

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth circuit

AUG 06 1990

ROBERT L. HOECKER
Clerk

PHILIP M. BRADY,
Petitioner-Appellant,

v.

UNITED STATES PAROLE COMMISSION; and
T.C. MARTIN, Warden,
Respondents-Appellees.

No. 89-6105
(D.C. No. CIV-88-2103-R)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **LOGAN, SEYMOUR, and TACHA**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Philip Brady appeals the district court's order denying his petition for a writ of habeas corpus. Brady contends that the district court erred in determining that the Parole Commission could consider charges dismissed in plea agreement in deciding to exceed the guidelines. We affirm.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Our review of Parole Commission decisions is whether there is a clear showing that the determination was arbitrary or capricious or represented an abuse of discretion. See Resnick v. United States Parole Comm'n, 835 F.2d 1297, 1301 (10th Cir. 1987). In our view, Brady's case falls within the rule announced in Nunez-Guardado v. Hadden, 722 F.2d 618, 622 (10th Cir. 1983), where we held that the Parole Commission may consider evidence concerning counts dismissed as a result of a plea bargain agreement. Because Brady admits that there is no specific provision of the plea bargain agreement prohibiting such consideration, we find Nunez-Guardado indistinguishable. Id. Mere representations not to prosecute are not sufficient to foreclose Parole Commission consideration. Under the facts and circumstances of this case, which includes the stated finding of the Parole Commission that the guidelines were exceeded due to Brady's repetitive assaultive behavior, we cannot say the Parole Commission abused its discretion.

Accordingly, the judgment of the district court is AFFIRMED. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge