

1990

Kerry Ross Boren v. Gary W. Deland : Brief of Petitioner

Utah Supreme Court

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Dan R. Larsen; Attorney for Respondent.

Kerry Ross Boren; Pro se; Attorney for Petitioner/Appellant.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

900646-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

KERRY ROSS BOREN,
Petitioner/Appellant

Case No. 900161

V.

PETITIONER'S
APPELLANT BRIEF

GARY W. DELAND, Director,
Utah State Dept. of Corrections;
Respondent

90-0646-CA

BRIEF OF PETITIONER

APPEAL FROM A DENIAL OF A WRIT OF
HABEAS CORPUS, IN THE THIRD JUDICIAL
DISTRICT COURT, IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE
SCOTT DANIELS, JUDGE, PRESIDING.

KERRY ROSS BOREN
Pro Se
P.O. Box 250
Draper, Utah 84020

Attorney for Petitioner/
Appellant

DAN R. LARSEN
236 State Capitol
Salt Lake City, Utah 84114
Attorney for Respondent

FILED

AUG 24 1990

Clerk, Supreme Court, Utah

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	APPOINTMENT OF COUNSEL

1 IN THE SUPREME COURT OF THE STATE OF UTAH

2 KERRY ROSS BOREN,
3 Petitioner,

Case No. 900161

4 v.

5 GARY W. DELAND, Director,
6 Utah State Dept. of Corrections;
7 Respondent.

PETITIONER'S
APPELLANT BRIEF

8 BRIEF OF PETITIONER

9 INTRODUCTION

10
11 Respondent will file a separate brief on appeal to
12 this Court. Therefore, Petitioner will address only the
13 issues on appeal.

14 JURISDICTION AND NATURE OF PROCEEDINGS

15 This appeal is from a denial of Petitioner's Petition
16 for a Writ of Habeas Corpus, in the Third Judicial District
17 Court. This Court has jurisdiction to hear this appeal
18 under Utah Code Ann. § 78-2-2 (3) (i) (Supp. 1988).

19
20 STATEMENT OF THE ISSUES PRESENTED ON APPEAL

21
22 1. Whether the trial court properly denied Petitioner's
23 Petition for Writ of Habeas Corpus finding that Petitioner's
24 Constitutional rights, privileges and immunities were not vio-
25 lated.

26 2. Whether Petitioner's Constitutional rights, privi-
27 leges and immunities were violated when the trial court
28 did not instruct Petitioner that he had a right to review

3. Whether Petitioner's Constitutional rights, privileges and immunities were violated by illegal search and seizure, and failure to instruct Petitioner of his Miranda rights prior to arrest, and whether these violations effected the outcome of Petitioner's sentence and/or plea.

4. Whether Petitioner's right to fundamental fairness was honored by the trial court when Petitioner's presentence report was disclosed to Petitioner's Counsel prior to sentencing, but not to Petitioner.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

STATE V CASAREZ, 656 P. 2d 1005, 1008 (UTAH 1982):

Sentencing is critical stage of criminal proceeding at which defendant is entitled to effective assistance of counsel.

Procedural fairness is as obligatory at sentencing phase of trial as at guilt phase.

If defendant cannot inspect contents of presentence report, his constitutional right to effective assistance of counsel at time of sentencing is seriously impaired if judge may rely on information which may be inaccurate and is unknown to defendant.

UTAH CODE ANN. 1953, 77-18-1 (2)

Statute providing that court may disclose all parts of presentence report to defendant or his counsel as interest of justice requires was not intended to make disclosure of presentence report depend on personal whim or subjective standard of individual judge; rather, Legislature expressly provided that exercise of discretion should be guided as "the interest of justice requires" and, thus, statute was constitutional.

STATE V LIPSKY, 608 P. 2d 1241, 1248 (UTAH 1980)

Fundamental fairness requires that presentence report be disclosed to defendant prior to sentencing.

Trial Court committed reversible error in sentencing defendant to imprisonment for aggravated assault, where presentence report prepared by Adult Probation and Parole Department had not been disclosed to defendant prior to sentencing, although court orally summarized contents of report and defendant did not challenge accuracy of the report.

STATEMENT OF THE CASE

Petitioner, Kerry Ross Boren, was charged with Murder in the Second Degree, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (Supp. 1983). Petitioner pled guilty to subparagraph (c) of Murder in the Second Degree, a first degree felony, on April 16, 1984, in the Third Judicial District Court, in and for Salt Lake County, the Honorable Jay E. Banks, Judge, presiding. Petitioner was sentenced by Judge Banks on May 17, 1984, to a term of five years to life in the Utah State Prison. Petitioner subsequently filed a Motion to Withdraw Plea of Guilty which was denied.

STATEMENT OF THE FACTS

On September 15, 1983, Petitioner called a 911 telephone operator to report that his wife, Elvia Boren, was extremely ill and having difficulty breathing. She was pronounced dead within minutes of arrival of emergency aid. Petitioner's wife had been raped some four months prior to her death, by several men in Las Vegas, Nevada, who were never charged with the crime. Petitioner's wife was also addicted to barbituates given to her by her

assailants, and was suicidal and suffering from Rape Crisis Syndrome in the months prior to her death. Petitioner attempted to prevent his wife from committing suicide, and subsequently deprived her of the pills he discovered to her possession, whereby she suffered regressive seizures. Subsequent medical examination revealed that the victim suffered from "hidden epilepsy."

Petitioner was arrested on September 15, 1983 and charged with subsections (a) and (b) of Murder in the Second Degree, a first degree felony, in violation of Utah Code Ann. 76-5-203 (1) (a) and (b) (Supp. 1983). At a preliminary hearing on January 6, 1984 the State amended the information to add subsection (c) of Second Degree Murder. Based upon the evidence adduced, Judge Robert C. Gibson bound Petitioner over to the district court for trial.

Petitioner was arraigned in district court on January 13, 1984. He entered a plea of "not guilty" to the Murder charge. On April 16, 1984, Petitioner entered a change of plea, having discussed with his counsel that he would not plead guilty to "intentional murder" in the death of his wife. Subsequently, Petitioner plead guilty under subsection (c), the depraved indifference subsection, which reads exactly:

"Acting under circumstances evidencing a depraved indifference to human life, Defendant engaged in conduct which created a grave risk of death to another and thereby caused the death of another. I created a grave risk of death to my wife which resulted in her death by my lack of appropriate treatment and care." (Affidavit of Defendant, April 16, 1984).

Judge Jay E. Banks sentenced Petitioner to a term of five years to life in the Utah State Prison. Petitioner did not appeal his conviction and sentence. On July 28, 1987, Petitioner filed a Pro Se MOtion to Withdraw his Guilty Plea. After a hearing on October 28, 1987, Judge Frank G. Noel denied the motion.

On January 12, 1990. a hearing was held in Third Judicial District Court, before the Honorable Scott Daniels, Judge, presiding. On January 16, 1990, Judge Daniels issued an order dismissing Petitioner's Motion in respect to Miranda and Search and Seizure issues, but granted Petitioner a hearing on the issue of the presentence report. Both Petitioner and Respondent filed briefs in respect to the presentence issue, and Judge Daniels subsequently denied Petitioner's Motion. Petitioner then filed an appeal pertaining to these issues with the Utah Supreme Court on April 10, 1990.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion when it failed to inform Petitioner that he had a right to review the presentence report, and that the information and contents would be used by the trial judge to determine Petitioner's sentence. Furthermore, the trial court violated Petitioner's right to fundamental fairness when Petitioner's presentence report was disclosed to Petitioner's counsel prior to sentencing, but not to Petitioner.

The trial court abused its discretion when it denied Petitioner's claim that illegal Search and Seizure and the failure to inform Petitioner of his Miranda rights violated Petitioner's Constitutional rights, privileges and immunities, and effected the outcome of his sentence and plea.

- 5 -

ARGUMENT

Point I

THE TRIAL COURT ABUSED ITS DISCRETION IN
DENYING PETITIONER'S PETITION FOR WRIT
OF HABEAS CORPUS ON GROUNDS THAT HIS RIGHT
TO REVIEW PRESENTENCE REPORT PRIOR TO
SENTENCING WAS NOT VIOLATED.

Petitioner maintains that Judge Scott Daniels abused his discretion in denying his Petition for Writ of Habeas Corpus on the issue of the presentence report. Judge Daniels based his opinion upon the supposition that it was sufficient to provide access to the presentence report to Petitioner's Counsel prior to sentencing.

A defendant is generally entitled to disclosure of the information contained in a presentence investigation report prior to sentencing. The purpose of disclosure is to assure accurate information in determining sentence. Once disclosed, a defendant has the opportunity to refute the information contained in the report.

The Utah Supreme Court has clearly stated that procedural fairness requires that all parts of a presentence report be disclosed to a defendant prior to sentencing, except when disclosure of information may jeopardize the life or safety of Third persons. The wording of the court is quite specific: "If defendant cannot inspect contents of presentence report, his constitutional right to effective assistance of counsel at time of sentencing is seriously impaired if judge may rely on information which may be inaccurate and is unknown to defendant." (State V. Casarez, 656 P.2d 1005, 1008, [Utah 1982]).

State V. Lipsky, (608 P. 2d 1241, 1248 [Utah 1980]) is as equally clear: "Fundamental fairness requires that presentence report be disclosed to defendant prior to sentencing..."

While it is true that Utah Code Ann. 1953, 77-18-1 (2) provides that court "m ay disclose all parts of presentence report to defendent or his counsel as interest of justice requires," it continues by clarifying that this is "not intended to make disclosure of presentence report depend on personal whim or subjective standard of individual judge;..." Clearly, the decision of the trial court initially, and of Judge Scott Daniels in the instant action, violates this statute, being his personal discretion and whim. The presentence report should have been provided to the Petitioner according to the interests of justice.

Both Casarez and Lipsky are specific that if the defendant cannot personally inspect his presentence report, he cannot refute information being relied upon to determine his sentence, his fundamental rights are violated. Clearly defense counsel cannot be relied upon to correct erroneous information which is known only to the defendant.

Therefore, it is not enough that a copy of the presentence report be provided to defense counsel, if the defendant is not instructed by the Court that the information therein will be used to determine his sentence, and that he has an oppurtunity under law to review and refute the contents of the presentence report. The defendant relies totally upon his counsel and the court to protect his fundamental rights. If defense counsel fails to provide adequate instruction to the defendant, then the alternativee for him/her is to have been apprised by the court.

Clearly it is the responsibility of the Court to apprise a defendant of the statutes governing his sentencing, and should not be left to the discretion of defense counsel in such a crucial phase of a criminal proceeding. This is in keeping with Legislative intent wherein they have stipulated that disclosure of the presentence report to the defendant should be "as the interest of justice requires." (Casarez at 1007).

In Casarez, the Court indicated that because sentencing is a critical stage of a criminal proceeding, the failure to allow a defendant's counsel sufficient opportunity to read and investigate a presentence report may be equivalent to a denial of access to counsel. (Casarez, 656 P.2d at 1007-08).

