USED THE AFORESAID ITEMS, PROVIDED BY THE VICTIM'S MOTHER, TO DENY ANY DEFINITE DATE OF PAROLE TO THE PETITIONER AND SET THE NEXT HEARING DATE FOR THE YEAR 2003.

THE PETITIONER WAS INFORMED BY HIS CASEWORKER, MR. JOHN IRONS, THAT THE RECOMMENDED GUIDELINES THAT THE PETITIONER SHOULD SERVE IS 119 MONTHS. THIS WAS ALSO WHAT MR. IRONS SAID THAT HE RECOMMENDED. THE BOARD ERRONEOUSLY EXCEEDED THOSE GUIDELINES, OF THE CASEWORKER'S RECOMMENDATION AND THEIR OWN POLICY, AND SAID THE PETITIONER SHOULD BE INCARCERATED 192 MONTHS, WHICH IS 73 MONTHS BEYOND THE GUIDELINES. (IN ACCORDANCE WITH THE UTAH ADMINISTRATIVE CODE)

DURING THE HEARING, THE BOARD OF PARDONS CLAIMED THAT THE PETITIONER HAD NOT ATTENDED ANY VIOLENT OFFENDER THERAPY OR PROGRAMMING, THOUGH IT SHOULD HAVE BEEN OBVIOUS THAT SUCH THERAPY WASN'T AVAILABLE TO PETITIONER AT THE TIME. THE PETITIONER BELIEVES ITEMS LIKE THIS ARE USED AGAINST INMATES EVEN WHEN THEY HAVE NO CONTROL OVER SUCH SITUATIONS.

AT THE CONCLUSION OF THE HEARING, THE PETITIONER WAS GIVEN A DOCUMENT WHICH GIVES NO EXPLANATION AS TO THE RATIONALE FOR DENIAL OF PAROLE, BUT ONLY A FORM LETTER WITH FORTHCOMING REHEARING DATE.

STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

THE PETITIONER IS ENTITLED TO A HEARING TO DETERMINE HIS DATE OF PAROLE. SEE UTAH CODE ANN. § 77-27-5(2) (1990); UTAH ADMIN. R. 655-311 (1988); CF. UTAH CONST. ART. VII § 12. THE FACT THAT HE IS ENTITLED TO A HEARING TO DETERMINE HIS DATE OF PAROLE IMPLIES THAT DUE PROCESS PROTECTIONS APPLY AT THE PAROLE HEARING. FOOTE V. UTAH BD. OF PARDONS, 808 P.2D 734, 735 (UTAH 1991). INDEED, THOUGH TO

A LESSER DEGREE DUE TO HIS INCARCERATION, PETITIONER HAS A LIBERTY INTEREST PROTECTED UNDER ARTICLE 1 SECTION 7 OF THE UTAH CONSTITUTION, WHICH LIBERTY INTEREST IS ANALOGOUS TO THE LIBERTY INTEREST AFFORDED A DEFENDANT IN A FEDERAL COURT AT THE TIME OF SENTENCING. ID.; SEE ALSO STATE V. HOWELL, 707 P.2D 115, 117 (UTAH 1985); GARDNER V. FLORIDA, 430 U.S. 349, 358, 51 L.ED.2D 393, 402 (1977). THIS LIBERTY INTEREST CANNOT BE TAKEN FROM PETITIONER WITHOUT DUE PROCESS. UTAH CONSTITUTION ARTICLE 1 § 7. THE QUESTION PETITIONER ASKS THIS COURT TO ANSWER, THEREFORE, IS WHAT PROCESS IS DUE AT THE TIME OF HIS PAROLE DETERMINATION HEARING. ALTHOUGH THIS COURT HAS PREVIOUSLY RULED ON SOME OF THE FOLLOWING ISSUES IN FOOTE AND IN LABRUM V. UTAH BOARD OF PARDONS, 227 UTAH ADV REP 30, DEC. 6, 1993 THESE PROTECTIONS WERE NEVER GIVEN TO THE PETITIONER. THIS COURT SHOULD REVIEW THE PROCEDURES USED BY THE BOARD OF PARDONS TO SEE WHETHER THEY MEET THE MINIMUM DUE PROCESS REQUIREMENTS OF ARTICLE 1 SECTION 7 OF THE UTAH CONSTITUTION. HATCH V. DELAND, 790 P.2D 49, 50 (UTAH APP. 1990); FOOTE 808 P.2D AT 735.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PETITIONER HAS A LIBERTY INTEREST IN PAROLE RELEASE SECURED BY UTAH'S AND THE U.S. CONSTITUTION BY INSTITUTING A CRITERIA [GUIDELINES] THAT WHEN MET WOULD GIVE THE OUTCOME TO BE REACHED.

