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Burghart v. Carlin Respondent's Brief Dckt. 40181

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STATEMENT OF THE CASE

Nature Of The Case

The Appellant (“Burghart”), a pro se incarcerated inmate, appeals the district court’s Judgment and Order Granting Summary Judgment and dismissal of Burghart’s Petition for Writ of Habeas Corpus.

Statement of Undisputed Facts

Burghart is a presently incarcerated within the Idaho Department of Correction (“IDOC”) by virtue of a judgment of conviction and order of commitment. Burghart is currently housed at the Kit Carson Correctional Center. Burghart was convicted in 1998 and sentenced to five (5) years fixed not to exceed twenty (20) years. Burghart was denied parole following hearings before the Parole Commission (“Commission”) in March 2002 and August 2009.

Procedural History

Burghart filed a Petition for Writ of Habeas Corpus on December 23, 2009. (R., Aug. p. 16.)¹ In his Petition Burghart made four claims:

(1) Given the statutory language “shall” in statute under *Sass v. California Par. Bd.* 461 F3d 1123 and *Martin vs. Marshall* 448 FSupp 2nd 1143 Petitioner has a liberty interest in parole 5th & 14th Amendment.

(2) The parole board showed no evidence under the “some evidence” rule guaranteed to prisoners in a disciplinary, which under *Hill vs Superintendent*, some evidence applies to the parole context.

(3) State parole board would satisfy due process requirements in action on petitioner’s application when board conducts hearings, considers inmate’s circumstance, prior record, institutional record, future plans and advising their reason denying application.

(4) The commission is arbitrary, capricious and unconstitutional in their activities is why the Corrections budget went from \$25 million in 1985 when Olivia Craven became director to \$200 million now, because the parole board has went unchecked.

¹ Citation to the Clerk’s Record filed on March 4, 2011, in appeal no. 38137 pursuant to the Order Augmenting Record issued on September 10, 2012. (R., p. 159.)

(R., Aug. p. 18.)

The district court issued an Order Directing Response and Notice of Hearing on December 29, 2009, directing that Respondents file a response within 60 days of the court's order. (R., Aug. p. 22.) The Respondents' filed their Response and Motion to Dismiss on February 17, 2010. (R., Aug. pp. 26-35.) The Respondents' moved to dismiss the Petition for Burghart's failure to state a claim and failure to exhaust his administrative remedies. (R., Aug. p. 26.)

Burghart filed a Reply to Respondents' Answer and Motion to Dismiss Habeas Corpus on March 1, 2010. (R., Aug. pp. 36-39.)

The district court held a hearing on April 2, 2010. (R., Aug. p. 40.) Both parties presented argument to the court. (Id., pp. 40-41.) The court granted Burghart an additional 10 days to supplement his Petition with paperwork regarding exhaustion of remedies. (Id., p. 41.)

Burghart filed a Supplemental Attachment (Exhaustion) on April 7, 2010. (R., Aug. p. 46.) The Respondents' filed a Supplemental Response to Motion to Dismiss on April 12, 2010. (R., Aug. pp. 42-44.)

The district court issued its Memorandum Decision and Order on June 1, 2010, granting the Respondents' Motion to Dismiss and dismissing Burghart's Petition for Writ of Habeas Corpus. (R., Aug. pp. 45-51.)

Burghart filed a Motion For Reconsideration and Motion to Leave to Amend Petition on June 11, 2010. (R., Aug. pp. 53-59.) The Respondents' filed an Objection to Motion to Reconsider and Motion to File Amended Petition on July 13, 2010. (R., Aug. pp. 60-64.)

The district court issued a Memorandum Decision and Order on August 16, 2010. (R., Aug. pp. 66-70.) The district court denied Burghart's motion to amend and motion to reconsider.

(R., Aug. pp. 68-69.) Thereafter Burghart filed a Notice of Appeal on September 9, 2010. (R., Aug. pp. 77-81.)

The Court of Appeals affirmed the district court's decision that Petitioner failed to exhaust his administrative remedies as to Respondent Carlin. *Burghart v. Carlin*, 151 Idaho 730, 732, 264 P.3d 71, 73 (Ct. App. 2011).

