In the Supreme Court of the State of Utah

Kevin Blanke, *Petitioner*, v. Utah Board of Pardons and Parole, *Respondent*.	**No. 20160766-SC**

Brief of Respondent

On Petition for Writ of Certiorari to the Utah Court of Appeals

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Additional Parties Before the Court of Appeals or District Court

Alfred Bigelow was listed as a respondent in both the district court and court of appeals proceedings.

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Introduction

"Based on the undisputed facts" before the Court in *Neese v. Utah Board of Pardons and Parole*, 2017 UT 89, 416 P.3d 663, the Court held that the Board of Pardons and Parole (Board) could not consider allegations about an unconvicted sexual offense in making its parole decision without first affording Mr. Neese some additional procedural protections at his parole hearing.

The question before the Court now is whether *Neese* applies here. It does not for at least two reasons. First, unlike *Neese*, Mr. Blanke pled guilty to kidnapping a fifteen-year old girl and repeatedly admitted--in his presentence report and at his 2006 and 2012 parole hearings--that he had sex with her. At a minimum, that's unlawful sexual activity with a minor--a serious sex offense. Mr. Blanke never objected to those facts in his presentence report and any current objection has long since been waived.

Second, and regardless of Mr. Blanke's admissions, the child kidnapping offense to which he pled guilty is rightfully considered a sex offense.

The Board was well within its authority to rely on either Mr. Blanke's admissions or his child kidnapping conviction in determining that he should participate in sex offender therapy as part of its parole determination.

Statement of the Issues

Issue: "Whether the Board of Pardons and Parole is required to comply with the due process standards articulated in *Neese v. Board of Pardons*, 2017 UT 89, under the circumstances presented by this case." Order of June 20, 2018 attached hereto as Addendum A.

This Court instructed that the parties' arguments should address whether Mr. Blanke "was convicted of a sex offense" and whether his conviction of a sex offense "may be considered as an alternate ground for affirmance." Order of June 20, 2018. Further, this Court told the parties to address "whether any admissions to sexual misconduct in light of the record as a whole would obviate any requirement that the Board provide the additional due process set forth in *Neese*." *Id.*

Standard of Review: On writ of certiorari, the Court reviews the "decision of the court of appeals, not that of the district court, and appl[ies] the same standard used by the court of appeals." *Judd v. Bowen*, 2018 UT 47, ¶ 8 n.8, 428 P.3d 1032 (internal quotation marks omitted).

The court of appeals reviewed the district court's denial of Mr. Blanke's petition for extraordinary writ challenging the Board's parole decision. "A court's decision to grant or deny a petition for extraordinary relief . . . is discretionary with the court to which the petition is brought, and it is

discretionary in the sense that it is 'never a matter of right on behalf of the applicant.'" *V-1 Oil Co. v. Dep't of Envtl. Quality*, 939 P.2d 1192, 1195 (Utah 1997) (quoting *Renn v. Bd. of Pardons,* 904 P.2d 677, 683 (Utah 1995)). On either certiorari or appeal from a decision granting or denying extraordinary relief, the appellate court reviews the applicable facts for clear error, *V-! Oil Co.*, 939 P.2d at 1195, and any legal determinations for correctness. *Neese*, 2017 UT 89, ¶ 21.

The Board's decisions are generally not subject to judicial review. Utah Code § 77-27-5(3). But courts may use an extraordinary writ to review the Board's decisions in two narrow circumstances: to correct "a gross and flagrant abuse of discretion," *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 683 (Utah 1995), and to assure that procedural due process was not denied, *Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 909-13 (Utah 1993). Importantly, judicial review addresses only "the fairness of the *process* by which the Board undertakes its sentencing function," not the result. *Padilla v. Utah Bd. of Pardons & Parole*, 947 P.2d 664, 667 (Utah 1997) (internal quotation marks omitted). The Board has exclusive authority to determine the actual number of years a defendant serves, *Preece v. House*, 886 P.2d 508, 512 (Utah 1994), and the court does not "sit as a panel of review on the result, absent some other constitutional claim." *Lancaster v. Utah Bd. of Pardons*, 869 P.2d 945, 947 (Utah 1994).

Statement of the Case

Mr. Blanke is currently incarcerated on a 2002 conviction for Attempted Child Kidnapping and a 2003 conviction of Kidnapping. The kidnapping offense actually pre-dated the child kidnapping offense, however.

According to the victim of the kidnapping and the Presentence Investigation Addendum, on December 7, 1997, a fifteen-year old girl and her friend encountered Mr. Blanke at a convenience store. R. 126. He drove the two to a nearby business where he parked his truck. The friend got out of Mr. Blanke's truck. The fifteen-year old decided she needed to leave as well and went to locate her friend. Mr. Blanke tried to get her to stay with him. *Id.* He followed her in his truck and confronted her. Mr. Blanke told her he had a gun and she needed to get back into his truck. When she did so, Mr. Blanke drove her to an unknown location in West Valley where he admittedly had sex with her and she alleges that he raped and sodomized her. *Id.*

The victim gave the police a physical description of Mr. Blanke, provided details for a composite drawing of him, and picked his picture out of a photo lineup. *Id.* Unfortunately, while Mr. Blanke was identified as a possible suspect in the rape and kidnapping investigation in early 1998, the detective investigating this matter was transferred to another division. R. 156. The investigation "fell through the cracks." It was only when Mr. Blanke was arrested in 2002 for kidnapping a seven-year old that he was

linked to the prior kidnapping and rape. *Id.* Unfortunately, by then the statute of limitations on the rape charge had run. *Id.* n.1.

Mr. Blanke pled guilty to attempted child kidnapping, a first degree felony, in the 2002 kidnapping of the seven year old. R. 8. For this crime he was sentenced to a term of three years to life at the Utah State Prison. *Id.* In 2003, Mr. Blanke pled guilty to kidnapping, a second degree felony, in the kidnapping of the fifteen year old. R. 10. He was sentenced to serve one to fifteen years at the Utah State Prison. *Id.* This sentence was to be served consecutively to the first. R. 11.

As part of the Presentence Investigation Addendum related to Mr. Blanke's guilty plea to kidnapping, he prepared and signed a Defendant's Statement. R. 127. In that statement Mr. Blanke admits that he had sex with his fifteen-year old kidnapping victim. "I got aroused and we had sex. I did not know that she was under age until three days later when I talked to the police. After we got done having sex I asked her where she wanted to go . . ." R. 127. While he denied that he had raped his victim, Mr. Blanke, then "49 years old" at the time he wrote the statement, admitted that "the girl was under age and I was an adult and take full responsibility." *Id.*

At his sentencing in the kidnapping case, Mr. Blanke's attorney asked the court to remove "the statement that he raped and sodomized the victim. He believes there's no physical evidence of that and believes that that should

not be in the report." Addendum B at 2. But Mr. Blanke did not ask the court to remove his statement in which he admitted having sex with the victim or any other statement from the Presentence Report.

Mr. Blanke's victim was at the sentencing hearing. She testified that Mr. Blanke had terrorized her and threatened to kill her. *Id.* at 7. "He raped me, I had to – after he let me go, he told me if I told anybody, that -- that he would track me down and kill me." *Id.* Given an opportunity to address the court, Mr. Blanke's response was "That's all right, your honor. I'll just be sentenced and just do my time." *Id.* at 8. The trial court then stated that he would be imposing the maximum sentence he could impose in the case, saying, "[i]n reading this [presentence] report, I'm convinced that you're a threat to our community and need to be incarcerated." *Id.* at 10. The court continued that he would be writing to the Board to ask them to hold Mr. Blanke as long as the law would allow. *Id.*

Mr. Blanke filed an appeal, which was denied, arguing he should have been permitted to withdraw his appeal because he received ineffective assistance of counsel. *See State v. Blanke*, 2005 UT App 259U. Addendum D. He did not assert any claims regarding his sentencing hearing or the presentence report.

Mr. Blanke first came up for a parole hearing in 2006. At this hearing, he reaffirmed his statement from the Presentence Report Addendum that he

had sex with the victim, and he also admitted to raping her. When asked by the hearing officer if he had told the victim that he had a gun and what he would do if she did not comply (R. 136), Mr. Blanke explained that he had been doing drugs and he didn't "remember it like that." R. 137. The Hearing Officer then asked him how he remembered it.

