

2009

# William Sherratt v. Utah Board of Pardons : Brief of Appellant

Utah Court of Appeals

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FILED  
UTAH APPELLATE COURTS  
JUL 21 2009  
LODGED

IN THE UTAH COURT OF APPEALS

William Shearrit,  
Appellant, Petitioner,  
prose.,

Appellants  
Brief on  
Appeal

vs.

Utah Board of Pardons, et al.,  
Appellee, Respondents.

This is an Appeal from Three Third  
District Judge Orders: Argued in  
#5 Below:

5 Judge Denise Lindberg's dismissal  
of a 65 B Petition; and 2 Motions to  
Recuse; and a 60(6)(4) motion for  
void jurisdiction - *void ab initio*; and  
a Quo Warranto Motion; \*

5 - 2. Judge Robert K Hilder, 2 Motion  
to Recuse denials; \*

5 - 3. Judge Paul Mangham's denial  
of a 60(6)(3) Fraud Motion; \*

\* all captioned within this case, ~~and~~  
when the 60(6)(3) Motion was wrongly  
placed in this case by Third District  
Court; even though the Fraud complained  
of arose during this case.

FILED  
UTAH APPELLATE COURTS  
JUL 21 2009

UTAH ADVANCE GENERAL  
1408300S 60541  
SLC, UT 84114

- 1- Parties not named in caption: UTAH STATE  
PRISON  
2 & 3 follow
- 4- The Utah Court of Appeals was assigned  
to officiate over this appeal by order  
of the Utah Supreme Court, no objection  
being filed, pursuant to UTAH CODE 78-2  
and Rule 42(c) Utah Rules of App. Procedure.

### 5-1- Statement of Issues AND FACTS.

9) District Judge Lindberg erred, or abused her discretion, when she dismissed the Petition on its merits without holding an Evidentiary Hearing to complete the record?

### Standards:

Matters of law reviewed for correctness,  
abuse of discretion reviewed giving no  
deference to decision below.

Law: ~~See~~ Lucco v. U.S. Prison, 841  
P2d 1230 (Ut. App. 1992; Rule  
65 B; Reno v. U.S. B.O.P.,  
904 P2d 677 (Utah 1995);  
Foore v. U.S. B.O.P., 808 P2d 734 (Ut. 1991);  
Curtis v. U.S. B.O.P., 870 P2d 958 (Ut. App. 1994);  
Utah Const. Art. 1, Sec 7, U.S. Const. Amendments 5 & 14.

b)- District Judge Lindberg denied justice to Appellant by waiting over 2 years to complete process of ab. . . .

Standard of Review: matters of law reviewed for correctness, and given no deference to the order below.

Laws: Utah Const. Art. 1, Sec 11; Art. 1, Sec 7; U.R.Civ.P. 65B; U.S. Const. Amendments 1, 5 & 14.

- c) Judge Lindberg abused her discretion, or erred in applying law, when she denied the 60(b)(4) motion on November 13, 2006.

Standard of Review: Review matters of law for correctness, giving no deference to ruling below.

Law: State ex rel Cannon v Leary, 646 P2d 727 (Utah 1982); Jones v. Bock, 549 U.S. — (2007) n.2; Utah Const. Art. 1, Secs 7, 1, 9, 11, 13, 14, 26, 27. U.S. Const. Amendments 1, 4, 5, 8, 14; Utah Code 77-1-2, 3; 77-2-1; 77-3-3; State v Freeman 71 P2d 196 (Utah 1937).

- d) Judge Denise Lindberg erred by law, and abused her discretion, in holding U.S. Supreme Court holdings of Sixth Amendment jury-determined-facts-to-be-used-in-sentencing was inapposite in Utah's indeterminate system.

Standard of Review, review for correctness, giving



no deference to decision below.

Law: U.S. Const. Amend 6; Apprendi v. (2000) New Jersey, 120 S.Ct. 2348; Blakely v. Washington, 124 S.Ct. 2531 (2004); U.S. v. Booker, 125 S.Ct. 738 (2005); U.S. Const. Art. I, sec's 1, 3, 10, and 7.

- c) District Judge Lindberg abused her discretion, and erred in applying law, when she allowed the B.O.P. to change the crime matrix from 66 months to 72 to 104 months, and to then extend the matrix to 104 months without finding any fact requiring increase of sentence, or, if rationale sheet from Board is what was used, allowing factors or elements of crime to be used as aggravators of the same crime.

Standard of review: review for correctness, giving no deference to decision below.

Law: Cunningham v California, 549 U.S. — (2007); Rita v. U.S., 551 U.S. — (2007); Jones v Bock, supra; Booker, supra; Labrum v U.B.O.P., 870 P2d 902 (Utah 1993); Peterson v. B.O.P., 931 P2d 147 (Utah 1997); Neel v. ~~B.O.P.~~ B.O.P., 849 P2d 601 (Utah 1993); Reno v B.O.P., supra; Preece v House, 886 P2d 508 (Utah 1994); Curtis v BOP, 870 P2d 958 (Utah 1994); Utah Const. Art. I, sec 10; Art. I. Sec 7. U.S. Const. Amendments 1 5 6 8 14.

f) District Judge Lindberg abused her discretion, and erred by law, in allowing B.O.P and U. St Prison to ignore, and refuse to investigate, or order to be investigated, Brian Starkey's rape confessions sworn in the Petition and listed in the Board's packet while Starkey was under their direct control at Utah State Prison when he confessed to 14 rapes (which still arguably fell under statute of limitations period allowing charging).

Standard of Review: review for correctness and abuse of discretion, giving no deference to decision below.

Law: 76-5-402; U. Const. Art. 4, Sec 10; Penn, supra; Labaton, supra; 77-27-9-3; Utah Const. Art. 1, Sec 1; Art 1, Sec 2; Art. 1, Sec. 11; U.S. Const. Amendments 1, 5 & 14. Utah Constitution Article 11, Sec. 16, Article VII, Sec. 12.

g) District Judge Lindberg treated Appellant with unnecessary rigor when she denied scrutinizing Starkey's confessions and left Appellant in prison for those crimes; Judge Lindberg knew a sworn accusation existed in the record and the Board files, and Prison records before her.

Standard of review: Review as a matter of law for correctness, giving no deference to the decision below, as a matter of law.  
 Law: Utah Const. Art. 1, Sec 9; 76-5-402; Art. 1, Sec 1; Sec. 7; Sec. 11; Judicial Canons 1, 2 & 3; Utah Const. Article 4, Sec. 10.

h) Judge Lindberg abused her discretion, and misapplied law mandates of double jeopardy and double punishment by allowing the Board to use elements of first degree rape as aggravators to enlarge the sentence after they had been used to establish the type of sentence (here a five-to-life and multiple incidents, using a position of trust) and the sentence matrix set by the trial court.

Standard of review: Review for correctness of law application, deference not to be given trial court rulings.

Law: Utah Constitution Articles 1, Secs. 1, 2, 10, and 18; U.S. Const. Amendments 5, 8 & 14; Rita, Supra; Labrum, Supra.

i) Judge Lindberg erred in law, and abused her discretion when she refused a hearing after State's Answer when claims were

7

Not denied nor countered by respondents  
that Constitutional claims were raised  
in the Petition which by legal mandate  
required a hearing to investigate those  
claims.

Standard of Review: Review for correctness, giving  
no deference to court below's ruling.

Law: U.S. Constitution Amendments 1, 5, 6, 8, 14;  
Utah Const. Art. 1, Sec's. 4, 5, 6, 7, 9, 13, 14,  
10, 11, 23, 26, 28; Price, Supra; Curtis,  
Supra; Labrum, Supra; Reno, Supra; Peterson,  
Supra; Neel, Supra; Jones v Bock, Supra; Apprecht,  
Supra; Blackly, Supra; Borker, Supra; Cunningham, Supra;  
Rien, Supra.

JT District Judge Lindberg erred in law  
application, and abused her discretion, in  
holding Boards acts were within their  
discretion when, <sup>1</sup> They exceeded and changed  
the court matrix, <sup>2</sup> using no fact found by  
a jury, <sup>3</sup> increased their own matrix set (726  
months) to 104 without finding additional facts,  
<sup>4</sup> used failure to access non mandatory  
therapy as aggravation, <sup>5</sup> They denied  
eligibility to parole in part on legal  
appeals and guaranteed process use.

Standard of Review: Review for correctness, giving  
no deference to courts ruling below.

Law: Cunningham, supra; Riva, supra;  
 Apprendi, supra; Blackly, supra; Booker, supra;  
 Larsen v. Torgersen, 862 P2d 1382 (Utah 1993);  
 Labram, supra; Neel, supra; Kern, supra; Utah  
 Const. Art. 1, sec's 1, 7, 10, 11, 9; U.S. Const.  
 Amends 1, 5, 6, 14.

1K.) District Judge Lindberg erred in law  
 application, and abused her discretion, in  
 dismissing Petition without hearing when  
 declaration that Board file was "very  
 inaccurate" was made during hearing and  
 Board never inquired into "what" was  
 inaccurate?

Standard of review: review for correctness, and  
 abuse of discretion, giving no deference to conclusions  
 Law: Curtis, supra; Puccio, supra; Labram, supra;  
 Kern, supra; Foote, supra; Stone v. Casarez,  
 656 P2d 1005 (Utah 1982); Neel, supra;  
 Blackly, supra; Booker, supra; Braunholtz, v.  
~~Supra~~ Inmates of Neb. Pen. C.C., 442 U.S. 1, 13,  
 99 S.Ct. 2100 (1979). Utah Const. Art. 1, Sec 7,  
 U.S. Const. Amends 1, 5, 6, 14.

1.) Judge Lindberg erred by not requiring State  
 to answer Quo Warranto Motion prior to  
 ruling on merits, and then misapplied law mandating  
 of jurisdiction after failing to rule them frivolous  
 and denying a hearing under Rule 65B where they  
 can only be raised.