THE FEDERAL LAW IS CLEAR THAT OFFICIAL STATUTES OR OFFICIAL REGULATIONS ARE NOT THE ONLY SOURCE OF A LIBERTY INTEREST. A PROTECTED LIBERTY INTEREST MAY ARISE WHEN "PARTICULARIZED STANDARDS OR CRITERIA GUIDE THE STATE DECISION MAKERS". OLIM V. WAKINEKONO, 461 U.S. 238 (1983). IN LUCAS V. HONGES, 730 F.2D 1493 (D.C. CIR. 1984), FOR EXAMPLE, THE COURT HELD THAT OFFICIAL STATEMENTS OF PRISON POLICY CONTAINED IN INTERNAL DIRECTIVES OF OFFICIALS AT THE DISTRICT OF COLUMBIA DETENTION FACILITY COULD GIVE RISE TO A LIBERTY INTEREST EVEN THOUGH THE STATEMENTS WERE NOT PROMULGATED UNDER THE ADMINISTRATIVE PROCEDURE ACT OR PUBLISHED IN THE DISTRICT OF COLUMBIA REGISTER. THE SIXTH CIRCUIT IN WALKER V. HUGHES, 568 F.2D 1247, 1254-56 (6TH CIR 1977) FOUND A LIBERTY INTEREST

IN POLICY STATEMENTS ISSUED BY THE FEDERAL BUREAU OF PRISONS AND THE WARDEN OF A FEDERAL INSTITUTION EVEN THOUGH NEITHER HAD BEEN PROMULGATED UNDER THE ADMINISTRATIVE PROCEDURE STANDARDS OR PUBLISHED IN THE FEDERAL REGISTER. [REFER TO UTAH'S ADMINISTRATIVE RULE MAKING ACT]

IN BILLS V. HENDERSON, 631 F.2D 1287, 1291 (6TH CIR 1980) THE COURT HELD THAT A LIBERTY INTEREST WAS ESTABLISHED BY A PRISON RULE CONTAINED IN AN "ADULT SERVICES POLICIES AND PROCEDURES MANUAL ON THE DEPARTMENT OF CORRECTION GUIDELINE" THE TENTH CIRCUIT IN GURULE V. WILSON, 635 F.2D 782, 785 (10TH CIR 1980) FOUND A PROTECTED LIBERTY INTEREST IN THE "OFFICIAL STATEMENT OF POLICY" ISSUED BY THE ADMINISTRATOR OF ONE COLORADO PENITENTIARY. SIMILARLY, THE SEVENTH CIRCUIT HAS HELD THAT A LIBERTY INTEREST MAY BE CREATED BY "INTRA AND INTER INSTITUTIONAL DIRECTIVES CONTAINING GUIDELINES FOR ALLOWING OR DENYING COMPENSATORY GOOD TIME" ARSBERRY V. SIELAFF, 586 F.2D 37, 47 (7TH CIR. 1978); HARRIS V. McDONALD, 737 F.2D 662, 664 (7TH CIR 1984)

IN GREENHOLTZ V. INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, 442 U.S. 1, 60 L.ED.2D 668 (1979), IN A CONCURRING OPINION JUSTICE BRENNAN STATED THAT "RESPONDENTS MUST SHOW - BY REFERENCE TO STATUTE, REGULATION, ADMINISTRATIVE PRACTICE, CONTRACTUAL ARRANGEMENT OR OTHER MUTUAL UNDERSTANDING THAT PARTICULARIZED STANDARDS OR CRITERIA GUIDES THE STATE DECISION MAKERS" CONNECTICUT BOARD OF PARDONS V. DUMSCHAT, 452 U.S. 458, 467 (BRENNAN, J., CONCURRING). SEE ALSO, HEWITT V. HELMS 459 U.S. 460 WHERE JUSTICE STEVENS STATED, "IT DOES NOT MATTER WHETHER THE STATE USES A PARTICULAR FORM OF WORDS IN ITS LAWS OR REGULATIONS, OR INDEED WHETHER IT HAS ADOPTED WRITTEN RULES AT ALL" ID AT 486 N.12.