The State contends that "It is axiomatic that a represented party is deemed to be informed when the trial court informs the party's counsel." (Respondent's Supplemental Memorandum of Law, 24 Jan. 1990, p. 3). It is therefore the State's contention that defense counsel's silence regarding the accuracy of the report constituted a waiver of an objection to the report. Petitioner disagrees. While "[d]ecisions as to...what objections to make...are generally left to the professional judgment of counsel," (State V. Medina, 738 P.2d 1021,1023 [Utah 1989]) the issue here instead whether such a decision should be left to defense counsel, or whether in the instance of the presentence report, the interests of justice are to be served only by responsibility of the Court to apprise defendant of his fundamental rights, and not in defense counsel's exercise or waiver of such rights. Certainly a defendant must, in the interest of justice, have a voice in the issues affecting his plea bargain and sentence, and he is deprived of that opportunity if not properly informed by the sentencing court, of his fundamental rights.

Moreover, Petitioner's counsel did not have sufficient time to properly review presentence report with Petitioner. Defense counsel requested presentence report at a plea bargain hearing on April 16, 1984 [transcript p. 6 at lines 7-12]. Preparation of the report required several weeks, and defense counsel did not receive a copy until two days before sentencing, which took place May 4, 1984.

Utah R. Crim . P. 11 (e), Utah Code Ann. & 77-35-11 (e) (Supp. 1988), provides that a guilty plea shall not be accepted by the court unless:

(4) that the defendant understands the nature and elements of the offense to which he is entering the plea;

...

In Boykin V. Alabama, 395 U.S. 238 (1969), the United States Supreme Court held that it was reversible error for a trial court to accept a guilty plea without an affirmative showing in the record that it was made intelligently and voluntarily. A plea cannot be either intelligent or voluntary if the pertinent information being used to determine the guilty and sentence of the defendant, i.e. the presentence report, is withheld from or denied to him in any fashion. This clearly violated Petitioner's rights under Rule 11 (e).

In the instant case, at the sentencing phase on May 4, 1984, Judge Jay Banks asked Petitioner if he had reviewed his constitutional rights and understood the rights he was waiving, to which Petitioner indicated that he did. In addition, at plea bargain hearing on April 16, 1984, Judge Banks asked Petitioner: "By entering a plea of guilty, you do, in fact, admit the facts that support that charge?..." (transcript April 16, 1984, p. 3 lines 8-9).

On pages 4-5 of the aforesaid transcript, Judge Banks asks Petitioner if he understands his constitutional rights, and that he is waiving those rights (p.3 lines 25, p.4 lines 1-12), to which Petitioner replies that he does.

At the time of plea bargain and sentencing, Petitioner was unaware that the pertinent information which would determine his sentence, i.e. the presentence report, was being withheld from him. The sentencing judge makes no mention of it, and Petitioner was therefore deprived of his only opportunity to make an intelligent and voluntary plea.

Moreover, Petitioner's inability to discern the true elements of his plea and sentence because of information having been denied him, deprived him of the necessary basis of facts to determine whether or not to appeal his case in the initial stages.

Finally, the Utah State Board of Pardons uses the presentence report to determine the length and type of confinement and conditions of parole (Utah State Board of Pardons Policies and Procedures Manual, at No. 4.02, revised July 7, 1986). This is further granted by statute in UTah Code of Criminal Procedure at 77-27-13 (2). A defendant still has a right to full disclosure of the presentence report even if the trial court disregards the report altogether in imposing a sentence, because of the subsequent uses made of it. (State V. Lockwood, La. 399 So. 2d 190 [1981]).

POINT II

PETITIONER'S CONSTITUTIONAL RIGHTS,
PRIVILEGES AND IMMUNITIES WERE VIO-
LATED BY ILLEGAL SEARCH AND SEIZURE,
AND FAILURE TO INSTRUCT PETITIONER
OF HIS MIRANDA RIGHTS PRIOR TO ARREST
AND SENTENCING, EFFECTING OUTCOME OF
BOTH SENTENCE AND PLEA.

Failure to give a habeas petitioner Miranda warnings is not grounds for habeas, since no confession was given or used at trial. (Bonaparte V. Smith, 362 F Supp. 1315 [D. Ga. 1973]). However, where information was illegally taken at time of arrest and entered into presentence report, it directly effects outcome of Petitioner's plea bargain and sentencing. Moreover, it effects his length and conditions of confinement, which are appropriately remedied by habeas corpus. (Drollinger V. Milligan, 552 F. 2d 1220 [7th Cir. 1977]; Crawford V. Bell, 579 F. 2d 890 [9th Cir. 1979]).

Following Petitioner's arrest on September 15, 1983, in - vestigators used information illegally seized to entice and/or coerce witnesses, and withheld pertinent evidence seized which would have tended to verify Petitioner's alibi. This information was submitted to the trial court in the presentence report, and used against Petitioner to determine his sentence. This information, unavailable to Petitioner, prejudiced the Board of Pardons in determining Petitioner's length of sentence, conditions of confinement by classification, and terms of eligibility for parole.

CONCLUSTION

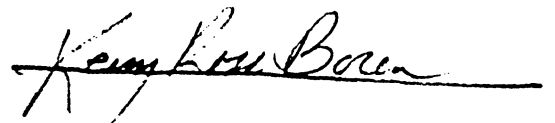
Based on the foregoing, Petitioner respectfully requests this Court to reverse the decision of the lower Court's denial of Petitioner's Petition for Writ of Habeas Corpus.

DATED this 31 day of July, 1990.



CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Petitioner was mailed, postage prepaid, to attorney for Respondent, Dan R. Larsen, 236 State Capitol, Salt Lake City, Utah 84114, this 31 day of July, 1990.



EXHIBITS

EXHIBIT A

In the District Court of the Third Judicial District
State of Utah

APR 16 1984

THE STATE OF UTAH
Plaintiff
vs.
Kerry R. Boren
Defendant

H. Dixey
By Pat Jones
Deputy Clerk

Affidavit of Defendant

Criminal No 84-40

I, Kerry R. Boren, under oath, hereby acknowledge that I have entered a plea of guilty to the charge(s) of.

Criminal Homicide

(Name of Crime)

Elements

Facts.

<u>Acting under circumstances</u>	<u>I created a grave risk of</u>
<u>evidencing a depraved indifference</u>	<u>death to my wife which</u>
<u>to human life, Defendant</u>	<u>resulted in her death by</u>
<u>engaged in conduct which created</u>	<u>my lack of appropriate</u>
<u>a grave risk of death to another</u>	<u>treatment and care.</u>
<u>and thereby caused the death of another.</u>	

I have received a copy of the charge (Information) and understand the crime I am pleading guilty to is a First Degree Felony

(Degree of Felony or Class of Misdemeanor)

and understand the punishment for this crime may be 5 to life
prison term, \$10,000 fine, or both. I am not on drugs or alcohol.

My plea of guilty is freely and voluntarily made. I am represented by Attorney Linda E. Carter
who has explained my rights to me and I understand them.

1 I know that I have a constitutional right to plead not guilty and to have a jury trial upon the charge to which I have entered a plea of guilty, or to a trial by a judge should I desire.

2 I know that if I wish to have a trial, I have a right to see and hear the witnesses against me in open court in my presence and before the Judge and jury with the right to have those witnesses cross examined by my attorney. I also know that I have a right to have my witnesses subpoenaed at state expense to testify in court upon my behalf and that I could testify on my own behalf, and that if I choose not to do so, the jury will be told that this may not be held against me.

3 I know that if I were to have a trial that the prosecutor must prove each and every element of the crime charged beyond a reasonable doubt, that any verdict rendered by a jury whether it be that of guilty or not guilty must be by a complete agreement of all jurors.

4 I know that under the constitution that I have a right not to give evidence against myself and that this means that I cannot be compelled to admit that I have committed any crime and cannot be compelled to testify unless I choose to do so.

5 I know that under the constitution of Utah that if I were tried and convicted by a jury or by the Judge that I would have a right to appeal my conviction and sentence to the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, that those costs would be paid by the State without cost to me.

6 I know and understand that by entering a plea of guilty I am giving up my constitutional rights as set out in the preceding paragraphs and that I am admitting I am guilty of the crime to which my plea of guilty is entered

7 I also know that if I am on probation, parole, or awaiting sentencing upon another offense of which I have been convicted, that the present action may result in consecutive sentences being

8 I know that the fact that I have entered a plea of guilty does not mean that the Judge will not impose either a fine or sentence of imprisonment upon me and no promises have been made to me by anyone as to what the sentence will be

9 No promises or threats of any kind have been made to induce me to plead guilty. The following other charges pending against me, to-wit (Court case number(s) or count(s)):

The State will not file any charges arising from alleged sexual relations with a child.

will be dismissed, and that no other charge(s) will be filed against me for other crimes I may have committed which are now known to the prosecuting attorney. I am also aware that any charge or sentencing concessions or recommendations or probation or suspended sentences, including a reduction of the charges for sentencing made or sought by either defense counsel or counsel for the State, is not binding on the Judge and may not be approved by the Judge

10 I have read this Affidavit, or I have had it read to me by my attorney, and I know and understand its contents. I am 42 years of age, have attended school through the 12th grade and I can read and understand the English language

Dated this 4-16- day of April, 19 84.

Kerry R. Boren
Defendant

Subscribed and sworn to before me in Court this 16th day of April, 19 84

Gay E. Borch
Judge

CERTIFICATE OF DEFENSE ATTORNEY:

I certify that I am the attorney for Kerry R. Boren, the defendant named above and I know he has read the Affidavit, or that I have read it to him, and I discussed it with him and believe he fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief the statements, representations and declarations made by the defendant in the foregoing Affidavit are in all respects accurate and true.

Linda L. Carter
Defense Attorney

CERTIFICATE OF PROSECUTING ATTORNEY:

I certify that I am the attorney for the State of Utah in its case against Kerry R. Boren, defendant. I have reviewed the Affidavit of the defendant and find that the declarations are true and accurate. No improper inducements, threats, or coercions to encourage a plea have been offered the defendant. There is reasonable cause to believe the evidence would support the conviction of the defendant for the plea offered, and that acceptance of the plea would serve the public interest.

Shirley Ann Harnett
Prosecuting Attorney

ORDER

Based upon the facts set forth in the foregoing Affidavit and certification, the Court finds the defendant's plea of guilty is freely and voluntarily made and it is ordered that defendant's plea of "Guilty" to the charge, set forth in the Affidavit be accepted and entered.

Done in Court this 16th day of April, 19 84.

