IN THE SUPREME COURT OF UTAH

KEVIN BLANKE, Petitioner, v. UTAH BOARD OF PARDONS AND PAROLE, Respondent.	Case No. 20160766-SC **Public Brief**

OPENING BRIEF OF APPELLANT

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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ORAL ARGUMENT REQUESTED

PARTIES

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INTRODUCTION

Petitioner Kevin Blanke is entitled to the due process procedural protections the Court outlined in *Neese v. Board of Pardons*, 2017 UT 89, 416 P.3d 663, procedures that the Utah Board of Pardons and Parole (the "Parole Board") must afford a prisoner before it may consider unconvicted sexual misconduct in making its parole determination. In such situations,

> the Parole Board (1) must, in advance of the hearing, provide particularized written notice that it intends to consider and effectively decide unconvicted sexual conduct in making its parole determination; (2) unless the safe administration of the prison system requires otherwise, it must allow the inmate to call witnesses and present documentary evidence in his defense; and (3) it must provide a written statement of the evidence it relied upon and the reasons it concluded that the inmate committed the unconvicted sexual conduct.[1]

Neese, 2017 UT 89, ¶ 43.

Although *Neese* was issued prior to Blanke's most recent original parole grant hearing, held on December 6, 2018, and although the circumstances of the present case are sufficiently similar to those in *Neese*, the Parole Board denied Blanke a *Neese* hearing. Had the Parole Board afforded Blanke a *Neese* hearing, something it should have and easily could have done, this appeal could have been moot.

Blanke pled guilty to a 2002 charge of attempted child kidnapping, a first-degree felony, and to a 2003 charge of kidnapping, a second-degree felony. He was sentenced to consecutive terms of three-years-to-life and one-to-fifteen-years, respectively.

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[1] For the sake of simplicity, these procedural protections will be hereinafter referred to as a "*Neese* hearing."

Blanke has been incarcerated for over 16 years, more than twice as long as the sentencing matrix suggested he should be incarcerated. This is not due to any disciplinary problems on the part of Blanke. Indeed, by all reports, he has been a model inmate. The reason for Blanke's extended prison commitment is the Parole Board's determination that he committed unconvicted sexual misconduct and yet refuses to participate in sex offender treatment. Although the Parole Board has the authority to make such a determination, it may only do so after it affords Blanke the protections required by *Neese*.

To be eligible for sex offender treatment, a person must first "admit[] guilt" to a sex offense. *Neese*, 2017 UT 89, ¶ 30 (quoting *State v. Humphrey*, 2003 UT App 333, ¶ 5, 79 P.3d 960). As such, the Parole Board may only condition parole on the completion of sex offender treatment if the offender has been convicted of a sex offense or has been determined to have committed a sex offense after a *Neese* hearing. But what constitutes a sex offense for purposes of sex offender treatment eligibility? This is an important question and one the Court asked the parties to address.

Logically, a sex offense must be one that contains a sexual element. But neither child kidnapping nor kidnapping require the proof of a sexual element or motive, nor do they provide for a sentencing enhancement if the defendant committed the offense with a sexual motive. Notably, the Utah Criminal Code distinguishes "Sexual Offenses" from "Kidnap Offenses," codifying them in separate parts. And nowhere in the Utah Code is there a definition of "sex offense" or "sexual offense" that includes child kidnapping or kidnapping. By contrast, both the Utah Criminal Code and the Utah Code of Criminal Procedure exclude child kidnapping and kidnapping from its definitions of "sex offense"

or "sexual offense." For these reasons, Blanke cannot be deemed to have committed a "sex offense."

While it is true that, at the time of Blanke's offense, child kidnapping was a registrable offense for purposes of sex offender registration, identifying him as a sex offender is a misnomer. This is so, not only because child kidnapping and kidnapping do not require proof of any sexual element, but also because the Utah Legislature, apparently recognizing the distinction between kidnapping and sexual offenses, renamed the registry to the Sex and Kidnap Offender Registry. The Sex and Kidnap Offender Registry, codified at Utah Code § 77-41-102, now provides one definition for "sex offender" and another for "kidnap offender."

Kentucky similarly requires child kidnapping offenders to register, but it does not consider child kidnapping to be a sex offense for purposes of sex offender treatment. That Blanke is considered a registrant for the purposes of registration does not mean that he has committed a sex offense for which he can be required to complete sex offender treatment.

Blanke's improvident and false confession at the 2006 hearing cannot be a basis on which the Parole Board may deprive Blanke of a *Neese* hearing. The Parole Board may consider Blanke's false confession, but it may only do so after it has afforded Blanke a *Neese* hearing where he will be able to call witnesses and demonstrate that he did not commit the alleged, unconvicted offenses that led to the denial of his release.

Even if the Court concludes that child kidnapping or kidnapping is a sex offense for purposes of sex offender treatment, absent a *Neese* hearing, due process precludes the

Parole Board from considering the unconvicted sexual misconduct alleged here. The Parole Board was fixated on Blanke's alleged, unconvicted sexual misconduct and based its decision to condition parole on the completion of sex offender treatment, not on his convicted offenses, but on the alleged, unconvicted offenses. The allegations, which amount to attempted forcible sodomy and rape, are serious, no doubt. But they are just that, allegations. Due process requires that Blanke be allowed to call witnesses and present evidence in his defense and that the Parole Board issue a written decision explaining its decision. This is particularly true here, where Blanke has already served twice the suggested sentence, has been a model prison inmate, and the media attention surrounding Blanke's parole hearing likely affected the Parole Board's decision.

Blanke has not been afforded due process. Accordingly, the Court of Appeals erred in affirming the decision of the district court granting the Parole Board's motion for summary judgment. The Court should reverse the Court of Appeals and remand to the district court with instructions to issue an order requiring the Parole Board to hold a *Neese* hearing.

STATEMENT OF THE ISSUE

Issue 1: Whether the Parole Board is required to comply with the due process standards articulated in *Neese v. Board of Pardons*, 2017 UT 89, 416 P.3d 663, under the circumstances of this case.[2] (R. 2, 259–63; *see also* the Court's Jun. 20, 2018 Order.)

[2] In granting certiorari on this issue, the Court provided: "In considering this question, the parties' analysis should include, but not necessarily be limited to, addressing whether: (1) Petitioner was convicted of a sex offense and whether Respondent's argument that he was convicted of a sex offense may be considered as an alternate ground for affirmance; and (2) if not, whether any admissions to sexual misconduct in light of the record as a

Standard of Review: "On certiorari, we review the decision of the court of appeals, not the decision of the trial court." *State v. Harmon*, 910 P.2d 1196, 1199 (Utah 1995). "We review the court of appeals' decision for correctness and give its conclusions of law no deference." *State v. James*, 2000 UT 80, ¶ 8, 13 P.3d 576.

STATEMENT OF THE CASE

Blanke is serving time on two convictions, a 2003 charge of attempted child kidnapping, a first-degree felony, (R. 8), and a 2004 charge of kidnapping, a second-degree felony, (R. 10). He pleaded guilty to both charges. (R. 8-11.) He was sentenced to consecutive terms of three-years-to-life and one-to-fifteen-years, respectively. (*Id.*)

Blanke has been incarcerated for over 16 years, more than twice as long as the sentencing matrix suggested he should be incarcerated. (R. 9, 12-14, 188.) Other than one minor verbal warning,[3] Blanke has had no disciplinary problems during his prison commitment. (R. 187-88.) By all reports, he has been a model inmate. (*Id.*)

In July 2006, Blanke had an original parole grant hearing. (R. 133.) In that hearing, the child kidnapping victim's ("Victim 1") father stated that Victim 1 alleged that, during the kidnapping, Blanke tried to make Victim 1 rub lotion on his genitals. (R. 146.) This was a new allegation, and Blanke flatly denied it. (R. 146, 148.) The

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whole would obviate any requirement that the Board provide additional due process set forth in *Neese*." (June 20, 2018 Order.)

[3] Blanke was given a verbal warning for possessing a coffee stinger to warm up water. (R. 153.)

kidnapping victim ("Victim 2") testified at the hearing and maintained that Blanke raped her during the kidnapping, which occurred in late 1997.[4] (R. 140; *see also* R. 137.) The hearing officer questioned Blanke about the alleged rape: "Bottom line is you forced her into your truck and took her some place . . . and had sexual intercourse with her, basically raped her. That what occurred?" (R. 137.) Blanke responded, "Yes your honor." (*Id.*) Blanke later denied at a 2012 rehearing that he committed any sexual misconduct, (R. 179-80, 188), and he maintains that the reason he did not deny the sexual misconduct at the 2006 hearing was due to bad advice he had received that the Parole Board would treat him favorably if he admitted to the allegation that he raped Victim 2. (R. 273; Add. A.) Aside from his response to the hearing officer at the 2006 hearing, Blanke has vigorously denied any allegation that he raped Victim 2. (R. 273; Add. A at 2; Add. B at 2.)

The 2012 rehearing closely resembled the 2006 hearing with a few exceptions. The 2012 rehearing attracted a large crowd, including media. (R. 174.) As previously mentioned, Blanke denied any sexual misconduct. The hearing officer concluded the 2012 rehearing by asking Blanke if he thought he was a sex offender, to which Blanke

[4] Victim 2 had reported the alleged rape in 1997, but the case fell through the cracks due to a reassignment. (R. 178.) When Victim 2 heard about Blanke's child kidnapping arrest in 2002, she followed up with the police about her case. (*Id.*) By that point, the statute of limitations had run on a potential rape charge. (R. 140, 179.) Victim 2 reportedly played a part in leading the Legislature to amend the Criminal Code to eliminate the statute of limitations for rape. (R. 140, 184.)

responded in the negative. (R. 188.) Before concluding the hearing, the hearing officer tipped his hand on his recommendation:

> [U]ntil you've been through sex offender treatment, I wouldn't consider any kind of a release. . . . I don't buy your story, . . . I think you . . . kidnapped [Victim 1] with the intent of sexually abusing her. I think you brutally raped [Victim 2,] and I think because of those two cases, you need to do treatment before we consider any kind of a release into the community. . . . [Y]ou're not gonna get into sex offender treatment if you say you don't have a sex problem. You're not gonna get into sex offender treatment if you refuse to talk about the rape, so. . . you're kinda in a stalemate . . . until you decide you want to be truthful. . . . [Y]ou're gonna get stuck right where you're at, so my feeling is that . . . we'll be looking at a rehearing.

(*Id.*) The day of the rehearing, the Parole Board reached its decision and again scheduled a rehearing—this time for 2032, *twenty years* after the 2012 rehearing. (R. 191.) The Parole Board also ordered a sex offender treatment memorandum. (*Id.*)

In May 2015, Blanke filed a pro se petition for extraordinary relief pursuant to Rule 65B of the Utah Rules of Civil Procedure. (R. 1.) Among other things, Blanke contended that the Parole Board violated his due process rights by conditioning his release on completing sex offender treatment, even though he had not committed a sex offense. (R. 2.) In support of this contention, Blanke relied on *Faulkner v. Board of Pardons*, No. 100920215 (Jan. 12, 2012), a decision by the Third District Court of Utah in which Judge Hruby-Mills denied the Parole Board's motion for summary judgment on a petition for extraordinary relief like the one here and ordered the Parole Board to grant the petitioner a rehearing. (R. 2, 1518.)

In October 2015, the Parole Board filed a motion for summary judgment, arguing that the Parole Board's consideration of the unconvicted sex offenses and the requirement

of a sex offender treatment memorandum did not violate due process. (R. 93, 114-15.) The district court agreed and granted the Parole Board's motion. (R. 330-31, 336.)