PETITIONER CONTENDS THAT THE SENTENCING GUIDELINES NOW UTILIZED IN THIS STATE BY BOTH JUDGES AND THE BOARD OF PARDONS CONSTITUTES THE TYPE OF REGULATION AND PRACTICE WHICH GIVES RISE TO A LIBERTY INTEREST UNDER FEDERAL LAW. THESE GUIDELINES WERE CREATED BY THE UTAH COMMISSION OF CRIMINAL AND JUVENILE JUSTICE WHICH CONSISTED OF JUDGES, ADMINISTRATORS, AND LAWYERS FROM ALL FACETS OF THE CRIMINAL AND CORRECTIVE LAW SYSTEM. THESE GUIDE

INES ARE UTILIZED BY A DEFENDANT'S ATTORNEY IN ADVISING A DEFENDANT WHETHER TO PLEAD GUILTY OR NOT; ARE USED BY PROBATION OFFICERS IN PREPARING PRESENTENCE REPORTS; ARE USED BY SENTENCING JUDGES IN DETERMINING THE TYPE OF SENTENCE TO BE IMPOSED; ARE USED BY PRISON SCREENING OFFICERS IN DETERMINING WHERE TO PLACE AN INMATE FOR INCARCERATION; AND ARE USED BY THE BOARD OF PARDONS IN EVALUATING THE TIME AN INMATE SHOULD BE INCARCERATED.

IN THE INSTANT CASE IT IS QUITE PROBABLE THAT THE LOWER COURT, DEFENDANT'S ATTORNEY, AND CERTAINLY DEFENDANT ANTICIPATED THAT HE WOULD BE INCARCERATED FOR A PERIOD APPROXIMATING THE GUIDELINE CRITERIA. THESE STATE GUIDELINES UTILIZE A VARIETY OF FACTORS IN DETERMINING A DATA INCLUDING THE SEVERITY OF THE CRIME, THE PREVIOUS HISTORY OF THE OFFENDER, EDUCATION AND A NUMBER OF OTHER PSYCHOLOGICAL AND HISTORICAL DATA. THUS, THESE GUIDELINES CREATE AN EXPECTATION BY SENTENCING JUDGE AND THE INMATE THAT HIS OR HER SENTENCE WILL APPROXIMATE THESE PERIODS OF PROJECTED TIME. GREENHOLTZ, SUPRA, 30-31 (MARSHALL, BRENNAN, STEVENS, J. DISSENTING).

THE FEDERAL SYSTEM OF DETENTION CONTAINS AN ELABORATE PROCEDURE FOR DETERMINING GUIDELINES FOR FEDERAL INMATES SEE 28 CFR § 2.20 ET. SEQ. SEVERAL FEDERAL DECISIONS HAVE HELD THAT ANY DECISION TO GO ABOVE THE GUIDELINES IN DETERMINING A PRESUMPTIVE PAROLE DATE IS A DEPRIVATION OF LIBERTY AND IS ENTITLED TO DUE PROCESS PROTECTION IN DIXON V. HADDEN, 550 F. SUPP. 157 (D. COLO. 1982) A FEDERAL INMATE COMPLAINED THAT HIS INCARCERATION FOR A TOTAL OF 78 MONTHS WAS OVER 25 MONTHS IN EXCESS OF THE FEDERAL GUIDELINE FOR THAT SENTENCE. THE DISTRICT COURT OF COLORADO CONCLUDED THAT BECAUSE OF THIS EXCESS OF GUIDELINES DEFENDANT WAS ENTITLED TO DUE PROCESS PROTECTION. THE COURT STATED:

ACCORDINGLY. I CONCLUDE THAT IN ARRIVING AT A DECISION TO GO ABOVE THE GUIDELINES APPLICABLE TO THE OFFENSES FOR WHICH LOUIS DIXON WAS SENTENCED, THE PAROLE COMMISSION IS LIMITED BY THE DUE PROCESS PROTECTION OF FIFTH AMENDMENT. ID AT 159 SEE ALSO. SOLOMON V. ELSEA, 676 F.2D 282 (7TH CIR. 1982) AND EVANS V. DILLAHUNTY, 662 F.2D 522 (8TH CIR 1981) (HELD AN INMATE WAS ENTITLED TO DAMAGES AGAINST A REGIONAL PAROLE COMMISSIONER UPON ALLEGATION OF UNCONSTITUTIONAL CONDUCT CAUSING A DECISION TO BE MADE OUTSIDE THE SENTENCING GUIDELINES).