ATTEST
H. DIXON HINDLEY
Clerk

D-1

Gay E. Borch
District Judge

000051

THIRD JUDICIAL DISTRICT
County of Salt Lake - State of Utah

FILE NO: CR84-40

TITLE: (<input checked="" type="checkbox"/> Parties Present)	:	COUNSEL: (<input checked="" type="checkbox"/> Counsel Present)
<u>State</u>	:	<u>N. Gunnerson</u>
<u>Kerry R. Boren</u> <input checked="" type="checkbox"/> <u>in jail</u>	:	<u>L. Carter</u> <input checked="" type="checkbox"/>
<u>d.o.b. 8-3-41</u>	:	
<u>P. Jones</u> Clerk		HON: <u>Jay E. Banks</u> Judge
<u>R. Raynie</u> Reporter		DATE: <u>April 16, 1984</u>
<u>J. Bond</u> Bailiff		FINE AMOUNT: _____

- ☐ This being the time set for the defendant to enter his plea, appearances as shown above.
- ☐ The defendant now enters a plea of Guilty to the crime of _____
 And waives the statutory time for passing of sentence and same is set for _____.
- ☐ The defendant now enters a plea of Not Guilty to the crime of _____
 as charged and the case is set for trial on _____.
- ☒ Comes now the above named defendant and being represented by counsel as appears above and moves the court and is granted leave to withdraw his plea of not guilty heretofor entered. Whereupon, the defendant now enters a plea of guilty to the crime of criminal homicide, including second degree, 1st felony
 and waives time for passing of sentence and same is set for May 4 at 9:30.

SENTENCE FORM

- ☐ This being the time fixed for passing of sentence upon the above named defendant, appearances as shown above. The deft. is now asked if he has any legal cause to show why sentence should not be passed upon him in accordance with Sec. 77-35-9 U.C.A. The defendant answering he has none, judgment and sentence is pronounced as follows:
- "It is the judgment and sentence of this court that you _____
 be confined and imprisoned in the ☐ UTAH STATE PRISON ☐ SALT LAKE COUNTY JAIL, for the _____
- ☐ And Ordered To Pay Fine of \$ _____ as provided by law for the crime of _____."
- ☐ The defendant is now placed on probation under the supervision of the APPD and is granted a stay of execution of sentence _____ on the conditions listed below.

CONDITIONS:

- ☐ The usual and ordinary conditions required by the Adult Parole and Probation Department

- ☐ Commitment to issue forthwith.
- ☒ Case is referred to APPD for investigation & presentence report.
- ☒ APPD Notified ☒ Called Bonnie _____ at APPD.
- ☐ Placed copy M.E. in APPD Box.
- ☐ APPD Agent _____ Present.

000052

THIRD JUDICIAL DISTRICT,
County of Salt Lake - State of Utah

FILE NO: CR54-40

TITLE:	(<input checked="" type="checkbox"/> Parties Present)	: COUNSEL:	(<input checked="" type="checkbox"/> Counsel Present)
<u>State</u>		: <u>D. Gunnarson</u>	
<u>VS</u>		: <u>L. Carter</u>	
<u>Kerry R. Boren</u>			
<u>(Jail)</u>			

<u>C. Porter</u>	Clerk	HON: <u>Jay E. Banks</u>	
<u>F. Hayne</u>	Reporter	DATE: <u>5/17/84</u>	Judge
<u>J. Bodd</u>	Bailiff	FINE AMOUNT: _____	

SENTENCE FORM

- ☐ The motion of ☐ Plt. ☐ Def. ☐ The Court - to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ Granted ☐ Denied.
- ☒ This being the time fixed for passing of sentence upon the above named defendant, appearances as shown above. The def. is now asked if he has any legal cause to show why sentence should not be passed upon him in accordance with Sec. 77-35-9 U.C.A. The defendant answering he has none, judgment and sentence is pronounced as follows:
- "It is the judgment and sentence of this court that you Kerry R. Boren be confined and imprisoned in the ☒ UTAH STATE PRISON ☐ SALT LAKE COUNTY JAIL for the Ind Term 5 years to life
- ☐ And ordered to pay a fine of \$ _____ as provided by law for the crime of Criminal Homicide, Murder Second Degree, 1st F."
- ☐ The Court suspends the imposition of sentence and def. is placed on probation under supervision of Adult Parole and Probation Department on the conditions listed below:
- ☐ The defendant is now placed on probation under the supervision of the Adult Parole and Probation Department and is granted a stay of execution of sentence _____ on the conditions listed below.

CONDITIONS:

- ☐ The usual and ordinary conditions required by the Adult Parole and Probation Department.

- ☐ Based on the Court's motion, it is ordered that def. be committed to _____
☐ for a 90-day evaluation period ☐ for an additional 90-day evaluation period, and sentencing date is set for _____
- ☒ Commitment to issue forthwith (Court recommends psychiatric evaluation for def.)
- ☐ Other: (Dismissal of other charges)
- ☐ APPD Notified ☐ Called _____ at APPD
- ☐ Placed copy of M. E. in APPD box
- ☐ APPD Agent _____ Present

EXHIBIT B

RECEIVED

MAR 21 1988

UTAH STATE OFFICE
OF ATTORNEY GENERAL

Kerry Ross Boren, Pro se
P.O. Box 250
Draper, Utah 84020

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

KERRY ROSS BOREN,

Petitioner,

vs.

GARY DELAND; Director of the
Utah State Prison; State of Utah;
Department of Corrections,

Respondent.

PETITION FOR A WRIT
OF HABEAS CORPUS
(POST CONVICTION
RELIEF)

Case No. CR84-40

Rule 65 (B) (i) (2) of the Utah Rules of Civil Procedure directs the complainant to "set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated." In addition, "argument, citations and discussion of authorities" are set out in supporting memorandum in accordance with Rule 65 (B) (i) (3) of the Utah Rules of Civil Procedure.

COMES NOW the petitioner, KERRY ROSS BOREN, and for cause of action alleges as follows:

1. That on the 17th of May, 1984, Petitioner was sentenced from a guilty plea, by Judge Jay Banks of the Third District Court in and for the County of Salt Lake, State of Utah, on a charge of 2nd degree homicide, a first degree felony, in a charge stemming from the death of Petitioner's wife which occurred on September 15, 1983.

2. That Petitioner was sentenced to a term of five-years-to life at the Utah State Prison.

WRIT - 2

3. That Petitioner is being illegally held at the Utah State Prison where he is currently located and imprisoned.

4. That Petitioner is currently restrained from the due exercise of his life and liberty by his placement at the Utah State Prison for the following reasons:

a) Presentence Report was made available to Defense Counsel but the contents and information and evidence therein were never disclosed to the Defendant, even by the trial court, although evidence therein was used to determine the sentence of the Defendant.

b) Further, defense counsel was provided with a copy of defendant's pre-sentence report (see Sentencing Hearing transcript), but defendant was never apprised of this fact nor informed of the contents thereof, either by defense counsel or the trial judge. This inadequacy certainly effected the defendant's decision regarding his guilty plea.

c) Trial judge stated in Sentencing Hearing of the defendant (see transcript) that he had read all the reports and his decision was thereby based upon the contents and information therein, without providing the defendant the opportunity to refute the matter or to present mitigating circumstances.

d) Subsequent investigation has revealed that the pre-sentence report contains erroneous and potentially damaging false information which has effected the petitioner and will continue to effect petitioner in the future if not corrected, and attempts to date by the petitioner to be permitted to examine the report and make the necessary corrections have been ignored or denied.

5. That no other issues have previously been decided by this or any other court.

6. That this writ of Habeas Corpus seeks redress on the specific matters mentioned above.

WRIT - 3

WHEREFORE, Petitioner prays that this Court:

1. Hold an evidentiary hearing at which time evidence may be offered concerning the allegations in this complaint.
2. Permit Petitioner, who remains indigent, to proceed without pre-payment of costs, fees, or other assessments.
3. Grant Petitioner the authority to obtain subpoenas in Forma Pauperis, for witnesses and documents necessary to assist in proof of the facts alleged in the petition as stated above.
4. Issue a Writ of Habeas Corpus to have the Petitioner brought before it, to the end that he may be discharged from the illegal and unconstitutional confinement and restraint.

DATED this 16 day of March, 1988.


Petitioner

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Petition for Writ of Habeas Corpus, postage prepaid, to the Utah Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, 84114, H. Dixon Hindley, Clerk, The Third District Court, Salt Lake County, 240 East 400 South, Salt Lake City, Utah 84111, this 16 day of March, 1988.


Petitioner

Kerry Ross Boren, Pro Se
P.O. Box 250
Draper, Utah 84020

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT
LAKE COUNTY, STATE OF UTAH

KERRY ROSS BOREN,
Petitioner,

Case No. CR84-40

Vs.

PETITION FOR A WRIT OF
HABEAS CORPUS
(Post Conviction Relief)

GARY W. DELAND, Director,
Utah State Dept. Of Corrections,
Respondent.

Rule 65 (B) (1) (2) of the Utah Rules of Civil Procedure directs the Complainant to "set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated." Additionally, "argument, citations and discussion of authorities" are set out in supporting memorandum in accordance with Rule 65 (B) (1) (3) of the Utah Rules of Civil Procedure.

COMES NOW the Petitioner and for Cause of Action states and alleges as follows:

- 1) That on the 17th of May, 1984, Petitioner was sentenced from a guilty plea by Judge Jay Banks of the Third District Court in and for the County of Salt Lake, State of Utah, on a charge of second degree homicide, a first degree felony, in a charge stemming from the death of Petitioner's wife which occurred on September 15, 1983.
- 2) That Petitioner was sentenced to a term of five-years-to-life at the Utah State Prison.
- 3) That Petitioner is being illegally held at the Utah State Prison where he is currently located and imprisoned.
- 4) That Petitioner has been incarcerated for a total of approximately six (6) years.
- 5) That Petitioner is currently restrained from the due exercise of his life and liberty by his illegal placement at the Utah State Prison for the following reasons:
 - A. Petitioner was denied his constitutional rights of protection against self-incrimination, his rights to an attorney, and to be properly informed of the accusations and charges against him under the Miranda Decision.

PETITION FOR WRIT -2-

- B. Petitioner was subjected to illegal search and seizure of property which culminated in obtaining evidence against him; subsequently evidence which could have verified Petitioner's alibi was suppressed and destroyed.
- C. Petitioner was denied the opportunity to examine the Presentence Report which contained erroneous and damaging statements directly affecting the outcome of Petitioner's sentence, and which, had Petitioner been granted the right and/or privilege of examining said Report before sentencing, would have assuredly changed the outcome of Petitioner's plea.

THEREFORE, Petitioner maintains that his statutory and/or Constitutional rights were violated at the time of his arrest and/or sentencing and that he has been unlawfully deprived of his liberty and Constitutional rights and immunities by the actions of his accusers and respectfully demands the Court to MOVE upon Petitioner's petition as attached.

6) That these issues have not been previously decided by this or any other Court.

7) That this writ of Habeas Corpus seeks redress on the specific matters mentioned above.

WHEREFORE, Petitioner prays that this Court:

- a.) Hold an evidentiary hearing at which time evidence may be offered concerning the allegations in this Petition.
- b.) Permit Petitioner, who remains indigent, to proceed without pre-payment of costs, fees, or other assessments.
- c.) Grant Petitioner the authority to obtain subpoenas in Forma Pauperis, for witnesses and documents necessary to assist in proof of the facts alleged in the Petition as stated above.
- d.) Issue a Writ of Habeas Corpus to have the Petitioner brought before it, to the end that he may be discharged from the illegal and unconstitutional confinement and restraint.

