OPINION
68-148

January 8, 1968 (OPINION)

Mr. Irvin Riedman

Chief Parole Officer

RE: Pardon Board - Procedure - Appointment of Counsel

This is in reply to your letter with regard to the bearing of the recent trend of decisions of the United Supreme Court as affecting the operations of your Board.

It is our understanding that the case of Mempa v. Rhay, Walking v. Washington State Board of Prison Terms and Paroles (emphasis supplied) decided at the October 1967 term of the United States Supreme Court is currently the latest expression of opinion of that august body in this field. We find it, and Jerry Douglas Mempa v. B. J. Rhay, Superintendent, Washington State Penitentiary, 416 P. 2d. 104, the Washington Supreme Court case it overrules, to contain very interesting dissertations on points of law involved in these proceedings.

Looking first to the decision of the Washington Supreme Court, and more particularly to the dissenting opinion of Judge Hamilton, (Judges Donworth and Weaver concurring in such dissent), we note the opening statement as follows:

> I dissent. The majority in overruling those portions of State v. O'Neal, 147 Washington 169, 265 P. 175 (1928), in re McClintock v. Rhay, 52 Washington 2d. 615, 328 P. 2d. 369 (1958), and State v. Shannon, 60 Washington 2d. 883, 379 P. 2d. 646 (1962), which inferentially or directly characterize imposition of criminal judgment and sentence as part of a criminal prosecution, have taken, in my view, an unwarranted, unjustified and unrealistic step backward in the administration of justice. * * *."

We note also in the United States Supreme Court decision at page 6 of the advance sheet that the court finds it necessary to inform us:

> * * * The applicable statute requires the trial judge in all cases to sentence the convicted person to the maximum term provided by law for the offense of which he was convicted. Washington Revised Code Section 9.95.010. The actual determination of the length of time to be served is to be made by the Board of Prison Terms and paroles within six months after the convicted person is admitted to prison. Washington Revised Code Section 9.95.040."

Noting the fact that by legislative fiat, two member of North Dakota's Board of Pardons (the Attorney General, and the Chief Justice of the Supreme Court) are learned in the law, and that by executive action two additional members of the current board are also learned in the law (Mr. Chapman and Mr. Vogel), we would certainly

not question that such current board is well qualified to participate in such judicial functions as imposition of criminal judgment and sentence as part of a criminal prosecution; however, both on the basis of the history of such board in this state, and current North Dakota legislation, it would appear that in this state the Board of Pardons is primarily an administration agency charged primarily with the responsibility of administering the executive function of pardons and paroles, at a point in time, after the court has performed the judicial function of imposing sentence, and any suspensions, deferments, probations, etc., it may deem appropriate in any given case. While we clearly recognize the responsibility of this administrative agency to maintain adequate standards of administrative due process and quasijudicial "fair play" in accordance with modern legal and constitutional concepts, we must recognize that great weight must be given to their prior administrative determinations as to their scope and function, and to the legislative and constitutional specifications of the their jurisdiction and responsibilities. We find no enactment of the Legislative Assembly of this state or administrative determination of the board that would justify their claiming to be a "Board of Prison Terms" of this state, or that would justify their requiring the district judges of this state to impose only "the maximum term provided by law for the offense of which he was convicted" or authorizing them to actually determine the length of time to be served within six months after the convicted person is admitted to prison similar to that contained in Washington Revised Code sections 9.95.010 and 9.95.040.

We feel that the North Dakota Supreme Court has definitely decided that full administrative due process could be given by the North Dakota Board of Experts (predecessor to the Board of Pardons) and that the substance of their proceedings could, in effect, be fully considered by the courts of this state in State ex rel., Vadnais v. Stair, 1921 North Dakota 472, 185 N.W. 301. We are familiar with no North Dakota judicial decision or legislative enactment to the contrary. The Mempa v. B. J. Rhay, 416 P. 2d. 104, decision apparently contemplated quite a substantial change in what had previously been the procedure in the State of Washington, and the United States Supreme Court decision does seem to clarify the legal situation under the laws of that state a great deal. However, we are familiar with no such substantial changes, in the courts viewpoint, on the law of this state as applied to the North Dakota Board of Pardons.

We do think that the primary responsibility for maintenance of the functions of the Board of Pardons is primarily vested in the State Pardon Board just as the functions of maintenance of the prison system is primarily vested in the Warden of the State Penitentiary. The State ex rel., Vadnais v. Stair case 48 North Dakota 472, 185 N.W. 301, previously considered, certainly does not militate against such administrative agencies holding such formal hearings and investigations as will result in proper and just administration of the responsibilities of these agencies. If guidelines for such administration are not made specifically applicable to the board, the Administrative Agencies Practice Act, chapter 28-32 of the North Dakota Century Code, can be used in proper cases as an outline of what the legislature of this state has determined to be

administrative due process. We see no reason why a full-blown administrative hearing must be held in determining to revoke the parole of an admitted violator, though more elaborate proceedings might well be appropriate where there is a substantial question as to whether there is a violation.