> BLANKE: Like in the letter, I, I, I have a statement that I wrote down there that's been the same since I started that I don't wanna say anything verbally or otherwise that would ever hurt anybody because the people have obviously been hurt enough.
>
> HEARING OFFICER: Okay. Bottom line is you forced her into your truck and ah, took her some place, I guess also in the West Valley area or Kearns, and had sexual intercourse with her, basically raped her. That what occurred?
>
> BLANKE: Yes your honor.
>
> HEARING OFFICER: Did she protest as to what you were doing?
>
> BLANKE: Yes your honor.
>
> HEARING OFFICER: Okay. Then after that you ah, that was just the one incident is all you did with her?
>
> BLANKE: Yes.

R. 137-38.

His victim in this kidnapping then spoke about how his actions and threats were still impacting her and her efforts in seeking a longer statute of limitations for rape to avoid what had happened in her case. R. 138-140. The hearing officer asked Mr. Blanke if he had anything to say in response to his

kidnapping victim's statements. R. 140. Mr. Blanke responded that he did not. *Id.* Later he denied that he had written a note to the victim prior to the incident. R. 143-44.

The father of Mr. Blanke's child kidnapping victim also spoke. He recounted that as part of a lesson at church, his child's group had been asked to write about some bad thing that had happened to her. The teacher gave the victim's father her statement, which said: "when I was kidnapped he took out his lotion and tried to make me rub it on his ding dong." R. 146. Mr. Blanke specifically denied that allegation. R. 148.

After the 2006 hearing, the Board scheduled Mr. Blanke for a Rehearing in June 2012.

Mr. Blanke then had another parole hearing in 2012. At that hearing, the hearing officer repeated the information contained in Mr. Blanke's file, including his kidnapping victim's assertion that he raped her and that "you [Mr. Blanke] admitted ah, having intercourse with a fifteen year old girl, ah claimed it was consensual." R. 178. Mr. Blanke's response was that "everything happened as you said the first time, but, I, because of the statute of limitations, and because I was never charged, I haven't been able to bring forth any evidence on, on behalf of the rape accusation, your honor." R. 179. The hearing officer specifically asked, "Kevin, did you rape her?" Mr. Blanke responded that he did not plead guilty to that but that he did not want to

answer that question. R. 179-180. The father of the child kidnapping victim also spoke at this hearing, disputing Mr. Blanke's version of events and arguing that Mr. Blanke is a continuing threat to society. R. 181-82. After being asked to make comments regarding both victims' accounts, Mr. Blanke responded to the father's statements but did not address the kidnapping victim's. R. 185.

The kidnapping victim also testified at Mr. Blanke's 2012 parole hearing. R. 182-84. She explained the trauma that she suffered from the rape and the kidnapping. R. 182-83. After the hearing, the Board set the matter for rehearing in June 2032, with a Sex Offender Treatment Memo due to the Board by May 1, 2032. R. 191.

Mr. Blanke filed a petition for extraordinary writ to challenge the Board's decision. In dismissing his petition on summary judgment, the district court held that the Boards' decision was "fully supported" by Mr. Blanke's admission that he had raped the kidnapping victim. R. 332.

Mr. Blanke appealed the district court's decision. The Utah Court of Appeals summarily affirmed the district court on July 18, 2016. The court held that the Board had not clearly abused its discretion in making its 2012 parole decision. R. 365-68. The court acknowledged that the Board had the discretion to consider many facts, not just the inmate's convictions. R. 367. "However, the Board has discretion to consider numerous factors in granting

parole, including a defendant's acceptance of responsibility of his crimes and any inducement this creates does not compel an accused to make self-incriminating statements within the meaning of the Fifth Amendment." *Id.*

Mr. Blanke subsequently filed a petition for certiorari, which this Court provisionally granted pending its decision in *Neese v. Utah Board of Pardons and Parole.* R. 377. After *Neese* was decided, the Court formulated the issues to be addressed, focusing on whether the additional parole hearing due process procedures outlined in *Neese* must be afforded to someone in Mr. Blanke's circumstances.

While his petition for certiorari was pending in this Court, the Board gave Mr. Blanke another parole hearing. At this point, he changed his story. He stated that his conduct with the victim of his kidnapping and her friend as "[w]ell, it was just one of those things where we all went and got a little high and things happened, and that's all I can say about that." Aplt. Br., Add. E at 4. When asked what things happened, his response was "[w]ell, I can't really talk about it at this time due to a recent ruling in *Neese v. Board of Pardons*." *Id.* While admitting that he got high with his victim and her friend, he now stated that no sex or rape was involved and that he did not expose himself to her or her friend. *Id.* at 7.

The Board scheduled Mr. Blanke for a rehearing in February 2024, with a Sex Offender Treatment Program Memo, updated LS-RNR (a risk and

needs assessment) and an Institutional Progress Report due to the Board by January 2, 2024.

Summary of the Argument

Neese does not require the Board to give Mr. Blanke additional due process at his parole hearings before the Board may consider an unconvicted sexual offense. Unlike Mr. Neese, Kevin Blanke admitted on multiple occasions that he had sex with his fifteen-year old kidnapping victim. His written admission was part of his presentence report. By statute Mr. Blanke needed to challenge any part of the report that he disagreed with at his sentencing hearing or his right to do so would be waived. He did not challenge his own statement that he had sex with his kidnapping victim. And his statements at his 2006 and 2012 parole hearings support his confession. At his 2018 hearing, he first denied that he had sex with his kidnapping victim. But the Board had the right to rely on Mr. Blanke's admission in the presentence report, especially as it was supported by other evidence in the report and from his first two parole hearings.

Even without his admissions, *Neese* would not apply because at the time Mr. Blanke pled guilty to attempted child kidnapping, that crime rendered him a sex offender and required him to register as such. That the law has changed does not alter the fact that Mr. Blanke's conviction occurred

under the 2003 version of the law. That version is the one that applies to him unless the Utah State Legislature has expressly made retroactive amendments to the law. It has not done that. Relevant Department of Corrrections' policy and Sentencing Guidelines confirm that child kidnapping is a sex offense.

Finally, Mr. Blank is not entitled to *Neese* hearing regardless of his admissions and existing convictions. Mr. Blanke's situation is not similar to that of Mr. Neese. He has repeatedly admitted that he had sex with a minor in court as well as before the Board of Pardons. Mr. Neese, on the other hand, always insisted that he was not guilty of any kind of sexual misconduct, and he was also unsuccessfully tried for the sexual misconduct that he was charged with. Here, Mr. Blanke from the beginning admitted that he had sex with a minor and only changed his story at a later date. The Board had the right to rely on the presumptively reliable court record of Mr. Blanke's criminal case together with the evidence that it received in his parole hearings.

Argument

I. Mr. Blanke's Repeated Admissions to Sexual Misconduct Obviate Any Need for a Neese Hearing.

In *Neese*, this Court concluded, "[b]ased on the undisputed facts," that due process required the Board to provide Mr. Neese with additional

procedural protections before the Board "considers the unconvicted sexual offense that its hearing officers have questioned Mr. Neese about." 2017 UT 89, ¶ 116. But the undisputed facts that drove the Court's decision in *Neese* do not exist here. In Mr. Neese's case, the Board considered an alleged sex offense (1) that Mr. Neese had consistently and steadfastly denied, (2) for which he had been charged and tried but not convicted, and (3) culpability for which he had intentionally avoided by pleading guilty to other crimes that were not logically related to the alleged sex offense. *Id.* ¶¶ 2, 27, 32, 34.

None of that is true of Mr. Blanke. To the contrary, he initially and repeatedly admitted and confirmed that he had sex with his then fifteen-year old kidnapping victim. That alone obviates the need for *Neese's* additional procedures, which were established to reduce the risk of error and preserve the appearance of fairness. *Id.* ¶ 24. Those concerns don't exist here.

In his Defendant's Statement in the Presentence Investigation Addendum, Mr. Blanke stated that he had sex with his fifteen year old kidnapping victim. R. 127 ("I got aroused and we had sex"). He also states that he "did not know that she was under age until three days later when I talked to the police." *Id.* While he denied that he had raped his victim, Mr. Blanke, then "49 years old," admitted that "the girl was under age and I was an adult and take full responsibility." *Id.*

Utah law required that Mr. Blanke receive a copy of his presentence report before sentencing and that he object to any inaccuracies before or at sentencing. Utah Code § 77-18-1(6)(a). and he did receive - and had a full opportunity to challenge - the Presentence Investigation Addendum before and at his sentencing hearing. A transcript of his June 10, 2004 sentencing hearing is attached as Addendum B. The only challenge he made, through counsel, was to the inclusion in the addendum of the victim's statement that he raped and sodomized her. *Id.* at 2. But he did not ask the district court to remove his confession that he had sex with a fifteen year old from the report.