Standard of Review: Review for correctness, and abuse of discretion, giving no deference to decision. Law: Lucero, Supra; Reno, Supra; Bock, Supra; State v. Sheffield, 146 P 306 (Utah 1915); Cannon, Supra; Freeman, Supra; 41 Am Jur. 2d, Indictments and Informations §§ 2, 4, 7, 10, 14, 15, 19, 20; U. R. Civ. P. 65 B (1), (2), (3), (4); McRae & Deland v. Felch, 665 P2d 404 (Utah 1983); Dean v. Henrich, 975 P2d 946 (Ut. app. 1999); State v. Zoknarakis, 269 P 1006 (Utah 1928); Albrecht v U.S., 219 U.S. 346; Cannon, Supra; F.R. Civ. P. 81 (a) (2); Am. Fire & Cas. v Finn, 341 U.S. 6 (1951); U.S. v. Cheare, 276 F2d 724; Sinalcham v. Makysia Entl., 127 S. Ct. 1184 (2007); Basso v. Uta. P. & L. Co., 495 F2d 906 (10th Cir 1974).

m) - District Judge Lindberg abused her discretion when she held "nothing more was needed to properly invoke the jurisdiction of the court", and she misapplied legal mandates.

Standard of Review: Review for correctness, and abuse of discretion, giving no deference to decision below. Law: Cannon, Supra; 77-2-1; Uta. Const. Art. 1 Secs. 7, 13, 14, 11; U.S. Const. Amendments 4, 5 & 14.

n) ~~But~~ District Judge Lindberg usurped judicial authority, when magistrate Braithwaite had issued the warrant and began a criminal prosecution without

having constitutional authority to do so (which appears on the record here in the Information of case 991500552), and she intruded into the determination of Pennin before her knowing no sworn oath had authorized "judicial authority use" by any court, as it (the prosecution) was void of judicial jurisdiction "ab initio". She didn't use judicial authority that was proper. Standard of Review: Review for correctness matters of law, and give no deference to decision below.

Law & Cannon, *supra*; 77-2-1; 77-3-3; Shethfield, *supra*; Zolantakis, *supra*; U.S. Const. Article 1, Sec's 7, 13, 14; U.S. Const. Amendments 1, 4, 5, 14; U.R.C.P. 65 B Penn, *supra*; Labenn, *supra*.

- 0). District Judge Lindberg erred in using her discretion to dismiss with prejudice the jurisdictional question raised by Cannon v Leary, step 4, requiring sworn Information prior to filing with the court; and in ruling that the Quo Warranto claim is the same as a jurisdictional deficiency; (when Quo Warranto focuses on intruding into judicial authority, usurping judicial authority or unlawfully holding or exercising judicial authority); or That Rule 65 B is not the appropriate vehicle to address these claims.

Standard: review for correctness, giving no deference to the decision below.

Law: U.R. Civ. P. 65 B (c); U.S. Const. Art. I, Sec's, 7, 13, 14, 10, 11. U.S. Const. Amendments 1, 4, 5, 14; Sheffield, supra; Ushy v. City of Independence, 402 P.2d 91 (Colo 1965); Hoyer v. Klappeneich, 28 N.W. 2d 780 (Minn 1947); Zolotarukis, Supra; Swadlow v. Malaysia, Supra. Reno, Supra; Labrum, Supra.

p) District Judge Lindberg abused her discretion, and erred by law, in holding Appellant had caused the misfiling of documents here, when it was Third District Court Staff who made the errors, and Utah Attorney General Office staff who listed improper numbers in their reply asserting a case number and an unsigned court order granting the merger of the cases, and Appellant only replied to those filings in responding.

Standard: review for correctness, giving no deference the decision below.

Law: U.R. Civ. P. 1, 2 & 4; U.S. Const. Art. I, Sec. 7 & 11.

q) District Judge Lindberg erred, and misapplied law, when she held the Board used proper information in setting the original date for hearing when two different commitment orders



(one showing rape of a child) existed in the file, and the Board never identified what info was relied on, nor did the Board remove from the file the wrong one - which means it was used by the Board in 1) setting the date for hearing and 2) setting the new matrix, and setting the rehearing as well.

Standard: Review for correctness, giving no deference the decision below.

Law: Utah Code 77-27-2-(2) (f); Utah Const. Art. 7, ~~Sec. 12~~ Sec. 12; Utah Code 77-27-7-(1). Labrum, supra, Foote, supra; Reno, supra; Greenholts, supra.

r) - District Judge Lindberg erred by law, and abused her discretion, by allowing Board to leave contradicting evidence in file concerning Appellants attempts to enter SOTP Therapy; and then allowing the Board to use that information as an Aggravator when Appellant had tried numerous times to be allowed in the SOTP Therapy.

Standard: Review for correctness giving no deference the decision below.

Law: Utah Const. Article 1, Sec's 7, 10; Article 7, Sec 12; Labrum, supra; Reno supra.

Peterson, Supra; Preece, Supra; Cox, Supra;  
U.S. Const. Amendments 6, 8, 14; 5<sup>th</sup> Greenholtz, Supra.

- s) District Judge Lindberg earned by law,  
and abused her discretion by allowing  
the Board to delay eligibility for parole  
because appellant had exercised his  
Sixth Amendment right of appeal.

Standard: review for correctness or in-  
correctness in decision below.  
Law: U.S. Const. Amendment 6; 6<sup>th</sup> Greenholtz.  
Art. 1 Sec. 7 1 and 12; Greenholtz, Supra.

- t) District Court Judge Lindberg earned,  
and abused her discretion by allowing  
the Board to delay appeal - in prison  
because he had no completed or man-  
datory therapy program that he  
was never eligible to apply for using  
prison, CDC and Board policies.

Standard: Review for correctness, giving  
no deference to the decision below.  
Law: Utah Code 64-9-1(b)(4)(i); Utah  
Const. Article 1, Secs 7, 9; Utah Code 77  
27-9; U.S. Const. Amendments 6, 8 & 14 (Abraham Re.  
Rice Block Board Proc. 4, and Greenholtz, Supra.

- u) District Judge Lindberg earned by law, and

abused her discretion by allowing Board to use "facts" not supported by record (Pages 13, 14 and 16; a plea bargain; rape of a child; Information and Amended Information; failure to request therapy; and lack of programming success) to increase sentence or deny parole eligibility.

Standard: review for correctness, giving no deference the decision below.

Law: U.S. Const. Amend. 6; U.S. Const. Art. I, Secs 7 and 12; Article 7, Sec. 12.

V) - District Judge Lindberg abused her discretion when she allowed the Board to ignore Starkey's rape confession (It was under their custody and supervision at the time of the confession - and criminal culpability was within limitations time-frames) when it was entered under oath and by letter of June 2004; The Board's duty was to make its determination of Petitioner's declaration of innocence based on the circumstances of his individual case. Starkey's confession is a direct attack on Petitioner's individual case circumstances.

Standard: review for correctness and for abuse of discretion.

Local rule since 12-1-11 - Art. I Sec. 7 17

Utah Codes 77-27; 76-5-402;  
UTAH CONST. Article 7, Sec 12; U.S.  
CONST. Amendments 5 + 14.

- W). District Judge Lindberg errand by law,  
and abused her discretion in not applying  
"flagrant abuse of discretion" standard to  
Beards actions, where Beard admitted it did  
not research or sentence Stareys offense.  
to 14 counts of Rape.

Standard: plain error, review for correctness,  
giving no deference decision below.  
Law: U.R.C.P. B; Utah Code 77-27; 76-  
5-402; Utah Const. Art 1, Sec 7 + 11.  
Larson, supra; Preece, supra; Reno, supra.

- X). District Judge Lindberg abused her discretion,  
and errand by not applying "flagrant abuse"  
standard when Beard admissions and denials,  
and Prisons admissions and denials, supported  
claims made by Petitioner.

Standard: review for correctness, plain error,  
abuse of discretion, giving no deference decision  
below.  
Law: Utah Const. Art 1, Sec 7, Sec 1, Sec 9;  
Utah Code 77-27; U.S. Const. Amendments 1, 5, 8, 14,  
6; U.R.C.P. 65 B.

y) - District Judge Lindberg erred in holding, "Boards exercise of authority within [Utah's] statutorily authorized limits does not create a constitutional violation," (pg. 5 decision below, 1<sup>st</sup> para.), where actions of Board fell outside authority in the record before here.

Standard: review for correctness, giving no deference the decision below.

Law: Apprendi, Blakely, Booker, Cunningham, Rita, Supra; U.S. Const. Amend. 6; U.S. Const. Art. I, Sec's 7, 9 & 12; Greenham, Supra.

2) District Judge Lindberg erred in not defeating conflicts in State Law mandates to Federal U.S. Court holdings which clearly and authoritatively state only a jury has the right to determine facts that:

- 1 - will increase a sentence over the standard range (matrix);
- 2 - will set the standard for reviewing the setting of the matrix;
- 3 - only a jury has the right to determine facts a judge may use to set the range, or exceed it, using "reasonableness" standards.

Standard: errors of law reviewed for correctness, giving no deference to decision below.

Law: Apprendi, Blakely, Booker, Cunningham, Rita, Supra; U.S. Const. Article I, Sec 3.

aa) - District Judge Lindberg erred in holding 65 B was improper venue to raise constitutional violations of jurisdiction and due process, especially where those violations appeared in the record before her<sup>1)</sup> in the Bonds file, and <sup>2)</sup> in the court's records before her; and must be raised there.

Standard: review for correctness, giving no deference the decision below.

Law: U.R.Civ.P. 65 B; Utah Code 77-27; U.S. Const. Art. I, Sec 70; U.S. Const. Amendments 1, 5 & 14: 65 B(c)(d).

bb) - District Judge Lindberg erred in holding, "reversal of a conviction and release from incarceration are not available under Rule 65 B.

Standard: review for correctness, giving no deference decision below.

Law: U.R.Civ.P. 65 B; U.S. Const. Art. I, Sec 11, 12, 7.

cc) District Judge Lindberg erred in holding "petitioner had improperly filed Motion to Revoke A-6, when it was

filed by Presiding Judge Hilder for "being more appropriate" in this case; and then Judge Lindberg denying it because it was "improperly" before her at petitioner's responsibility.

Standard's review for correctness, giving no deference the decision below.

Law: Utah Code 78-1; UTA Const. Art. 1, Sec's 7, 10, 11.

dd-) District Judge Lindberg erred by law, and abused her discretion in assuming judicial power to decide issues where judicial-power-to-act was not properly invoked below, and records before her clearly showed violation, and it was properly raised.

Standard's review for correctness, giving no deference the decision below.

Law: UT Const. Art. 1, Sec's 13, 14, 7, & 11; Cannon v. Leary, Supra; Sheffeld, Supra; Tolansky, Supra; Swickham, Supra.

ee) District Judge erred in remaining on this case after motion to Recuse was filed showing a 29 year delay of justice caused by the court, and Judge Lindberg.

Standard's review for correctness, giving no deference the decision below.

Law: UT Const Art. 1 Sec's 7 and 11 & U.R.C.P.

63 (a).

ff.) District Judge Lindberg erred and abused her discretion in denying Rule 11 Motion for sanctions on A-G. for lying by omission to the court in their answer to the Motion to Rease; and in allowing A-G. to remain on case when a civil suit (Sherratt v. A-G's Office - Federal case 207-CV-393) was remanded to state court and was pending, and that fact had been verified in court filings here.

Standard's review for correctness, giving no deference the decision below.

Law: U.S. Const. Art. I, Sec. 2, 11; Art. 4 Sec. 10; Ariz. 1, Sec. 1.

gg.) - District Judge Lindberg erred, and abused her discretion, in allowing Board to exercise authority over a criminal conviction's sentence when the Informant's used by the Board showed the trial court had proceeded without a sworn complaint.

Standard's review for plain error, correctness, abuse of discretion giving no deference the decision below.

Law: Cannon, Supra; Labourn, Supra; Renu, Supra; Sheffield, Supra; Tolman, Supra;



Ut. Const. Art. 1, Secs 7, 13, 11, 14; U.  
S. Const. Amendments. 1, 5, 4, 14; U.S. Const.  
Art. 3, Sec 12; Utah Code 77-2-1.

h-h.) District Judge Lindberg erred, or abused  
her discretion in holding "with prejudice"  
standard to claims she refused to verify  
or allow hearing on to establish factual  
basis of, or legal standing for, following  
two motions to recuse and misstating  
responsible parties for "screwed-up"  
filings.

Standard: review for correctness, plain  
error, giving no deference decision below.  
Law: *Lucero, Supra*; U.S. Const. Amend's 1,  
4, 5, 6, 8, & 14; U.S. Const. Art. 1, Sec's,  
1, 3, 7, 9, 10, 11, 12, 13, 14, 18, 24, 25,  
26 and 27.

ii) - The Board of Pardoners actions qualify as  
violations based upon "gross and flagrant  
abuse of discretion" and "flouting of the  
principles of fundamental fairness" prior  
to, during, and after the original hearing.  
Standard: review for correctness, plain error,  
giving no deference the decision below.  
Law: *Reyno, Supra*; *Greenhalgh, Supra*.

jj) The Board's decision was "fundamentally  
unfair where then allowed later evidence to

Remain in the file,<sup>2)</sup> allowed it to be uncorrected,  
 3) failed to identify it as false,<sup>4)</sup> refused to  
 investigate or order investigation of Rape  
 confession of Starnes,<sup>5)</sup> increased matrix,  
 6) violated double punishment standards,<sup>7)</sup> ex-post  
 facto documents,<sup>8)</sup> due process,<sup>9)</sup> exercised authority  
 they did not possess,<sup>10)</sup> refused to exercise  
 authority granted them to assist in proof  
 of innocence,<sup>11)</sup> operated in a scheme to prevent  
 access to SOP,<sup>12)</sup> refused parole based on  
 said scheme,<sup>13)</sup> denied parole because of  
 legal process filings,<sup>14)</sup> refused notice of  
 requirements for parole,<sup>15)</sup> and otherwise acted  
 as argued above, in hearing Petitioner/  
 Appellant in prison without dealing with  
 any of the "individual case" circumstances  
 here, and cumulative effect was not addressed.  
 Standard & review for correctness, plain error,  
 abuse of discretion, giving no deference the  
 decision below.

Law: *Renn*, *Supra*; *Labrum*, *Supra*.  
 Utah Const. Art. 1, Sec. 1; *Greenholtz*, *Supra*.  
 U.S. Const. Amend. 1.

KK) Due process was not followed by 1)  
 The Trial court, 2) The Prison, or 3) The Board,  
 in this case.

Standard & review for correctness, plain error,  
 abuse of discretion, giving no deference decision  
 below.

Law: Ut. Const. Art. 1, Sec. 1; U.S. Const. Amend. 1

5 and 14.

11.) The Board, with the district court's permission, withheld notice of requirements of parole prior to, during, and following hearing of May 5, 2005 regarding a scheme. Standards review for correctness, abuse of discretion, plain error, giving no deference decision below. Law: U.S. Const. Art. I, Sec. 12, Art. I, Sec. 12; U.S. Const. Amend. 6; Labrum, Remo, Fosse, Perenson, Supra; Greenholte, Supra.

mm.) Judge Lindberg abused her discretion, errand by law, and joined in a sentencing scheme that does not provide notice of jeopardy, eligibility for parole criteria, or uphold constitutional standards of timely sentencing or proper sentencing.

Standards review for plain error, correctness and abuse of discretion giving no deference decision below. Law: Labrum, Supra; Perenson, Supra; Remo, Supra; Fosse, Supra; Greenholte, Supra.

Discussion below incorporates these statements as pre-requisite facts for determination, and legal precedent for issues.

5-2-

a) Judge Robert Hilder erred by law, and abused his discretion when he refused to remove Judge Lindberg from this case for usurping judicial powers reserved for criminal prosecutions legally begun under Sheffield, supra; Cannon v. Leary, supra, and Zolotaruk, supra. Also violating due process mandates.

Standard: review for correctness, plain error, and abuse of discretion giving no deference the decision below.

Law: Sheffield, supra; Cannon v. Leary, supra; Zolotaruk, supra; Ur. Const. Article 1, Secs 7, 13 & 14; U.S. Const. Amendments 1, 4, 5 & 14; Utah Code 77-2-1, 77-3-3.

b) Judge Hilder erred by law, and abused his discretion when he allowed Judge Lindberg to remain on this case after she had delayed the period for 2 years after ordering state to answer, and she had denied justice by so doing.

Standard: review for correctness, abuse of discretion and plain error, giving no deference the decision below.

Law: Utah Const. Art. 1, Sec. 11, Sec. 7, Sec. 9; U.S. Const. Amendments 1, 5, 8, 14.

5-3-

a) Judge Paul Mungben erred in denying

60 ~~(b)~~ (3) Fraud motion, captioned in this case, though wrongly placed here by Third District Clerks, as the case should have ~~been~~ been docketed properly, ~~and~~ not assigned to Judge Lindberg (~~because~~ the fraud complained of occurred by Judge Lindberg during this case history).

Standard: plain error, abuse of discretion, review for correctness, giving no deference decisions below.

Law: U.R. Civ. P. 65 B; 60 (b); U.R. App. 1, Sec. 1; U.R. Const. Art. 1, Sec. 2; U.S. Const. Amendments 1, 5 & 14.

b) - Judge Maughan erred by law, and abused his discretion by denying the 60 (b) Motion when usurpation of powers, and delay and denial of due process appeared on the face of the record below, and Judge Maughan knew it.

Standard: review for correctness, plain error and abuse of discretion, giving no deference the decision below.

Law: Sheffield, supra; Swachen, supra; Cannon, supra; Tolamakers, supra; U.R. Civ. P. 60 and 65 B. U.S. Const. Article 1, Sec's 7, 11, 13, 14, 9; U.S. Const. Amendments 1, 4, 5, 8 and 14.

## Procedural History

This history is listed to hopefully clear the Air about the resulting convoluted procedural history below:

On May 3, 2006 A 65B Petition, 300 pages, was filed providing extensive paper-trail of acts that show complete disregard for law, and which expose a sentencing scheme that operates within Utah's Department of Corrections and Utah's court system, that violates not only recent U.S. Supreme Court holdings of proper sentencing, but also violates Utah Supreme Court holdings requiring due process and fundamental fairness based upon disclosure (notice) and compliance with law. (See Volume One - record pgs. 1 thru 300)

From this point in time (May 9, 2006) a series of court clerk and Utah Attorney General mistakes created a mish-mash procedural history that would infect three years of legal filings and seven separate legal actions filed by Appellant; for which Judge Lindberg assigns the

blame on Petitioner and ~~costs~~ ends with the judge chastising Petitioner/Appellant because Judge Lindberg was caught delaying the order for answer for 2 years after its issuance and filing in the case\*.

The docket sheet supplied this court on May 19, 2009 - time: 1:20pm - and initialed by the court clerk on the "certified" stamp, does not show the date of Judge Lindberg's order being filed in the case even when the court stamp appears on the order for the state to answer (listed as "minute entry" - record Volume Two - pgs 441-443 dated 12-19-2008).

This delay was intentional, Appellant asserts, because the day before the court minute entry being "misfiled while unsigned" Appellant had filed a poignant Motion to Dismiss or Recuse Judge Lindberg for acting with bias and prejudice (see Volume Two record at

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\* Order is "Filed" stamped, and initialed by the clerk, on December 19, 2006, and then certified as served by mail on December 19 2008. See Order below. R-441442

pps 370 - 379 - dated December 18, 2006).

Judge Lindberg's actions that followed (not serving or signing the minute entry for 2 years - and not acting on the Motion to Recuse for 11 months) (See records pps 441-443 and pps. 382-383) expose a tantrum-like response to being attacked by Appellant for clearly ignoring Cannon v. Leary steps to initiate a prosecution - by - Information (- Utah Supreme Courts state decision case for Utah Code 77-2-1) and delaying timely ruling on the Motion to Recuse.