DATED this 25 day of September, 1989.


PETITIONER

Kerry Ross Boren, Pro se
P.O. Box 250
Draper, Utah 84020

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

KERRY ROSS BOREN,		
Petitioner,		MEMORANDUM IN SUPPORT
		OF WRIT OF HABEAS
		CORPUS (POST CONVIC-
vs.		TION RELIEF)
GARY DELAND; Director of the		
Utah State Prison; State of Utah;		Case No. <u>CR84-40</u>
Department of Corrections,		
Respondent.		

Rule 65 (B) (i) (2) of the Utah Rules of Civil Procedure directs the complainant to "set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated." In addition, "argument, citations and discussion of authorities" are set out in supporting memorandum in accordance with Rule 65 (B) (i) (3) of the Utah Rules of Civil Procedure.

COMES NOW the petitioner, KERRY ROSS BOREN, and presents the following facts, information, argument, citations and discussion of authorities in support of the attached Writ of Habeas Corpus:

1. That on the 17th of May, 1984, Petitioner was sentenced from a guilty plea, by Judge Jay Banks of the Third District Court in and for the County of Salt Lake, State of Utah, on a charge of 2nd degree homicide, a first degree felony, in a charge stemming from the death of Petitioner's wife which occurred on September 15, 1983.

- B. Petitioner was subjected to illegal search and seizure of property which culminated in obtaining evidence against him; subsequently evidence which could have verified Petitioner's alibi was suppressed and destroyed.
- C. Petitioner was denied the opportunity to examine the Presentence Report which contained erroneous and damaging statements directly effecting the outcome of Petitioner's sentence, and which, had Petitioner been granted the right and/or privilege of examining said Report before sentencing, would have assuredly changed the outcome of Petitioner's plea.

THEREFORE, Petitioner maintains that his statutory and/or Constitutional rights were violated at the time of his arrest and/or sentencing and that he has been unlawfully deprived of his liberty and Constitutional rights and immunities by the actions of his accusers and respectfully demands the Court to MOVE upon Petitioner's petition as attached.

6) That these issues have not been previously decided by this or any other Court.

7) That this writ of Habeas Corpus seeks redress on the specific matters mentioned above.

WHEREFORE, Petitioner prays that this Court:

- a.) Hold an evidentiary hearing at which time evidence may be offered concerning the allegations in this Petition.
- b.) Permit Petitioner, who remains indigent, to proceed without pre-payment of costs, fees, or other assessments.
- c.) Grant Petitioner the authority to obtain subpoenas in Forma Pauperis, for witnesses and documents necessary to assist in proof of the facts alleged in the Petition as stated above.
- d.) Issue a Writ of Habeas Corpus to have the Petitioner brought before it, to the end that he may be discharged from the illegal and unconstitutional confinement and restraint.

DATED this 25 day of September, 1989.


PETITIONER

Kerry Ross Boren, Pro se
P.O. Box 250
Draper, Utah 84020

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

KERRY ROSS BOREN,		
Petitioner,		MEMORANDUM IN SUPPORT
		OF WRIT OF HABEAS
vs.		CORPUS (POST CONVIC-
		TION RELIEF)
GARY DELAND; Director of the		
Utah State Prison; State of Utah;		Case No. <u>CR84-40</u>
Department of Corrections,		
Respondent.		

Rule 65 (B) (i) (2) of the Utah Rules of Civil Procedure directs the complainant to "set forth in plain and concise terms the factual data constituting each and every manner in which the complainant claims that any constitutional rights were violated." In addition, "argument, citations and discussion of authorities" are set out in supporting memorandum in accordance with Rule 65 (B) (i) (3) of the Utah Rules of Civil Procedure.

COMES NOW the petitioner, KERRY ROSS BOREN, and presents the following facts, information, argument, citations and discussion of authorities in support of the attached Writ of Habeas Corpus:

1. That on the 17th of May, 1984, Petitioner was sentenced from a guilty plea, by Judge Jay Banks of the Third District Court in and for the County of Salt Lake, State of Utah, on a charge of 2nd degree homicide, a first degree felony, in a charge stemming from the death of Petitioner's wife which occurred on September 15, 1983.

2. That Petitioner was sentenced to a term of five-years-to life at the Utah State Prison.

3. Presentence Report was made available to Defense Counsel but the contents and information and evidence therein were never disclosed to the Defendant, even by the trial court, although evidence therein was used to determine the sentence of the Defendant.

- a) Utah Code of Criminal Procedure states in 77-18-1(at p. 104), under "Presentence reports":

"Former 77-35-13, which required circumstances aggravating or mitigating punishment to be presented by witnesses in open court, did not apply to presentence reports so that such reports could have been received by the trial judge but such reports should have been disclosed to the defendant." (State v. Lipsky, [1980] 608 P 2d 1241 - emphasis added).

Under the above provision, the defendant was denied this right by the trial judge who erred when he did not disclose the presentence report to the defendant to permit defendant to fully and factually know the true nature of the charges against him and of the disclosures and explanation of the elements thereof.

- b) Utah Code of Criminal Procedure (Id. "Presentence reports") continues:

"Failure to furnish defendant with copy of presentencing report prior to sentencing was not prejudicial error where sentencing court had stated specific information in the report upon which it relied and thus given defendant an opportunity to refute the matter and defendant did not contend any of the information was inaccurate or false or that he was precluded from presenting any mitigating circumstances." (State v. Roberts, [1980] 612 P 2d 360).

4) Further, defense counsel was provided with a copy of defendant's pre-sentence report (see Sentencing Hearing transcript), but defendant was never apprised of this fact nor informed of the contents thereof, either by defense counsel or the trial judge. This inadequacy certainly effected the defendant's decision regarding his guilty plea.

5) Trial judge stated in Sentencing Hearing of the defendant (see transcript) that he had read all the reports and his decision was thereby based upon the contents and information therein, without providing the defendant the opportunity to refute the matter or to present mitigating circumstances.

a) The following citations are taken from STATE OF UTAH V. STEVEN MICHAEL CASAREZ (Utah, 656 F. 2d 1005 - Pacific Reporter) [Supreme Court No. 16997, Dec. 9, 1982].

1. Criminal Law - 988

Sentencing is critical stage of criminal proceeding at which defendant is entitled to effective assistance of counsel. U.S.C.A. Const. Amend. 6

2. Criminal Law - 986.1

Procedural fairness is as obligatory at sentencing phase of trial as at guilt phase.

3. Criminal Law - 986.5

If defendant cannot inspect contents of presentence report, his constitutional right to effective assistance of counsel at time of sentencing is seriously impaired if judge may rely on information which may be inaccurate and is unknown to defendant. U.S.C.A. Const. Amend. 6.

4. Constitutional Law -48(1)
Statutes - 181(1)

It is policy of court to construe statutes when possible to effectuate legislative intent and to avoid potential constitutional conflicts.

5. Criminal Law - 978

Statute providing that court may disclose all parts of presentence report to defendant or his counsel as interest of justice requires was not intended to make disclosure of presentence report depend on personal whim or subjective standard of individual judge; rather, Legislature expressly provided that exercise of discretion should be guided as "the interest of justice requires" and, thus, statute was constitutional. U.C.A. 1953, 77-18-1(2).

6. Criminal Law - 986.5

Only when disclosure of presentence report will jeopardize life or safety of third parties should there be deletions from report to protect them and, in such cases, disclosure to defendant of as much of report as possible should be made. U.C.A. 1953, 77-18-1(2).

b) In the aforesaid case [cited in 5 (a) above], the Utah Supreme Court ruled as follows:

STEWART, Justice:

Defendant was convicted of two counts of aggravated sexual assault, one for rape and one for sodomy, in violation of U.C.A. 1953, * 76-5-405. He contends that the trial court erred in 1) denying him access to his presentence report prior to sentencing; 2) admitting evidence of another crime; and 3) denying him his statutory right of allocation at the time of sentencing...

On appeal the defendant contends that the imposition of the sentence was improper because the trial court did not, prior to sentencing, give him access to the presentence report as required by State v. Lipsky, Utah, 608 P.2d 1241 (1980). The State counters with the argument that an amendment to U.C.A., 1953, * 77-18-1(2), enacted subsequent to the decision in Lipsky, modified the rule in that case and justified the trial court's discretionary refusal to give the defendant the presentence report. That amendment reads:

Prior to imposition of any sentence for an offense for which probation may be granted, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence report on the defendant...The contents of the report shall be confidential. The court may disclose all or parts of the report to the defendant or his counsel as the interest of justice requires. (Emphasis added.)

On the basis of that provision, the State argues that the trial judge acted within the proper bounds of discretion in not disclosing the report.

[1-3] Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. E.g., Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967); Specht v. Patter- son 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967); Townsend v. Burke 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948). Procedural fairness is as obligatory at the sentencing phase of a trial as at the guilt phase. Fres- nell v. Georgia 439 U.S. 14, 16, 99 S. Ct. 235, 236, 58 L. Ed. 2d 207 (1978); Gardner v. Florida 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), held that it is a denial of due process in a capital case to sentence a defendant on the basis of confidential information not disclosed to a defendant or his counsel. In Lipsky, a non-capital case, this Court held on a due process analysis that "fundamental fairness" requires that a defendant have the right to in- spect a presentence report prior to sentencing so that a sentence will not be influenced by inaccurate information. 608 P.2d at 1248. Furthermore, if the defendant cannot inspect the contents of the presentence report, his constitu- tional right to the effective assistance of counsel at the time of sentencing is seriously impaired if a judge may rely on information which may be inaccurate and is unknown to the defendant.

A number of other courts have held that fundamental fairness requires disclosure of the presentence report. See, e.g., Buchea v. Sullivan 262 Or. 222, 497 P.2d 1169 (1972); State v. Kunz 55 N.J. 128, 259 A.2d 895 (1969); Jones v. State Okl.Cr.App., 477 P.2d 85 (1970). This rule is implicit in several more recent cases. For example, in State v. Lockwood La., 399 So.2d 190 (1981), the court approved disclosure and held that defendant, who alleged that false and prejudicial statements were contained in his presentence report, was entitled to an opportunity to refute or explain even though the trial court contended that its decision was unaffected by the report. In State v. Phelps N.D. 297 N.W.2d 769 (1980), the court held that the trial court acted unreasonably and abused its discretion in allowing defendant's counsel insufficient time to read and investigate a presentence report which contained a *complicated medical history*. And in Howell v. State Del., 421 A.2d 892 (1980), the court, construing a statute which provided that the trial court "may, in its discretion, permit the inspection of the (presentence) report or parts thereof by the offender or his attorney," *id.* at 900, stated in dictum that "[f]ailure to disclose the investigative portion of a presentence report to counsel for a criminal defendant may 'in practical effect' be equivalent to denial of access to counsel." *Id.* at 900 (quoting in part from United States v. Verdugo 402 F.2d 599 [9th Cir. 1968], cert. denied, 402 U.S. 961, 91 S. Ct. 1623, 29 L. Ed.2d 124 [1971]).