Finding the Petitioner's arguments unavailing, the Court of Appeals also affirmed the district court's decision that the use of the word "shall" in Idaho Code Section 20-223(c) did not constitute mandatory language creating a liberty interest in parole and, did not implicate due process protections in parole proceedings. *Id.* at 733. The Court of Appeals further stated Petitioner's argument was frivolous. *Id.* at 732.

The Court of Appeals also rejected the Petitioner's argument that the denial of parole, in the absence of new evidence not considered by the sentencing court, constitutes "extending his sentence." *Id.* at 733.

Lastly, the Court of Appeals held that the district court incorrectly dismissed the Petition for failing to state a claim that the Parole Commission ("Commission") lacked a rational basis for the denial of parole, holding that the Petition contained sufficient allegations to withstand a motion under I.R.C.P. 12(b)(6). *Id.* at 734.

The Court of Appeals remanded to the district court to determine, whether there is a rational basis for the Commission's decision to deny parole. *Id.* The Court of Appeals instructed that a proceeding should be held where the Commission is allowed to "present evidence of any factors supporting the denial of parole." *Id.* A Remittitur was issued by the Court of Appeals on September 21, 2011.

Burghart filed his Motion for Summary Judgment and Brief in Support for Summary Judgment on September 30, 2011. (R., pp. 4-11.) Respondents filed a Motion for Summary Judgment on October 18, 2011. (R., p. 13.) The district court issued a Scheduling Order and order for Hearing on October 28, 2011. (R., p. 15.)

Respondents filed a Memorandum in Support of Summary Judgment and Response to Petitioner's Motion for Summary Judgment and supporting affidavits on November 2, 2011. (R., pp. 18-56.) Burghart filed a Response to Respondents (sic) Motion for Summary Judgment on November 17, 2011. (R., pp. 59-72.)

A telephonic hearing on the motions for summary judgment was held before the district court on December 2, 2011. (R., p. 80.) The district court issued an Order Granting Summary Judgment on December 2, 2011. (R., p. 84.)

On April 18, 2012, Burghart filed a Motion to File Tardy Notice of Appeal of No Fault of the Appellant and a supporting affidavit. (R., pp. 88-96.) A Notice of Appeal was filed on April 24, 2012. (R., p. 109.) On June 4, 2012, an Order Dismissing Appeal Without Prejudice was issued by the Supreme Court because there had not been a final judgment and/or order entered in the district court. (R., p. 130.) On June 12, 2012, the district court issued an Order Dismissing Petition for Habeas Corpus. (R., p. 131.) A Remittitur was issued by the Supreme Court on July 11, 2012, dismissing the appeal without prejudice. (R., p. 133).

On July 11, 2012, Burghart filed another Notice of Appeal. (R., p. 148.) An Order Conditionally Dismissing Appeal was issued by the Supreme Court on July 31, 2012. (R., p. 155.) On August 28, 2012, a Judgment was entered by the district court denying and dismissing the Petition for Writ of Habeas Corpus. (R., p. 157).

The conditional dismissal was withdrawn on September 4, 2012, and an Order Augmenting Appeal by the Supreme Court was filed on September 10, 2012. (R., p. 159.) The appeal proceedings were suspended by order of the Supreme Court on January 15, 2013, to allow time for the court to mail a copy of the Clerk's Record to Burghart.

The Court ordered Burghart's brief to be filed by May 27, 2013. Burghart timely filed his brief and the Respondents' brief was ordered due by June 25, 2013. Respondents timely file this response.

ISSUES

Burghart has asserted four issues on appeal as follows:

1. In Petitioners Response to Respondents Motion for Summary Judgment Filed on November 15, 2011 in Petitioners asserts protection from requirement to conform to standards as to form of terminology as would be expected from a professional Attorney as is mandated for Pro Se Litigants via U.S. Supreme Ct. in Haines Vs Kerner US. 519 (1972). (sic)
2. Idaho Statue "shall" not give Petitioner Liberty Interest in possibility of parole but rather "shall" Language merely set forth conditions which must be satisfied before prisoner becomes eligible for parole. Due Process of Law. (sic)
3. "Some Evidence must apply to rational basis in parole eligibility under due process clause. (sic)
4. Order Dismissing Petition for Habeas Corpus for reasons set forth[.] (sic)

(Appellant's Brief, p.7.)