The type of delays in legal process shown here violates Utah Constitutional Article I, Sec 11 as both delays were unnecessary, and both were done by the court. (11 month delay on Motion to Recuse, and 2 year delay in signing and serving a minute entry filed in the case).

These delays, and Judge Lindberg's chastising Appellant for court clerk mistakes, and Utah Attorney General mistakes in mislabeling the case numbers involved in the seven legal filings going through Tenth District Court, show a continued violation of due process and a



abuse of perceived judicial power at worst,  
and a complete and total denial of fair  
treatment and professional handling of the legal  
filings at best.

Appellant has been forced to respond to  
seven different legal filings - Federal  
Cases <sup>#1</sup> 2:07-CV-393 and <sup>#2</sup> 2:07-CV-204;  
(which arose from State Third District Court  
filings of cases <sup>#3</sup> 070904827 and <sup>#4</sup> 070906498)  
all during this case history.  
Case 827 was assigned to Judge Lindberg,  
and 498 was assigned to Judge Robert  
Faust. The Utah A-6 filed a Motion  
to Consolidate these two cases and noticed  
the case number 2:07-CV-204 as the new  
case number for both. Also Case 070902112  
and a markesnee again (numbered 314 to 348).  
It turns out - NOONE consolidated the  
cases - yet Third District clerks began  
to combine them as if they had been  
ordered combined, and then began to mix up  
documents for those cases with this case,  
also filed with Judge Lindberg, and Judge  
Lindberg received documents meant for  
case 498 when they were mailed to case  
498 by Appellant following remand by  
Federal Court for state trial (which  
remand occurred in March 2008 and  
April - - - - -

until after Judge Robert Faust activated the case in December 08 (case 498), and Appellant requested a copy of that order from U.S. Federal Courts.

Appellant was again chastized by Judge Lindberg for mailing documents to her in a case that was remanded to Federal Court, when it was court clerks who made the mistake, and Appellant's attempts to reconcile the issue drew nothing but venom from Judge Lindberg, in her written lecture (record 883-885).

The Utah A.G.'s Office has been complicit in furthering the deceptions they began - including covering for 14 rapes (confessed to by Sweeney) and witness tampering (sworn to by Dianne Meyer) at Appellant's trials. They have also lied to Fifth District Court in Case 040500252-ME (maintenance suit Shearn v. Bower) and the Federal Court (stating Appellant caused the delay in appeal of case 030500719 - caused when Fifth District Court accepted a rehearing petition of a habeas - held to be in excess of their authority - by this court).

Appellant did not argue against

This court being assigned to hear this case - for the reason argued below: This court is responsible for the first usurpation of Appellate authority, so it is appropriate the issue be argued here first. Even though there is no jurisdiction here.

### FACTUAL Summary

Appellant was wrongly convicted in Fifth District Court for 2 counts of rape - originally charged with 6 counts rape of a child and 4 counts rape of a minor. (S.D. ss. case #99/500552)

It was done by a court who usurped judicial authority at the outset (June 1, 1999) and was allowed to continue by every Appellate court available. (See Information, Amended Information, Second Amended Info)  
This court said it was Appellant's fault that happened - because he didn't yell foul during preliminary proceedings (where trial counsel was responsible to do so - apparently).

This court also said trial counsel wasn't responsible (holding Brad Rich was not ineffective). Brad Rich was the only one in the defense who was

It is ironic that his law firm was counsel for Cannon v. Leary - but this court's decision declares his incompetence Appellant's fault.

It is also a fact that every court learned the true identity of the actual rapist in June of 2002 with the filing of case ~~020500~~ 020500-440 - Fifth District Court. (Something Rich knew in 2000 before trial) Brian Starkey had confessed to 12 years sexual conduct with the Accuser. (see affidavit + Gary Potter report)

\* 14 counts of Rape of a minor.  
Again this court blamed Appellant for not raising that issue.

There is a definite pattern here.

The pattern has not changed in the 9 years of ensuing legal fights.

Not a single judicial, or quasi-judicial person (charged with proper application of law to protect Appellant's rights - including the rights to liberty, property and reputation) has withstood the rest of their duty: All have blamed Appellant for the admitted failures.

During The same timeframe of This case, 2000 to 2009, much public attention has been drawn to Warren Jeffs for his failure to report, or have investigated, rapes of a 13 year old girl (by abusing his religious obligation to report the rapes); Here Utahs judicial system has acted the same way toward Brian Storkes confessed 14 rapes - because a jury was lied to when judicial entities knew she was lying and allowed it. (Thus abusing their judicial or quasi-judicial duties and responsibilities) Brian is now free.

Court officers have an even higher duty to the law than does Warren Jeffs, as They have sworn an affirmative oath under Utahs Constitution Article 4, Sec. 10.

The Utah Board of Pardons has followed suit - They too usurp judicial powers reserved for courts - and can be argued to be following suit - and that issue has been raised here; as has the Storkes confessions. Everyone knows about it - But no one has come out to blame Article 4

Another Appeal is before this Court on that very issue Case 20090413-CA - where the Trial Court again blame Appellants. (will this court follow as before?)

### Declaration of Appellants

Appellants William Henry Stearns declares under penalty of perjury that he did not commit these acts, and he did not knowingly waive any right under Utahs Constitution, nor the U.S. Constitution.

All legal proceedings, below and here, are based on a clear usurpation, intrusion into, or abusive use of perceived judicial power that was not, is not, nor can it be shown proper by Utah law, nor U.S. law: beginning June 1, 1999 through this date. Dated: July 12, 2009.

WHS

### Second Declaration of Appellants

Appellants William Henry Stearns declares under penalty of perjury that the

Unsub Board of Pandors has declared  
themselves to be a "sentencing court";  
... issuing thousands of [judicial decisions]  
a year"; Thus following suit with  
this court's usurpation of perceived  
judicial powers: shown through this  
case history below. (see email here included)  
Dated: July 14, 2009

W. M. Sherratt

- ★ Note: The Board email is the basis of a U.S.  
Supreme Court "Original Filing" pursuant to Rule  
20 U.S. Supreme Court Rules and U.S. Const.  
Article II & III, sections 2 - now pending review.  
Docketed July 8, 2009, case 09-5122  
Also Raised in new Legal 65B Filing on  
Boards 2009 Hearing - Third Dissent  
Court - no number before Judge Karen  
Toomey.

## Argument & Legal Analysis:

In re Yengo, the U.S. ~~Supreme~~ Federal Court addressed the underlying issue here: A judges intrusion into perceived judicial power. The court held it to be unconstitutional. 371 A2d 41 (N.J. 1977)

That being said, The Utah Supreme Court declared authoritatively in State vs.

Sheffield, 146 P 306 (Utah 1915) that "A verified complaint or an affidavit before a magistrate, charging accused with a public offense, is essential to a preliminary examination, since without it the magistrates jurisdiction to act is not judicially invoked." Id at 2

Then again in 1982 another panel of the Utah Supreme Court held that there were 5 steps to properly initiate a criminal prosecution by Information; it again held that the fourth step was the presence of a sworn document requirement, prior to it being filed with the court. See State ex rel. Cannon v Leary, 646 P2d 727 (1982 Utah) cited in Utah Code 77-2-1.

As Yengo, supra, discusses, the issue is not whether the judge was a judge, but whether he followed the process declared



"necessary" to invoke judicial authority in establishing jurisdiction. The U.S. Supreme Court held that when a judge fails to follow that procedure, his authority is only perceived to be proper by the judge. *Stump v. Sparkman*, 433 U.S. 349 (1978).

The U.S. Supreme Court concluded that that was not enough - The process was a mandatory condition. *Sheffield*, *supra*, says the same, as does *Cannon*, *supra*, see also *State v. Zolantakis*, *Hoppe v. Klappach*, 28 N.W 2d 280 (Minn. 1947).

*Sheffield* also lays to rest whether or not Appellant waived his rights of liberty in #1 where it says "unless waived by accused with consent of the state"; here no waiver was made as preliminary hearing was demanded by Appellant, and was held in July 1999.

Therefore, attempting to declare Appellant had failed to assert his right to the courts jurisdiction fails miserably - preliminary was held.

What does not reconcile with this courts holding is the obvious failure of Judge (Magistrate) Robert Braithwaite usurping authority without following the "essential" *...*

See Sheffield at 2 and Cannon at 2

Nowhere in Constitutional law does it say that a requirement to jurisdiction lies with the accused, so to attempt to argue that which cannot be constitutionally cited as requiring jurisdiction of the accused, cannot invoke the jurisdiction that mandate falls squarely under the magistrates duty alone. Sheffield, supra at 2.

Further, there is no legal precedent that grants Appellant the power to invoke a courts jurisdiction - as he is not a magistrate (to whom all authority lies upon following the process). (No cite available)

All Constitutional law (Fourth Amendment and Fifth Amendment under U.S. Constitution; Article 1, Sec's 7, 13 and 14, Utah Constitution) declares jurisdiction based upon a sworn oath is mandated. (Sheffield and Cannon, Supra.)

Nowhere does either Constitution say that the accused can perform the taking or creating of judicial jurisdiction, so why does this court say he can? OR that he did? (see Onix in case 02050440 appeal)

Lastly, when no sworn complaint exists outside the Information, as Sheffield requires the Information mirror the complaint, Sheffield is dispositive of this issue in its entirety. An unsworn Information cannot mirror what does not exist. *Id.* at 3. *Hoppe, supra* and *Wiley v. City of Independence*, 402 P.2d 91 (Or 1965). Therefore, nothing exists to authorize invoking judicial authority in this criminal prosecution, so jurisdiction has never been authorized. Sheffield at 2.