Questions of inaccuracies in a presentence report are matters for the courts, and not the Board of Pardons:

> Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, . . . If after 10 working days the inaccuracies cannot be resolved, the court shall make a determination of relevance and accuracy on the record.

Utah Code § 77-18-1(6)(a).

So when a district court fails to resolve a criminal defendant's objections to the report, this Court has stated that the correct resolution is to "remand for the sole purpose of resolving such objections on the record." *State v. Jaeger*, 1999 UT 1, ¶ 46, 973 P.2d 404. Mr. Blanke did not raise a challenge to any failure of the district court to resolve alleged inaccuracies in

the report on appeal.[1] *State v. Blanke*, 2005 UT App 259U (Addendum D). The only issue he raised involved the denial of his motion to withdraw his guilty plea. *Id.*

If a party fails to object to any alleged inaccuracies in a presentence report, the objections are waived. Utah Code § 77-18-1(6)(b). These presentence report statements are then presumed accurate and the Board is entitled to rely on them. *State v. Maestas*, 2002 UT 123, ¶ 32, 63 P.3d 621 ("after completion of the review detailed in subsection 77–18–1(6), the information in a presentence report is presumptively accurate. The report is then used to inform the court's decision regarding the proper sentence").

Accordingly, the court of appeals has previously rejected a claim that the Board of Pardons relied on inaccurate information contained in a presentence investigation report. *McCammon v. Board,* 2016 UT App 119, ¶ 5, 378 P.3d 106. Because the petitioner had not challenged the accuracy of the information at sentencing, the court of appeals held that the matter was waived pursuant to the statute and the Board's use of the information could not be challenged. *Id.*

[1] Though Judge Reese did not expressly resolve Mr. Blanke's objections, his concluding remarks leave no doubt that he did not sustain the objections. Judge Reese stated he was convinced Mr. Blanke was a threat to the community and should be incarcerated for the maximum amount of time.

Likewise, Mr. Blanke did not challenge his admission to having sex with his fifteen-year old victim at his 2006 hearing. Instead, he admitted that he had sexual intercourse with her (that the hearing officer described as basically being raped). R. 137-38. This was not a change in Mr. Blanke's position but an affirmance of what he had said in the presentence report. Mr. Blanke's later claim that this admission was false (made only because of bad advice from other inmates) does not alter that fact. Opening Brief of Appellant at 17-19. It also doesn't explain why Mr. Blanke, in his defendant's statement in the Presentence Investigation Addendum, admitted the sexual intercourse but not the rape. R. 127. His admission of the rape on this occasion can just as easily have been caused by the unusual way in which the hearing officer asked the question, describing Blanke's actions as sexual intercourse that was "basically" like rape. R. 137.

The same is true of his comments at the 2012 hearing where he admitted for a third time that he had sex with his kidnapping victim. There the hearing officer stated that the victim accused him of rape and Mr. Blanke admitted to having consensual intercourse with a fifteen-year old girl. R. 178. He responded that "everything happened as [the hearing officer] said the first time" but he was not given the opportunity to challenge the rape accusation. R. 179. Again, Mr. Blanke admitted the sexual intercourse but did not admit that it had been rape.

At other times, Mr. Blanke has admitted or accepted allegations that he forcibly raped J.B. First, at his sentencing hearing, he specifically declined the trial court's offer to respond or dispute the J.B.'s account of being raped. Second, at his 2006 Board hearing, he agreed he "had sexual intercourse with her, basically raped her" and that she protested.

Even if the Board and this Court do not credit Mr. Blanke's admissions to rape, he has repeatedly admitted to committing a sex offense. Here, the undisputed fact is that Mr. Blanke had sexual intercourse with a minor. Mr. Blanke was approximately 45 at the time of the kidnapping and it is undisputed that the victim was 15. This confession makes him guilty of the "sex offense" of Unlawful Sexual Activity with a Minor in violation of Utah Code § 76-5-401(2)(a). Given the circumstances, this is a third-degree felony. *Id.* at (3)(a).[2] That Mr. Blanke claims he did not know the victim was underage does not matter. Section 401 "impose(s) strict liability for the crime of unlawful sexual activity with a minor." *State v. Martinez*, 2002 UT 80, ¶ 19, 52 P.3d 1276.

Mr. Blanke argues that he has not admitted to a sex offense because he asserted, for the first time, at his 2018 hearing that he did not have sex with

[2] At the time of his sentence and currently, this crime would be registerable as a "sex offense." *See* Utah Code Ann. § 77-27-21.5(1)(e)(i)(C) (West 2003) and Utah Code § 77-41-102(17)(a)(iii). Even by the most stringent definition of "sex offender," Unlawful Sexual Activity with a Minor.

his kidnapping victim. This argument lacks merit. The Board had the right to rely on Mr. Blanke's repeated confessions and his later statements that he had sexual intercourse with his fifteen-year old kidnapping victim. His original confession was not challenged. The Board had the right to consider his prior statements in addition to his changed story at his latest hearing.

Mr. Blanke has waived any right to assert that his confession contained in the presentence report to having sex with a minor was inaccurate or wrong. Once facts were established in the Presentence Investigation Addendum, the Board was entitled to give them whatever weight it chose. *Maguire v. Bigelow*, 2013 UT App 221, ¶ 2 n.1, 310 P.3d 765. In *Maguire*, the inmate argued that the Board relied on inaccurate information and gave insufficient weight to his position, though he "acknowledge[d] that he objected to" the material at his Board hearing, but claimed that the Board did not give sufficient weight to his arguments. *Id.* The court found, "[t]he weight given to the evidence is within the Board's discretion in making its final determination and is not subject to judicial review." *Id*. (citing *Lancaster v. Board of Pardons*, 869 P.2d 945, 947 (Utah 1994)).

Mr. Blanke's argument—to require the Board to also hear challenges to facts set out in a presentence report—would authorize an inmate to compel the Board to consider whether it should overrule the decision made by a court or rule on factual objections that were long since waived. Instead, the Board

can rely on the prior decision of the court or the statutory waiver of the inmate's claim if it was not properly raised in the court.

Moreover, Mr. Blanke made admissions at each Board hearing prior to 2018. At every Board hearing, he was placed under oath. Mr. Blanke has never explained why he would confess repeatedly, under oath, and then recant approximately 14 years later. Though he says he received "bad advice" regarding his admissions to rape at the 2006 hearing, he does not assert the source of that advice or that the Board was responsible for it in some way. He also does not ever indicate that his admissions to unlawful sexual activity with a minor were the result of poor advice or otherwise not entitled to weight. The Board was entitled to continue to credit Mr. Blanke's repeated admissions. *See Lancaster*, 869 P.2d at 947 (holding the Board is afforded absolute discretion to determine what weight to give the evidence before it); *see also, e.g., Webster v. Sill,* 675 P.2d 1170, 1172–73 (Utah 1983) ("But when a party takes a clear position in a deposition, that is not modified on cross-examination, he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy").

The 2018 statements also do not undermine the trial court's or the court of appeal's decision. Both of those were issued before Mr. Blanke sought to repudiate his statements. At the time of every previous decision in

this case, it was completely undisputed that Mr. Blanke had sex with his kidnapping victim.

Here, the undisputed fact is that Mr. Blanke admitted he had sexual intercourse with a minor.

II. Mr. Blanke Was Convicted of a Sex Offense and the Court Can Affirm on That Alternate Ground.

A. Child Kidnapping Was a Sex Offense at the Time Mr. Blanke Was Convicted.

Putting aside Mr. Blanke's repeated admissions to having sex with an underage girl--an obvious sex offense--the Board could still conclude that he committed a sex offense and request he participate in SOTP based on his actual convictions. Specifically, Mr. Blanke pled guilty to and was convicted of attempted child kidnapping, a first degree felony, on December 6, 2002. R. 119-20. He was sentenced May 23, 2003. He had also previously been convicted of distribution of pornographic material, a class a misdemeanor, on February 24, 1992, in case number 921002274 in Third District Court. While Mr. Blanke asserts that child kidnapping is not a "sex offense," he makes no argument about his distribution of pornographic material conviction.

At the time of his conviction and sentence for attempted child kidnapping, Mr. Blanke was considered a "sex offender." Specifically, registration as a sex offender was governed by Utah Code § 77-27-21.5 (West

2003) at the time of Mr. Blanke's conviction and sentence for Attempted Child Kidnapping. Section 77-27-21.5(1)(e)(i)(B) included "a person convicted by this state of Section 76-5-301.1, kidnapping of a child" as a "sex offender." Subsection (1)(e)(i)(S) then included individuals convicted of an attempt to commit a sex offense as "sex offenders."

