

1995

# Luis R. Fernandez, Petitioner-Appellant, v. Board of Pardons, and Hank Galetka, Respondents-Appellees : Brief of Respondents-Appellees

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS  
STATE OF UTAH

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LUIS R. FERNANDEZ, :  
Petitioner-Appellant, :  
v. : Case No. 950465-CA  
BOARD OF PARDONS, and HANK GALETKA, :  
Respondents-Appellees. : Priority No. 03

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BRIEF OF RESPONDENTS - APPELLEES

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Appeal from the  
Third Judicial District Court, Salt Lake County  
Honorable Pat B. Brian, Presiding

UTAH COURT OF APPEALS  
BRIEF

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ORAL ARGUMENT NOT DESIRED BY RESPONDENTS - APPELLEES

**FILED**

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COURT OF APPEALS

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<u>TABLE OF CONTENTS</u>	<u>Page</u>
STATEMENT OF JURISDICTION .....	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW .....	1
DETERMINATIVE STATUTES .....	2
STATEMENT OF THE CASE .....	2
STATEMENT OF RELEVANT FACTS .....	3
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	5
I.    THIS COURT IS WITHOUT JURISDICTION TO HEAR THE PRESENT APPEAL .....	5
II.   FERNANDEZ IS NOT ENTITLED TO CREDIT FOR TIME SERVED ON A SEPARATE FEDERAL CONVICTION .....	6
CONCLUSION .....	10
ORAL ARGUMENT AND A PUBLISHED OPINION <u>NOT</u> REQUESTED BY THE RESPONDENTS - APPELLEES .....	10
CERTIFICATE OF DELIVERY .....	11
ADDENDUM: DETERMINATIVE STATUTES	

## TABLE OF AUTHORITIES

### STATE CASES

<u>Andrus v. Turner</u> , 509 P.2d 363 (Utah 1973) .....	8
<u>Henretty v. Manti City Corp.</u> , 791 P.2d 506 (Utah 1990) .....	5
<u>Isaacson v. Dorius</u> , 669 P.2d 849 (Utah 1983) .....	5
<u>Lancaster v. Utah Board of Pardons</u> , 869 P.2d 945 (Utah 1994) .....	2
<u>Nelson v. Stoker</u> , 669 P.2d 390 (Utah 1983) .....	5
<u>Northern v. Barnes</u> , 825 P.2d 696 (Utah App. 1992), <u>aff'd</u> , 870 P.2d 914 (Utah 1993) .....	7
<u>Ontiveros v. Utah Board of Pardons</u> , 897 P.2d 1222 (Utah App. 1995) .....	8
<u>Rawlings v. Holden</u> , 869 P.2d 958 (Utah App. 1994) .....	9
<u>S. Utah Wilderness v. Board of State Lands</u> , 830 P.2d 233 (Utah 1992) .....	1
<u>Sampley v. Morris</u> , 632 P.2d 837 (Utah 1981) .....	8
<u>State v. Johnson</u> , 700 P.2d 1125 (Utah 1985) .....	5
<u>State v. Richards</u> , 740 P.2d 1314 (Utah 1987) .....	7
<u>State v. Schreuder</u> , 712 P.2d 264 (Utah 1985) .....	7
<u>Varian-Eimac, Inc. v. Lamoreaux</u> , 767 P.2d 569 (Utah App. 1989) .....	2

### STATE STATUTES AND RULES

Utah Code Ann. § 76-3-202 (1989) .....	9
Utah Code Ann. § 77-27-5(3) (1988) .....	7
Utah Code Ann. § 78-2a-3(g) (Supp. 1995) .....	1
Utah Rules of Appellate Procedure, Rule 4 .....	5

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UTAH BOARD OF PARDONS, et al.,	:	
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BRIEF OF RESPONDENTS - APPELLEES

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STATEMENT OF JURISDICTION

The instant action comes within the original jurisdiction of the Utah Court of Appeals under Utah Code Ann. § 78-2a-3(g) (Supp. 1995).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. This Court is without jurisdiction to hear the instant appeal because the petitioner's notice of appeal was filed thirty-one days after the entry of the final judgment in this matter.

**STANDARD OF REVIEW:** This Court has the power, and the duty, to determine if it has jurisdiction to hear this matter. S. Utah Wilderness v. Bd. of State Lands, 830 P.2d 233, 234 (Utah 1992). If this Court concludes that it does not have jurisdiction, "it

retains only the authority to dismiss the action." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah App. 1989).

2. The trial court correctly determined that the Board of Pardons' decision not to give Fernandez credit for his time served in federal custody did not violate the petitioner's constitutional rights.

**STANDARD OF REVIEW:** This issue presents only a question of law which this Court reviews for correctness giving no deference to the trial court. Lancaster v. Utah Bd. of Pardons, 869 P.2d 945 (Utah 1994).

#### **DETERMINATIVE STATUTES**

The determinative statutes are set forth in the Addendum to this brief.

#### **STATEMENT OF THE CASE**

Luis R. Fernandez filed this action against the Utah Board of Pardons, asking the trial court to force the Board to give Fernandez credit for time he served in federal custody on a separate federal charge. R. 4-5. Judge Peuler refused to order the Board of give the petitioner credit for time served in federal custody and for periods of time during which Fernandez had absconded from parole supervision. R. 114-16.

Judge Peuler's decision was entered on June 13, 1995. R. 114-16. Petitioner Fernandez filed the present notice of appeal on July 14, 1995, thirty-one days after the filing of the final judgment in this matter. R. 118.

#### **STATEMENT OF RELEVANT FACTS**

Luis Fernandez was committed to the Utah State Prison on an indeterminate sentence of not more than five years on May 8, 1990. R. 46-47. The Utah State Board of Pardons gave Fernandez credit for 179 days that the petitioner had served in jail before his sentencing. R. 64. On December 7, 1990, custody of the petitioner was given to federal authorities. R. 2, 64, 92. On February 8, 1991, Fernandez was sentenced by a federal court, pursuant to a federal conviction, to serve a period of incarceration in a federal penal institution. R. 51-52. The Utah Board of Pardons released Fernandez to the federal authorities, with a state parole to commence upon his release from federal custody. R. 53-54. The Board of Pardons did not give Fernandez credit for the time he served in federal custody. R. 64.

Fernandez' Utah parole became effective on August 28, 1992, when he was released from federal custody. R. 64, 69. On December 16, 1992, the Board of Pardons issued a warrant for the



arrest of Luis Fernandez for absconding from parole supervision. R. 55, 64. Fernandez was not returned to the custody of the State of Utah on the Board of Pardon's Arrest Warrant until January 11, 1994. R. 56, 64.

Having been paroled on April 12, 1994, Fernandez again absconded from parole supervision on June 2, 1994. R. 64, 79. Fernandez was returned to the custody of Utah on August 24, 1994. R. 64, 79.

#### **SUMMARY OF ARGUMENT**

The present appeal was filed thirty-one days after the entry of the final judgment in this action. This Court is without jurisdiction to hear this appeal because it was not filed in a timely manner.

Even if this appeal had been filed in a timely manner, the decision of the trial court should still be affirmed. Fernandez's only claim is that he is entitled to credit for time served on a federal charge in federal custody. The trial court correctly determined that the petitioner had no such entitlement and that the Board of Pardons was properly within its discretion in determining whether or not to grant such credit.

## ARGUMENT

### I. THIS COURT IS WITHOUT JURISDICTION TO HEAR THE PRESENT APPEAL

Rule 4(a) of the Utah Rules of Appellate Procedure provides, in part, that "the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of the entry of the judgment or order appealed from." This time can be extended, upon a showing of good cause or excusable neglect, for an additional thirty days. Rule 4(e) of the Utah Rules of Appellate Procedure.

The Utah Supreme Court has consistently held that the filing of a timely notice of appeal is jurisdictional. Henretty v. Manti City Corp., 791 P.2d 506, 511 n.11 (Utah 1990); State v. Johnson, 700 P.2d 1125 (Utah 1985); Isaacson v. Dorius, 669 P.2d 849 (Utah 1983); Nelson v. Stoker, 669 P.2d 390 (Utah 1983).

Plaintiff's notice of appeal was not filed in this matter until after the running of the thirty day period from the date of the entry of the final judgment. The notice of appeal is clearly defective under any standard, and this Court is without jurisdiction to hear this action.