The state rephrases the issues on appeal as follows:

1. Was special consideration warranted due to Burghart's pro se litigant status?
2. Did the district court abuse its discretion in granting the Respondents' Motion for Summary Judgment and dismissing Burghart's Petition for Writ of Habeas Corpus finding that the Commission had a rational basis for denying Burghart parole?

ARGUMENT

I.

SPECIAL CONSIDERATION WAS NOT WARRANTED DUE TO BURGHART'S PRO SE LITIGANT STATUS

A. Introduction

Burghart argues that he asserted in his Response to Respondents (sic) Motion for Summary Judgment that the court give consideration to his pro se status in regards to form or language in his motions consistent with U.S. Supreme Court case *Haines v. Kerner*. (Appellant's Brief, p. 8.) It appears he is arguing that the district court's finding that he failed to provide affidavits or evidence in support of his motion for summary judgment, or in his opposition to State's motion for summary judgment was in error and that because of his pro se status he should not be held to the same evidentiary standards or requirements of the summary judgment process.

B. Standard of Review

Idaho courts have long held that pro se litigants are held to the same standard as those represented by an attorney. As recently stated by the Supreme Court, "it is well-established that courts will apply the same standards and rules whether or not a party is represented by an attorney and that pro se litigants must follow the same rules, including the rules of procedure." *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 297 P.3d 1134, 1139 (2013) *citing Michalk v. Michalk*, 148 Idaho 224, 229, 220 P.3d 580, 585 (2009) (citations and quotations omitted); *Suitts v. Nix*, 141 Idaho 706, 709, 117 P.3d 120, 123 (2005); *Twin Falls Cnty. v. Coates*, 139 Idaho 442, 445, 80 P.3d 1043, 1046 (2003).

C. Pro Se Litigants Are Held To The Same Standards As Those Represented By An Attorney.

Burghart relies upon *Haines v. Kerner* in support of his argument that he be given special consideration due to his pro se status, which states pleadings drafted by a pro se complainant are

held “to less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 596, 30 L.Ed.2d 652 (1972) citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Likewise, Idaho courts have held that “access to justice is not premised on technical rules of pleading...the character and nature of a pleading is to be determined from the substance of the facts therein alleged and not from what the pleading may have been designated or called by the party.” *Hauschultz v. State*, 143 Idaho 462, 466-67, 147 P.3d 94, 98-99 (Ct. App. 2006). However, any leniency or deference afforded to pro se litigants does not apply to compliance with rules of procedure and evidence. See *Bettwieser*, 154 Idaho 317, 297 P.3d 1134 (2013).

I.R.C.P. Rule 56(e) clearly states that when opposing a motion for summary judgment, the opposing party “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial.” “Neither is a mere pleading allegation sufficient to create a genuine issue as against affidavits and other evidentiary materials which show the allegation to be false.” *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 871, 452 P.2d 362, 368 (1969). In *Shacocass, Inc. v. Arrington Const. Co.*, the Court of Appeals found that drawings and a letter appended to the Plaintiff’s brief were not “presented to the district court in a manner cognizable by Rule 56, I.R.C.P.” *Shacocass, Inc. v. Arrington Const. Co.* 116 Idaho 460, 463, 776 P.2d 469, 473 (Ct. App. 1989). Similarly, the exhibits Burghart attached to his Response to Respondents (sic) Motion for Summary Judgment were not supported by an affidavit or submitted in a manner recognized by I.R.C.P. Rule 56, and therefore cannot be considered evidence.

In the Notice of Appeal filed on July 12, 2012, Burghart asserts that he considers his Response to Respondents (sic) Motion with Exhibits to be the equivalent of an affidavit or statement

of facts. (R., p. 150, ¶ 5.) However, in his brief Burghart does not cite to any authority to support this argument. The act of notarizing his response does not turn the response into an affidavit. Even if Burghart's Response to Respondents (sic) Motion for Summary is considered by this Court to be an affidavit, it fails to specify factually how the Commission failed to establish a rational basis for the denial of his parole. Burghart states that the decision to deny him parole was based on inaccurate information and false or no evidence, but he does not specify what that inaccurate information was or provide any evidence to prove it was inaccurate or false. (R., p. 150, ¶ 6.) "Where an affidavit merely states conclusions and does not set out facts, such supporting affidavit is inadmissible to show the absence of a genuine issue of material fact." *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 508, 600 P. 2d 1387, 1390 (1979). *See also Corbridge v. Clark Equipment Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1006 (1986) (I.R.C.P. 56(e) contemplated flawed affidavits that are only conclusory in nature and merely repeat allegations contained in a complaint without establishing specific facts or refuting the evidence presented by the other party.)