IN WILLIAMS V. TURNER, 702 F. SUPP. 1439 (W.D. MO 1988) A FEDERAL PRISONER WAS CONFINED FOR A CRIME WITH A GUIDELINE OF BETWEEN 24 AND 36 MONTHS. THE COMMISSION ORDERED HIM TO BE CONFINED 80 MONTHS BASED UPON TESTIMONY WHICH THE PRISONER WAS FORCED TO GIVE AGAINST ANOTHER DEFENDANT. THE GOVERNMENT ARGUED THAT THE PETITIONER SUFFERED NO PENALTY AS A RESULT OF HIS TESTIMONY AND THEREFORE WAS NOT ENTITLED TO A LIBERTY INTEREST GIVING RISE TO DUE PROCESS. THE COURT REJECTED THIS ARGUMENT AND STATED:

HOWEVER, DOES ONE WHOSE PRESUMED PAROLE DATE IS PUSHED BEYOND THAT RECOMMENDED BY THE SENTENCING GUIDELINES, DUE TO CONSIDERATION OF COMPELLED TESTIMONY, "SUFFER NO PENALTY?" THE RESPONDENTS MAINTAIN THAT NO PENALTY IS SUFFERED SINCE THE COMMISSION'S ACTIONS "DID NOT RESULT IN A NEW SENTENCED OR AN ENHANCED SENTENCE; PETITIONER'S SENTENCE REMAINED TEN YEARS". RESPONDENT'S RESPONSE TO PETITIONER'S OBJECTIONS TO REPORT AND RECOMMENDATION, P.2. THE PETITIONER STATES THAT SUCH REASONING PLACES FORM BEFORE SUBSTANCE BECAUSE THOUGH "THE MATHEMATICAL TERM OF PRISONER'S SENTENCE (10 YEARS) IS NOT LENGTHENED, THE TERM OF CONFINEMENT IS CLEARLY LENGTHENED". PETITIONER'S OBJECTIONS TO REPORT AND RECOMMENDATION, P.4.

THE COURT CONCLUDES THAT A PENALTY IS SUFFERED BECAUSE A LIBERTY INTEREST IS INVOLVED. A SUBSTANTIAL LIBERTY FROM LEGAL RESTRAINT IS AT STAKE ANY TIME THE GOVERNMENT MAKES DECISIONS REGARDING PAROLE OR PROBATION. LIBERTY FROM BODILY RESTRAINT ALWAYS HAS BEEN RECOGNIZED AS THE CORE OF THE LIBERTY PROTECTED BY THE DUE PROCESS CLAUSE FROM ARBITRARY GOVERNMENTAL ACTION. INGRAHAM V. WRIGHT, 430 U.S. 651 (1977) ID AT 1447.

IN THE INSTANT CASE PETITIONER HAS NOW SERVED 85 MONTHS. ACCORDING TO THE UTAH COMMISSION OF CRIMINAL AND JUVENILE JUSTICE, HE IS TO SERVE 119 MONTHS. YET, THE UTAH BOARD OF PARDONS IS DEMANDING 192 MONTHS, WHICH IS 73 MONTHS OVER! EVEN UNDER THE RESTRICTIVE REASONING OF THE GREENHOLTZ MAJORITY OPINION PETITIONER HAS CLEARLY SUSTAINED AN INJURY TO A LIBERTY INTEREST BASED UPON A STATE REGULATORY EXPECTATION OF RELEASE. THE VERY EXISTENCE OF THESE GUIDELINES CREATE A REASONABLE EXPECTANCY ON THE PART OF AN INMATE OF A PAROLE DATE WHICH IS GENERALLY MUCH SHORTER THAN THE SENTENCED TIME PERIOD. THUS, THESE GUIDELINES ALONE SHOULD CREATE

FEDERAL DUE PROCESS PROTECTION IN THE PAROLE BOARD PROCEEDINGS. IN ANY EVENT, HOWEVER, WHEN THESE GUIDELINES ARE GROSSLY EXCEEDED AS IN THE INSTANT CASE AN AUTOMATIC 5TH AMENDMENT DUE PROCESS RIGHT IS CREATED.

BASED UPON THE PRECEDING REASONING, THEREFORE, PETITIONER IS ENTITLED TO RELIEVE FEDERAL DUE PROCESS PROTECTION IN THE PAROLE BOARD HEARINGS CONDUCTED BY RESPONDENTS.

II. THE PETITIONER IS ENTITLED TO A HEARING BEFORE AN IMPARTIAL BOARD OF PARDONS

THE UNITED STATES SUPREME COURT IN MORRISSEY V. BREWER, 408 U.S. 471 (1972) HELD IN THE CONTEXT OF A PAROLE REVOCATION HEARING THAT A DEFENDANT WAS ENTITLED TO CERTAIN PROCEDURAL SAFEGUARDS INCLUDING AN IMPARTIAL SCREENING OFFICER TO DETERMINE IF A PAROLE REVOCATION PROCEEDING WAS JUSTIFIED AND A NEUTRAL AND DETACHED HEARING BODY TO EVALUATE ANY CHARGES BROUGHT AGAINST THE DEFENDANT. SEE ALSO, INGERSON V. MAINE, 491 A2D 1176 (ME. 1985). PETITIONER CONTENDS THAT THIS FUNDAMENTAL RIGHT APPLIES EQUALLY TO PAROLE HEARINGS.