## **II. FERNANDEZ IS NOT ENTITLED TO CREDIT FOR TIME SERVED ON A SEPARATE FEDERAL CONVICTION**

Since his commitment to the Utah State Prison on May 8, 1990, Luis Fernandez has not remained in the custody, and under the jurisdiction of, the State of Utah at all times. During four separate time periods, Fernandez has been outside the jurisdiction of the Utah Department of Corrections and the Board of Pardons. R. 64

For 138 days (12/07/90 to 4/23/91), Fernandez was in the custody of the United States Marshals Office answering federal criminal charges that he pled guilty to. Fernandez then served a further 493 days (4/24/91 to 8/28/92) in the federal prison system on his federal conviction and sentence.

Fernandez, after absconding from Utah parole supervision, spent another 392 days (12/16/92 to 1/11/94) on escape status before being returned to the custody of the State of Utah. Part of this time was spent in federal custody on unrelated federal charges.

Fernandez then absconded a second time from Utah parole supervision for a final period of 84 days (6/2/94 to 8/24/94).

Fernandez claims that he is entitled to credit for at least the time he spent in federal custody serving his federal sentence. The Board of Pardons, while giving Fernandez credit for the time he served in jail prior to his Utah conviction, has refused to give him credit for the time Fernandez has served in federal custody and for the time that Fernandez spent on escape from Utah supervision.

The Utah State Board of Pardons has been given the power to reduce or terminate sentences. Utah Code Ann. § 77-27-5(3) (1988). The Utah Supreme Court and this Court have repeatedly held that "the discretion to give credit for time served was determined to lie solely with the Board." Northern v. Barnes, 825 P.2d 696, 698 (Utah App. 1992), aff'd, 870 P.2d 914 (Utah 1993).

In State v. Schreuder, 712 P.2d 264 (Utah 1985), the Utah Supreme Court made it clear that the Board of Pardons was vested with the power to grant or deny such credit. The only time when the Board of Pardons must give credit for time served is for presentence incarceration imposed because the inmate was unable to make bail. State v. Richards, 740 P.2d 1314, 1317 (Utah 1987). The Board of Pardons did not abuse its discretion by refusing to give the petitioner credit for time served on a

separate federal conviction towards completion of the petitioner's Utah sentence.

In Ontiveros v. Utah Bd. of Pardons, 897 P.2d 1222 (Utah App. 1995), this Court rejected a similar claim. Ontiveros involved a Utah parolee who was arrested, convicted, and served a foreign (California) sentence before being returned to the State of Utah for a parole violation hearing. In affirming the Board's refusal to give credit for the time served in California, this Court explained:

Appellant's imprisonment in California on a different conviction effectively suspended the time for the running of his sentence in Utah. Appellant is not entitled to credit for time served in California on a new and different conviction.

897 P.2d at 1224.

In Andrus v. Turner, 509 P.2d 363 (Utah 1973), the Supreme Court upheld the Board of Pardon's denial of credit for time served in another state awaiting extradition to Utah. In Sampley v. Morris, 632 P.2d 837, 839 (Utah 1981), the Court stated that "We see no basis in law, logic or justice which would justify compliance with defendant's insistence that he should be given credit on his Utah sentences for time served in foreign penal

institutions while he was on escape from Utah." See also,  
Rawlings v. Holden, 869 P.2d 958 (Utah App. 1994).

Fernandez was not entitled to credit for the time he served in federal custody. Fernandez was in federal custody to serve his federal sentence, not his Utah sentence. The trial court correctly upheld the Board of Pardon's decision denying the petitioner credit for time served in federal custody and for time during which Fernandez had been on escape from Utah authority.

Fernandez also claims that he is entitled to at least partial credit for the time he served in federal custody because he alleges that he was serving his Utah parole while incarcerated in the federal penal system. The petitioner's error is that time served in custody cannot count towards time served on parole. By statutory definition, "all time served on parole, outside of confinement and without violation constitutes service of the total sentence . . . ." Utah Code Ann. § 76-3-202 (1989) (emphasis added). The Board has given Fernandez credit for all time served on parole outside of confinement and without violation. But Fernandez is not entitled to credit for time served in foreign confinement as part of parole.

## CONCLUSION

For these reasons, the respondents urge this Court to affirm the trial court's dismissal of this action.

The petitioner's notice of appeal was untimely.

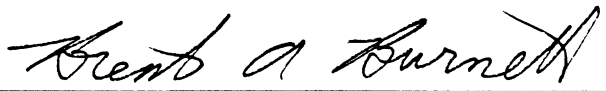
The Board of Pardons did not violate any constitutional right of the petitioner when it denied his request for credit for time served in federal custody.