Even as a pro se litigant, the burden is on Burghart to ensure the information he presents to the court is done in a manner consistent with the rules of procedure to make the information part of the record. *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 821, 979 P.2d 1174, 1179 (1999). The district court was correct to hold Burghart to the same standard as litigants with attorneys and properly determined Burghart failed to provide any evidence or affidavits in support of his motion for summary judgment or in opposition to Respondents' motion for summary judgment.

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II.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT AND DISMISSED BURGHART'S PETITION FOR WRIT OF HABEAS CORPUS

A. Introduction

Burghart appeals the district court's Judgment and Order Granting Summary Judgment and dismissal of Burghart's Petition for Writ of Habeas Corpus.

B. Standard Of Review

The decision to issue a writ of habeas corpus is a matter within the discretion of the court. *Johnson v. State*, 85 Idaho 123, 127, 376 P.2d 704, 706 (9162); *Brennan v. State*, 122 Idaho 911, 914, 841 P.2d 441, 444 (Ct. App. 1992). When the court reviews an exercise of discretion in a habeas corpus proceeding, the court conducts a three-tiered inquiry to determine whether the lower court rightly perceived the issue as one of discretion, acted within the boundaries of such discretion, and reached its decision by an exercise of reason. *Id.*; *Sivak v. Ada County*, 115 Idaho 762, 763, 769 P.2d 1134, 1135 (Ct. App. 1989). If a petition is not entitled to relief on an application for a writ of habeas corpus, the decision by the petitioned court to dismiss the application without an evidentiary hearing will be upheld. *Brennan*, 122 Idaho at 917, 841 P.2d at 447.

When reviewing an order for summary judgment, the standard of review utilized by this Court is the same standard used by the district court in initially ruling on the motion. *Mendenhall v. Aldous*, 146 Idaho 434, 436 (2008). Under I.R.C.P. 56(c), summary judgment is to be rendered to the moving party if all the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In considering summary

judgment the court liberally construes all facts and all reasonable inferences in favor of the non-moving party. *A & J Const. Co., Inc. v. Wood*, 141 Idaho 682, 684 (2005).

In order to withstand a motion for summary judgment, a non-moving party may not rest on allegations in the pleadings, but must produce evidence by affidavit or deposition to contradict the assertions of the moving party. I.R.C.P. 56(e); *Worthen v. State*, 96 Idaho 175, 176 (1974). A non-moving party may not rely on general or conclusory allegations unsupported by specific facts, particularly where opposing affidavits set forth specific and otherwise uncontroverted facts. *Cameron v. Neal*, 130 Idaho 898, 902 (1997). Rather, a party must provide factual details of specificity equal to those furnished by his opponent. *Bob Daniels and Son v. Weaver*, 106 Idaho 535, 541 (1984). "A mere scintilla of evidence or only *slight doubt* as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment." *Finholt v. Cresto*, 143 Idaho 894, 897 (2007) (emphasis added). Moreover, even disputed facts will not defeat summary judgment when the non-moving party fails to establish the existence of an essential element of his or her case, *Badell v. Beeks*, 115 Idaho 101, 102 (1988), or when a plaintiff fails to establish a prima facie case on which he or she bears the burden of proof. *State v. Shama Res. Ltd. P'ship*, 127 Idaho 267, 270 (1955).