We believe that the Mempa v. Rhay decisions clearly point up the fact that "freedom" is a substantial right, and that services of counsel may very well be appropriate where a question as to violation arises. It would probably be of great aid in future proceedings of the board to incorporate in its minutes a note of whether or not the alleged violator was asked whether he wanted representation by counsel, and whether he accepted or refused same. Services of a court reporter might also be desirable particularly where counsel or an alleged violator demands same though we find no specific legislative mandate establishing that the legislature now intends to change the practices of the agency concerned to require such court reporter in all cases before such board. Services of mechanical recording devices, shorthand notes of a qualified stenographer, and like devices for preserving testimony adduced, pursuant to stipulation of counsel, have been utilized by other administrative agencies and we see no reason why similar systems could not be utilized by this board also in proper cases.

We would certainly go along with the proposition announced by the Supreme Court of the United States is Eskridge v. Washington; State Board of Prison Terms and Paroles, 357 U. S. 215, 2 L. Ed. 2d. 1269, 78 S. Ct. 1061, decided 16 June 1958, to the effect that the indigent defendant must be afforded as adequate appellate review as defendants who have money enough to buy transcripts; however, we do not feel that this necessarily establishes even for the situation in the State of Washington that all persons appearing before the board are thereby entitled to a transcript as a matter of law. If standard operating procedures of the North Dakota Pardon Board would require a transcript in each instance where the party appearing before the board could afford one, we would agree that appellate proceedings must be equally available to indigents. However, we are familiar with no decision, statute or prior practice of this agency indicating that any such standard operating procedure exists.

The North Dakota Legislative Assembly has made provision for appointment of counsel for indigents. Section 29-07-01.1 of the 1967 Supplement to the North Dakota Century Code does provide:

> APPOINTMENT OF COUNSEL FOR INDIGENTS - PAYMENT OF EXPENSES. The magistrate before whom a defendant charged with the violation of state criminal law is brought may appoint counsel from a list prepared under the direction of the senior district judge in his district and in the manner prescribed by him. The determination of the degree of need of the defendant shall be deferred until his first appearance before the trial judge, and the court may require the defendant to answer all inquiries under oath concerning his need for appointment of counsel. Thereafter, the court concerned shall determine, with respect to each proceeding, whether the defendant is a needy person. The appropriate judge may appoint counsel for a needy person at any time or for any proceeding arising out of a criminal case

if reasonable.

> Lawyers appointed to represent needy persons shall be compensated at a reasonable rate to be determined by the court. Expenses necessary for the adequate defense of a needy person, when approved by the judge, shall be paid by the county wherein the alleged offense took place. A defendant with appointed counsel shall pay to the county such sums as the court shall direct. The state's attorney shall seek recovery of any such sums any time he determines the person for whom counsel was appointed may have funds to repay the county within six years of the date such amount was paid on his behalf."

Basically, it would appear that this statute is designed to handle situations where judicial processes before a court are contemplated, though, considering the possible close interrelationship of judicial sentencing, deferment and suspension of sentences, probation, etc., we would hesitate to suggest that same might not in a proper case also have a bearing on a proceeding before the Pardon Board. Perhaps further legislation is in order to either provide for stenographic records for administrative agency proceedings, or to provide for counsel for indigents. However, this should in the first instance be a matter for legislation.

To conclude we do feel that some of the recent decisions of the United States Supreme Court do shed a great deal of new light on some of the provisions of the United States Constitution. Some of these matters may well be applicable to proceedings before the North Dakota Pardon Board. However, as with any other administrative agency, we feel that the Pardon Board must consider each and every case before it on its merits. It may well be that factors of a particular case may in the determination of the board on the basis of alleged meritorious defense, indigency, jurisdiction, problems of evidence, etc., require appointment of counsel, possibly in a situation where section 29-07-01.1, cited supra, would not apply and possibly a case might arise where a transcript also might be appropriate, though we would hesitate to brief such a case prior to the case having arisen. Under the current State of north Dakota law, and current interpretations of the United States Constitution, it would be difficult to state that a Court Reporter's transcript and appointment of counsel have suddenly been made an essential part of due administrative process before the North Dakota Pardon Board so as to make all of their proceedings automatically invalid without such transcript and appointment of counsel.

If, of course, the North Dakota Pardon Board feels that current trends in constitutional interpretation, or their concept of due administrative process, requires greater expenditure of appropriated funds for some of these items, it would certainly be within their provenance to seek legislation orientated towards these ends.

HELGI JOHANNESON

Attorney General