In April 2016, Blanke appealed the district court's decision to the Utah Court of Appeals. (R. 349.) The court of appeals affirmed the district court's decision on a *sua sponte* motion for summary disposition. (R. 365.) Following the disposition, Blanke filed a petition for a writ of certiorari in September, 2016. On December 19, 2016, the Court provisionally granted Blanke's petition pending its decision in *Neese v. Board of Pardons*. (R. 377.) On January 3, 2018, following its decision in *Neese*, the Court lifted the provisional nature of Blanke's petition and remanded the case to the district court for the purposes of appointing Blanke pro bono legal counsel. (*Id*.)

In May 2018, ostensibly in response to the Court's decision in *Neese*, the Parole Board held a special retention review and scheduled a rehearing for December, 2018[5], and ordered an updated Institutional Progress Report and a psychosexual evaluation. (Add. C.) As such, the parties filed a joint stipulated motion to stay the proceedings, which the Court granted. (Sept. 10, 2018 Order.)

Blanke agreed to the psychosexual evaluation but would not have agreed to it if he knew that the evaluator, [redacted], was employed by the Utah State Prison. (Add. D at 1; Add. E at 16.) The evaluation heavily considered the alleged, unconvicted sex offenses. (Add. D. at 13-14.) In conducting the evaluation, [redacted] considered

[5] The rehearing was initially scheduled for September, 2018, but was bumped to December.

Blanke's Institutional Progress Report (Add. D at 1-2), [redacted] (Add. F at 1).

The 2018 rehearing paralleled the 2012 rehearing. The media was again in attendance, and the hearing officer again asked Blanke about the alleged sexual misconduct. (Add. E at 1, 7.) Blanke denied all allegations. (*Id.* at 7.) The hearing officer also asked Blanke if he would complete sex offender treatment to which Blanke said that he could not. (*Id.* at 17.) The hearing officer noted that Blanke had maintained his positive reports from prison officials and had continued taking classes (*Id.* at 17-18).

The rehearing concluded with an exchange between Blanke and the hearing officer. Blanke emphasized that he was not incarcerated until he was almost 40 years old and that he has never been found to have committed a sex offense. (*Id.* at 20.) In Blanke's view, if he was a sex offender, there would have been a string of victims and evidence, but there is none. (*Id.*) In response to these comments, the hearing officer said, "Well sir, two victims is way too many," indicating that he had already determined that Blanke had committed the alleged sex offenses. (*Id.*)

The Parole Board issued a decision on January 28, 2019, again scheduling a rehearing, this time for February 2024. (Add. G.) The Parole Board also ordered a sex offender treatment memorandum and noted that it would consider an earlier release if Blanke completes sex offender treatment therapy. (*Id.*)

SUMMARY OF ARGUMENT

Blanke is entitled to a *Neese* hearing. Under Utah law, child kidnapping and kidnapping are not sex offenses, and Blanke's convictions for these crimes cannot be a

basis on which he can be deprived of the due process rights articulated in *Neese*. Indeed, child kidnapping and kidnapping are not codified in the Criminal Code as "Sexual offenses" under Part 4, and are not included in any definition of "sex offense" or "sexual offense" in the Utah Code.

Blanke's improvident and false confession at the 2006 hearing may be considered by the Parole Board, but only after he has been afforded a *Neese* hearing where he will be able to call witnesses and demonstrate that he did not commit the alleged, unconvicted offenses that led to the denial of his release. His false confession cannot strip him of his due process right to a *Neese* hearing.

Even if the Court determines that child kidnapping is a sex offense, the Parole Board violated Blanke's due process rights when it "considered and effectively decided" that Blanke committed unconvicted sexual offenses and based its decision to deny parole on that determination.

ARGUMENT

I. BLANKE IS ENTITLED TO THE PROCEDURAL PROTECTIONS REQUIRED BY *NEESE V. BOARD OF PARDONS*.

"No person shall be deprived of life, liberty or property, without due process of law." Utah Const. art. I, sec. 7. By depriving Blanke of a *Neese* hearing, the Parole Board has violated that right. Before the Parole Board may consider unconvicted sexual offenses as a factor in its decision to deny parole, it must (1) give the inmate timely notice of its intent to decide the allegations, (2) permit the inmate to call witnesses and

present evidence, and (3) issue a written decision, fully explaining the basis for its decision. *Neese v. Board of Pardons*, 2017 UT 89, ¶¶ 1, 43, & 116, 416 P.3d 663.

The Court should reverse the Court of Appeals for three reasons: (A) Blanke's convictions of attempted child kidnapping and kidnapping are not "sex offenses" under Utah law, (B) Blanke's false confession at the 2006 hearing does not strip him of his right to a *Neese* hearing, and (C) even if the Court determines that Blanke's convictions are "sex offenses," the Parole Board violated Blanke's due process rights by "consider[ing] and effectively decid[ing]" that Blanke committed unconvicted sexual offenses, without first affording him a *Neese* hearing, and denying parole on that basis.

A. Child Kidnapping Is Not a "Sex Offense" under Utah law and Cannot Be a Basis on Which Blanke Can Be Deprived of a *Neese* Hearing.

In an attempt to justify its failure to conduct a *Neese* hearing, the Parole Board asserts that Blanke's 2002 conviction of attempted child kidnapping was considered a "sex offense" at the time he pleaded guilty. (Add. H.) This assertion rests only on the fact that Utah's offender registry, then called the Utah Sex Offender Registry, required persons convicted of attempted child kidnapping to register. *See* Utah Code § 77-27-21.5 (2002). The Parole Board's strains to deem Blanke a sex offender is due to the fact that, to be eligible for sex offender treatment and to successfully complete the treatment, the offender must first "admit[] guilt" to a sex offense. *Neese*, 2017 UT 89, ¶ 30 (quoting *State v. Humphrey*, 2003 UT App 333, ¶ 5, 79 P.3d 960).