C. The Commission Established a Rational Basis for Denial of Parole

In reviewing a petition for writ of habeas corpus to decide if the writ should issue and an evidentiary hearing be held the court must treat all allegations contained in the petition as true. *Mahaffey v. State*, 87 Idaho 228, 392 P.2d 279 (1964). In order for a court to have jurisdiction to grant a writ of habeas corpus, it must appear a violation of constitutional rights has occurred. If, after treating the allegations as true, the court finds that they do not state a constitutional claim, the court must dismiss the petition without further hearing. *Mitchell v. Agents of the State*, 105 Idaho 419, 670 P.2d 520 (1983). Although a petition for writ of habeas corpus differs somewhat

from a typical civil complaint, the Idaho Rules of Civil Procedure do apply to habeas corpus proceedings. *Sivak v. Ada County*, 118 Idaho 193, 795 P.2d 898 (Ct. App. 1990).

In this case the district court should look to draw all inferences in favor of Burghart and seek to determine whether he has alleged sufficient facts in support of his claim, which, if true, would entitle him to relief, and whether he is entitled to offer evidence in support of his claims. As the following discussion will illustrate, even when all inferences are drawn in Petitioner's favor, it was proper for the district court to dismiss Burghart's claim.

The issue before the district court on remand was whether there were sufficient facts before the Commission to establish a rational basis to deny Burghart parole at his August 6, 2009, parole hearing. Idaho's statutory parole scheme allows for parole only in the discretion of the Commission. *Vittone v. State*, 114 Idaho 618, 619, 759 P.2d 909 (Ct. App. 1988); I.C. § 20-223(c) ("A parole shall be ordered when, in the discretion of the commission, it is in the best interests of society, and the commission believes the prisoner is able and willing to fulfill the obligations of a law-abiding citizen.") The Idaho courts have long recognized that parole "is a gratuity which shall be ordered only for the best interest of society when the commission reasonable believes that the prisoner no longer poses a threat to the safety of society, not as a reward of clemency." *Freeman v. State*, 119 Idaho 692, 695-96, 809 P.2d 1171, 1174-75 (Ct. App. 1991). "[T]he Commission has sole power to determine eligibility for parole." *Mellinger v. Idaho Dep't. of Corrections*, 114 Idaho 494, 499 (Ct. App. 1988); IDAPA 50.01.01.250.01 ("Parole determination is at the complete discretion of the commission ...[and it] may release an inmate to parole on or after the date of parole eligibility, or not at all.") In *Drennon v. Craven*, this Court stated that the parole decisions of the Commission "often involve no more than informed predictions about what would best serve correctional purposes or the inmate's safety

and welfare.” *Drennon v. Craven*, 114 Idaho 34, 105, P.3d 694 (Ct. App. 2004) *citing Vittone*, 114 Idaho at 620, 759 P.2d at 911. In *Freeman* the court explained,

the decision whether to release a prisoner on parole depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the decision-making body, based upon the members’ experience with the difficult and sensitive task of evaluating the advisability of parole release.

Freeman at 696 *citing Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 9-10, 99 S.Ct 2100, 2104-2105, 60 L.Ed.2d 668 (1979). “The denial of parole by the Parole Commission need only be supported by a rational basis in the record.” *Banks v. State*, 128 Idaho 886, 888 (1996).

The district court correctly determined that the decision to grant or deny parole is within the discretion of the Commission and stated “the court will not substitute its opinion for the opinion of the parole commission as long as the commission had a rational basis for its decision.” (R., p. 86.) The scope of review of a commission decision is limited to:

[d]etermining whether the information relied on by the Parole Board was sufficient to provide a factual basis for the reasons given. The inquiry is not whether the Board is supported by the preponderance of the evidence, or even by substantial evidence; the inquiry is only whether there is a rational basis in the record for the Board’s conclusions embodied in its statement of reasons.

Ybarra v. Dermitt, 104 Idaho 150, 151, 657 P.2d 14, 15 (1983) *citing Zannino v. Arnold*, 531 F.2d 687, 691 (3d Cir.1976). “The Commission allows for parole consideration criteria, but no prediction regarding the granting of parole can be based upon any hearing standard or criteria.” IDAPA 50.01.01.250.01.c. The commission considers (1) the seriousness and aggravation and/or mitigation involved in the crime; (2) prior criminal history; (3) failure or success of prior probation/parole; (4) institutional history, including conformance to rules, involvement in programs and jobs, custody level, and overall behavior; (5) evidence of the development of

positive social attitudes and willingness to fulfill obligations of a good citizen; (6) information/reports regarding physical or psychological condition; and (7) strength and stability of proposed parole plan, including adequate home placement, employment, or maintenance and care. IDAPA 50.01.01.250.01.c(i)-(vii).