Mr. Blanke argues that he is not a "sex offender" because current law defines him as a "kidnap offender." But that doesn't govern his claim; it's the definition at the time of his sentence. "It is well established that [t]he courts of this state operate under a statutory bar against the retroactive application of newly codified laws," and therefore "parties' substantive rights and liabilities are determined by the law in place at the time when a cause of action arises." *Waddoups v. Noorda*, 2013 UT 64, ¶ 6, 321 P.3d 1108 (citations and internal quotation marks omitted). "The statute barring retroactive application of new laws contains [an] exception, [a] provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive. Thus, absent clear legislative intent to the contrary, we generally presume that a statute applies only prospectively." *Id*. (citations and internal quotation marks omitted). Additionally, "a statute may be applied retroactively if it affects only procedural and not substantive rights." *Soriano v. Graul*, 2008 UT App 188, 186 P.3d 960. "'Substantive law is defined as the positive law which creates, defines and regulates the rights

and duties of the parties and which may give rise to a cause of action." *Brown & Root Indus. Serv. v. Indus. Comm'n of Utah*, 947 P.2d 671, 675 (Utah 1997) (internal quotation marks omitted). Procedural law, in contrast, "merely pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective." *Id.* So "statutory changes are purely procedural only where they provide a different mode or form of procedure for enforcing substantive rights." *Id.* (internal quotation marks omitted).

There is no indication in Utah Code § 77-41-102 that the current definitions were intended to be given retroactive application. Therefore, Mr. Blanke would only be entitled to be considered a "kidnap offender" if there was no substantive right or obligation that attached to being a "sex offender." If the distinction between a "sex offender" and a "kidnap offender" is purely procedural, Mr. Blanke can allege no substantive harm from the designation that he is a "sex offender."

Mr. Blanke also asserts that he is not a "sex offender" because there was no "sexual element" to his crime. This argument lacks merit. Indeed, Utah has no other statutory or case-law definition for "sex offender" beyond the definition that is found in the sex offender registration statutes. Further, the definition of "sex offender" for registration purposes is the minimum definition for a "sex offender" in many different contexts. For example, in its

public material regarding Sex Offender Treatment, the Department of Corrections says, "[a]ll individuals sentenced to prison for a sex offense (whether a new commitment or a parole violator) receive a treatment assessment." Http://corrections.utah.gov/index.php/family-friends/sex-offender-treatment. Similarly, the Department of Corrections' Inmate Classification Policy, FC0407.05, indicates the Department makes housing classification determinations based on a number of factors, including the "current offense." https://webapps.corrections.utah.gov/webdav_pub/F%20-%20Institutional%20Operations%20Public%20Policy/FC04%20-%20Inmate%20Classification.pdf. The Offense categories are for (1) driving, alcohol, etc., (2) "Sex/Non-Registerable, Property & Other," (3) "Sex-Registerable & Weapons," (4) "Murder & Person." Thus, the Department considers all registerable offenders as "sex offenders," as well as some class of offenders who do not have a registerable conviction.

Moreover, the current (2017) Adult Sentencing and Release Guidelines consider child kidnapping and attempted child kidnapping as "sex offenses." Addendum C, Sex Offense Columns, to the Guidelines. Addendum C. The Guidelines include nearly every registerable sex offense as "sex offenses,"[3] as

[3] The only "sex offense" that is absent from the Sex Offense Column in the Guidelines is Sexual Extortion or Aggravated Sexual Extortion, in violation of Section 76-5b-204.

well as other offenses which are not registerable, such as Custodial Sexual Misconduct with a Youth Receiving State Services, and offenses which are not registerable on the first conviction, such as Lewdness. Compare the Adult Sentencing and Release Guidelines with Utah Code § 77-41-102(17) (West 2018).

Case law suggests that the legislature may define a "sex offender" as it deems appropriate. The United States Supreme Court considered whether Connecticut's registration statutes "deprived registered sex offenders of a liberty interest, and violated the Due Process Clause because officials did not afford registrants a predeprivation hearing to determine whether they are likely to be currently dangerous." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4, (2003) (internal quotation marks omitted). The Court held that "the fact that respondent seeks to prove—that he is not currently dangerous—is of no consequence under Connecticut's [registration law]." *Id.* at 7. Thus, the Court concluded the plaintiff had no procedural due process right to challenge his registration requirement when he had been convicted of one of the registerable offenses. *Id.*

Similarly, in another case the plaintiff contended that he was deprived of procedural due process when he was classified as a "sex offender" by a New York statute that defined a "sex offender" to include "kidnapping offenses, provided the victim of such kidnapping or related offense is less than

seventeen years old and the offender is not the parent of the victim." *Yunus v. Robinson*, 2018 WL 3455408, *16 (S.D.N.Y. June 29, 2018), report and recommendation adopted, 2019 WL 168544 (S.D.N.Y. Jan. 11, 2019) (citing N.Y. Correct. Law § 168-a (McKinney)). The court concluded that "plaintiff possesses a cognizable liberty interest in not being required to register as a sex offender. However, . . . having been convicted of an offense requiring registration under state law, plaintiff is not entitled to any further process." *Yunus,* 2018 WL 3455408, at *16.

Here, the legislature has offered only one definition for "sex offender" in the Utah Code and it is contained in the provision regarding sex offender registration.

Neese stated that a "sex offender" classification imposed hardships on offenders, which included: (1) the requirement to participate in invasive treatment and admit conduct that he/she may not have committed, 2017 UT 89, ¶¶ 30, 31; (2) identification by other inmates as a target for violence and sexual assault, *id.* ¶ 31; (3) removal from general population and placement in more restrictive housing with other sexual predators, *id.* There is no evidence in the present case regarding any of these alleged hardships.[4]

[4] Indeed, the assertions that offenders are required to admit conduct which they deny and engage in invasive treatment are largely obsolete. The Board is informed that the Department is in the process of amending its policies to reflect that. An offender can be admitted into treatment and can complete

However, Mr. Blanke's classification as a sex offender occurred by operation of law at the time of his sentencing, including the requirement that he register as a sex offender,[5] without any action by the Board. There can be no plausible claim that any hardship Mr. Blanke may suffer as a result of his "classification as a sex offender" stems from anything other than his conviction itself. As discussed above, housing classifications consider crime of conviction (as well as institutional behavior), assessment for sex offender therapy relies upon crime of conviction, and registration relies upon crime of conviction. The fact that the Board has also acknowledged Mr. Blanke as a "sex offender" does not increase the risk of hardship.

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the program without ever admitting their offense. The program is skills-based and these skills are applicable to many behaviors in everyday life. Further, according to FC04, the Department assesses housing classification based on a number of factors, including proximity to release date and engagement in programming. Those offenders who are engaged in treatment or have completed it would have scores in that area supportive of lower risk housing. Indeed, the Sex Offender Treatment information provided publicly (http://corrections.utah.gov/index.php/family-friends/sex-offender-treatment) indicates offenders must be medium security or better to engage in treatment. Finally, the fact that the Department reports, on the same link, housing a high percentage of offenders convicted of "sex offenses" calls into question assertions that those offenders are targeted for violence.

[5] In fact, Mr. Blanke currently appears on the public website for the Sex and Kidnap Offender Registry. *See* http://www.icrimewatch.net/offenderdetails.php?OfndrID=709706&AgencyID=54438.

The Board may also rely on Mr. Blanke's conviction for Distribution of Pornographic material as a "sex offense." Though it is not a registerable offense, it is an "Offense Against Public Health, Safety, Welfare, and Morals" under Chapter 10 of Title 76 of the Utah Code and it contains a "sexual element," as Blanke asserts is necessary. Mr. Blanke himself admitted that he was not simply the distributor of the pornographic videotape but that he was involved in it's production. Addendum D to Opening Brief of Petitioner. The psychosexual evaluator considered this part of Mr. Blanke's Sexual Offender History. *Id*.

B. The Court Can Affirm Based on Mr. Blanke's Existing Convictions.

The Court asked the parties to address whether it may consider Mr. Blanke's conviction(s) for a sex offense "as an alternate ground for affirmance." Addendum A. The answer is "yes."

The district court granted summary judgment against Mr. Blanke's claims. R. 318-36. The court of appeals affirmed. R. 365-68. While neither court discussed or held that Mr. Blanke's existing convictions are sex offenses or otherwise categorize him as a sex offender, this Court can, on certiorari review, "affirm a grant of summary judgment upon any grounds apparent in the record." *Park v. Stanford*, 2011 UT 41, ¶ 27, 258 P.3d 566; *see also Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158 (stating well-settled rule that an

appellate court may affirm the judgment appealed from "on any legal ground or theory apparent on the record, . . . and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court"). And Mr. Blanke's prior convictions are indisputably apparent in the record and were described as undisputed facts by the district court. R. 320 (identifying Mr. Blanke's convictions for attempted child kidnapping, kidnapping, and distribution of pornographic material).