Referring to Blanke as a "sex offender" is a misnomer, however, because he has not been convicted of a sex offense. Regardless, the definition of "sex offense" is what

matters here. In asserting that child kidnapping falls under the definition of "sex offense" for purposes of sex offender treatment eligibility, the Parole Board ignores that (1) child kidnapping does not require proof of a sexual element or motive, (2) kidnapping offenses and sex offenses are codified in separate parts of the Criminal Code, (3) the Utah Code does not contain a statute defining "sex offense" for purposes of sex offender treatment, (4) the Utah Code excludes child kidnapping from any of its definitions of "sex offense" or "sexual offense," (5) the Utah Legislature amended section 77-27-21.5 in 2012 to rename the registry as the Sex *and* Kidnap Offender Registry and separately defines "sex offender" and "kidnap offender,"[6] and (6) registration is not conclusive of whether a person has committed a "sex offense."

The offense of child kidnapping does not contain any sexual element or even provide for a sentencing enhancement if it was committed with a sexual motive—aggravated kidnapping, a separate offense, covers that situation, s*ee* Utah Code § 76-5-302 (2018). Rather,

> [a]n actor commits child kidnapping if the actor intentionally or knowingly, without authority of law, and by any means and in any manner, seizes, confines detains, or transports a child under the age of 14 without the consent of the victim's parent or guardian, or the consent of a person acting in *loco parentis*.

Id. § 76-5-301.1(1). Thus, transporting a child without the authority to do so qualifies as child kidnapping in Utah. This is the variation of child kidnapping to which Blanke pleaded guilty, albeit in its attempted form. In addition, Chapter 5, Part 4 of the Criminal

[6] Codified at Utah Code § 77-41-101 *et seq.*

Code is entitled "Sexual Offenses," but kidnapping offenses are not codified there and were not codified there at the time of Blanke's conviction. Logically, then, Blanke cannot be deemed to have committed a sex offense.

The Court need not rely on logic alone, however, in determining that Blanke was not convicted of a sex offense. Despite sex offender treatment's relative significance to the correctional system, the Utah Code is surprisingly sparse in addressing it[7] and does not provide a definition for "sex offense" for purposes of sex offender treatment eligibility. Notwithstanding, the Utah Code defines "sex offense" and "sexual offense" in several places, none of which includes child kidnapping within its definition. The Court should therefore rely on these definitions in defining "sex offense" for purposes of sex offender treatment eligibility. *See LeBeau v. State*, 2014 UT 39, ¶ 34, 337 P.3d 254 ("Though the Legislature did not specifically define 'interests of justice' in the aggravated kidnapping statute, it has provided guidance elsewhere in the Utah Code."); *Wasatch Crest Ins. v. LWP Claims Adm'rs Corp.*, 2007 UT 32, ¶ 13, 158 P.3d 548 ("Although the Utah Insurance Code does not define the term 'distribution,' the term is defined elsewhere in the Utah Code as a portion of equity."); *O'Hearon v. Hansen*, 2017 UT App 214, ¶ 26, 409 P.3d 85 ("When a term is not defined within a particular section of the Utah Code, courts may also look to other sections of the Utah Code to see whether the same term is defined elsewhere.")

[7] For example, "Utah's sentencing statutes do not mandate treatment as a condition of parole for sex offenders." *Kimbal v. Dep't of Corrections*, 2015 UT App 139, ¶ 3, 352 P.3d 136 (citation and internal quotation marks omitted).

For example, Section 76-5-502 of the Criminal Code—both at the time of Blanke's convictions and now—defines "sexual offense" as "a violation of state law prohibiting sexual offense under Title 76, Chapter 5, Part 4." *Id.* § 76-5-502(7) (2002); *accord id.* § 76-5-502(8) (2018).[8] This definition does not include child kidnapping nor does any other definition found in the Utah Code.

The Utah Code of Criminal Procedure also contains various definitions of "sex offense." Section 77-40-105, which discusses a person's eligibility for expungement, provides: "A petitioner is not eligible to receive a certificate of eligibility from the bureau if: (a) the conviction for which expungement is sought is . . . a registrable ***sex offense*** as defined in Subsection 77-41-102(17) [of the Sex and Kidnap Offender Registry]." *Id.* § 77-40-105(2)(a)(vi) (2018) (emphasis added). Subsection 77-41-102(17), in turn defines "sex offender" as someone who has been convicted of a crime under Chapter 5, Part 4 of the Criminal Code or the crimes of enticing a minor, sexual exploitation of a minor or vulnerable adult, sexual extortion, incest, lewdness involving a child, voyeurism, and aggravated exploitation of prostitution. *Id.* § 77-41-102(17)(a) (2018).

[8] Relatedly, Section 76-5-406 is entitled "Sexual offenses against the Victim without consent of victim—circumstances." This section lists a large number of offenses, but it does not include child kidnapping. *Id.* § 76-5-406 (2002); *id.* § 76-5-406 (2018). Similarly, at the time of Blanke's conviction, Section 76-3-407 of the Criminal code was entitled "Repeat and habitual sex offenders—Additional prison term for prior felony convictions." *Id.* § 76-5-407 (2002). This statute provided for an additional prison term for offenders who were convicted of an offense under Chapter 5, Part 4 of the Criminal Code and later committed another offense under Part 4—child kidnapping did not trigger the additional prison term.

Missing from the list of offenses is child kidnapping. As previously mentioned, "kidnap offender" is separately defined and includes child kidnapping. *See id.* § 77-41-102(9).