ANY ALLEGED BIAS PREJUDICE OF A TRIBUNAL OR ADMINISTRATIVE BOARD MUST STEM FROM AN EXTRA-JUDICIAL SOURCE AND NOT FROM THE CONDUCT OF THE COURT'S BUSINESS. UNITED STATES V. GRINNELL, 384 U.S. 563, 583 (1966). FOR EXAMPLE, IN NEWELL V. STATE, 620 P.2D 680 (ALA. 1980) THE ALASKA SUPREME COURT OVERTURNED THE FINDING OF A BOARD OF PAROLE IN A REVOCATION HEARING IN WHICH THE DEFENDANT'S PAROLE OFFICER WAS ALLOWED TO SIT IN ON THE BOARD'S DELIBERATIONS. THE ALASKA SUPREME COURT HELD THAT DUE PROCESS INCLUDES "THE RIGHT TO AN IMPARTIAL FACTFINDER".

THE EXISTING RULES OF THE BOARD OF PARDONS, SUCH AS THEY ARE, RECOGNIZES THAT INMATES ARE ENTITLED TO AN IMPARTIAL HEARING. RULE 655 - 309 STATES :

OFFENDERS ARE ENTITLED TO AN IMPARTIAL HEARING BEFORE THE BOARD OF PARDONS. TO THE END, THE BOARD OF PARDONS DISCOURAGES ANY DIRECT OUTSIDE CONTACT WITH INDIVIDUAL BOARD MEMBERS REGARDING SPECIFIC CASES. THIS ALSO APPLIES TO HEARING OFFICERS WHO MAY BE DESIGNATED TO CONDUCT HEARINGS.

ANY SUCH CONDUCT SHOULD BE MADE WITH THE BOARD ADMINISTRATOR.

RULE 655-309-Z PROVIDES A PROCEDURE IN WHICH OUTSIDE CONTACTS ARE DOCUMENTED AND REQUIRES THAT IF A BOARD MEMBER MAY NOT BE ABLE TO MAKE A FAIR AND IMPARTIAL DECISION THEN THE BOARD MEMBER SHALL DECIDE WHETHER TO PARTICIPATE. IF THE DECISION IS TO PARTICIPATE THE OFFENDER SHALL BE INFORMED AND GIVEN THE OPPORTUNITY TO REQUEST THE MEMBER NOT TO PARTICIPATE. "SUCH A REQUEST IS NOT BINDING IN ANY WAY, BUT SHALL BE WEIGHED ALONG WITH ALL OTHER FACTORS IN MAKING A FINAL DECISION REGARDING PARTICIPATION IN THE HEARING".

IN THE INSTANT CASE, IT IS GUESSED, BUT NOT KNOWN, THAT THE VICTIM'S MOTHER HAD CONTACT WITH BOARD MEMBERS. YET, IT IS KNOWN THAT THE VICTIM'S MOTHER GAVE TESTIMONY AND OFFERED ITEMS TO THE BOARD WHICH WERE READ BY THE BOARD AND GIVEN BACK TO THE VICTIM'S MOTHER. THESE ITEMS WERE NOT READ INTO THE RECORD NOR WERE THEY COPIED AND PLACED INTO THE PETITIONER'S FILE. ALSO, THE VICTIMS REPRAVATION ACT WAS DESIGNED FOR A LIVE VICTIMS TESTIMONY NOT UNVERIFIED HEARSAY STATEMENTS OF THIRD PERSONS WHO ARE NOT DIRECT VICTIMS OF AN INMATE. THIS TESTIMONY WILL CERTAINLY BE ONE-SIDED AND BIASED.

IT IS THEREFORE REQUESTED THAT EITHER THIS COURT REQUIRE A SPECIAL BOARD TO BE CONVENED WHERE THE APPEARANCE OF IMPROPIETY DOES NOT EXIST OR THAT THIS MATTER BE REMANDED FOR AN EVIDENTIARY HEARING TO DETERMINE WHAT INFLUENCE THE VICTIM'S MOTHER MAY OR MAY NOT HAVE HAD IN THE PRIOR PROCEEDINGS. IT IS FUNDAMENTAL THAT AN IMPARTIAL FACT FINDER IS THE HEART AND SOUL OF A DUE PROCESS SYSTEM WHETHER IT BE FEDERAL OR STATE. PETITIONER IS ENTITLED TO RELIEF.

III . DUE PROCESS REQUIRES THAT AN INMATE BE GIVEN TIMELY NOTICE OF THE HEARING AS WELL AS CRITERIA THAT WILL BE USED BY THE BOARD OF PARDON IN DETERMINING PAROLE

AT THE TIME OF PETITIONER'S HEARING A TYPICAL NOTICE SENT TO AN INMATE STATES THE FOLLOWING:

PRESENTLY, BOARD STAFF IS GATHERING PERTINENT INFORMATION ON YOUR CASE FROM THE COURTS, LAW ENFORCEMENT AGENCIES AND OTHER SOURCES WHICH WILL BE USED IN ORDER TO PROVIDE YOU A FAIR HEARING. ANY WRITTEN INFORMATION OR DOCUMENTATION YOU WISH THE BOARD TO CONSIDER SHOULD BE SENT IN ADVANCE OF YOUR HEARING.

THIS NOTICE ESSENTIALLY TELLS AN INMATE NOTHING. THERE ARE NO RULES OR REGULATIONS THAT AN INMATE CAN REFER TO AS TO WHAT IS "PERTINENT INFORMATION" WHICH "WILL BE USED IN ORDER TO PROVIDE [HIM] A FAIR HEARING". THERE IS NOT EVEN A LISTING OF RELEVANT DOCUMENTS THAT ARE CONTAINED IN THE INMATE'S FILE WHICH MAY BE CONSIDERED BY THE BOARD IN ITS DETERMINATION.

JUSTICE MARSHALL, BRENNAN, AND STEVENS IN THEIR DISSENTING OPINION IN GREENHOLTZ NOTED A SIMILAR DEFICIENCY IN THE NEBRASKA PROCEDURE. THE DISSENTING JUDGES NOTED:

THE BOARD CURRENTLY INFORMS INMATES ONLY THAT IT WILL CONDUCT AN INITIAL REVIEW OR FINAL PAROLE HEARING DURING A PARTICULAR MONTH WITHIN THE NEXT YEAR. THE NOTICE DOES NOT SPECIFY THE DAY OR HOUR OF THE HEARING. INSTEAD, INMATES MUST CHECK A DESIGNATED BULLETIN BOARD EACH MORNING TO SEE IF THEIR HEARING IS SCHEDULED FOR THAT DAY. IN ADDITION, THE BOARD REFUSE TO ADVISE INMATES OF THE CRITERIA RELEVANT IN PAROLE RELEASE PROCEEDINGS, DESPITE A STATE STATUTE EXPRESSLY LISTING FOURTEEN FACTORS THE BOARD MUST CONSIDER AND FOUR PERMISSIBLE REASONS FOR DENYING PAROLE. 422 U.S. AT 37.

WHILE THERE DOES NOT APPEAR TO BE A NOTICE PROBLEM AS TO TIME AND DATE AT THE UTAH STATE PRISON, THE LACK OF EXACT CRITERIA CREATES A SERIOUS PROBLEM FOR THE INMATE. AS WILL BE DISCUSSED INFRA NOT ONLY DOES THE INMATE NOT HAVE ANY CRITERIA GOING INTO THE HEARING BUT HE IS GIVEN NO SPECIFIC FINDINGS OR CRITERIA AFTER COMING OUT OF THE HEARING. VIRTUALLY, THE INMATE MUST GO FROM YEAR TO YEAR BASED UPON THE VALGE STATEMENTS MADE AT THE HEARING. FURTHERMORE, THERE IS NO GUARANTEE THAT MEMBERS OF THE HEARING BOARDS WILL BE CONSISTENT IN APPLYING ANY PARTICULAR CRITERIA FROM HEARING TO HEARING OR YEAR TO YEAR.

THIS COURT, THEREFORE, CONSISTENT WITH DUE PROCESS SHOULD REQUIRE THE BOARD OF PARDONS TO ESTABLISH CRITERIA IT UTILIZES IN EVALUATING AN INMATE'S PAROLE POTENTIAL IN CONJUNCTION WITH THE GUIDELINES UTILIZED BY THE BOARD AS PREPARED BY THE UTAH COMMISSION OF CRIMINAL AND JUVENILE JUSTICE. IN THIS MANNER, AN INMATE CAN AT LEAST PREPARE TO ADDRESS THOSE AREAS WHICH THE BOARD CONSIDERS IMPORTANT IN DECIDING WHETHER PAROLE SHOULD BE GRANTED. THE INMATE WOULD HAVE THE OPPORTUNITY TO PREPARE HIS CASE BOTH BY WAY OF DOCUMENTATION FROM OUTSIDE SOURCES AND BY PREPARING FOR ORAL TESTIMONY.