III. The Board's Decision Did Not Require a *Neese* Hearing for Mr. Blanke.

Mr. Blanke argues that regardless of whether child kidnapping is a sex offense, the Board owed him a *Neese* hearing because it essentially determined that he committed other unconvicted sex offenses upon which the Board based its decision(s). Pet. Br. at 19-22. But the argument suffers from several flaws.

First, Mr. Blanke mischaracterizes the Board's decisions by trying to put others' words in the Board's mouth. To support his view of the Board's 2012 decision, for instance, Mr. Blanke quotes only the hearing officer's statements, Pet. Br. at 21, even though the hearing officer expressly stated he had "no idea what [the Board's] gonna do," R. 188, including when the Board might schedule another hearing. R. 189. Similarly, Mr. Blanke relies

only on his psychosexual evaluation to support his view of the Board's 2018 decision. Pet. Br. at 21-22.[6]

But the Board never adopted the hearing officer's statements[7] much less the psychosexual evaluation. Instead, the Board issued its own decisions based on its own reasoning. R. 191, 193, Pet. Br., Add. G. And those decisions don't particularly support Mr. Blanke's argument that the Board "was fixated" on Blanke's unconvicted sexual misconduct and based its decision on those acts. Aplt. Br. at 20. Indeed, the Board's rationale sheet for its 2018 decision expressly states that Mr. Blanke's crimes of conviction were considered sex offenses at the time he pled guilty. Pet. Br., Add G.

Second, even if the Board's decision relied on an unconvicted sexual offense, it wouldn't necessitate a *Neese* hearing. Mr. Blanke repeatedly admitted—in his presentence report and before the Board—that he had sex with his minor kidnapping victim. At a minimum, that's statutory rape. As

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[6] Mr. Blanke claims he never would have agreed to the evaluation had he known the evaluator worked for the Utah State Prison. Pet. Br. at 21-22. But even after learning that fact, he declined an offer to rescind his consent to the evaluation and just wanted to know the results. Pet. Br., Add. D at 5.

[7] Mr. Blanke asserts the Board rendered its decision the same day as the 2012 hearing, Pet. Br. at 21, as if to suggest that the Board merely rubber-stamped the hearing officer's recommendations and views without any independent analysis of their own. But the Board actually issued its decision one week after the hearing. R. 191-93.

noted above, the Board was well within its authority to consider those record facts and did not need to give Mr. Blanke additional *Neese* procedures just because he later tried to change his story.

Under the facts of this case, the due process concerns—reducing the risk of error and promoting the perception of fairness— that motivated additional procedures in *Neese* are not implicated here. *Neese*, 2017 UT 89, ¶¶ 24, 28. As noted, Mr. Neese's situation was far different than Mr. Blanke's. Mr. Neese denied committing the alleged sexual offense, had been unsuccessfully taken to trial on the offense, and then had specifically bargained away any culpability for the sex offense in plea negotiations for crimes (obstruction of justice, theft, and burglary) that were logically unrelated to the alleged sex offense, and had offered a plausible excuse for the sex crime accusation at his parole hearings. *Id.* ¶¶ 2, 27, 32, 34. These unique facts prompted the Court to hold that the risk of error was too high and the perception of fairness too low for the Board to determine Mr. Neese had committed the unconvicted sex offense without first affording him additional due process to defend against the allegation. *Id.* ¶¶ 25-48.

But *Neese* does not require its additional requirements for every hearing where the Board considers unconvicted sex offenses. In fact, the Court distinguished Mr. Neese's case "from those instances where the Parole Board is reviewing presumptively reliable court and disciplinary files or

otherwise taking into account undisputed background facts about the inmate or his victim." *Id.* ¶ 29. That's essentially what happened here (to whatever extent the Board relied on the unconvicted offenses). Again, Mr. Blanke admitted to sexual misconduct--statutory rape at the least--in his presentence report and his 2006 parole hearing. He did not deny this misconduct--sex with a minor--in his 2012 hearing even if he arguably denied raping the victim.

This puts Mr. Blanke on very different footing than Mr. Neese. Mr. Blanke has not consistently denied the sexual misconduct, he was never unsuccessfully tried for it (and avoided trial only because the statute of limitations had run), he did not specifically plead to other unrelated crimes to avoid liability for the sexual offense(s), and the alleged sex offense is not logically unrelated to the crimes for which he was convicted. The Board would not have had to sort through conflicting or unsupported, unreliable facts to conclude that Mr. Blanke had sex with a minor. The Board simply had to rely on a presumptively and legally reliable presentence report and Mr. Blanke's own repeated admissions to the Board. There is no risk of error or reasonable perception of unfairness here. Nor does the Board's decision based on this record undermine sentence uniformity, rational plea bargaining, or good prison behavior. *Neese,* 2017 UT 89, ¶ 32-34. So no *Neese* hearing is required.

Conclusion

Based on the foregoing, this Court should affirm the court of appeals' decision.

Respectfully submitted,

s/ Brent A. Burnett
Brent A. Burnett
Assistant Solicitor General
Counsel for Respondent

Certificate of Compliance

1. This brief complies with the type-volume limitations of Utah Rule of Appellate Procedure 24(g) because it contains 8,332 words, excluding the table of contents, table of authorities, addendum, and certificates of counsel.

2. This brief complies with the typeface requirements of Utah Rule of Appellate Procedure 27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Century Schoolbook.

3. This brief complies with Rule 21 of the Utah Rules of Appellate Procedure because it does not contain any non-public information.

s/ Brent A. Burnett

Certificate of Service

I certify that on June 5, 2019, I caused a copy of the foregoing Brief of Respondent to be sent by e-mail to the following:

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Addenda

Addendum A - Order of June 20, 2018

Addendum B - Sentencing Hearing *State v. Blanke*, Case No. 021910838

Addendum C – Addendum C, Sex Offense Columns to the Guidelines

Addendum D – *State v. Blanke*, 2005 UT App 259U

“Addendum A”

IN THE SUPREME COURT OF THE STATE OF UTAH

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Kevin Blanke,

Petitioner,

v. Case No. 20160766-SC

Utah Board of Pardons,

Respondent.

ORDER

In orders dated December 19, 2016, and January 3, 2018, this Court granted Petitioner's petition for certiorari. On April 18, 2018, the Court requested that the parties submit letters suggesting the issues for review. Having reviewed those letters, the Court now requests that the parties brief the following question:

Whether the Board of Pardons and Parole is required to comply with the due process standards articulated in Neese v. Board of Pardons, 2017 UT 89, under the circumstances presented by this case.

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 whole

would obviate any requirement that the Board provide the additional due process set forth in Neese.

The Clerk of Court will notify the parties of the schedule for briefing.

FOR THE COURT:

June 20, 2018
Date

Thomas R. Lee
Associate Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2018, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

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By _____
Kimberly Shafer
Judicial Assistant

Case No. 20160766
District Court No. 150902967

“Addendum B”

20040138-CA

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH, WEST VALLEY DEPARTMENT

-o0o-

STATE OF UTAH,	)	
	)	
Plaintiff,	)	Case No. 021910838
	)	
vs.	)	SENTENCING
	)	
KEVIN R. BLANKE,	)	(Videotape Proceedings)
	)	
Defendant.	)	

-o0o-

BE IT REMEMBERED that on the 2nd day of February, 2004, commencing at the hour of 10:06 a.m., the above-entitled matter came on for hearing before the HONORABLE ROBIN W. REESE, sitting as Judge in the above-named Court for the purpose of this cause, and that the following videotape proceedings were had.

-o0o-

A P P E A R A N C E S

For the State:

JOY E. NATALE
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District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111

For the Defendant:

JULIE GEORGE
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Wilde & Lish
32 Exchange Place, #101
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P R O C E E D I N G S

MS. GEORGE: Your Honor, I'm ready on Mr. Blanke for sentencing.

THE COURT: I'll call that case.

Come right up here, sir. Are you Kevin Blanke?

MR. BLANKE: Yes, your Honor.

THE COURT: All right. Counsel, I've received your sentence memorandum. Do you--are you prepared to go forward with sentencing today?

MS. GEORGE: Your Honor, I am. We do have one brief modification to that, which is that Mr. Blanke would add as an objection, that he would like the updated pre-sentence report to take out the statement that he raped and sodomized the victim. He believes there's no physical evidence of that and believes that that should not be in the report.