In another example, Section 77-22-2.5 provides:

> When a law enforcement agency is investigating *a sexual offense against a minor*, an offense of stalking under Section 76-5-106.5, *or* an offense of child kidnapping under Section 76-5-301.1, and has reasonable suspicion that an electronic communications system or remote computing service has been used in the commission of a criminal offense, a law enforcement agent shall . . . articulate specific facts showing reasonable grounds to believe that the records or other information sought . . . are relevant and material to an ongoing investigation[.]

Id. § 77-22-2.5(2) (emphases added). If the use of the disjunctive "or" in this section were not enough to demonstrate that child kidnapping is not a sex offense, the Legislature clarified that by defining "sexual offense against a minor":

> "Sexual offense against a minor" means: (i) sexual exploitation of a minor as defined in Section 76-5b-201 or attempted sexual exploitation of a minor; (ii) a sexual offense or attempted sexual offense committed against a minor in violation of Title 76, Chapter 5, Part 4, Sexual Offenses; (iii) dealing in or attempting to deal in material harmful to a minor in violation of Section 76-10-1206; (iv) enticement of a minor or attempted enticement of a minor in violation of Section 76-4-401; or (v) human trafficking of a child in violation of Section 76-5-308.5.

Id. § 77-22-2.5(1)(g). Again, child kidnapping is nowhere to be found under a definition of "sex offense."

That the definitions from the Code of Criminal Procedure—contrasted by the definitions from the Criminal Code—were enacted after Blanke's convictions is irrelevant because there was no definition then, nor is there one now, of "sex offense" for purposes of sex offender treatment eligibility. Thus, the Court should look to the Legislature's definitions elsewhere in the Utah Code and should not be restricted from

looking to current definitions. Moreover, the elements for child kidnapping have not changed, and as the definitions from the Criminal Code at the time of Blanke's conviction show, child kidnapping has never been included in the Legislature's definitions of "sex offense."

Utah is not the only state where child kidnapping triggers offender registration but not sex offender treatment eligibility. In *Ladriere v. Kentucky*, 329 S.W.3d 278 (Ky. 2010), the Kentucky Supreme Court considered whether the defendant, who had been convicted of kidnapping a minor[9]—the analog of child kidnapping in Kentucky—could be ordered to complete sex offender treatment. *Id.* at 279–81. The court held that, although the defendant was required by statute to be a lifetime registrant on Kentucky's offender registry, he could not be ordered to complete sex offender treatment because kidnapping of a minor is not considered a "sex crime," and is not an eligible offense for sex offender treatment under Kentucky's sex offender treatment statute. *See id.* at 281-82.

Although the question in *Ladriere* was more straightforward than the question here, due to Kentucky's statute addressing sex offender treatment eligibility, *Ladriere* is analogous for several reasons. First, the elements of child kidnapping in Utah are nearly identical to the elements of kidnapping of a minor in Kentucky. Second, Kentucky statutorily requires offenders to have been convicted of a "sex crime" to be eligible for sex offender treatment, while Utah requires offenders to "admit[] guilt" to a sex offense. *Neese*, 2017 UT 89, ¶ 30 (quoting *State v. Humphrey*, 2003 UT App 333, ¶ 5, 79 P.3d

[9] *See* K.R.S. § 509.040(1)(f).

960). Finally, Kentucky's definition of "sex crime" is in line with the Utah Legislature's various definitions of "sex offense."

Child kidnapping is not a sex offense and, therefore, the Parole Board violated Blanke's due process rights when it failed to afford him a *Neese* hearing.

B. Blanke's False Confession at the 2006 Hearing Cannot Strip Him of His Right to a *Neese* Hearing.

"False confessions are an unsettling and unfortunate reality of our criminal justice system. Just as the criminal law is rife with instances of mistaken identification, it is beyond dispute that some people falsely confess to committing a crime that was never committed or was committed by someone else." *State v. Perea*, 2013 UT 68, ¶ 69, 322 P.3d 624 (brackets, citations, and internal quotation marks omitted). This describes Blanke's situation.

At his 2006 hearing, with bad advice from fellow inmates, Blanke falsely confessed to raping Victim 2. (R. 273; Add. A at 2; Add. B at 2.) Blanke did so, thinking that admitting responsibility for the alleged crime would put him in the good graces of the Parole Board and land him a more favorable prison term.[10] (R. 273; Add. A at 2; Add. B at 2.) He was, of course, wrong, and his false confession has cost him.

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[10] Blanke's fellow inmates were not entirely off base—"an incentive exists for all prisoners facing parole boards to admit guilt and apologize for the crime in order to maximize their chances for release, irrespective of their true feelings and culpability." Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 Iowa L. Rev. 491, 516 (Feb. 2008). Medwed, a former professor at the University of Utah, S.J. Quinney College of Law, also notes that "[p]arole officials seldom deny that inmate acceptance of responsibility is a critical variable in the release decision and, instead, are often overt in showing their dependence on this factor." *Id.* at 515. Indeed, the Parole Board's "Rationale Sheet" "expressly

Ever since his false confession, Blanke has denied that he committed any sexual misconduct. Blanke denied the allegations at the 2012 hearing. (R. 179-80, 188.) He denied the allegations in his petition for extraordinary relief and in his memorandum in opposition to the Parole Board's Motion for Summary Judgment. (R. 2, 273.) He denied the allegations in his 2018 psychosexual evaluation. (Add. D at 5, 13.) He denied them at the 2018 hearing. (Add. E at 7.) In a letter to the Parole Board as part of his 2018 hearing, Blanke pointed out inconsistencies in Victim 2's report to the police and explained that he did not fit the description of Victim 2's rapist. (Add. A at 3.) Both Blanke and Victim 2 were using drugs at the time of the kidnapping, which may explain the inconsistencies in Victim 2's report. (Add. E at 7.) Victim 2 was evaluated for rape, but no indications of seminal fluid were detected. (R. at 272.) If afforded a *Neese* hearing, Blanke would vigorously defend himself.