### Uncontravered Facts/Conclusions

- 1- Robert Braithwaite, Magistrate in Criminal case 991500552, never had a sworn complaint or a sworn Information, or sworn probable cause of any kind authorizing the ~~invocation~~ invocation of judicial authority.
2. The Information and the Probable Cause Statement are BOTH unsworn, so cannot provide the Sheffield requirement, nor can they "mirror the complaint" as none exists.
3. Therefore no judicial authority to invoke jurisdiction could be activated by Judge Braithwaite, nor was authorized by law.
4. Trial - Rebuttal - see also on issue the unsworn

and beginning the criminal prosecution, amount to nothing more than the use of perceived authority. *Yengo, Supra*

5. Therefore this courts previous holding is baseless by law, and is nothing more than a mirage of jurisdiction-properly-invoked, using judicial authority. (See *Field* at 2), And this conviction should be vacated.

### Quo Warranto Doctrine

The common law writ of quo warranto is one of the oldest writs known in legal jurisprudence, which demands an answer to the query, "By what authority do you act?" *Barany v. Bueller*, 670 F.2d 726 (7th Cir. 1982)

In Utah, the Utah Supreme Court believed they were authorized to abolish this writ, and did so in *Renn vs. Ut. B.O.R.*, *Supra*, see *fn* at end of decision there.

However, in so doing, and whether or not they had authority to abolish that writ, they mandated that "those issues" were to be properly raised under Rule 65B.

Further, the U.S. Supreme Court has ruled on Quo Warranto complaints, and federal courts

Informations in the Narney Quo Warranto, since Utah's Supreme Court abolished those writs in Utah. See *People of Puerto Rico v. Robert Hemmos, Inc.*, 305 U.S. 543 (1940); *Milauhtlin v. City of Lumb.*, Miss., 947 F. Supp. 954 (S.D. Miss. 1995).

Therefore, the Utah Supreme Court banning of Quo Warranto is in error, and can be deemed an act of perceived judicial power as well requiring a review under Yengo, supra.

Further, Appellant cannot find where Utah Statute allows for abolishing Quo Warranto as some states have been reported to have done, so that ban cannot be based in statutory authority properly assigned to judges or the judicial branch of government. See ~~Article~~ <sup>Section</sup> 8, Utah Constitution, and ~~Article~~ <sup>Section</sup> 7 Utah Constitution, where both are silent as to this authority, as is Utah Statutes. *Dumas v. Underwood*, 707 A2d 333 (Conn. 1998).

Therefore, Appellant asserts, that ban is unconstitutional unless Rule 65B allows for the same processes (including plea hearings and jury trial fact finding of quo warranto claims); as violating separation of powers under ~~Article~~ <sup>Section</sup> II, Utah Constitution.

Appellant found this Quo Warranto legal malware while researching this suit

against The Utah Board of Pardons, and since all legal precedents and mandates indicate Quo Warranto is a viable legal doctrine, Appellant must raise it here, as was done in the court below. *Dumais, Supra.*

Quo Warranto properly addresses whether, 1) power was usurped, 2) intruded into, or 3) abused by one having some level of authority, by law. *State v. Information of Hancock ex rel. Barnes, 163 A 2d 342 (Me 1960).* Clearly then, it applies here as the entities being declared in violation are <sup>A)</sup> Fifth District Court magistrates and judges, <sup>B)</sup> and this Court as well, <sup>C)</sup> Third District Court and judges too.

All have been authorized to proceed in legal venues in limited functions that are specifically identified by law. *Ut Const. Art. 8.*

The questions become, 1) Have they functioned within their limited areas, or have they exceeded the power given them by law? 2) Or have they intruded into areas they are not authorized to operate in? 3) The last question is whether they have usurped powers not given them?

Questions # 1, 2 & 3 Applied:

A - Magistrate Robert Braithwaite clearly did not

function within his limited venue as shown by "Sheffield argument" above. *Supra.*

He also intruded into two areas that require sworn complaints prior to acting:  
1- issuing warrants, and 2- beginning a criminal conviction. *Sheffield & Cannon, Supra,* and constitutional law mandates.

Lastly, he usurped power not authorized to be used by statute or constitutional law. Utah Const. Art. 1, Secs 7, 13 & 14; U.S. Const.

Amends. 4 and 5; Utah Code 77-2-1. See also *Sheffield, Cannon and Zolotarakis, supra.*

C - out of sequence for clarity -

THIRD District Court Judge Denise Lielberg held that all that was necessary to begin a prosecution was screening, authorizing and filing of an Information - (see orders below)

SHE WAS TOLD, OR REMINDED OF *Cannon* LEGAL PRECEDENT prior to her ruling; She was also told no sworn complaints under *Sheffield* existed.

She denied both the 6064 Motion for Void Jurisdiction, and the Quo Warranto Motion. (see orders of Nov 2006 and decision

In doing so, she relied upon this court's previous holding in Case 020500440's appeal, even though the 3 Informations clearly showed the "Sheffield" failures, and "Cannon's" failures as well.

She clearly held against both Sheffield and Cannon mandates of the Utah Supreme Court; a clear intrusion into deciding law (which she is not allowed) already decided without declaring the previous mandate unconstitutional for cause under the facts shown before her; as well as taking upon herself to override constitutional law identified here in (A clear usurpation of power) and thereby abusing the authority she was authorized to function within.

She violates, therefore, all 3 conditions of Quo Warranto Doctrines.

B- This court has had this issue before it numerous times & Cases 020500440 (twice); 030500719;

Throughout all cases, this court had before it all 3 Informations (and no sworn complaint) and case law of Cannon v. Leary and Constitutional



Challenges to the procedures used  
by Branthwaite and every judge  
ruling therein - including themselves.

Motions to Recuse the Judges here  
were filed numerous times - all  
denied without discussion or ruling  
of the merits. See cases above. (claiming  
they reached the merits in 020500440 appeal)  
Utah Court of Appeals Authority

A- Since Sheffield's mandate to invoke judicial  
authority and jurisdiction was not  
followed, the Court of Appeals had power  
only to reverse the conviction in Case  
020500440 and its appeal, because no  
judicial authority had been invoked  
at the outset of the case, for a criminal  
conviction to exist.

Utah precedent *State Soc. Sec. v. Vigil*, 784  
P2d 1130 (Utah 1985) mandated the conviction  
"cannot stand against whom it operates,"  
so without holding that case law to  
be unconstitutional this court was  
bound to apply its remedy upon  
seeing on the face of the record that  
no sworn oath existed.

By so ruling in that appeal, this

and judicial mandates required to invoke jurisdiction, and constitutional mandates of due process and separation of powers. See Utah Const. Art. I, Sec. 7 and Article II, Article III and Article VIII; See also Art. 1, Sec's 13 & 14; Sheffield, Tolantakis, Cannon, and see also *State v. Johnson*, 114 P2d 1034 (Utah 1941)

Further, this Court's Authority must be limited to operating within Utah Supreme Court state decisions (case law), so must therefore follow Cannon's 5 steps. This has been authoritatively held by this court in *Itano v. Salt Lake Co. Comm.*, 945 P2d 125 (Ut. Ct. App. 1997) citing *State v. Menzies* 889 P2d 393 (Utah 1994).

Cannon holds (at 730 - [3-6] ... an information must be "sworn to by a person having reason to believe the offense has been committed" and "authorized by a prosecuting attorney". See also note 7 p. 731, Id.

Tolantakis holds (at 1007 - [24] "we are of the opinion that in this jurisdiction a sworn complaint is essential to a valid conviction" citing *Compiled Laws of Utah 1917*, § 9420; This requires this court to

correct their previous decision to comply with Utah Supreme Court precedent, and reverse Judge Lindbergs ruling and dismissal.

The next step would be to follow Sheffield's mandates and reverse the conviction. See also State v. Beddo, ~~82 Utah 216, 23 P~~ 22 Utah 432, 63 P 96 (1900) where it holds that the conviction and sentence of a person changed with a crime by an information unsigned... *see also* for want of jurisdiction "... Sheffield, who plead guilty and was sentenced, then charged with a second offense, attempted to vacate his first conviction; that is not the case here - here the original sentence has not been completed, so the issue remains valid, per Beddo and Cannon, and Sheffield's mandate that the magistrate was never authorized to use judicial authority, or in other words, failed to establish judicial jurisdiction to proceed. See also State v. Merritt, 67 Utah 325 (1926); Commons v. Paatt, 38 Utah 258 (1910); State v. McNally, 23 Utah 277 (1901); State v. Morrey, 23 Utah 273 (1901); State v. Baker, 23 Utah 276 (1901).

B- State v Johnson, 114 P2d 1034 (Utah 1941) outlines and defines the Appellate courts functions and duties as well as the district courts duties, for Utah Courts.

The core issues that apply here are discussed ~~on~~ at 1038, [6-8] through 1039; identifying original jurisdiction must be proper "when their cause reaches it in a manner provided by law.

Appellant asserts Canon is that law requirement, with the core jurisdiction invoking element being the sworn to Information or complaint discussed by Sheffield, and required to invoke judicial authority or jurisdiction.

Johnson cites Muller Brown, at [6-8], 31 Utah 473, and on p. 1039, last para. and lists all statutes and procedure requirements for magistrates. It further states the Framers of Article III provides the framework of court proceedings.

Throughout the discussion of venue, jurisdiction and procedures, the point is finally reached about the Information needing to be sworn (at 1044), as opposed

to Sheffield's complaint necessary, stating that must occur when no preliminary is held based on a sworn complaint. Here no complaint exists so no trial process could initiate, and the Informant is not sworn, so no trial may occur either.

This infers that a preliminary hearing cannot be held without the sworn complaint, yet if no preliminary hearing is held that procedural step may be filled by swearing to the information.

Cannon, however, states that all informants must be sworn to prior to filing.

So, obviously, if a sworn oath appears as preliminary as a complaint or an information, then Sheffield's procedure is met to invoke judicial authority powers (jurisdiction); Johnson says "Do not confuse venue with jurisdiction" at 1040, 1st para., last sentence.

Nowhere in any of these cases discussion or citations is it declared that a

or Information. This is the point of this issue, and no precedent supports Judge Lindberg, nor this court's failure in 020500440's appeal.