Except for the very rare possibility when disclosure might lead to harm of a third person, there is no substantial reason for sentencing criminal defendants on the basis of confidential information gleaned from a variety of more- or-less reliable sources without affording those defendants some opportunity to point out mistakes in that information. It is essential to both the form and substance of a fair proceeding that the defendant have the right to point out errors, misinterpretations, or even to demonstrate that he is not in fact the person who is the subject of the report. Such errors are not unknown. Particularly when the criminal justice system is being pressed to deal with ever more criminal defendants on an impersonal basis not unlike an assembly line, the possibility of error becomes even greater. If a

(cont.)

defendant were not allowed to correct an error at the time of sentencing, the error is likely to go undetected for as long as the defendant remains subject to the criminal justice system since the presentence report remains in the file on the defendant and is used by the Board of Pardons and other authorities in making decisions as to the length and terms of his incarceration, rehabilitation, and parole.

We also note that it is not just the defendant, but the State as well, that has an interest in the sentence being based on accurate information. Decisions as to the type of rehabilitation program, if any, to which a defendant is assigned and the duration of incarceration both influence the allocation of scarce personnel and monetary resources. Such decisions should be based upon the most reliable data possible as to each defendant so that this State may deal with its criminal justice program as efficiently as possible.

...We find no difficulty in reconciling the defendant's right to disclosure with the language of * 77-18-1(2). That provision was not intended to make disclosure of a presentence report depend on a personal whim or a subjective standard of an individual judge. The interests at stake are far too important for that. Rather, the Legislature expressly provided that the exercise of discretion should be guided as "the interest of justice requires." Under that standard, it is the exceptional case where full disclosure is not justified...

Finally, it is of no moment that the trial court may disregard the presentence report altogether in imposing a sentence. A defendant still has a right to disclosure of the report because of the subsequent uses made of it. State v. Lockwood La. 399 So.2d 190 (1981).

...The conviction is affirmed, but the sentence is vacated. The case is remanded for the defendant to review and verify the contents of the presentence report, unless the narrow exception above defined applies, and for the trial judge to resentence the defendant on a nunc pro tunc basis.

Affirmed.

OAKS, HOWE and DURHAM, JJ., concur.

HALL, C.J., concurs in the result.

6) There is limited due process right to have erroneous and derogatory information expunged from a prisoner's parole or institutional file. In Paine v. Baker 595 F.2d 197 (4th Cir. 1979), the court held that to obtain judicial relief, a prisoner must show that the false information is in his/her file, that it is likely to be relied on in denying or revoking parole, good time, or another liberty interest, and that he/she has requested prison officials to correct the matter and has been refused.

- a. Petitioner has formally applied to have erroneous information expunged from his prison institutional file and has been summarily denied.
- b. Without access to pre-sentence report, petitioner is being denied the opportunity to have such erroneous and derogatory information expunged or even to seek judicial relief since "a prisoner must show that the false information is in his/her file..." (Paine v. Baker Id.)

7) Subsequent investigation has revealed that the pre-sentence report contains erroneous and potentially damaging false information which has effected the petitioner and will continue to effect petitioner in the future if not corrected, and all attempts to date by the petitioner to be permitted to examine the report and make the necessary corrections have been ignored or denied.

8) Inasmuch as the pre-sentence report is used by the Board of Pardons to determine parole and release eligibility, denial of access to the pre-sentence report denies the petitioner the right and opportunity to change false and erroneous information which might be potentially damaging to his future eligibility for parole and release, and thereby does deny the petitioner of his constitutional and state statute rights.

- (a) In STATE OF UTAH V. STEVEN MICHAEL CASAREZ (Utah, 656 F. 2d 1005 - Pacific Reporter) [Supreme Court No. 16997, Dec. 9, 1982], Judge Stewart has stated:

If a defendant were not allowed to correct an error at the time of sentencing, the error is likely to go undetected for as long as the defendant remains subject to the criminal justice system since the presentence report remains in the file on the defendant and is used by the Board of Pardons and other authorities in making decisions as to the length and terms of his incarceration, rehabilitation, and parole.

- (b) Utah State Board of Pardons Policies and Procedures Manual (revised July 7, 1986)

Number: 4.02

Procedure:

Prior to any hearing which may result in the setting of a parole date, information concerning an offender's past and present criminal activity is gathered along with all background and social history from a pre-sentence or post-sentence report and any other documentation and input given to the Board of Pardons. Based upon information provided by the offender during the hearing and previous offense patterns or needs, the Board may require the addition of Special Conditions to the Parole Agreement...

- (c) 77-27-13 (2) Utah Code of Criminal Procedure:

The Department of Corrections shall furnish pertinent information it has and shall provide a copy of the pre-sentence report and any other investigative reports to the board...

9) Petitioner was denied his Constitutional rights of protection against self-incrimination, his rights to an attorney, and to be properly informed of the accusations and charges against him under the Miranda decision.

On the date of Petitioner's arrest--September 15, 1983--he was held incommunicado at the scene of the alleged crime. Investigating Officer (Det. Michael Stewart) at the scene issued orders to a uniformed policeman to hold Petitioner pending charges and to not allow Petitioner to leave the scene under any circumstances. During this time, investigating Officer questioned Petitioner and, in fact, compelled Petitioner to walk with him through the entire environs of the scene and point out specific places and to describe specific events which had occurred, during which period of questioning, Petitioner's rights were never stated to him.

Defendant did not volunteer information during the questioning, but was coerced and misled by interrogating officer into responding to questions without the benefit of Petitioner's rights against self-incrimination being protected.

During the custodial interrogation as stated above, Petitioner asked interrogating officer about an attorney, to which said officer replied: "I don't think that will be necessary at this time. All we are doing is trying to find out what happened to your wife." (Police Report, CR84-40)

After several hours of interrogation while in custody at the scene of the alleged crime, Petitioner was taken forcefully to the South Salt Lake Police Station where he was detained further while other witnesses were being questioned. Petitioner's Miranda rights had never been extended to him at this point.

Petitioner was then interrogated by investigating officers at the station for approximately one-half hour before his Miranda rights were given to him. Petitioner waived the right to remain silent at this point because he had already been interrogated and had been refused counsel at the scene.

During the interrogation at the station, when it became clear to Petitioner that he would be charged with the murder of his wife, Petitioner inquired about the counsel, stating to the interrogating officer, William Judd, that Petitioner no longer wished to discuss the issue. Said officer asked defendant if he had his own attorney, and Petitioner responded that he did not. Judd thereupon informed Petitioner of how terrible conditions were at county jail, and stated to Petitioner that it could be "weeks or even months" before counsel might be appointed by the Court, and that meanwhile Petitioner would have to languish in jail, that Petitioner's children would be taken from his custody, etc.

Said officer then stated that it would be "better" for Petitioner to cooperate and interrogation continued despite Petitioner's request for counsel. Interrogation ceased only after it was apparent that Petitioner would not change his story.

In the transcript of the aforesaid interrogation, Det. Michael Stewart admits on record that Petitioner was interrogated prior to being given Miranda rights at the station.

Petitioner's inquiry as to whether or not he needed an attorney at the scene were dismissed by interrogating officer who led Petitioner to believe that nothing more than a routine investigation was being conducted and that Petitioner need not be concerned about his rights.

Petitioner was not properly notified that he was being charged with second degree homicide at the time his Miranda rights were read to him at the station, but was instead simply informed that "some charge" might be pending against him, and was merely told that only "a few questions" would be asked of him. This mis-leading statement by the arresting officers caused Petitioner to believe that he had no need of safeguarding his constitutional rights.

Petitioner was naive concerning the law and his rights, privileges, and immunities, having never before been arrested or accused of any crime, a fact which arresting officers were aware of and used to their advantage to deprive Petitioner of his rights and his liberty.

On the transcript of Petitioner's initial interrogation (case no. 83-9-2055, Sept. 15, 1983, 11:57 a.m.), Officer Stewart states clearly that "earlier I had you walk through the scene with me," and continues by stating that he now wants Petitioner to "repeat" the statements made earlier. This is clear and substantial evidence that Petitioner was interrogated without benefit of having been apprised of his rights and immunities under the Miranda decision.

10) Petitioner was subjected to illegal search and seizure of property which culminated in obtaining evidence against him; subsequently evidence which could have verified Petitioner's alibi was suppressed and destroyed.

Upon Petitioner's arrest on September 15, 1983, all of his personal possessions were confiscated by arresting officers without benefit of warrant (as attested to in response to interrogatories in Boren V. Stewart, et. al., U.S. Federal District Court, Case No. 88-C2548). Subsequently, said officers used personal photos and other personal items of Petitioner to entice Petitioner's daughter, aged nine, to testify against him. These items, although the personal property of Petitioner, were promised to Petitioner's daughter for her "cooperation," and, in fact, were subsequently given to her by arresting officers and/or their agents.

Further, Petitioner had testified to the fact that his late wife had been taking drugs, which Petitioner had discovered and disposed of. Arresting officers maintained that Petitioner had fabricated this story. However, after Petitioner had been sentenced to a term of five-years-to-life, arresting officers revealed that they had found phenobarbital tablets in Petitioner's wife's luggage at a residence where she had been residing. The suppression of this evidence directly effected the decision of Petitioner at the time plea bargain negotiations were made, and therefore directly effected the outcome of these negotiations. There is a factual probability that Petitioner would not have made a plea bargain had he been apprised of this circumstance supporting his alibi.

Utah Rules of Criminal Procedure

77-35-15 (a) Except as otherwise provided, The prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(a) (4) Evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(a) (5) Any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

(b) The Prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

Rules of Evidence

Rule 401

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Statute 78-3-27 (1)

There is established an annual judicial conference for all courts of this state, the purpose of which is to facilitate the exchange of ideas among all courts and judges and to study and improve the administration of the courts.

Further, following Petitioner's sentencing in May, 1984 all evidence and other personal belongings of Petitioner were destroyed by investigating officers (evidence provided by Discovery in Boren V. Stewart, et. al., Civil No. 88-C-254 S, Federal District Court, District of Utah.)

WHEREFORE, Petitioner hereby respectfully submits this Memorandum in Support of a Writ of Habeas Corpus.

DATED this 25 day of September, 1989.

Kenneth Boren

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF WRIT OF HABEAS CORPUS, and SUPPORTING AFFIDAVITS, ETC., postage prepaid, to the Utah Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, 84114; H. Dixon Mindley, Clerk, The Third District Court, Salt Lake County, 240 East 400 South, Salt Lake City, Utah 84111.

DATED this 25 day of September, 1989.