Up to this point, Blanke has been treated as if he committed the alleged, unconvicted offenses, resulting in a prison term that has already exceeded twice his suggested sentence. (R. 12-14, 188.) All this despite having been reported as being a model prison inmate. (R. 187-88.)

To be clear, the Parole Board may consider Blanke's false confession, but it may only do so after affording him a *Neese* hearing where he will be able to address the allegations against him as well as the false confession. Just as a confession does not strip

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designates complete acceptance of responsibility as a mitigating factor and denial or minimization as an aggravating one." *Id.*; *see also* R. 193.

a defendant of his right to a trial, *see generally State v. Mauchley*, 2003 UT 10, 67 P.3d 477 (discussing the admissibility of criminal confessions), Blanke's false confession cannot strip him of his right to a *Neese* hearing. This is especially true where indigent prison inmates do not have a right to counsel at parole grant hearings. *See Monson v. Carver*, 928 P.2d 1017, 1029 (Utah 1996).

The Court should therefore conclude that Blanke's false confession cannot strip him of his due process right to a *Neese* hearing.

C. Even if Child Kidnapping Is a "Sex Offense," the Parole Board "Considered and Effectively Decided" that Blanke Committed the Unconvicted Sex Offenses and Therefore Was Required to Afford Blanke a *Neese* Hearing.

"Due process is flexible and calls for the procedural protections that the given situation demands." *Labrum v. Utah Board of Pardons*, 870 P.2d 902, 911 (Utah 1993) (citation and internal quotation marks omitted). "To determine what procedural protections are due in a given case requires that we attend to two 'critical functions' of procedural due process: (1) to reduce the risk of error and (2) to 'preserve the appearance of fairness and the confidence of inmates in the decisionmaking process.'" *Neese*, 2017 UT 89, ¶ 24 (quoting *Labrum*, 870 P.2d at 909–10). The risk of error is "particularly acute" where "the Parole Board decides that an inmate has committed an unconvicted sex offense." *Id.* ¶ 31.

In developing procedural protections, the Court must also safeguard "other important criminal procedure values: 'promot[ing] uniformity in sentences, reduc[ing] the need for trials by encouraging rational plea bargains, and provid[ing] incentives for good

behavior in prison.'" *Id.* (quoting *Labrum*, 870 P.2d at 908). These values and functions are threatened where the Parole Board "consider[s] and effectively decide[s] unconvicted sexual conduct," *id.* ¶ 43, which is what occurred here.

Even if the Court determines that child kidnapping is a sex offense, under the unique facts of this case, due process requires that the Parole Board afford Blanke a *Neese* hearing. It is readily apparent that the Parole Board was fixated on Blanke's alleged, unconvicted sexual misconduct and based its decision to condition parole on the completion of sex offender treatment, not on his convicted offenses, but on the alleged, unconvicted offenses.

Blanke's 2012 rehearing attracted a large audience, including the media, which had closely followed Blanke since his convictions. (R. 174.) This no doubt impacted the Parole Board's decisionmaking, especially where law enforcement had failed to follow through with its investigation of the alleged rape of Victim 2 and where Victim 2 had reportedly played a role in the Legislature's changing the statute of limitations for rape from four years to eight years.[11] By this point, Blanke had already been incarcerated for ten years, two years more than his suggested sentence, and all reports of his behavior while in prison had been positive. Blanke had completed more classes and programs than had been asked of him (Add. B at 2; Add. F at 2-5), he maintained employment (Add. F.

[11] The statute of limitations has since been amended, and there is no longer a statute of limitations for rape.

at 6; Add. I at 2), and, with the exception of one minor verbal warning,[12] had not been disciplined (R. 187-88).

Despite his good behavior and having served two years more than his suggested sentence, the hearing officer concluded the hearing by revealing that he had decided that Blanke committed the alleged, unconvicted sexual offenses:

> [U]ntil you've been through sex offender treatment, I wouldn't consider any kind of a release. . . . I don't buy your story, . . . I think you . . . kidnapped [Victim 1] with the intent of sexually abusing her. I think you brutally raped [Victim 2,] and I think because of those two cases, you need to do treatment before we consider any kind of a release into the community. . . . [Y]ou're not gonna get into sex offender treatment if you say you don't have a sex problem. You're not gonna get into sex offender treatment if you refuse to talk about the rape, so. . . you're kinda in a stalemate . . . until you decide you want to be truthful. . . . [Y]ou're gonna get stuck right where you're at, so my feeling is that . . . we'll be looking at a rehearing.

(R. 188.) The Parole Board did not delay in reaching a decision and made its decision the same day. The Parole Board again scheduled a rehearing—this time for 2032, *twenty years* after the 2012 rehearing. (R. 191.) The extension alone would have equaled two and a half times Blanke's suggested prison sentence. (R. 12-14, 188.)

The 2012 rehearing is not the only evidence that the Parole Board based its decisions to deny parole on the alleged, unconvicted sex offenses. In 2018, the Parole Board ordered that Blanke receive a psychosexual evaluation. (Add. G.) Although he agreed to the evaluation, Blanke did not realize at the time that the evaluator, [redacted], was employed by the Utah State Prison and would not have agreed to the

[12] *See* R. 153.

evaluation if he did. (Add. D at 1; Add. E at 16.) The evaluation heavily considers the alleged, unconvicted sex offenses. (Add. D. at 13-14.) In conducting the evaluation, [redacted] considered Blanke's Institutional Progress Report (*Id.* at 1-2), [redacted] (Add. F at 1).

The Parole Board's consideration of Blanke's unconvicted offenses is even more problematic where, unlike *Neese*, Blanke was not charged with the unconvicted offenses, there was no discovery of the alleged offenses, and there was no trial. The factual development of Blanke's alleged offenses is at least three steps removed from that of Neese, increasing the likelihood of error.