IV. THE UTAH BOARD OF PARDONS FAILED TO DISCLOSE TO PETITIONER HIS ENTIRE FILE AND FAILED TO PROVIDE A MEANS OF CORRECTING INACCURATE INFORMATION

THIS COURT HAS JUST PREVIOUSLY RULED ON THIS ISSUE IN LABRUM. THE PETITIONER SEES NO REASON TO WASTE THIS COURT'S TIME BY WRITING A LENGTHY MEMORANDUM ON THIS SUBJECT. THE ONLY REASON THE PETITIONER LEFT THIS ISSUE IN THE BRIEF WAS THAT THE PETITIONER WAS DENIED THIS AS WAS LABRUM AND, SAME AS LABRUM, THE PETITIONER SHOULD BE REHEARD BY THE BOARD OF PARDONS WITH THIS SAFEGUARD IN EFFECT.

IV. DUE PROCESS REQUIRES THAT A WRITTEN DECISION DETAILING THE REASONS OF THE BOARD OF PARDONS DECISION BE GIVEN TO THE INMATE.

RULE 655-305 OF THE BOARD OF PARDONS PROVIDE THAT THE TIME THE OFFENDER APPEARS BEFORE THE BOARD HE IS NOTIFIED VERBALLY OF THE DECISION. "AN EXPLANATION OF THE REASONS FOR THE DECISION IS GIVEN AND SUPPORTED IN WRITING". THE OFFENDER "SHALL BE NOTIFIED IN WRITING OF THE DECISION OF THE BOARD WITHIN THIRTY DAYS AFTER THE HEARING".

AGAIN, WHILE THE REGULATION OF THE BOARD OF PARDONS WOULD COMPLY WITH DUE PROCESS, THE PRACTICE DOES NOT. THE ONLY WRITING WHICH IS RECEIVED IS A FORM. ESSENTIALLY, THE FORM GIVEN IS JUST CHECKED ON CERTAIN BOXES WHICH NEVER FULLY EXPLAIN THE REASONING. IN OTHER WORDS, THE INMATE IS GIVEN A

VERBAL DECISION ONLY BY THE BOARD AND IS NEVER GIVEN ANY REASONING FOR THE DENIAL OF PAROLE - WRITTEN OR OTHERWISE.

THE DISSENTING OPINION IN GREENHOLTZ ARGUED THAT A SUMMATION OF THE EVIDENCE RESULTING IN A DENIAL OF THE PAROLE WAS ESSENTIAL. THE DISSENTING OPINION STATED:

MOREOVER, CONSIDERATION IDENTIFIED IN MORRISSEY AND MATHEWS MILITATE IN FAVOR OF REQUIRING A STATEMENT OF THE ESSENTIAL EVIDENCE. SUCH A REQUIREMENT WOULD DIRECT THE BOARD'S FOCUS TO RELEVANT STATUTORY CRITERIA AND PROMOTE MORE CAREFUL CONSIDERATION OF THE EVIDENCE. IT WOULD ALSO ENABLE INMATES TO DETECT AND CORRECT INACCURACIES THAT COULD HAVE HAD A DECISIVE IMPACT AND THE OBLIGATION TO JUSTIFY A DECISION PUBLICLY WOULD PROVIDE THE ASSURANCE, CRITICAL TO THE APPEARANCE OF FAIRNESS, THAT THE BOARD'S DECISION IS NOT CAPRICIOUS. FINALLY, IMPOSITION OF THE OBLIGATION WOULD AFFORD INMATES INSTRUCTION ON THE MEASURES NEEDED TO IMPROVE THEIR PRISON BEHAVIOR AND PROSPECTS FOR PAROLE, A CONSEQUENCE SHORTLY CONSISTENT WITH REHABILITATIVE GOALS. BALANCING THESE CONSIDERATIONS AGAINST THE BOARD'S MINIMAL INTEREST IN AVOIDING THIS PROCEDURE, I AM CONVINCED THAT THE FOURTEENTH AMENDMENT REQUIRES THE PAROLE BOARD TO PROVIDE INMATES A STATEMENT OF THE ESSENTIAL EVIDENCE AS WELL AS A MEANINGFUL EXPLANATION OF THE REASONS FOR DENYING PAROLE RELIEF. 442 U.S. AT 40-41.