### Conclusion - Appellate Power

This court, like the trial court, may reverse itself when an error is exposed without violating Constitutional law, and all precedents state that jurisdiction issues are supposed to be raised *sua sponte* by any court. (Sinochem, ~~Supreme~~ 459 U.S. (2007))

"Since the Legislature has laid down a certain procedure for invoking the jurisdiction of the district courts this procedure must be followed." Johnson at [13, 14]; citing *State v. Ferguson* that panel continued, "[without a complaint - and using an Information], the district court was without jurisdiction to try the accused for the ~~offense~~ charged in the Information."...

Johnson, at 1042, last para. states plainly, "There are many cases where courts have jurisdiction of a subject matter, but that

jurisdiction must be invoked according to a certain procedure."

The waiver this court spoke of in its first decision was attached to the Information, not the complaint. Even so, if the Information was the document establishing original jurisdiction, Johnson clearly requires it to be sworn, as does Cannon.

Therefore this court should correct its previous ruling based upon Cannon, Supra; and Johnson, Supra; and Tolantaris, Supra; and their lines of cases.

Petitioner / Appellant so prays.

### U.S. Supreme Court Precedents

Further, the U.S. Supreme Court addressed actions taken by courts where judicial authority was not invoked (*Ex Parte Yarbrough*, 110 U.S. 651, 654), that courts were to restore to liberty any person held in violation of "any law".

In *Ex Parte Royall*, the U.S. Supreme Court admitted, "What law and justice may require, in a particular case, is often an embarrassing question to the court or the judicial officer before whom the petitioner is brought."

lastly, on point is *Ex Parte Lange*, where that panel of the U.S. Supreme Court held, "...but where it is void for want of jurisdiction, habeas corpus will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case." 18 Wall. 163, cited in *Royall*, supra, pp. 253.

Petitioner/Appellant is sure this court tires of this argument, but the facts are what they are - and no amount of legal posturing can avoid the embarrassing reality that Judge Robert Benithwaite violated the very most basic premise of legal law -



he refused to follow Constitutional law, statutory law, and state decision law of this state, as cited herein; and this court refused to hold him to that law using their sworn duty and their supervisory powers.

You should be embarrassed, and you should follow the law. (Hart, supra)

Much is made of the premise that a judge's job is to apply the law, not make new law; yet Utah courts here have shown a proclivity to operate just the opposite.

Judicial authority to ACT was never invoked. There is only one remedy.

Appellants respectfully demand this court do its job right this time. The conviction and sentence must be revoked and Appellants' liberty restored. Yarbrough, Lange and Royall, supra; Sheffield, Cannon, Monacy, Beddo, Tolandaris, Vigil, supra; Hart, supra.

U.S. Supreme Court Mandate

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A reaffirmation of a court's duty to establish, and verify, judicial jurisdiction prior to acting in either original jurisdiction or appellate jurisdiction; *Sinochem Int'l vs. Malaysia Int'l Shipping Co.*, 459 U.S. \_\_\_\_ (2007), citing *Steel Co. vs. Citizens of a Better Environment*, 523 U.S. 83 (1998) - other citations omitted.

In that citation, *Ex parte McCadle*, a Steel Co. chain case, they quoted "Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case."

This should put to rest any discussion or argument, but it remains to be seen if proper law is followed.

Appellant is striving to be as respectful as possible, asking for what all precedent says is proper by law, nothing more.

It is important to note that

Nowhere in this case law discussion  
is it required of the accused to  
establish jurisdiction.

That is the courts job.

## Argument of Issues

5-1-a) *Lucero v. Utah State Prison*, 841 P2d 1730 (Ut App 1992) requires a judge to hold evidentiary hearing if she refuses to dismiss for the merits being frivolous (which Lindberg did) and orders the state to answer.

In the Alternative, if the record is not complete, and a constitutional issue has been raised, a hearing is required to complete the record. See *Watts v U.B.O.P.*, 870 P2d 258 (Ut App. 1994) and also *Preece v U.B.O.P.*, 886 P2d 308 (Utah 1994) ~~and~~ *Peterson v B.O.P.*, 931 P2d 147 (Ut App. 1997); *Foot v U.B.O.P.*, 808 P2d 234 (Utah 1991); *Labeum v B.O.P.*, 870 P2d 92 (Ut 1994)

## General Holdings of Cases

For economy in argument, the following issues are held by the case listed, as they apply here:

*Peterson*; First: An inmate must receive adequate notice to prepare for hearing.  
Second: An inmate must have the information the Board will use.

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Third: Boards actions must not violate  
the constitutional rights of inmates.

Neel: First: liberty interest exists in  
parole hearing in indeterminate system.

Second: Due process must apply.

Third: Touchstone of Due Process is  
whether process substantially furthers  
accuracy and reliability of B.O.P.

fact-finding process. Per. 1, Sec 7.

Fourth: Andrews decision applies  
to rules set by law.

Fifth: Review for correctness.

Labrum: First: Due process requires some  
procedural protections, given situations  
demands.

Second: inmate must know what  
Board will be considering  
soon enough to have opportunity  
for preparing responses and  
rebuttals.

Third: Due process applies to first  
hearing.

Preece: First: review is limited to the  
process Board uses in hearings,  
unless some other constitutional  
claim exists.

Second: Court of Appeals has no original  
jurisdiction; must appeal of

board decisions involving  
a first degree or capital felony,  
where the sentence or the conviction  
is challenged.

Third: inmate must know what  
will be used by Board.

Lancaster v. U.D.O.P., 896 P2d 945 (w. 1994)

First: judicial review proper when  
result is challenged with  
a constitutional claim.

Second: unusual circumstances  
require "arbitrary and  
capricious" review.

Curtis: First: trial court hearing on  
merits of due process claim  
required.

Second: Allegation of arbitrary  
and capricious, or cruel and  
unusual, allow challenge of  
Board's decision, when  
claim exists of exceeding the  
guidelines.

Foote: First: judiciary review proper  
for due process claims.

Second: meaningful review of  
due process not possible

Without a hearing for  
Adequate record.

Third: Board functions analogous  
to sentencing judge in  
indeterminate systems as  
far as that analogy extends.

Fourth: What due process requires  
cannot be determined in the  
abstract, but only after  
flushing out the facts.

Monson v. Lauch, 1996 WL 704268 (1996)

First: Any hearing is a threat to  
prisoners liberty.

Second: Monson does not identify  
any constitutional claim, so need  
not be reached.

Third: Board standards in  
Article VII, Sec. 12 omits  
"parole" from language.

Fourth: Double jeopardy may be  
raised in parole decision  
appeals.

Fifth: Court must show sentence  
was actually disproportionate to  
1) gravity of offense and harshness of  
penalty, 2) sentences imposed in  
other jurisdictions and 3) sentences  
imposed on other inmates.

STATE v Holland, 777 P2d 1019 (Utah, 1989).  
First: prohibits double punishment for same criminal act or fact.  
Second: Constitution prohibits double punishment.

Rehn: First: Where petition raised due process procedural violation, it states claim for relief.  
Second: review available when fundamental fairness or void sentence is imposed.  
Third: Court review encompasses questions of jurisdiction and regularity of proceedings and is used to correct errors affecting substantial rights of parties.  
Fourth: review may correct gross abuses of discretion.  
Fifth: review available under Constitution to be allowed when circumstances of particular case warrant extraordinary relief, and no plain, speedy and adequate remedy exist.  
Sixth: review available when abuse of judicial authority or failure to comply with duty appear in case history and circumstances.  
Seventh: relief available to claims



under gross and flagrant abuse of discretion and when fundamental principles of fairness are flouted.

Eighth: Result Review is available with constitutional claims by extraordinary writ.

Ninth: Petition raising claim rehearing exceeded matrix by three years was reviewable and required remand to determine if wrongful use existed with authority, or was a failure to comply with duty.

Tenth: Reasons for exceeding matrix need to be identified in writing of explanation.

Eleventh: Court of Appeals precedent has binding effect on all subsequent Courts of Appeal panels.

Twelfth: Habeas corpus expanded to include unusual circumstances using fundamental fairness review or whether sentence imposed is void.

Thirteenth: Quo Warranto and other common law writs may be brought under these rules.

of the process by which the Board undertakes its sentencing function.

*Greenholtz v. Inmates of Neb. Penal + Corr. Complex*,  
442 U.S. 1 (1979)

First: parole hearings should include the entire record of the crime, including the gravity of the offense.

Second: A valid conviction, with all its safeguards extinguishes the liberty right to parole.

★ Unless otherwise cited, these are the points to be applied in the argument here.

## 5-1-b) Procedural Errors Discussion

In the Court's Dismissal Order the Judge assigns the blame for a nearly three year delay, on Appellant.

The judge does not admit that it was following a complaint to the presiding judge by Appellant, and a complaint to the Judicial Conduct Commission that "brought it to her attention". She also does not give a true picture of her

Two year delay between filing  
the order to answer (record 441-443)  
on December 19, 2006 and signing  
it and serving it on December 19, 2008.  
~~See United States v. [redacted]~~

This two year delay was both unnecessary  
and improper and violates Utah Constitution  
Article 1, Sec. 11; thus making her actions  
violations of Utah Constitutional rights, for  
which the remedy is termination of the  
illegal and unconstitutional action. Ed.  
See also U.R. Civ. P. 65 B. Wrongful use of  
judicial authority, subsec. (d).

It also violates due process of Article 1,  
Sec. 7 and U.S. Constitution Amendments 1,  
right of redress, 5 and 14, due process.