Not only do the facts demonstrate a high risk of error and undermine the appearance of fairness and confidence in the Parole Board's decisionmaking, but they also show that the Parole Board has tossed by the wayside the values of promoting uniformity in sentencing and incentivizing good prison behavior. Without the benefit of a *Neese* hearing, Blanke stood no chance of receiving an early release.

The allegations of sexual misconduct against Blanke are serious, no doubt. But they are just that, allegations. Due process requires that Blanke have the opportunity to call witnesses and present evidence in his defense[13] and that the Parole Board issue a written decision explaining its decision.

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[13] Blanke maintains his innocence as to the allegations of sexual misconduct. (R. 273; Add. A at 2; Add. B at 2.) He does not dispute that Victim 2 was raped; rather, he disputes that he was the perpetrator. Notably, he asserts that Victim 2's descriptions of her rapist do not match him, nor do her descriptions of the rapist's vehicle match the vehicle that Blanke owned at the time. (Add. A at 3.) Both Blanke and Victim were using drugs at the time of the kidnapping, which may explain the inconsistencies in Victim 2's

CONCLUSION

For the foregoing reasons, the Court of Appeals erred in affirming the decision of the district court granting the Parole Board's motion for summary judgment. The Court should reverse the Court of Appeals and remand to the district court with instructions to issue an order requiring the Parole Board to hold a *Neese* hearing.

DATED this 25th day of March, 2019.

Respectfully submitted,

/s/ *Chris D. Mack*
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Attorneys for Petitioner Kevin Blanke

report. (Add. E at 7.) Victim 2 was evaluated for rape, but no indications of seminal fluid were detected. (R. 272.) To Blanke's knowledge, the Parole Board has not been able to consider this evidence.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(a)(11), I certify that this brief complies with the word count limitations of Rule 24(g) because, excluding parts of the document exempted by Rule 24(g)(2), this document contains 7,238 words. I further certify that this brief complies with the requirement of Rule 21 governing public and private records.

/s/ *Chris D. Mack*
Chris D. Mack #16094
Counsel for Petitioner Kevin Blanke

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2019, I caused a true and correct copy of the foregoing **OPENING BRIEF OF APPELLANT** to be sent via e-mail, with printed and bound copies to follow via U.S. Mail, postage prepaid, within 5 days, to the following:

Sean D. Reyes
Attorney General
Brent A. Burnett
Assistant Solicitor General
Amanda N. Montague
Assistant Attorney General
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P. O. Box 104858
Salt Lake City, Utah 84114
Attorneys for Respondent

and also via electronic mail to:

supremecourt@utcourts.gov
kims@utcourts.gov (Supreme Court clerk)

/s/ *Chris D. Mack*
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Attorneys for Petitioner Kevin Blanke

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ADDENDA

ADDENDUM A

REDACTED

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REDACTED

ADDENUM B

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REDACTED

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REDACTED

REDACTED

REDACTED

REDACTED

ADDENDUM C

BEFORE THE BOARD OF PARDONS AND PAROLE OF THE STATE OF UTAH

Consideration of the Status of BLANKE, KEVIN RAMEY Offender # 154364

SPECIAL ATTENTION REVIEW

After a review of the submitted information and good cause appearing, the Board makes the following decision and order:

Results	Effective Date
1. SCHEDULE FOR HEARING (REHEARING)	09/2018

Agreement Condition

Hearing Notes

1. NOTE: Schedule for a Rehearing in 09/2018 with a Psychosexual Evaluation, an Updated LS-RNR, and an updated INSTITUTIONAL PROGRESS REPORT due one month prior to the hearing on 08/01/2018.

No.	Crime	Sent	Case No.	Judge	Expiration
1.	ATTEMPTED CHILD KIDNAPPING (COUNTS 1)	5 Yrs - 100 Yrs	021908449	HANSON	06/18/2102
2.	KIDNAPPING (COUNTS 1)	1 Yrs - 15 Yrs	021910838	REESE	07/12/2116

Allegations

This decision is subject to review and modification by the Board of Pardons at any time until actual release from custody.

By order of the Board of Pardons of the State of Utah, I have this date 9th day of May, 2018, affixed my signature as Chair for and on behalf of the State of Utah Board of Pardons.

Chyleen A. Arbon

Chyleen A. Arbon, Board Chair

ADDENDUM D

REDACTED

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REDACTED

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ADDENDUM E

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ADDENDUM G

BEFORE THE BOARD OF PARDONS AND PAROLE OF THE STATE OF UTAH

Consideration of the Status of BLANKE, KEVIN RAMEY Offender # 154364

REHEARING

After a review of the submitted information and good cause appearing, the Board makes the following decision and order:

Results	Effective Date
1. SCHEDULE FOR HEARING (REHEARING)	02/2024

Agreement Condition

Hearing Notes

1. Schedule for a Rehearing 02/2024 with a SEX OFFENDER TREATMENT PROGRAM MEMO, an UPDATED LS-RNR, and a INSTITUTIONAL PROGRESS REPORT due to the Board of Pardons by 01/02/2024.***

2. NOTE: The Board of Pardons may consider an earlier release if Mr. Blanke completes Sex Offender Treatment Program.

No.	Crime	Sent	Case No.	Judge	Expiration
1.	ATTEMPTED CHILD KIDNAPPING (COUNTS 1)	5 Yrs - 100 Yrs	021908449	HANSON	06/18/2102
2.	KIDNAPPING (COUNTS 1)	1 Yrs - 15 Yrs	021910838	REESE	07/12/2116

Allegations

This decision is subject to review and modification by the Board of Pardons at any time until actual release from custody.

By order of the Board of Pardons of the State of Utah, I have this date 28th day of January, 2019, affixed my signature as Chair for and on behalf of the State of Utah Board of Pardons.