The district court found that the Commission appropriately exercised its discretion and had a rational basis to deny parole based on the information provided to the Commission at the 2002 and 2009 parole hearings. The 2002 hearing minutes set forth the information relied upon by the Commission to deny Burghart parole. (R., pp. 40-41.) The district court identified the offense committed by Burghart, the number of other victims of Burghart, his relationship to the victims and families, his use of controlled substances, his high risk of re-offending, the impact on the victims, his enrollment in treatment programs, and his release plan as information considered by the Commission to establish a rational basis for its decision to deny Burghart parole in 2002. (R., p. 85.) The district court identified similar information in the 2009 hearing minutes to support a rational basis for the Commission's decision to deny parole:

- 1) The nature of the offense Burghart was convicted of, which the commissioners considered to be a horrific crime against a minor, 2) that Burghart had other victims, 3) that Burghart had a history of illegal drug use, 4) that Burghart was in the Relapse Prevention class at the time of the hearing and would like to complete the sex offender treatment program in the near future, 5) Burghart's release plan (to live at Bethel Ministries in Boise for up to 6 months and then find a place of his own, then look for work and get into the SANE program, which he would follow up with monthly therapy sessions, and eventually move back to Oregon), 6) that Burghart abused his victim and another victim about 45 times over a 9 or 10 month time period, 7) that Burghart agreed that he is a violent pedophile, and 8) the effect of Burghart's actions on two victims.

Id.

The district court found that these factors revealed that while Burghart had taken some steps towards rehabilitation, the "nature of the crime he was convicted of, the number of other

victims, the “grooming” of his victims and the number of abusive incidents with his victims, and the classification of Burghart as a violent pedophile” provided a rational basis upon which to deny parole. (R., p. 86.) Furthermore, in *Banks v. State*, the court found that Banks’ own statements regarding the Commission’s reliance upon allegations of other criminal activity demonstrated a rational basis for denial of parole. *Banks v. State*, 128 Idaho 886, 889, 920 P.2d 905, 908 (1996). Burghart made similar statements in his Response to Respondents (sic) Motion for Summary Judgment and stated the Commission’s reliance upon the existence of other crimes and other victims was prejudicial. (R., pp. 63-64.) Burghart stated, “[t]he Commission construes Petitioners Attempt to be Honest and Open Regarding his past as Evidence of further Crimes and Victims...” (R., p. 63.) In addition, Burghart admitted at the 2009 parole hearing that he had four (4) victims and “may have more” under the laws of Idaho and that he is a pedophile. (R., pp. 36-37.) As the court found in *Banks*, Burghart himself identified a rational basis for the Commission to deny him parole.

Based on the above, the district court did not err in granting the Respondents’ Motion for Summary Judgment and dismissing the Petition for Writ of Habeas Corpus. There is no genuine issue as to whether the Commission had a rational basis to deny Burghart’s request for parole.

1. Burghart failed to provide any evidence in support of his argument that the Commission did not have a rational basis to deny him parole.

In this appeal, Burghart has not presented any valid argument, evidence or citation to any authority that the Commission did not have a rational basis to deny him parole. Burghart’s argument is based upon his assertion that the district court erred by not considering the documents he submitted with his Response to Respondents (sic) Motion for Summary Judgment

and that the exhibits attached to the Affidavit of Olivia Craven should not have been considered by the court. *Appellant's Brief*, pp. 8, 10.

Neither in his Motion for Summary Judgment, nor in his Response to Respondents (sic) Motion for Summary Judgment, did Burghart submit evidence to create a genuine issue of material fact to controvert the evidence submitted by Respondents and ultimately relied upon by the district court. In his Response to Respondents (sic) Motion for Summary Judgment, Burghart attached three (3) documents for consideration by the district court. These documents included a letter dated March 5, 2003, regarding his progress in a Sex-Offender Therapy Group, a copy of an order dismissing a warrant and charges pending against him in Oregon, and a copy of an Access to Courts Request seeking access to the Tucker's Directory and a copy of research materials available for his writ of habeas corpus petition. (R., pp. 67-72.)