### ORAL ARGUMENT AND A PUBLISHED OPINION NOT REQUESTED BY THE RESPONDENTS - APPELLEES

Because this case presents no issues of law that are of importance that have not already been decided by the courts, the respondents respectfully submit that there is no need for either oral arguments or a published opinion in this matter.

DATED this 12<sup>th</sup> day of February, 1996.

JAN GRAHAM  
Attorney General

  
\_\_\_\_\_  
BRENT A. BURNETT  
Assistant Attorney General  
Attorneys for Respondents

CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing  
BRIEF OF RESPONDENTS-APPELLEES to the following this 12<sup>th</sup> day  
of February, 1996.

Luis R. Fernandez  
Inmate #14614  
Utah State Prison  
P. O. Box 250  
Draper, Utah 84020

Brent A. Burnett



## **ADDENDUM**

**76-3-202. Paroled persons — Termination or discharge from sentence — Time served on parole — Discretion of Board of Pardons.**

(1) Every person committed to the state prison to serve an indeterminate term and later released on parole shall, upon completion of three years on parole outside of confinement and without violation, or in the case of a person convicted of violating Section 76-5-301.1, Subsection 76-5-302(1)(e), Section 76-5-402, 76-5-402.1, 76-5-402.2, 76-5-402.3, 76-5-403.1, 76-5-404, 76-5-404.1, or 76-5-405, or attempting to violate any of those sections, upon completion of ten years on parole outside of confinement and without violation, be terminated from his sentence unless the person is earlier terminated by the Board of Pardons. Any person who violates the terms of his parole, while serving parole, shall at the discretion of the Board of Pardons be recommitted to prison to serve the portion of the balance of his term as determined by the Board of Pardons, but not to exceed the maximum term.

(2) Any person paroled following a former parole revocation may not be discharged from his sentence until either:

(a) he has served three years on parole outside of confinement and without violation, or in the case of a person convicted of violating Section 76-5-301.1, Subsection 76-5-302(1)(e), Section 76-5-402, 76-5-402.1, 76-5-402.2, 76-5-402.3, 76-5-403, 76-5-403.1, 76-5-404, 76-5-404.1, or 76-5-405, or attempting to violate any of those sections, ten years on parole outside of confinement and without violation;

(b) his maximum sentence has expired; or

(c) the Board of Pardons so orders.

(3) (a) All time served on parole, outside of confinement and without violation constitutes service of the total sentence but does not preclude the requirement of serving a three-year or ten-year, as the case may be, parole term outside of confinement and without violation.

(b) Any time a person spends outside of confinement after commission of a parole violation does not constitute service of the total sentence unless the person is exonerated at a hearing to revoke the parole.

(c) Any time spent in confinement awaiting a hearing before the Board of Pardons or a decision by the board concerning revocation of parole constitutes service of the sentence. In the case of exoneration by the board, the time spent shall be included in computing the total parole term.

(4) When any parolee without authority from the Board of Pardons absents himself from the state or avoids or evades parole supervision, the period of absence, avoidance, or evasion tolls the parole period.

(5) This section does not preclude the Board of Pardons from paroling or discharging an inmate at any time within the discretion of the Board of Pardons unless otherwise specifically provided by law.

**History:** C. 1953, 76-3-202, enacted by L. 1973, ch. 196, § 76-3-202; 1983, ch. 88, § 4; 1989, ch. 125, § 1.

**Amendment Notes.** — The 1989 amend-

ment, effective April 24, 1989, inserted "outside of confinement and" following "parole" throughout the section and made numerous stylistic changes

## COLLATERAL REFERENCES

**Key Numbers.** — Pardon and Parole ⇐ 5.

**77-27-5. Board of Pardons authority.**

(1) (a) The Board of Pardons 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) 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 its appointed examiner in open session.

(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 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) The determinations and decisions of the Board of Pardons in cases involving approval or denial of any action, of paroles, pardons, commutations or terminations of sentence, orders of restitution, or remission of fines, forfeitures, and restitution, are final and are not subject to judicial review. Nothing in this section prevents the obtaining or enforcement of a civil judgment.

(4) Nothing in this chapter may 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 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 released upon parole, pardoned, have restitution ordered, or have their fines or forfeitures remitted, or their sentences commuted or terminated, the Board of Pardons 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.