SEE ALSO. UNITED STATES V. ILLINOIS PAROLE AND PARDON BOARD, 669 F.2D 1185, 1191 (7TH CIR. 1980); PARKER V. CORBROTHERS, 750 F.2D (8TH CIR. 1984); TASKER V. MOHN, 267 S.E.2D 183, 191 (W. VA. 1980); MATHEWS V. ELDRIDGE, 424 U.S. 319, 335 (1976).

ANOTHER PURPOSE WOULD BE SERVED BY REQUIRING DETAILED WRITTEN FINDINGS FOR EACH INMATE. UNDER RULE 655-304 A RECORD IS TO BE MADE OF ALL HEARINGS. HOWEVER, EXCEPT IN HIGH PROFILE CAPITAL CASES ONLY TAPE RECORDINGS OF THE PROCEEDINGS ARE MADE UNLESS AN INMATE CHOOSES TO HAVE THE TAPE RECORDING TRANSCRIBED THERE IS NO RECORD OF PROCEEDINGS THAT A SUBSEQUENT BOARD CAN REVIEW. IT WOULD THUS SEEM TO BE CRITICAL TO HAVE SOME WRITTEN EVIDENCE OF THE THINKING AND FINDINGS OF THE BOARD SO THAT MEMBERS CAN REVIEW THE PREVIOUS DECISION WHICH IN MANY CASES OCCURS IN LENGTHY INTERVALS.

AGAIN, IT IS INCONSISTENT WITH STATE AND FEDERAL DUE PROCESS TO NOT FORMALLY ADVISE AN INMATE FOR THE REASONS OF DENYING HIS PAROLE ESPECIALLY SINCE HE HAS NO RECOURSE EXCEPT TO WAIT UNTIL THE NEXT PROCEEDINGS TO TRY AGAIN. BEING FORCED TO RELY UPON HIS MEMORY OF THE HIGHLY EMOTIONAL-PACKED HEARING IS IMPROPER. FURTHER, BOARD MEMBERS SHOULD BE REQUIRED TO TAKE THE TIME TO REDUCE THEIR REASONS FOR DENIAL TO WRITING IF FOR NO OTHER REASON SO THAT THEY CAN THOUGHTFULLY EVALUATE THE STANDARDS OF PAROLE IN LIGHT OF THE EVIDENCE IN THE INMATE FILE. THIS DEFICIENCY IN THE EXISTING SYSTEM MUST ALSO BE CORRECTED.

CONCLUSION

IN FOOTE AND LABRUM WE HAVE SEEN THAT DUE PROCESS IS REQUIRED OF BOARD OF PARDONS HEARING. AS THE PETITIONER HAS SHOWN BY THIS BRIEF, THE BOARD OF PARDONS IS STILL IN VIOLATION OF THE 5TH AND 14TH AMENDMENT OF THE U.S. CONSTITUTION AND THAT THE 6TH DISTRICT COURT JUDGE WAS IN ERROR TO DENY THE PREVIOUS WRIT (A VIOLATION OF 78-35-1, DENIAL OF WRIT) BECAUSE LABRUM ALSO SHOWED THAT AN INMATE IS ENTITLED TO HIS FILE AND TO THUS TO BE ABLE TO CORRECT INACCURATE INFORMATION. THE PETITIONER ASKS, IN THIS CASE, TO EXPAND THE REQUIRED DUE PROCESS IN BOARD HEARINGS AND ORDER THE BOARD OF PARDONS (A) TO GIVE WRITTEN REASON OF THE BOARD'S DECISION (NOT A FORM); (B) TO NOTIFY AN INMATE OF THE CRITERIA THAT WILL BE USED IN HEARINGS; (C) TO GO BY PETITIONER'S GUIDELINES; AND (D) HAVE HEARING BEFORE IMPARTIAL BOARD MEMBERS.

THUS, THE PETITIONER REQUESTS THAT THIS COURT VACATE THE BOARD OF PARDON'S RULING AND REMAND THIS MATTER BACK TO THE BOARD OF PARDONS WITH AN ORDER TO FOLLOW THE ABOVE WRITTEN DIRECTIONS.

DATED THIS 21ST DAY OF AUGUST, 1994

John Fletcher Pendergrass
JOHN FLETCHER PENDERGRASS

CERTIFICATE OF SERVICE

I, JOHN FLETCHER PENDERGRASS, DO HEREBY CERTIFY THAT TRUE AND CORRECT COPIES OF THE FOREGOING BRIEF WAS MAILED BY THE CONTRACT ATTORNEY TO THE SUPREME COURT AND TO THE ATTORNEY GENERAL.

John Fletcher Pendergrass