THE COURT: Let's see, that is in--on, rather--

MS. GEORGE: In the factual statement.

THE COURT: Oh, okay. On Page 2.

MS. GEORGE: Yes, your Honor. And as I state in my memorandum, I don't believe the earlier report should be included. I understand that what--what the Court's looking at is essentially an addendum to that earlier report. And so although I understand A P & P would like to save some time in going through, recreating the whole report, my concern is that

by incorporating the prior victim's statement and information and all of that in this one, it's prejudicial and I don't believe it's necessary. I think that the Court can take a look at the matrix from the earlier one and incorporate that in the Form 4 in looking at what sentence to impose.

And then Mr. Blanke would like to have the Court impose--if the Court's ready for this argument, time to run concurrent. Your Honor, he would submit to the Court that he would be willing to waive any of his appellate rights as to his motion to withdraw the plea that this Court heard and any appellate rights from sentencing if the Court would run the time concurrent. He has the one to 15 sentence in this case and then he has the five to life in the earlier case. Even running that concurrent will enhance the five to life, and obviously, as this Court knows, the board, based on the nature of the cases, will not likely parole him for some time. And he would ask the Court to consider concurrent time.

The one argument in support of that, your Honor, is that the case that is currently before you for sentencing occurred back in 1997, so it pre-dates the case that he was sentenced to last time.

In discussing this with the prosecution, their concern with that, even though the--this was a prior crime, their concern is that Mr. Blanke was on Federal probation at that time, and they believe that that's sufficient to enhance

this to make it run consecutive under State statute.

I would submit that I don't believe the State statute indicates Federal probation is a basis for it and there--and when this case stems from a 1997 incident and pre-dates his prior conviction, that he is eligible to have this Court run them concurrent.

THE COURT: So, in other words, you're--you're arguing that it's not mandatory that they be run consecutive?

MS. GEORGE: Yes, your Honor.

THE COURT: But I have the option?

MS. GEORGE: Yes, sir.

THE COURT: All right.

Counsel for the State, comments on any of those requests or recommendations of your own?

MS. NATALE: Your Honor, I will start with the--the last thing that Ms. George addressed. The statute, I believe, says that the Court shall impose consecutive sentences when the person is either on probation or parole. It doesn't distinguish between State or Federal probation or parole.

I would submit that it would cover both and our recommendation, obviously, is going to be that the Court impose these terms consecutively.

I do have several comments to make, but I know the victim would also like to address the Court, so I will allow her to do that first.

THE COURT: But what about the other points, before we get to that--

MS. NATALE: Okay.

THE COURT: --about the striking the language on Page 2, that the victim was raped and sodomized and also, not including the previous pre-sentence report prepared for Judge Hanson and dated January 28th, 2003?

MS. NATALE: Your Honor, with respect to the statement that the victim was raped and sodomized, that--that--that has been her testimony and her statement throughout the course of this case. And that is accurately what's reflected in the police reports.

I believe that this section of the pre-sentence report that addresses a factual summary of the offense is simply a summary of what's on the police reports. And I don't believe that that is inaccurate, despite the fact that Mr. Blanke may now deny that that's what he did.

I don't think that that statement is being subscribed to him, but simply what was reported, so I do believe that is appropriate to leave that.

With respect to the other pre-sentence report being attached, I think it certainly should be attached. I think that the Board of Parole and Pardons should have that additional information on Mr. Blanke. In addition, the fact that this was an addendum necessarily means that much of the

information that is normally included in a pre-sentence report has been omitted, because it was prepared earlier. And so, in terms of not duplicating the report, that's why it's been attached.

I do believe it is relevant for the board to consider in determining how long to keep Mr. Blanke in prison.

THE COURT: Okay. Now, I--Counsel, I'm going to give the complaining witness an opportunity to speak. And I'd ask maybe if we have Mr. Blanke moved over to this part of the courtroom.

Counsel, what is the person's name that will be speaking today?

MS. NATALE: Your Honor, her name is [redacted].

THE COURT: All right. [redacted] if you'd like to, you can come forward, please.

And [redacted] just come up right here to the microphone.

Start by telling me your whole name.

[redacted]

THE COURT: Okay. Now, this is the time for sentencing for Mr. Blanke and you have the right to tell me what you think ought to happen today as far as sentencing goes. Go ahead.

[redacted] I would like him to be sentenced to prison for the rest of his life, consecutively. If he ever

gets out again, I won't feel safe. Sorry. He should not be free ever again and if he is, he'll probably do the same thing and I won't feel safe. He--he--he terrorized me. When he kidnapped me, he didn't just--he--he chased me down in his truck and forced me to go with him and he threatened to kill me. I thought I was going to die. My life pretty much flashed before my eyes. I thought I'd never see my friends of family members again.

He raped me, I had to--after he let me go, he told me if I told anybody, that--that he would track me down and kill me, if I--if I told the cops or anybody, that he would come and find me and he has connections and he'll find me and kill me.

I--I've been living in fear thinking--you know, looking behind my back. I'm paranoid to go places in public by myself. I've been having nightmares--I couldn't sleep for--for months. I was afraid just--just living in fear. I--it's hard to explain.

He needs to--he needs to be in prison for what he did to me. I just--please give him the maximum sentence you can. He--I don't think he's even sorry for what he did.

I--

THE COURT: All right, ma'am.

[redacted] I don't know what to say.

THE COURT: Well, that's fine. Are you finished?

[redacted] Yes.

THE COURT: All right. Thank you. You can step back.

Mr. Blanke and Counsel come back up.

Counsel, anything further? Or of course if Mr. Blanke wants to speak, he has that right as well.

MS. GEORGE: Yes, your Honor. I would ask that the Court allow Mr. Blanke, if he wishes to address the Court, provide anything for the record. And the reasons for that are stated in my sentencing memorandum. I want to make sure that he has full opportunity to let the Court know about any objections he has to the pre-sentence report, any concerns he has about the matrix and any--any figures are addressed in there, and any other information he believes the Court needs to know in order to impose sentence.

THE COURT: All right. I will--go ahead, Mr. Blanke, if you have anything to say.

MR. BLANKE: That's all right, your Honor. I'll just be sentenced and just do my time.

THE COURT: All right. Everyone submit the matter then?

MS. GEORGE: Yes.

MS. NATALE: Your Honor, I do have a few additional comments I'd like to make.

THE COURT: Oh. I see. Go ahead.

MS. NATALE: I'm sorry.

THE COURT: Uh huh.

MS. NATALE: Your Honor, I think you can see from [redacted] statements today, that this is still a very painful and traumatic event in her life. And this happened in 1997. It's been nearly six years that this case has been ongoing. She still is suffering tremendously with the nightmares, with the feelings that--that Mr. Blanke is going to come out and get her, or fulfill the threats that he did make to her when she was kidnapped.

I think it's--that [redacted] actually hit the nail on the head when she said that she didn't sense any remorse or the--the fact that Mr. Blanke seems sorry. He's made no apologies today, he's accepted little responsibility in his pre-sentence report, for either the kidnapping or the rape. And he says of himself that he's not a violent person; but I think that's contradicted not only by his behavior, but by his criminal record.

I would ask you to impose the maximum prison sentence and to run it consecutive to his other conviction.

THE COURT: All right.

MS. NATALE: Thank you.

THE COURT: Now, again, Counsel and Mr. Blanke, the last word; anything further?

MS. GEORGE: Just in response to that real quickly,

your Honor. The--the issue of violence, the Court can see from his prior conviction record that crimes of violence are not in there and if you look at the factual information in the last conviction, which is now a part of his pre-sentence report, violence was not an issue there.

So, we would ask the Court to consider the fact that the first time violence comes into play in any allegation against Mr. Blanke is in this case.

THE COURT: All right. Mr. Blanke, on the charge of kidnapping, it is a second-degree felony, the maximum sentence could be one to 15 years in the State Prison. I'll impose that. And also order that you pay full and complete restitution.

I'll order that the sentence that I just imposed run consecutively to or on top of, in addition to the sentences that you're already serving. In reading this report, I'm convinced that you're a threat to our community and need to be incarcerated.

In fact, Mr. Blanke, just so that you'll know, I'll be up front and fair in telling you now, it's my intention to write a letter to the board and ask them to hold you there just as long as the guidelines that they have or the law would allow them to hold you.

So, one to 15 years to run consecutively and then payment of full and complete restitution. All right.

Follow the officer.

MS. GEORGE: Your Honor, and for the record, this was an L.D.A. conflicts case and I believe that Mr. Blanke would like to appeal. I will file a notice of appeal and then forward the case back because I know they have an appellate division that will pursue that. I just want to make sure that if for some reason there's a delay in pursuing that, that the Court's aware that Mr. Blanke does want to appeal and--and I will try to get the notice in.