With Judge Lindberg so acting, and ruling  
her reason to proceed was motivated  
to prevent an already delayed petition,  
shows her incapacity to properly deal  
with the law, or its mandates of due process,  
and she should have recused herself  
when her attention was drawn to her  
errors. A new judge should be appointed  
and a remand for hearing should occur.  
(See paragraph 1-decision) (see also para. 3)

C) - Judge Lindberg knew the 606(d) motion  
... to be incorrect as a proper file

under subsections (c) (2) (a) as she correctly states the real courts jurisdiction is being challenged so both (d)(2)(a) and (c)(2)(a) apply and she only applied one standard. Even in her order of dismissal she specifies the "unsworn" information, (R. at 368) and then denies relief available by law for the facts she identifies are before her. (See Cannon, Supra and other cites in Statement of issues above) See pg. 5 para. 10 decision

d) - Judge Lindberg, in spite of case law listed in Petition and Statement of Issues here, this holding, did not attempt to apply any U.S. Supreme Court precedent when raised, knowing Board was claimed to function as a judge in a determinative system (Lacena) and she admits her refusal was because 6B Amend. Rules only applied to determinative systems where that analogy must apply. See para. 4 order of dismissal. Judge Lindberg clearly misunderstood the argument, and this issue requires removal for discussion of the merits. (Lacena, Supra) See Memorandum (Petition) pgs. 14 - 21 & 23, 47, 48 - 50, 53, 60.

e) Three matrix sheets were before Judge Lindberg in this case, showing different matrix lengths, as was the result which

necessarily raised the matrix to at least 104 months. 2 of the Board's matrix's were different than the trial courts - without any explanation for the change - so Lindberg should have known her duty required flushing out of the true facts - yet she chose not to; both error by law and abuse of discretion. See cites - Statement of Issues - This heading. Second part - Rationale sheet provided shows elements of crime (trial) used to provide rationale for 104 month decision (positing trust and multiple incidents) so cases cited in Issues here required further evidence or fact-finding, which Lindberg denied when it was raised in Memorandum (Pöytäkirja) see also pages 4-10 for reasons for extending matrix, and letters of Board response discussed therein; also Form 1 + 3 - Board packet (39 Form 3), and Board Rationale sheet. See para. 11 - decision for dismissal rationale. Judge Lindberg was wrong to dismiss this issue. (See pg. 10 - Memorandum) These issues have merit, as shown here.

f) The Stacey confession issue, under fundamental fairness and due process, require flushing out under law listed in Statement of issues, as it is an integral part of this sentences

Supposed to do. Further, in addition to law listed, The Petition Memorandum invoked Utah Statute. 64-9-6-4-1 (see pgs 8, 32, 36, 37, 61 and 60). See para. 7, decision - Board has original jurisdiction here. At the time of The Board Hearing, The Board was in control of Starek and should have subpoenaed him, or issued a warrant for him to testify as they had been notified by mail in 2004 by Appellant. Judge Lindberg had a duty under Art 1, Sec. 11.

- g) Judge Lindberg helped them cover up Starek's rapes. A hearing should have been held to scrutinize this issue. No denial exists of Starek's confession, or that this issue was sworn. Fundamental fairness and due process require removal. See cited Statement of Issues some heading. Judge Lindberg's actions were unnecessary and left Appellant in prison without due process or rights under Art 1, Sec. 11, Utah Constitution for damage to liberty, reputation and property. (same pages of Memorandum as (f) above.) Hearing transcripts pgs 7 line 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.
- h) Judge Lindberg should have seen the plain errors of using the same aggravators to rationalize the Board's increase of the maximum (position of trust + multiple incidents) where the facts clearly identify they cannot be used to aggravate the crime since they were part of

The crime - The Form 3 sheets are all present, and establish facts, on their face, that require fleshing out for double punishment reasons. See Petition for issue raised, so the claim requires a hearing. (Lucero) see cites *Stevenson Issues*. Here after referred to as ~~the~~ "SOI".

i) Constitutional claims were raised and admittedly discussed by both sides, so a hearing should have been ordered. (Lucero) and cites in "SOI".

j) requires no further discussion on cite.

k) Board was told (Hearing 05) that the information they had was "very inaccurate". See Transcript at pg. 5, line 11, yet no inquiry was made or allowed. This requires hearing as cited in cases of "SOI".

l-) Judge Lielberg clearly misapplied the law, as 65 B.C.(2)-(A) raised "usurped authority" (in Quo Warranto Motion Memorandum, pg. 5 2d para.) was raised and qualified under (C)(2)(A) instead of only (C)(2)(D) (see paras 14-15 & 16 decision for holdings) and express words place Quo Warranto in subsec. (C) as admitted by Lielberg - so she should have held hearing - she held Informal

before her and US B expressly is  
 The only place this can be raised.  
 See Motion, pg 50 Remand is appropriate.

- m) Judge Lirlberg clearly misapplied  
 Cannon v Leary case law requirements  
 that "nothing more was needed for  
 jurisdiction". (see decision pg. 7, footnote 8  
 next to the last sentence) because 77-2-1  
 (not 77-2-1.1) requires Informations be  
 sworn (step 4 of Cannon, Id) prior to  
 filing. This requires remand or reversal  
 and remedy by law. See cites "SOI"  
 and Cannon at [?].
- n) Requires no further discussion - see "SOI".
- o) - Requires no further discussion - see "SOI".
- p) - This requires the court to look at every  
 filing made by Appellant and determine  
 whether the mistake was made by clerks, the  
 A-G, or Appellant. Looking at the chronological  
 order of filing each document will be identified  
 by handwriting, so it can be determined that  
 cases filed without numbers by Appellant will  
 show different numbers being assigned by someone  
 other than Appellant. It is the court's duty  
 to look at each filing to see if it is  
 assigned already - and if not, to decide where



to place it. The Matkosaree Petition was mailed to the Presiding Judge with no case number - The court sent it to Judge Ludwig by error. The A.G. combined the two civil cases in their request to combine - and noticed Appellant they were combined - so he replied in K.C.O. listing the case # they assigned - yet the clerk still sent it to this case when demand to Judge Faust had been ordered. Appellant only replied to filings noticed him. See law cites in "SOI".

q) - see Exhibits - Commitment Orders - no further discussion necessary - see "SOI" cites.

r) Appears in record 58 ~~58~~ Memorandum of Petition - pgs. 4-14, 24, 35, 36, 37, 41, 42-45, 56, 57, 58, 60-65; Transcript of Hearing; see also Sex Offender Memorandums (states exhibits 10) and Petitioner's Letters to Board and Sex Offender Treatment Assessments (3) and Board's Letters in response. They contradict real conduct, as all letters and requests by Appellant request therapy - the SOTP & Board answers refuse access.

This practice violates fundamental fairness, and due process as well as treating Appellant with unnecessary rigor - he is willing to take it. - See cites in "SOI".

S) See Hearing Transcript pg. 11, line 25; pg 15 & lines 8-18 which show discussion of the appeals being pursued, which are obviously in support of Appellants sworn innocence also discussed. See also Prison OMR reports and sex offender memos that list appeal and eligibility for parole. No further discussion necessary - The court should have flushed out this constitutional claim at hearing. See "SOI" cites. also pg. 17, lines 12-15 (transcript) & States Memorandum & answer at 15

T) - See Board Transcript pg. 9 thru 11 - line 19; pg 13, lines 5 thru 25; see also "r)" above; States Memorandum pg. 10 & 11, pg. 14-16, pg. 19, shows sentence is more severe and an ex-post facto punishment. See also pg 26-2d. See Board answer - pg. 15 - also New Motion \*

\* More evidence has appeared, during Appellants 2009 (March 19) hearing where the Board Hearing officer declared that Appellant was still in prison because he hadn't taken therapy; and the Boards Decision lists #2 - That Appellant will be given immediate consideration for parole on completion of SOSP. A Motion Accompanies this. Brief to produce the transcript; and a copy of the decision is attached here.

(A US Bd Petition is pending before Judge Kase Toomey on that hearing. (~~see #42~~))

Case 090910491.)

Oral Argument should occur to flesh out this issue, or a remand to the lower court, as this new evidence shows the Board lied in their Answer below, pages 13, bullet 14.

4.) In The P.S.I. Report, The first Commitment order, and the County prosecutor's letter, are known false "facts"; also the SOTP memo's, the OMR exhibits (Map Agreement, OMR C-NOTE ledger, and prison recommendation sheets) contain facts known to be false.

1. P.S.I. shows years 1993-94 & 96 as "years" of sexual involvement with the accuser - which were all proven false at trial ('93 was changed after sworn testimony, '94 was shown false during the defense portion of the trial by physical evidence, and '96 was never alleged nor proven);
2. Rape of a child, though originally charged was proven false by the accuser when she changed her testimony to 94 at trial (after having testified at preliminary to '93 - on the same incidents, and The Motion to Dismiss clearly states she had changed the years - requiring Dismissal.
3. Prison records speak for themselves - and their face then rename "asking for

Therapy - "Removed self from Therapy"; (which clearly implicates Appellant was not only eligible for, but active in Therapy - or how else can one be removed from it?) Also, given the written agreement in the MAP Agreement, as long as Appellant tried to obtain programming, he was to be allowed "privileges" - And the Record shows continual requests to be allowed therapy - and continued denials of access by prison officials; and then punishment being given Appellant for prison refusals - not his own conduct.

It is not a change in posture by Appellant - he swore innocence at trial, and still continues to prove it after 9 years - so why does that require remaining in prison over the time supposed to be served as the punishment set by the Legislative-authorized Sentencing Commission? No facts have changed to support guilt, but facts have been shown to show innocence, and yet no state protector of rights is willing to inquire to the sworn Affidavits showing innocence issues.

Utah's scheme of sentencing, as applied to Appellant goes like this:

- 1- He was convicted and set a matrix of 66 months by the trial court;
- 2- We will change the matrix the court assigned knowing trial facts;
- 3- we will deny him access to therapy we hold him responsible to take voluntarily (by statute 64-9-6-4-1) so we can punish him more severely than others admitting guilt and breaking prison rules - as if he also broke the rules;
- 4- we will punish him for appealing his case (a constitutional right);
- 5- we will ignore a prison confession by a violent prison inmate, to the rape Appellant was convicted of;
- 6- we will parole the confessed rapist and keep the sworn innocent man in prison - without verifying the sworn claim of the confession;
- 7- we will deny him that inmates testimony during parole - eligibility hearings;
- 8- we will fail to report the rape confession for investigation (required by 64-9-6-4-1 above), itself a third degree felony.