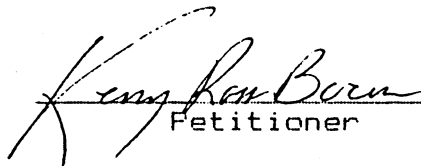
ss Boren, Pro Se
250
tah 84020

THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

ss BOREN,		
tioner,		APPLICATION TO PROCEED
		IN FORMA PAUPERIS
DELAND; Director of the		
te Prison; State of Utah;		Case No. <u>CR84-40</u>
rt of Corrections,		
ndent.		Judge <u>Jay Banks</u>

ES NOW THE Petitioner, KERRY ROSS BOREN, and
to the Court to proceed in Forma Pauperis. This
e based upon the indigent status of Petitioner, as
ticularly set forth in the attached affidavit.

IS 25 day of September, 1989.


Petitioner

WRIT -

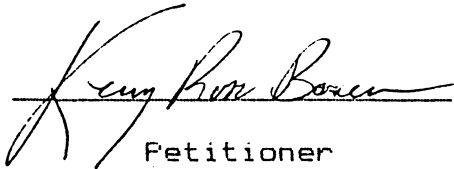
5. That during the last twelve months, he has received no money from any source.

6. That he does not own any cash, nor does he have any money in a checking or savings account.

7. That he does not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

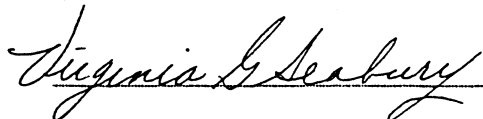
FURTHER, your deponent sayeth not.

DATED this 14 day of September, 1989.


Petitioner

SUBSCRIBED AND SWORN to before me this 14 day of

September, 1989.


NOTARY PUBLIC

My Commission Expires: 12-1-91

Residing at: Salt Lake County

WRIT -

Kerry Ross Boren, Pro Se
P.O. Box 250
Draper, Utah 84020

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

KERRY ROSS BOREN,		
Petitioner,		ORDER
vs.		
GARY DELAND; Director of the		
Utah State Prison; State of Utah;		Case No. <u>CR84-40</u>
Department of Corrections,		
Respondent.		Judge <u>Jay Banks</u>

Based upon the Application of Petitioner, and good
cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That Petitioner be entitled to proceed without being
required to pre-pay fees, costs or give security therefore.

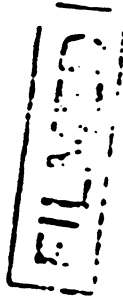
DATED this _____ day of _____, 1987.

BY THE COURT:

JUDGE

EXHIBIT C

Kerry Ross Boren, Pro Se
P.O. Box 250
Draper, Utah 84020



FILED IN CLERK'S OFFICE
Salt Lake County, Utah

AUG 20 1987

Is Dkt. Clerk's Office
By Pat [signature]
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

KERRY ROSS BOREN,

Defendant and Appellant.

MOTION TO WITHDRAW
PLEA OF GUILTY

Case No. CP84-40

COMES NOW the Defendant, KERRY ROSS BOREN, and pursuant to Utah Code Annotated 77-13-6 (1982), and under Utah v. G. Johns, (Utah Supreme Court No. 860405 - filed June 30, 1987) MOVES THE COURT to allow Defendant to Withdraw the Plea of Guilty in the above entitled case, and states the following as his cause of action:

- 1) Guilty plea was entered in violation of Utah Code Ann. 77-35-11 (1982 & Supp. 1986).
- 2) Guilty plea was entered in violation of Defendant's constitutional right to due process under Boykin v. Alabama, 395 U.S. 238, 243-244 (1969).
- 3) The trial court failed to determine if the guilty plea entered was made knowingly and voluntarily.
- 4) Trial judge did not inform Defendant of the elements of the crimes charged.
- 5) Defendant was not apprised nor did he receive real notice of the true nature of the charges against him.

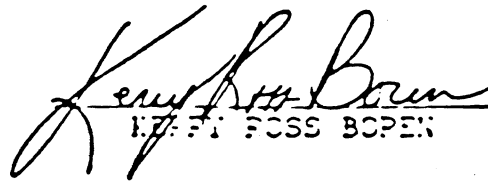
-page two-

- 6) Presentence Report was made available to Defense Counsel but the contents and information and evidence therein were never disclosed to the Defendant.
- 7) Court-appointed Defense Counsel was ineffective and representation of the Defendant fell below an objective standard of reasonableness.
- 8) There exists a reasonable probability that the result of the proceeding would have been different absent Defense Counsel's errors.
- 9) Guilty plea was made under threat of additional charges imposed by prosecution.
- 10) Defendant was under the impression that guilty plea was to "Depraved Indifference" and not to Second Degree Homicide. The nature of these charges and their implications were never explained to the Defendant, nor were the elements and true nature of the charges ever explained to the Defendant, either by his counsel or the trial court.
- 11) Preliminary hearing was postponed by Defense Counsel with permission of the trial court for three-and-one-half months without Defendant's understanding, knowledge, or consent.
- 12) Defense Counsel was changed in mid-negotiations with prosecution due to ineffectiveness of counsel, and prior counsel had filed improper motions and pleas with court which prejudiced and restricted ultimate outcome of Defendant's case in trial court.
- 13) Defendant was denied the right by the trial court to proceed with trial without the restrictions and prejudice imposed by the motions and pleas of former Defense Counsel, and therefore denied Defendant the right of a fair trial and influenced the decision to plea bargain.
- 14) That trial judge stated at Sentencing Hearing that he had no choice but to impose mandatory five-years to life sentence upon the defendant. When, in fact, he had other options at his discretion.
- 15) Defendant was led to believe by both defense counsel and trial court that he would not serve the mandatory time imposed upon him by his plea of guilty.

-page three-

Defendant thereby MOVES THE COURT that his plea of guilty be vacated and that he be given a new hearing and or benefit of a trial, or such other justice as is required and needed in this case.

Dated this 28 day of July, 1987.


KENNETH R. BROWN

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Motion to Withdraw Plea of Guilty, postage prepaid, to the Utah Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, 84114. H. Dixon Hindley, Clerk, The Third District Court, Salt Lake County, 240 East 400 South, Salt Lake City, Utah 84111, this 28 day of June, 1987.


Petitioner

EXHIBIT D

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

BEFORE THE HONORABLE JAY E. BANKS

--00000--

STATE OF UTAH

PLAINTIFF,

VS.

KERRY ROSS BOREN,

DEFENDANT.

)
)
)
)
)
)
)
)
)
)

CASE NO. CR-84-40

TRANSCRIPT OF PROCEEDINGS

TAKEN AT: METROPOLITAN HALL OF JUSTICE; SALT LAKE CITY, UTAH

APPEARANCES:

FOR THE STATE OF UTAH:

NEAL GUNNARSON
DEPUTY COUNTY ATTORNEY

FOR THE DEFENDANT:

MS. LINDA CARTER
LEGAL DEFENDERS' ASSOCIATION

DATE: APRIL 16, 1984

Robyn Haynie
Haynie & Snider
817 Lake Street
Salt Lake City, Utah 84102
(801) 531-6116

1 SALT LAKE CITY, UTAH; MONDAY, APRIL 16, 1987

2 9:30 A.M.

3 --00000--

4
5 THE COURT: KERRY ROSS BOREN.

6 MS. CARTER: LINDA CARTER APPEARING ON HIS
7 BEHALF. YOUR HONOR, THE PLEA BARGAIN THAT HAS BEEN
8 ACCEPTED BY MR. BOREN IS HE WILL REENTER A PLEA AS CHARGED
9 IN THIS CASE, AND THE STATE HAS AGREED THAT THEY WILL NOT
10 FILE ANY CHARGES CONCERNING ALLEGED SEXUAL RELATIONS WITH A
11 CHILD.

12 THE PROSECUTOR HAS ALSO AGREED THAT WE WILL
13 CALL THE PROSECUTOR IN UTAH COUNTY AND ASK THEM NOT TO
14 PROCEED ON A CAR THEFT DIVERSION CASE THERE WHERE THIS PLEA
15 WOULD CLEARLY VIOLATE THE DIVERSION, AND THAT'S THE EXTENT
16 OF THE PLEA BARGAIN.

17 MR. GUNNARSON: THAT'S CORRECT, YOUR HONOR.

18 THE COURT: YOUR NAME IS KERRY R. BOREN, AND I
19 BELIEVE YOU ARE CHARGED WITH MURDER IN THE SECOND DEGREE.

20 MS. CARTER: YOUR HONOR, PERHAPS I COULD HELP
21 THE COURT. HE IS PLEADING UNDER THE DEPRAVED INDIFFERENCE
22 SECTION; AND NOT UNDER EITHER THE "A" OR "B" SUBSECTIONS.

23 THE COURT: IS THAT AGREEABLE WITH THE STATE?

24 MR. GUNNARSON: YES, YOUR HONOR.

25 THE COURT: OTHER THAN WHAT HAS BEEN STATED

1 HERL IN COURT, MR. BOREN, HAS THERE BEEN ANY PROMISES MADE
2 TO YOU TO INDUCE YOU TO ENTER A PLEA OF GUILTY?

3 MR. BOREN: NO, YOUR HONOR.

4 THE COURT: HAS THERE BEEN ANY THREATS, DURESS
5 OR ANY OTHER UNDUE INFLUENCE EXERTED ON YOU TO ENTER SUCH A
6 PLEA?

7 MR. BOREN: NO, SIR.

8 THE COURT: BY ENTERING A PLEA OF GUILTY, YOU
9 DO, IN FACT, ADMIT THE FACTS THAT SUPPORT THAT CHARGE. DO
10 YOU UNDERSTAND THAT? THAT MEANS THE DEPRAVED INDIFFERENCE
11 TO HUMAN LIFE.

12 MR. BOREN: YES, YOUR HONOR.

13 THE COURT: HOW OLD ARE YOU?

14 MR. BOREN: 42.

15 THE COURT: DO YOU READ AND WRITE THE ENGLISH
16 LANGUAGE?

17 MR. BOREN: YES, SIR.

18 THE COURT: ARE YOU PRESENTLY UNDER THE
19 INFLUENCE OF ANY DRUGS, NARCOTICS OR ALCOHOLIC BEVERAGES?

20 MR. BOREN: NO, SIR.

21 THE COURT: DO YOU FEEL THAT YOU HAVE A MENTAL
22 OR PHYSICAL DISABILITY AS SUCH THAT INTERFERES WITH YOUR
23 FREE CHOICE TO ENTER A PLEA OF GUILTY?

24 MR. BOREN: NO, SIR.

25 THE COURT: HAVE YOU GONE OVER THE AFFIDAVIT

1 THAT SETS FORTH YOUR CONSTITUTIONAL RIGHTS?

2 MR. BOREN: YES, I HAVE.

3 THE COURT: DO YOU UNDERSTAND THOSE RIGHTS?

4 MR. BOREN: YES, I DO.

5 THE COURT: ARE THERE ANY QUESTIONS YOU WOULD
6 CARE TO ASK THE COURT WITH REFERENCE TO THOSE
7 CONSTITUTIONAL RIGHTS?

8 MR. BOREN: NO, YOUR HONOR, I DON'T.

9 THE COURT: BY ENTERING A PLEA OF GUILTY, YOU DO
10 WAIVE ALL OF THOSE CONSTITUTIONAL RIGHTS, INCLUDING ANY
11 STATE OR FEDERAL CONSTITUTIONAL RIGHTS. DO YOU UNDERSTAND
12 THAT?