THE COURT: He--he can certainly exercise the legal rights that he has, Counsel. Thank you.

(Whereupon, this hearing was concluded.)

* * *

TRANSCRIBER'S CERTIFICATE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, Toni Frye, do hereby certify:

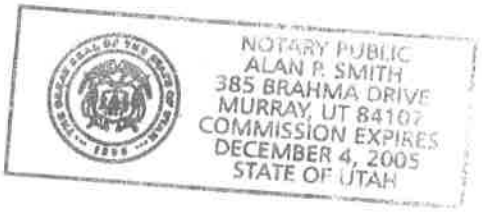
That I am a transcriber for Alan P. Smith, Certified Shorthand Reporter and a Certified Court Transcriber of Tape Recorded Court Proceedings; that I received an electronically recorded videotape of the within matter and under his supervision have transcribed the same into typewriting, and the foregoing pages, numbered from 1 to 11, inclusive, to the best of my ability constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 25th day of May, 2004.

Toni Frye
Transcriber

Subscribed and sworn to before me this 25th day of May, 2004.



Alan P. Smith
Notary Public

(S E A L)

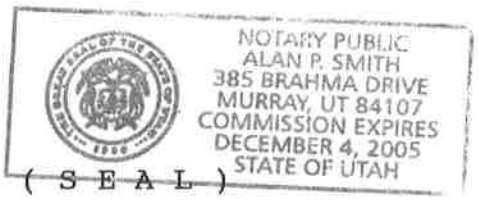
REPORTER'S CERTIFICATE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, Alan P. Smith, Certified Shorthand Reporter, Notary Public and a Certified Court Transcriber of Tape Recorded Court Proceedings within and for the State of Utah, do certify that I received an electronically recorded videotape of the within matter and caused the same to be transcribed into typewriting, and that the foregoing pages, numbered from 1 to 11, inclusive, to the best of my knowledge, constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 29th day of May, 2004.



(S E A L)

Alan P. Smith
Notary Public

“Addendum C”

ADDENDUM C

Categorization of Sex Offenses

Sex Offense Columns

Sex offenses are categorized by a letter, A through J, which corresponds with the appropriate crime category column on the sex offender matrix (Form 3). To find the appropriate crime category column on the sex offender matrix, simply find the column letter matching the letter indicated on this list. Unlike the categorization listing for general offenses, the sex offense category listing provides the specific column on the matrix, not simply the general category (*murder, death, person, possession only*). Therefore, the sex offender category listing is more specific than the general listing and includes inchoate offenses: attempt, conspiracy, and solicitation. Ordinarily, inchoate offenses are penalized at one level lower than the completed offense, e.g., 2nd degree felony *Forcible Sexual Abuse* is lowered to 3rd degree felony *Attempted Forcible Sexual Abuse.* See Utah Code Ann. § 76-4-102. However, within the sex offenses there are a number of exceptions to this general rule. For example, *Rape of a Child* is a 1st degree felony with mandatory prison of 25 years to life. *Attempted Rape of a Child* is not a 2nd degree felony; rather it is a 1st degree felony with mandatory prison and an indeterminate range of 15 years to life. *Conspiracy to Commit Rape of a Child*, on the other hand, is a 1st degree felony with no mandatory prison and indeterminate range of 3 years to life while *Solicitation to Commit Rape of a Child* is a 1st degree felony with mandatory prison and an indeterminate range of 15 years to life. Due to these distinctions between some sex offenses, regularly refer to the following listing to assure that the correct crime category column is used when calculating the guidelines recommendation

Code Citation	Description	Matrix Column
76-4-401	Enticing a minor over the internet – first degree felony	E
76-4-401	Enticing a minor over the internet – second degree felony	H
76-4-401	Enticing a minor over the internet – third degree felony	I
76-4-401	Enticing a minor over the internet – class A misdemeanor	J
76-5-301.1	Child kidnapping	A, B, or C
76-5-301.1 [1]	Attempted child kidnapping	G
76-5-301.1 [3]	Conspiracy to commit child kidnapping	G
76-5-301.1	Solicitation to commit child kidnapping	H
76-5-302	Aggravated kidnapping	A, B, or C
76-5-302	Attempt, conspiracy, or solicitation to commit aggravated kidnapping	H
76-5-401	Unlawful sexual activity with a minor	I
76-5-401	Attempt, conspiracy, or solicitation to commit unlawful sexual activity with a minor	J
76-5-401.1	Sexual abuse of a minor	J
76-5-401.1(3)(b)	Sexual abuse of a minor student	I
76-5-401.2	Unlawful sexual conduct with a 16 or 17 year old	I
76-5-401.2	Attempt, conspiracy, or solicitation to commit unlawful sexual conduct with a 16 or 17 year old	J
76-5-401.2(5)(b)	Unlawful sexual conduct with a 16 or 17 year old student	I
76-5-402	Rape	F (A, B, or C)
76-5-402 [1]	Attempted rape	G
76-5-402 [3]	Conspiracy to commit rape	G
76-5-402	Solicitation to commit rape	H
76-5-402.1	Rape of a child	25 Years- Life
76-5-402.1 [1, 2]	Attempted rape of a child	A, B, C or E
76-5-402.1 [3]	Conspiracy to commit rape of a child	G
76-5-402.1	Solicitation to commit rape of a child	A, B, C, or E
76-5-402.2	Object rape	F (A, B, or C)
76-5-402.2 [1]	Attempted object rape	G
76-5-402.2 [3]	Conspiracy to commit object rape	G
76-5-402.2	Solicitation to commit object rape	H
76-5-402.3	Object rape of a child	25 Years- Life
76-5-402.3 [1, 2]	Attempted rape of a child	A, B, C, or E

76-5-402.3 [3]	Conspiracy to commit rape of a child	G
76-5-402.3	Solicitation to commit rape of a child	A, B, C, or E
76-5-403(2)	Forcible sodomy	F (A, B, or C)
76-5-403(2) [1]	Attempted forcible sodomy	G
76-5-403(2) [3]	Conspiracy to commit forcible sodomy	G
76-5-403(2)	Solicitation to commit forcible sodomy	H
76-5-403.1	Sodomy on a child	25 Years- Life
76-5-403.1 [1, 2]	Attempted sodomy on a child	A, B, C, or E
76-5-403.1 [3]	Conspiracy to commit sodomy on a child	G
76-5-403.1	Solicitation to commit sodomy on a child	A, B, C, or E
76-5-404	Forcible sexual abuse	A, H
76-5-404	Attempt, conspiracy, or solicitation to commit forcible sex. abuse	I
76-5-404.1	Aggravated sexual abuse of a child	A, B, or C
76-5-404.1 [1]	Attempted aggravated sexual abuse of a child	G
76-5-404.1 [3]	Conspiracy to commit aggravated sexual abuse of a child	G
76-5-404.1	Solicitation to commit aggravated sexual abuse of a child	H
76-5-404.1	Sexual abuse of a child	H
76-5-404.1	Attempt, conspiracy, or solicitation to commit sex. abuse of child	I
76-5-405	Aggravated sexual assault	A, B, or C
76-5-405 [1]	Attempted aggravated sexual assault	G
76-5-405 [3]	Conspiracy to commit aggravated sexual assault	G
76-5-405	Solicitation to commit aggravated sexual assault	H
76-5-412(2)	Custodial sexual relations (victim is 18 or older)	I
76-5-412(2)	Attempt, conspiracy, or solicitation to commit custodial sexual relations (victim is 18 or older)	J
76-5-412(2)	Custodial sexual relations (victim is younger than 18)	H
76-5-412(2)	Attempt, conspiracy, or solicitation to commit custodial sexual relations (victim is younger than 18)	I

76-5-412(4)	Custodial sexual misconduct (victim is 18 or older)	J
76-5-412(4)	Custodial sexual misconduct (victim is younger than 18)	I
76-5-412(4)	Attempt, conspiracy, or solicitation to commit custodial sexual misconduct (victim is younger than 18)	J
76-5-413(2)	Custodial sexual relations with a youth receiving state services (victim is 18 or older)	I
76-5-413(2)	Attempt, conspiracy, or solicitation to commit custodial sexual relations with a youth receiving state services (victim is 18 or older)	J
76-5-413(2)	Custodial sexual relations with a youth receiving state services (victim is younger than 18)	H
76-5-413(2)	Attempt, conspiracy, or solicitation to commit custodial sexual relations with a youth receiving state services (victim is younger than 18)	I
76-5-413(4)	Custodial sexual misconduct with a youth receiving state services (victim is 18 or older)	J
76-5-413(4)	Custodial sexual misconduct with a youth receiving state services (victim is younger than 18)	I
76-5-413(4)	Attempt, conspiracy, or solicitation to commit custodial sexual misconduct with a youth receiving state services (victim is younger than 18)	J