Carrie L. Cochran, Board Chair

Jr received

THE UT[illegible]H BOARD OF PARDONS A[illegible] PAROLE

RATIONALE FOR DECISION FOLLOWING HEARING

OFFENDER NAME: Kevin Blanke **OFFENDER #:** 154364

HEARING DATE: 12/05/2018 **HEARING TYPE:** RH

Total (Aggregate) Sentence: 6 Life Maximum Sentence Expiration Date: 7/2/2116

Sentence Start Date: 5-23-2003 Credit for Time Served (Days Prior to Prison Arrival): 345

Sentencing Guidelines* (# months/years): 96 Guideline Date*: 6/15/2010

** The Board will use your total minimum sentence if it is higher than your sentencing guideline.*

☐ **IF MARKED,** the current decision includes consideration of CAP priority programming completed prior to this hearing.

BOARD ACTION

☐ **Rescission:** The Board rescinds a previous release date or affirms a prior rescission decision.

☐ **No Change:** There is no change from a previous Board decision.

☐ **Release Granted:** The Board grants a release, based upon your total minimum and maximum court sentence, your sentence guideline as calculated by the Board, the nature and seriousness of your offense and conduct, your risk to victims or public safety, your past criminal and supervision behavior, and any mitigating and aggravating factors.

☑ **Release Denied:** The Board denies a release at this time based upon your total minimum and maximum court sentence, your sentence guideline as calculated by the Board, the nature and seriousness of your offense and conduct, your risk to victims or public safety, your past criminal and supervision behavior, and the specific aggravating factors outlined below.

☑ **Rehearing** ☐ **Expiration of Sentence** ☐ **Expiration of Life Sentence**

If you have been scheduled for a rehearing, complete the following prior to the rehearing to be considered for release:

1. Comply with or complete your Case Action Plan goals, requirements and programming.
2. Maintain good behavior, including the absence of criminal conduct or major disciplinary violations.
3. Complete offense or risk specific programming, including: SOTP

☑ **Other:** Mr. Blanke's cms of conviction were considered sex offense at time of conviction (Aggr. Kidnap.).

☐ **Guideline Release**: You have been granted a release at your sentence guideline or statutory minimum sentence.

☐ **Below Guideline Release**: You have been granted a release below your sentence guideline or statutory minimum sentence based on the mitigating factors checked below.

☐ **Above Guideline Release**: You have been granted a release above your sentence guideline or statutory minimum sentence based on the aggravating factors checked below.

☐ **Above Guideline Release:** Due to credit for time served, you were above guidelines at the time of the court sentencing or Board hearing.

☐ **No Applicable Guideline**: There is currently no applicable guideline.

DECISION SPECIFIC MITIGATING AND AGGRAVATING FACTORS

Decision Factor	Mitigating	Aggravating
Nature of the Offense or Offense Conduct	☐	☑
Victim Impact	☐	☑
Program or Treatment Completion or Compliance	☐	
Significant Pro-Social Behavior After Commitment	☐	
Age, Cognitive Abilities, Developmental Disabilities, or Mental Health	☐	
Risk or Behavior Warrant Additional Incarceration		☑
Other Factors:	☐	☐

ADDENDUM H

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL

SEAN D. REYES
ATTORNEY GENERAL

Spencer E. Austin
Chief Criminal Deputy

Ric Cantrell
Chief of Staff

Tyler R. Green
Solicitor General

Brian L. Tarbet
Chief Civil Deputy

May 16, 2018

Nicole Gray
Clerk of the Court
UTAH SUPREME COURT
450 S. State Street
Salt Lake City, UT 84118

Re: Blanke v. Utah Board of Pardons and Parole, Case No. 20160766-SC

Dear Ms. Gray,

Respondent, through counsel Brent A. Burnett and Amanda N. Montague, Assistant Utah Attorneys General, submits this letter in response to the Court's request that the issues in this case be reframed "in light of the Court's decision in 2017 UT 89, Neese v. Board of Pardons."

Respondent agrees Petitioner has correctly identified the holding of Neese. Specifically, the Court held that "when the Parole Board intends to classify as a sex offender an inmate who has never been convicted of a sex offense or otherwise adjudicated a sex offender," the offender is entitled to procedures analogous to those offered to prisoners in the prison disciplinary hearing context, as articulated by Wolff v. McDonnell, 418 U.S. 539 (1974). Neese, 2017 UT 89, ¶¶ 42-43. In those cases,

> the Parole Board (1) must in advance of the hearing, provide particularized written notice that it intends to consider and effectively decide unconvicted sexual conduct in making its parole determination; (2) unless the safe administration of justice requires otherwise, it must allow the inmate to call witnesses and present documentary evidence in his defense; and (3) it must provide a written statement of the evidence it relied upon and reasons it concluded that the inmate committed the unconvicted sexual conduct.

Id. at ¶ 43.

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This case is distinct from Neese for two reasons. First, Petitioner was convicted of a sex offense. As Petitioner notes, he was convicted of Attempted Child Kidnapping in 2003. At the time of his conviction, Attempted Child Kidnapping was a "sex offense" according to Utah Code Annotated § 77-27-21.5(1)(e)(i)(B) and (S) (West 2003). Second, the record reflects that Petitioner admitted, on multiple occasions, having sexual intercourse with the 15-year-old victim of his 2004 Kidnapping conviction.

In light of the foregoing facts, the issue the Court should consider is:

> When an offender is (a) convicted of a sex offense and (b) admits to criminal sexual misconduct in conjunction with a non-sex offense, is the Board of Pardons and Parole required to provide that offender with the extraordinary due process required by Neese before it considers evidence that the offender engaged in other sexual crimes and orders the offender to engage in sex offender treatment?

Respondent appreciates the opportunity to consider this matter under the lens of Neese and looks forward to the Court's consideration.

Sincerely,

Amanda N. Montague
Assistant Attorney General

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ADDENDUM I

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