As argued above, the district court properly did not consider these exhibits as evidence. Even if the district court erred by not accepting these documents as evidence, the error is harmless as these documents do not create a genuine issue of material fact as to whether the Commission had a rational basis to deny Burghart parole. The 2009 parole hearing minutes show that Burghart informed the Commission of his progress in treatment and his plans to continue treatment in the community. (R., pp. 36-37.) Further, the district court acknowledged that participation in treatment programs was information considered by the Commission in reaching its decision. (R., p. 85.) As for the document showing a dismissal of an Oregon case involving Burghart, there is a reference in the 2002 and 2009 parole hearing minutes to pending charges against Burghart in Oregon and Montana. (R., pp. 37, 40.) However, the district court did not identify the pending Oregon charges as information to support its finding that the Commission had a rational basis to deny parole. (R., p. 85.) In addition, the record is silent as to the nature of

the charges dismissed in Oregon and whether the dismissed charges are the same charges referenced in the hearing minutes. The Access to Courts Request submitted by Burghart does not provide any evidence or have any relevance as to the issue before the district court.

The record supports the district court's finding that Burghart did not submit any evidence in support of his argument that the Commission did not have a rational basis to deny him parole.

2. The evidence submitted by State was properly considered by the district court and sufficient to establish a rational basis to deny parole.

In support of Respondents' Motion for Summary Judgment, Respondents submitted an Affidavit of Olivia Craven, Executive Director for the Commission, and minutes from Burghart's 2002 and 2009 parole hearings. (R., pp. 31-42.) Despite this evidence, Burghart argues that the Commission did not present sufficient evidence to establish a rational basis for its decision to deny parole. (Appellant's Brief, p. 10.) Burghart presented two theories to support his argument. First, Burghart states that Exhibit A to the Affidavit of Olivia Craven should not be considered as a true and correct copy of the 2009 parole hearing minutes because the minutes were not signed by Ms. Craven. *Id.* As the Executive Director, Ms. Craven is authorized to designate somebody to sign the minutes on her behalf. IDAPA 50.01.01.100.04(a). As stated in her Affidavit, Ms. Craven authorized Audrey Whitehurst to sign on Ms. Craven's behalf as approval of the 2009 hearing minutes and that the minutes are an "accurate summary of the hearing proceedings." (R., p. 32, ¶ 3.) Burghart did not submit any evidence or cite to any authority to dispute Ms. Craven's authority to approve hearing minutes by authorizing somebody to sign the minutes on her behalf, nor did Burghart submit any evidence as to dispute the accuracy of the 2009 minutes. Second, Burghart states that Exhibit B, the 2002 hearing minutes, should also not be considered because while it was signed by Ms. Craven, it was not notarized. (Appellant's Brief, p. 10.) There is no

requirement that the parole hearing minutes be notarized in order to be considered a true and correct copy of the minutes from the hearing. Rule 100.04(a) of the Rules of the Commission of Pardons and Parole only requires that the minutes from individual hearings be signed by the appropriate party, not that the minutes be notarized. IDAPA 50.01.01.100. As exhibits to Ms. Craven's sworn affidavit and information for which she has personal knowledge of, Exhibit A and Exhibit B were properly admitted and considered by the district court.

Burghart also argues that the Affidavit of Krista Howard should not be considered valid. (Appellant's Brief, p. 10). This argument is moot as the district court stated that this affidavit was not considered by the court in its decision because it was not notarized. (R., p. 84.)

CONCLUSION

The Commission established a rational basis for denying Burghart parole and the decision of the district court must be upheld. Based on the foregoing reasons and well settled Idaho law, the district court did not abuse its discretion in granting the Respondent's Motion for Summary Judgment and dismissing Burghart's Petition for Writ of Habeas Corpus. Accordingly, Respondents respectfully request that the Court affirm the district court's order granting summary judgment and dismissal of Burghart's Petition for Writ of Habeas Corpus.

DATED this 25th day of June, 2013.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL


KARIN MAGNELLI
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of June, 2013, I caused to be served a true and correct copy of the foregoing Respondents' Brief to be served on:

Randolph Burghart #55288, CA-102B
Kit Carson Correctional Center (KCCC)
P.O. Box 2000
Burlington, CO. 80807-0020

Via U.S. Mail



KARIN MAGNELLI