76-5b-201	Sexual exploitation of a minor	H
76-5b-201	Attempt, conspiracy, or solicitation to commit sexual exploitation of a minor	I
76-5b-202	Sexual exploitation of a vulnerable adult	I
76-7-102	Incest	I
76-7-102	Attempt, conspiracy, or solicitation to commit incest	J
76-9-702	Lewdness	I
76-9-702(3)	Sexual battery	J
76-9-702.5	Lewdness involving a child	I or J
76-9-702.7	Voyeurism	I or J
76-10-1206	Dealing in Materials Harmful to Minor by Person 18+	I or J
76-10-1306	Aggravated exploitation of prostitution	F or H
76-10-1306	Attempt, conspiracy, or solicitation to commit aggravated exploitation prostitution	I or H

[1] See 76-4-102(2)
[2] See 76-3-406(10)
[3] See 76-4-202(2)

“Addendum D”

IN THE UTAH COURT OF APPEALS

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State of Utah,

Plaintiff and Appellee,

v.

Kevin R. Blanke,

Defendant and Appellant.

MEMORANDUM DECISION

(Not For Official Publication)

Case No. 20040134-CA

F I L E D

(June 3, 2005)

2005 UT App 259

Third District, Salt Lake Department, 021910838

The Honorable Robin W. Reese

Attorneys: Margaret P. Lindsay, Orem, and Patrick V. Lindsay, Provo, for Appellant

Mark L. Shurtleff and Karen A. Klucznik, Salt Lake City, for Appellee

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Before Judges Billings, Greenwood, and Jackson.

JACKSON, Judge:

Kevin R. Blanke appeals the trial court's denial of his motion to withdraw his guilty plea, claiming he received ineffective assistance of counsel at the motion hearing. We affirm.

Blanke asserts that he has been twice subject to ineffective assistance of counsel. He claims that his attorney at the plea hearing, Michael Peterson, incorrectly advised him that the State possessed DNA evidence against him and, further, that if he pleaded guilty he could later raise a statute of limitations argument on appeal. After entering a guilty plea, Blanke then moved to withdraw his plea on grounds that Peterson provided ineffective assistance of counsel. During the motion hearing, Blanke claims that Julie George, his new attorney, failed to call Blanke as a witness and did not introduce into evidence his signed affidavit. The trial court denied his motion to withdraw and now, on appeal, Blanke claims the trial court's denial should be reversed because George also deprived him of effective assistance of counsel. This is an issue which we review for correctness. See State v. Rojas-Martinez, 2003 UT App 203,¶5, 73 P.3d 967.

"'[A]n individual has been denied the effective assistance of counsel if: (1) counsel's performance was deficient below an objective standard of reasonable professional judgment, and (2) counsel's performance prejudiced the defendant.'" Id. at ¶6 (citation omitted). The prejudice requirement is met with "a showing 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at ¶11 (citation omitted). The second prong is determinative in this case.

First, we agree with the trial court that any incorrect representation by Peterson regarding Blanke's right to appeal his statute of limitations claim would be remedied by the trial court's colloquy at the plea hearing. See State v. Dean, 2004 UT 63,¶12, 95 P.3d 276 ("When reviewing the trial court's denial of a defendant's motion to withdraw a guilty plea, the reviewing court may consider the record of the plea proceedings, including the plea colloquy . . . ."). At that hearing Blanke stated he understood that his guilty plea would preclude any such appeal.(1) This, combined with the fact that at the motion hearing George adequately summarized the evidence on this issue and read into evidence a letter from Peterson to Blanke,(2) leads us to conclude that Blanke's personal testimony or affidavit would likely not have changed the outcome.

Blanke disagrees with this conclusion and refers us to State v. Rojas-Martinez, 2003 UT App 203, for the proposition that an attorney's

affirmative misrepresentation regarding the consequences of a guilty plea supercedes the court's clarifications made during the plea colloquy. However, Rojas-Martinez does not state such a broad rule. In that case, the defendant's attorney misadvised the defendant that if he pleaded guilty he "might not" be deported. Id. at ¶¶2, 11. At the plea hearing, the court conducted a plea colloquy with the defendant, but the facts indicate that the court did not discuss the possibility of deportation, see id. at ¶3, which is not required as part of the colloquy, see Utah R. Crim. P. 11(e). After the plea colloquy, the defendant pleaded guilty, was sentenced, and moved to withdraw his guilty plea. See Rojas-Martinez, 2003 UT App 203 at ¶¶3-4. The court held that because the defendant was made to rely on his attorney's affirmative misrepresentation regarding the effect of his guilty plea, he had not received effective assistance of counsel. See id. at ¶¶10-11. Given these facts, Rojas-Martinez does not cause us to alter our conclusion in Blanke's case, where the court specifically explained to Blanke in the plea colloquy that he would not be able to appeal the statute of limitations claim.

Second, we consider Blanke's assertion that at the motion hearing George failed to present Blanke's signed affidavit and to call him as a witness to support his claim that Peterson had misinformed him about the State's DNA evidence. At the motion hearing, George summarized the contents of Blanke's affidavit for the court, stating that

on November 5th, [Blanke] was concerned that Mr. Peterson had misled him about the DNA, misled him about the discovery, misled him about the nature of the case and[,] therefore, had duped him into taking the plea against his best interest.

That on November 11th, he wrote Michael Peterson to ask for the DNA evidence report and that that had not been provided to him.

And then he also asks in the petition to ask if he can have DNA evidence tested and any information that was not tested, or any evidence not tested, if he could ask the court to test that.

The judge then reiterated Blanke's argument in detail, stating

[Blanke's] attorney told him that the State had some evidence, there had been DNA tests performed on the victim . . . that tied him to the crime.

That, before he entered the guilty plea, he received police reports or whatever evidence may have been turned over to him, but he didn't have a chance to read it before he entered the plea; however, at some point, he read did read those documents. He determined for himself that in fact, his attorney had lied to him, that there was no such evidence that the State had available, no DNA testing. And therefore, he now feels that he's been duped by his attorney, which Ms. George has said, and wishes to withdraw the guilty plea.

We conclude that these statements by counsel and the judge indicate that Blanke's evidence was sufficiently before the court. Blanke did not proffer any additional facts at the hearing[(3)] and has not done so on appeal.[(4)] Thus, to the extent that he claims additional facts exist, he has failed to identify them, thereby rendering the record "inadequate to enable us to consider this claim." State v. Bradley, 2002 UT App 348,¶65, 57 P.3d 1139 (refusing to consider claim of ineffective assistance of counsel when defendant "does not offer any evidence about who [the] potential witnesses are or what their testimony would entail"). Accordingly, we cannot conclude that Blanke's personal testimony or a verbatim reading of the affidavit would have, with
reasonable probability, caused the trial court to grant Blanke's motion.

We affirm.

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Norman H. Jackson, Judge

WE CONCUR:

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Judith M. Billings,

Presiding Judge

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Pamela T. Greenwood, Judge

1. The following exchange took place during the September 15, 2003 plea hearing:

THE COURT: If you plead guilty today, Mr. Blanke, you're giving up your right to challenge that, right to appeal; in other words, once you plead guilty today, you'll no longer be able to--to argue that the statute of limitations has run, that the State can't prosecute you. Do you understand that?

MR. BLANKE: Yes.

THE COURT: Are you willing to give up the right to file that appeal or to make that challenge?

MR. BLANKE: Yes, your Honor.

2. At the motion hearing George read into evidence the relevant portions of a letter sent from Peterson to Blanke after the plea hearing to clarify his counsel regarding the statute of limitations claim.

3. We note that during the hearing, George offered Blanke the opportunity to present any evidence she had overlooked. After summarizing Blanke's position, the following dialogue ensued:

THE COURT: Did you have anything further counsel?

MS. GEORGE: I have nothing further unless my client (inaudible--coughing) for the record. Is there anything else you want to submit supporting that?

MR. BLANKE: Those papers.

George then summarized Blanke's affidavit, as described above. The record, however, never indicates that Blanke sought to admit his personal testimony.

4. On appeal, Blanke bears the burden of assuring the trial record is adequate, see State v. Litherland, 2000 UT 76,¶16, 12 P.3d 92, and may move to include any "nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective," Utah R. App. P. 23B(a).