9. We will exceed the normal sentence because Appellant has the gall to stand up for himself and try to prove his innocence when we demand he confess or remain in prison (while we remain intentionally ignorant of facts sworn);
10. We will resentence him to a punishment equal to a crime many times more heinous and cruel than the "consensual sex acts" he was convicted of - while we claim no responsibility or duty to investigate the confession of another to the same crimes;
11. We will deny him access to help, and misrepresent his efforts of personal improvement so we can make him appear to be the type of inmate we need to keep in prison;
12. We will continually misrepresent who he is, and what he does so he will remain in prison indefinitely, without telling him what he has to do to get out.

Lubrum, Kern, Perras, Foote, Blackly, Bockea, Rita, Cunningham, Greenholtz, Appenack, and Sheffield, *supra*, all show a different system is mandated, as does the Utah Sentencing Commission and statute

77-27, et seq., but we are going to ignore all of that unless he - not Starkey - admits to the crime.

There is no due process protection, or presence in that scheme. Art. 1, Sec. 7; U.S. Const. Amendments 5 + 14.

V-) requires no further discussion

W-) requires no further discussion.

X-) Board admitted it withheld notice of requirements for parole (record at 462 bullet 21 + pg. 463 bullet 27) Answers 14 + 15; it denied it is a sentencing board (answer "record at 462 bullet 18"); Board denied it changed parole eligibility when it withheld the requirement for the SOTP memo - (Bullet 20, Id.); Board denied it increases the sentence when it sets a new rehearing (Id, bullet 17); Board denied it changes eligibility for parole due to appeal process being accessed by inmates (record Id. at 463, bullet 22); Board admits it knows a jurisdictional issue was raised in the petition, and chose not to address it. (R. Id. at 461 bullet 13). Board denied it kept

Appellant in prison because he had NOT participated in therapy; ~~that~~ admits some inmates are released to take therapy and some are released without therapy (what they don't say is why Appellant actually was kept in prison - they didn't identify the rationale for that decision, and it was a core issue discussed at the hearing [see transcripts]).

These claims are blatant lies by the Board (or the Attorney General) as in the 2009, March 19<sup>th</sup> hearing, the representative (hearing officer Tom Hartz) stated that, "both you and I know why you're in prison so far over your matrix is because you haven't taken therapy", and the Board decision there (currently under attack in Case 090910491) listed the only condition to be considered for parole was completion of SOTP therapy.

Appellant requests this court order a copy of the hearing record be provided for use in this appeal, so the lies can be heard by this court.



Further, Utah Board Chairman Curtis Garner declared "The Board functions as a sentencing court" (citing Labrum) in an email to Chair of the House Judiciary Committee Lorie Fouke on April 4, 2009, at 1:49 pm on [utah.gov](mailto:utah.gov). (CGARNER@utah.gov.)

This declaration states that the Board has functioned this way "Thousands of times a year" in issuing their "judicial decisions".

- \* This email has been used in an original jurisdiction habeas corpus petition, pursuant to 28 U.S.C. § 1651(a) and 2241, in the United States Supreme Court, docketed July 8, 2009 as case 09-5122.

This information is also appropriate here as it shows the Board as the liars they are in this 65B petitions process - they knowingly and intentionally misrepresent what they do to try and avoid redress by the inmates.

A 65B petition on the March 19, 2009 hearing is active in Third District Court in the case of *Manuel v. the Prison* - also

Raising most of the issues here.

Because the Board has tipped their hand in the extensive email correspondence with Chair Fowlke, and their asserted actions of being a court issuing thousands of judicial decisions a year (beginning with Christian Holtermans leaving in June 2008 or before - the topic of discussion therein) The timeframe includes the issues argued in this petition, and shows the Board to have lied to the trial court, which requires action to correct these unconstitutional acts, and the result they caused - leaving Appellant in prison when there is no legitimate reason for so doing so far over his matrix.

It further shows the Board to have acted as Appellant claimed in 2006 - that the Board acted like a sentencing court; changing the matrix, changing the elements of the crime, allowing character evidence that was purely hearsay, and resentencing Appellant to the crime they believe happened - not what Appellant was convicted of.

In the least, this violates due process, fundamental fairness doctrines, and separation of powers doctrines.

This email also shows the Board should be required under Quo Warranto doctrines to show by what authority they have acted or functioned as a sentencing court issuing thousands of judicial decisions, including this decision; as well as Fifth District Court and Third District Court needing to answer by what authority they have functioned in this criminal case's sentencing and conviction processes. (argued before) (already raised in Habeas 090910491)

Appellant believes it proper to also require a Quo Warranto query here, as their email contradicts the argument presented here below.

A "Constitutionality" inquiry should also occur, as these issues are raised in the Petition and the Memorandum here, in numerous places. See Memorandum, pgs. 4, through 46, inclusive.

This ... Board has ...

Since at least February 15, 2006, State officials have identified the Board as a sentencing Board (issue raised pg. 14 Memorandum below) and as it is applied, it shows the Board has been acting as the sentencing entity in this state for decades - as shown by the conclusion stated by then Governor Jon Huntsman on national TV discussing Tessias law and comparing Utah's system to the punishments handed out by the timeframes increased with "Tessias law" federally. Governor Huntsman clearly showed Utah's express permission, expectation, and support for the way the Board really functioned.

At the same time, whenever the issue was raised by an inmate, the AB and the courts denied that was happening; as did the Board (like their answer and memorandum here - record at 448 to 808).

Since the Board has now admitted their actions, this illegal sentence should terminate immediately. See *Cope v. Toronto*, 332, P2d 977 (Utah) at 979. y) - in view of the previous argument in x) - no further discussion is necessary.

2-) Article 1, Sec 3, Utah Constitution declares U.S. Constitutional law to be the supreme law in the land, which would require deferring conflicts in Utah case law to the holdings of U.S. Supreme Court holdings; not playing semantics games with the wording of which type of sentencing functions required Sixth Amendment protections. Judge Lielberg knew the issue was not based upon jury-trial facts specific and only applied to determine sentencing, but to sentencing periods. Her ruling borders on bad faith.

Regardless, The Board must function as statute directors, and case law directors, whether of state or federal origin. See *State v. Menzies*, 889 P2d 393, n.3 (Utah 1994) and *Hart v. S.L. Co. Comm.*, 945 P2d 125 (Utah App. 1997).

aa) Both U.R.C. P. 65 B c + d allow for illegal judicial authority to be addressed. Further the Utah Supreme Court holdings of *Benn*, *supra*, specify Quo Warranto issues and jurisdictional failures must be raised here; As both appear here, a hearing should have resulted to

bb.) *Bryant v. Turner*, 19 Utah 2d 284, 431, P. 2d 121 (Utah 1967) states 65Bb is to be used to attack jurisdiction and authority where the requirements of law have not been followed, or were ignored or distorted by a trial court; and an appropriate remedy through expanded jurisdiction or discretion of the judge the issue is before.

*State ex rel Vigil, Supra*, states the conviction cannot stand, when jurisdiction is lacking, as here. See also *Tones v. Smith*, 550 P.2d 194 (Utah 1976).

Therefore 65B may be used to vacate illegal sentences from the wrongful use of judicial authority, or usurping, intruding into, or abusing judicial authority.

cc) - no further discussion is necessary.

dd) no further discussion is necessary.

ee) - no further discussion is necessary.

ff.) Since Appellant filed an Opposition

to a Rule 11 Motion, it would be apparent that Appellant had been mailed one - otherwise no opposition would be necessary; judge should have ordered Attorney General to produce the Motion and review the filings for merits. A hearing should have been held to perfect the records.  
 65 Ba-b-c-d.

gg.) No further discussion necessary.

hh.) No further discussion required.

ii.) - Refer to All previous discussions.

jj.) - The Board, nor the court, applied any of the fundamental fairness or due process doctrines, as argued above, on any of these issues. When combined they create a scheme under which due process is flawed and flammé, as well as ignored and abused.

kk.) - The trial court, the Prison and the Board all combined to set in stone the illegal schemes shown above, using abusive tactics, methods and, as applied, illegal processes to chain like to those accused.

without having authority properly established by due process, or using procedurally proper process. (See cites)  
(See also previous arguments above.)

11.) Board has become used to being allowed to do whatever it wants when determining facts of sentence, length of incarceration, setting of numerous rehearings, setting and changing of Aggravations at whim, and abusing powers perceived to be given them; they do so because Utah courts have become indifferent to the mandates for sentencing, and have allowed the perceived power and the intrusion into legally required mandates reserved for other branches of government by the Board. (See cites)

mm)- Its Utah's sentencing scheme operates, there is no notice of the actual jeopardy faced at trial, and no notice of the final sentence until years following conviction. Utah Supreme Court has held that the argument, "every five-to-life conviction authorizes the top of life"



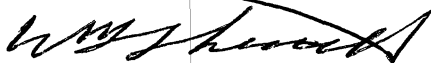
has no basis in fact (Labbaum, *supra*) so therefore does not dispose of this issue. Due process requires notice of jeopardy, and due process protection of the liberty interest that survives conviction that is protected in eligibility for parole hearings and parole grant hearings. There are no timely sentences in Utah's scheme - The time can be as low as 1 minute, or as long as 99 years, as applied. Here, it has been over 9 years and still no notice of jeopardy; An obvious due process violation. Utah's courts and judges allow this scheme to operate, without requiring notice, jeopardy, or other constitutional protections, as argued here and above. (See *cites*)

## Conclusion

Extraordinary writ should issue to end illegal sentence as argued and cited above.

Appellant believes the County Appeals lacks jurisdiction here as it involves a first degree felony - as cited on the original clockwork sheet and herein.

Appellant requests relief proper by law.

Respectfully,  


July 18, 2009

Notice of Service

I certify I mailed a copy of this document to the Utah AG at 160 E. 300 S 623 #1. SLC, UT 84114 This 22<sup>nd</sup> day of July 2009.