13 MR. BOREN: YES, SIR.

14 THE COURT: HAVE HIM EXECUTE THE AFFIDAVIT.

15 (MR. BOREN EXECUTES THE
16 AFFIDAVIT.)

17 THE COURT: THE SENTENCE FOR THIS CHARGE IS FIVE
18 YEARS TO LIFE IN THE UTAH STATE PENITENTIARY. YOU UNDER-
19 STAND THAT?

20 MR. BOREN: YES, I DO, YOUR HONOR.

21 THE COURT: HAS THERE BEEN ANY PROMISES MADE TO
22 YOU AS TO WHAT THE COURT MAY DO AS TO SENTENCE IN THIS CASE?

23 MR. BOREN: NO, SIR, THERE HASN'T.

24 THE COURT: I WANT YOU TO UNDERSTAND THAT IN ALL
25 PROBABILITY YOU WILL BE COMMITTED TO THE STATE PENITENTIARY.

1 YOU UNDERSTAND THAT?

2 MR. BOKEN: YES, SIR.

3 THE COURT: THERE WOULD HAVE TO BE A COMPELLING
4 REASON WHY I WOULD NOT COMMIT YOU TO THE STATE PENITENTIARY
5 UNDER SUCH A CHARGE. HIS FORMER PLEA OF NOT GUILTY IS SET
6 ASIDE.

7 MR. BOREN, TO THE CHARGE OF CRIMINAL HOMICIDE,
8 MURDER IN THE SECOND-DEGREE, A FIRST-DEGREE FELONY, AS I
9 HAVE EXPLAINED IT TO YOU, WHICH OCCURRED AT 34 EAST MILLER
10 AVENUE IN SALT LAKE COUNTY, STATE OF UTAH, ON OR ABOUT
11 SEPTEMBER 15, 1983, IN VIOLATION OF TITLE 76, CHAPTER 6,
12 SECTION 203, UTAH CODE ANNOTATED, 1953, AS AMENDED, IN THAT
13 YOU, KERRY R. BOREN -- WAIT A MINUTE. I HAVE GOT TO GET
14 THE AMENDED INFORMATION. CAUSED THE DEATH OF ELVIA BOREN --
15 WHILE ACTING UNDER CIRCUMSTANCES EVIDENCING A DEPRAVED
16 INDIFFERENCE TO HUMAN LIFE -- ENGAGED IN CONDUCT WHICH
17 CREATED A GRAVE RISK OF DEATH TO ANOTHER AND THEREBY CAUSED
18 THE DEATH OF ELVIA BOREN.

19 WHAT NOW IS YOUR PLEA, GUILTY OR NOT GUILTY?

20 MR. BOREN: GUILTY, YOUR HONOR.

21 THE COURT: PLEA OF GUILTY IS RECEIVED, AND THE
22 COURT FINDS THAT IT WAS FREELY AND VOLUNTARILY MADE BY THE
23 DEFENDANT, THAT HE IS NOT PRESENTLY UNDER THE INFLUENCE OF
24 ANY DRUGS, NARCOTICS OR ALCOHOLIC BEVERAGES, NOR HAS A
25 PHYSICAL OR MENTAL DISABILITY AS SUCH THAT INTERFERES WITH

1 HIS FREE CHOICE TO ENTER SUCH A PLEA.

2 I BASE THOSE FINDINGS ON MY OBSERVATIONS OF THE
3 DEFENDANT HERE IN THE COURTROOM, TOGETHER WITH THE QUESTIONS
4 THAT WERE PUT TO HIM AND HIS RESPONSES THERETO.

5 YOU HAVE A RIGHT TO BE SENTENCED IN NOT LESS
6 THAN TWO NOR MORE THAN 30 DAYS. WHAT IS YOUR PREFERENCE?

7 MS. CARTER: WE WOULD ASK FOR A PRESENTENCE
8 REPORT, YOUR HONOR.

9 THE COURT: THE MATTER WILL BE REFERRED TO THE
10 ADULT PAROLE AND PROBATION DEPARTMENT FOR A PRESENTENCE
11 REPORT, AND MY CLERK WILL HAVE AN AGENT CONTACT YOU IN THE
12 JAIL.

13 HAVE YOU SPENT MOST OF YOUR LIFE HERE IN UTAH?

14 MR. BOREN: YES, SIR.

15 THE COURT: THEY MIGHT BE ABLE TO HAVE IT DONE
16 BY THE 4TH. SENTENCING WILL BE SET FOR MAY THE 4TH AT
17 9:30 A.M.

18 MS. CARTER: THANK YOU, YOUR HONOR.

19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

I, ROBYN HAYNIE, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 2 THROUGH 6, INCLUSIVE, COMPRISE A FULL, TRUE AND CORRECT TRANSCRIPT OF THE REQUESTED PORTION OF THE PROCEEDINGS HAD UPON THE HEARING OF THE ABOVE-ENTITLED MATTER ON APRIL 16, 1984, AND THAT SAID TRANSCRIPT CONTAINS ALL OF THE EVIDENCE, ALL OF THE OBJECTIONS OF COUNSEL AND RULINGS OF THE COURT, AND ALL MATTERS TO WHICH THE SAME RELATE.

DATED THIS 16th DAY OF September, 1987.

Robyn Haynie
ROBYN HAYNIE, CSR/RPR

EXHIBIT E

FILMED

TED CANNON
Salt Lake County Attorney
By: ROGER S. BLAYLOCK
Deputy County Attorney
231 East 400 South, Suite 300
Salt Lake City, UT 84111
Telephone: 363-7900

FILED IN CLERK'S OFFICE
Salt Lake County, Utah

MAY 29 1984

H Dixon Hindley Clerk 3rd Dist Court
By Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,)	
Plaintiff,)	
vs.)	JUDGMENT AND COMMITMENT
KERRY R. BOREN, 206)	Case No. CR84-40
Defendant.)	

On the 17th day of May, 1984, before the Honorable Jay E. Banks, appeared E. Neal Gunnarson, the attorney for the State of Utah, and the defendant appeared in person and by counsel, Linda Carter.

The Court having asked if the defendant has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty of the offense of Criminal Homicide, Murder in the Second Degree, a first degree felony.

IT IS ADJUDGED that the defendant be confined and imprisoned at the Utah State Prison for the indeterminate term of not less than five years and which may be for life, and is not fined as provided by law for the crime of which the defendant was convicted. Commitment shall issue forthwith.

The Court recommends that defendant be given a psychiatric evaluation.

IT IS ORDERED that N. D. Hayward, Sheriff of Salt Lake County, State of Utah, take the said defendant, Kerry R. Boren, and deliver said defendant without delay to the Utah State Prison, Draper, Utah, where said defendant shall then and there be confined and imprisoned in accordance with this commitment.

DATED this 24th day of May, 1984.

BY THE COURT

(J. E. Banks)
JAY E. BANKS, Judge

ATTEST
H. DIXON HINDLEY
Clerk

By Pat Jones
Deputy Clerk

*Transported
5-24-84
Upstad*

Pursuant to the provisions of Section 77-18-5, Utah Code Annotated, 1953 as amended 1980, I recommend that the defendant serve _____ months prior to release or parole.

Comments, including mitigating or aggravating circumstances:

DATED this _____ day of May, 1984.

BY THE COURT

JAY E. BANKS, Judge

Delivered a copy of the foregoing Judgment and Commitment this 22nd day of May, 1984, to Linda Carter, Attorney for Defendant, by depositing same in the Legal Defender box located in the Salt Lake County Attorney's Office.

Linda L. Lamparac

EXHIBIT F

DAVID L. WILKINSON (3472)
Attorney General
DAN R. LARSEN (4865)
Assistant Attorney General
Attorneys for Respondent
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

KERRY ROSS BOREN,	:	FINDINGS OF FACT
	:	AND CONCLUSIONS
Petitioner,	:	OF LAW
v.	:	
GERALD L. COOK, Warden,	:	Case No. C88-1782
Utah State Prison	:	
Respondent.	:	Judge Frank G. Noel

The above-entitled matter having come on regularly for hearing on Respondent's Amended Motion to Dismiss on May 6, 1988 at the hour of 3:00 p.m. before the Honorable Frank G. Noel, Third Judicial District Court Judge, presiding; petitioner, Kerry Ross Boren, being present without counsel; respondent, State of Utah, being represented by Dan R. Larsen, Assistant Attorney General, and Gregory G. Skordas, Deputy Salt Lake County Attorney, and the Court being fully advised in the premises and good cause appearing therefore, now enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. That petitioner filed a Motion to Withdraw Plea of Guilty in Third District Court, Case No. CR-84-40, on August 20, 1987, alleging, among other things, that his guilty plea was involuntary due to defense counsel's failure to disclose to petitioner the contents of the pre-sentence report.

2. That an evidentiary hearing on petitioner's Motion to Withdraw Plea of Guilty was held on October 28, 1987, before Judge Frank G. Noel and upon reviewing the testimony and evidence the motion was denied.

3. That petitioner appealed the denial of his Motion to Withdraw Plea of Guilty to the Utah Supreme Court which appeal is pending.

4. That petitioner's sole claim in the present action is that his plea was involuntary due to defense counsel's failure to disclose the contents of his pre-sentence report.

CONCLUSIONS OF LAW

1. That petitioner is attempting to use the post-conviction remedy provided by Utah R. Civ. P. 65B(1) as a substitute for direct appeal in contravention of well-established legal principles. See Codianna v. Morris, 660 P.2d 1101, 1104

(Utah 1983); accord, Andrews v. Morris, 607 P.2d 816 (Utah 1988);
Rammel v. Smith, 560 P.2d 1108 (Utah 1977).

DATED this _____ day of May, 1988.

BY THE COURT:

FRANK G. NOEL
District Judge

EXHIBIT G

DAVID L. WILKINSON (3472)
Attorney General
DAN R. LARSEN (4865)
Assistant Attorney General
Attorneys for Respondent
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

KERRY ROSS BOREN,	:	
Petitioner,	:	ORDER
v.	:	
GERALD L. COOK, Warden,	:	Case No. C88-1782
Utah State Prison	:	Judge Frank G. Noel
Respondent.	:	

The above-entitled matter having come on regularly for hearing on Respondent's Amended Motion to Dismiss on May 6, 1988 at the hour of 3:00 p.m. before the Honorable Frank G. Noel, Third Judicial District Court Judge, presiding; petitioner, Kerry Ross Boren, being present without counsel; respondent, State of Utah, being represented by Dan R. Larsen, Assistant Attorney General, and Gregory G. Skordas, Deputy Salt Lake County Attorney.

The Court, having entered its Findings of Fact and Conclusions of Law, and being fully advised in the premises, it is hereby:

ORDERED, ADJUDGED, AND DECREED as follows:

1. The Petition for a Writ of Habeas Corpus is
dismissed with prejudice.

DATED this _____ day of May, 1988.

BY THE COURT:

FRANK G. NOEL
District Judge

CERTIFICATE OF MAILING

I hereby certify that true and accurate copies of the
foregoing Findings of Fact, Conclusions of Law and Order, were
mailed, postage prepaid, to the following this 12th day of May,
1988:

Kerry Ross Boren
P.O. Box 250
Draper, Utah 84020

Gregory G. Skordas
Deputy Salt Lake County Attorney
Salt Lake County Attorney's Office
231 East 400 South
Salt Lake City, Utah 84111

Brenda S. Hinkley

EXHIBIT H

1 IN THE THIRD JUDICIAL DISTRICT

2 SALT LAKE COUNTY, STATE OF UTAH

3 KERRY ROSS BOREN,

4 petitioner,

5 V.

6 GARY W. DELAND, UTAH STATE

7 Department of Corrections,

8 Respondent.

MOTION TO APPEAL
FROM JUDGE'S ORDER

case no. 890905823

Judge Scott Daniels

10
11 COMES NOW the petitioner in the above entitled action,
12 and MOVES to appeal the decision of the judge in an Order
13 stemming from a hearing on respondent's Motion to Dismiss
14 on January 12, 1990, before the Hon. Scott Daniels.

15 Petitioner hereby objects to item No. 1 of said Order,
16 wherein the judge grants respondent's Motion to Dismiss with
17 respect to petitioner's Miranda and Search and Seizure issues,
18 and MOVES the Court to appeal this decision. Petitioner
19 does not object to item #2 of said Order with respect to pet-
20itioner's presentence issue.

21 DATED THIS 19 day of January, 1990.

22 Kerry Ross Boren
23 KERRY ROSS BOREN, prose

24 CERTIFICATE OF MAILING

25 I hereby certify that I have mailed a copy of the fore-
26 going Motion to Appeal, postage prepaid, to attorney for Respon-
27 dent, Dan R. Larsen, 236 State Capitol, Salt Lake City, Utah
28 84114, This 19 day of January, 1990.

Kerry Ross Boren
KERRY ROSS BOREN, prose

R. PAUL VAN DAM (3312)
Attorney General
DAN R. LARSEN (4865)
Assistant Attorney General
Attorneys for Respondent
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1135

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

KERRY ROSS BOREN,	:	
Petitioner,	:	ORDER
v.	:	
GARY W. DeLAND, Utah State Department of Corrections,	:	Case No. 890905823
Respondent.	:	Judge Scott Daniels

The above-entitled matter came on regularly for hearing on respondent's Motion to Dismiss on January 12, 1990, at the hour of 11:00 a.m., before the Honorable Scott Daniels, Third District Court Judge. Petitioner was present representing himself. Respondent was represented by Dan R. Larsen, Assistant Attorney General. Based upon the pleadings and arguments of the parties, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. That respondent's Motion to Dismiss is GRANTED with respect to petitioner's Miranda and search and seizure issues.

2. That respondent's Motion to Dismiss is DENIED with respect to petitioner's presentence report issue.

3. That the presentence report issue is taken under advisement by the court.

4. That the parties may each file a memorandum of law on or before January 26, 1990, respecting the remaining issue.

5. That upon receiving the parties memorandums the court will rule on this matter without a further hearing.

DATED this _____ day of January, 1990.

BY THE COURT:

HONORABLE SCOTT DANIELS

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Order was mailed, postage prepaid, to Kerry Ross Boren, P.O. Box 250, Draper, Utah 84020, this 16th day of January, 1990.

Brenda A. Hill

KERRY ROSS BOREN, Pro Se
P.O. Box 250
Draper, Utah 84020

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH

KERRY ROSS BOREN,
Petitioner,

v.

GARY W. DELAND, Director, Utah
State Dept. of Corrections,
Respondent.

OBJECTION TO RESPONDENT'S
MOTION TO DISMISS

Case No. 890905823

Judge Scott Daniels

Petitioner, acting as Pro Se Counsel, hereby Objects
to Respondent's Motion to Dismiss, dated 4 October, 1989, and
lists the following as his reasons:

1) Petitioner's Petition for Post-Conviction Relief is
neither successive nor procedurally barred, under the circumstances
of this Petition, for reasons supported by an accompanying memorandum
of points and authorities.

2) The merits of the factual dispute were not resolved
in the State Court process.

3) The factfinding procedure employed by the State Court
was not adequate to afford a full and fair hearing.

4) The material facts were not adequately developed at the
State Court hearings.

5) Petitioner did not receive a full, fair, and adequate
hearing in the State Court.

6) Petitioner was otherwise denied due process of law in
the State Court proceeding.

7) Res Judicata does not fully apply to habeas corpus pro-
ceedings.

KERRY ROSS BOREN, pro se
p.o. Box 250
Draper, Utah 84020

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH

KERRY ROSS BOREN,
Petitioner,

v.

GARY W. DELAND, Director, Utah
State Dept. of Corrections,
Respondent.

MEMORANDUM IN SUPPORT OF
PETITIONER'S OBJECTION TO
RESPONDENT'S MOTION TO
DISMISS

Case No. 890905823

Judge Scott Daniels

Petitioner, acting as pro se counsel, hereby submits the following memorandum of points and authorities in support of Petitioner's Objection to Respondent's Motion to Dismiss.

ARGUMENT

On August 20, 1987, Petitioner filed a Motion to Withdraw Plea of Guilty. On October 28, 1987, an evidentiary hearing was held to consider Petitioner's Motion. Judge Frank G. Noel denied Petitioner's motion, but the issue of Pre-sentence Report and of Miranda Rights were not addressed. Judge Noel informed Petitioner that these issues should be presented to the Utah Supreme Court upon appeal. Petitioner filed a Notice of Appeal from the court's denial of his motion on December 17, 1987.

At the time of Petitioner's appeal, he submitted motions for the consideration of Pre-sentence and Miranda issues, but this was summarily attacked by the State on similar grounds of being successive and procedurally barred, even though these issues had not been decided. Petitioner was thereby instructed that these issues must be submitted independently in order to exhaust state procedures.

Petitioner at no time attempted to deceive the Court, as alleged [Respondent's Memorandum, p. 3], or to circumvent the regular appellate process. These issues are not on appeal, nor have they been decided by any court. Respondent's counsel appears to desire to bar Petitioner

Lisa.

Here's a copy
of the order
signed 10-16-89.
That's the last
document in the
file. I hope it
helps. If I can
help further, call.
Janet 535-5129

Kerry
P.O. E
Draper

OCT 16 1989
By Harold Buel
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

KERRY ROSS BOREN,

Petitioner,

vs.

GARY DELAND; Director of the
Utah State Prison; State of Utah;
Department of Corrections,

Respondent.

ORDER

890905823 HC
Daniels

Case No. CR84-40

Judge Jay Banks

Based upon the Application of Petitioner, and good
cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That Petitioner be entitled to proceed without being
required to pre-pay fees, costs or give security therefore.

DATED this 16 day of Oct, 1989.

BY THE COURT:

Scott Daniel

JUDGE

Kerry Ross Boren, Pro Se
P.O. Box 250
Draper, Utah 84020

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH

KERRY ROSS BOREN,
Petitioner,

vs.

GARY W. DELAND, Director of
The Utah State Prison, Dept.
of Corrections, State of Utah,
Respondent.

CASE NO. 890905823

REQUEST FOR A DECISION
and

MOTION FOR HEARING

Judge Scott Daniels

COMES NOW the Petitioner and respectfully Requests
a Court Decision on Respondent's Motion to Dismiss, which was
timely objected to by Petitioner under date of Oct 24, 1989.

FURTHER, Petitioner respectfully Moves the Court to deny
Respondent's Motion to Dismiss and to grant Petitioner a hearing
on the issues.

DATED This 13 day of December, 1989.

Kerry Ross Boren
Petitioner, Pro Se

CERTIFICATE OF MAILING

I hereby certify that I have mailed, postage pre-paid, a copy
of the foregoing Request For a Decision and Motion For Hearing, to the
attorney for the Respondent, DAN R. LARSEN, 236 State Capitol,
Salt Lake City, Utah 84114, on This 13 day of December, 1989.

Kerry Ross Boren

KERRY ROSS BOREN, pro se
P.O. Box 250
Draper, Utah 84020

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT
LAKE COUNTY, STATE OF UTAH

KERRY ROSS BOREN,
petitioner,

vs

GARY W. DELAND, Director,
Utah State Dept. of
Corrections,
Respondent.

Civil No. 890905823 HC

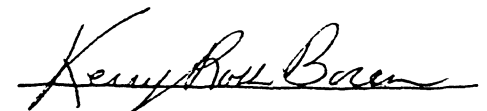
NOTICE OF APPEAL

Judge Scott Daniels

Notice is hereby given that KERRY ROSS BOREN, petitioner in the above entitled action, appeals to the Utah State Court of Appeals from the final judgment entered in this action on March 9, 1990.

The issues on appeal are: 1) Presentence Report 2) Miranda Rights 3) Illegal Search and Seizure. These issues pertain directly to Constitutional and Statutory violations which illegally restrain and deprive petitioner of his liberty.

DATED this 17 day of March, 1990.



KERRY ROSS BOREN
PETITIONER

CERTIFICATE OF MAILING

I hereby certify that I have mailed a copy of the foregoing NOTICE OF APPEAL, postage prepaid, to the following: Clerk, Third Dist. Court, Salt Lake City, Utah 84111; Utah State Attorney General, 236 State Capitol Bldg., Salt Lake City, Utah 84114; Utah State Court of Appeals, _____ Salt Lake City, Utah.

DATED this 17 day of March, 1990.



KERRY ROSS BOREN, pro se
p.o. Box 250
Draper, Utah 84020

IN THE THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY, STATE OF UTAH

KERRY ROSS BOREN,
petitioner,

vs.

GARY W. DELAND, Director,
Utah State Dept. of
Corrections,

Respondent.

Civil No. 890905823 HC

MOTION FOR CERTIFICATE
OF PROBABLE CAUSE
OF APPEAL AND
APPOINTMENT OF COUNSEL

Judge Scott Daniels

KERRY ROSS BOREN requests This Court to issue a certificate of probable cause in the above-entitled matter so that he may appeal his denial of his writ of habeas corpus, dated March 9, 1990. In support of his motion, he states:

1. Petitioner has raised a substantial issue concerning whether his Constitutional rights were violated when he was denied a copy of his Presentence Report, as well as other issues

2. Petitioner should have the denial of the Writ of Habeas Corpus reviewed by the Utah Court of Appeals.

3. Issues are complex and petitioner should be granted Appointment of Counsel.

DATED this 17 day of March, 1990.

Kerry Ross Boren
KERRY ROSS BOREN

CERTIFICATE OF MAILING

(Same as Notice of Appeal - KRB)