

1991

# Kerry Ross Boren v. Gary W. Deland : Petition for Writ of Certiorari

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

R. Paul Van Dam; Attorney General; Dan R. Larsen; Assistant Attorney General.

Kerry Ross Boren.

---

## Recommended Citation

Legal Brief, *Kerry Ross Boren v. Gary W. Deland*, No. 900646.00 (Utah Supreme Court, 1991).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/3368](https://digitalcommons.law.byu.edu/byu_sc1/3368)

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

**UTAH COURT OF APPEALS  
BRIEF**

UTAH

D. KERRY ROSS BOREN, PRO SE  
K. P.O. BOX 250  
5. DRAPER, UTAH 84020

DOCKET NO. 900646-CA

~~IN THE SUPREME COURT FOR THE STATE OF UTAH~~

KERRY ROSS BOREN,  
Plaintiff and Appellant,

Case No. 900646-CA

v.

APPLICATION FOR WRIT  
OF CERTIORARI

GARY W. DELAND, Director  
Utah State Department of  
Corrections  
Defendant and Appellee

910191

COVER SHEET

PARTIES

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

R. Paul Van Dam  
Attorney General  
Dan. R. Larsen  
Assistant Attorney General  
236 State Capitol Bldg.  
Salt Lake City, Utah 84114

**FILED**

APR 29 1991

CLERK SUPREME COURT,  
UTAH

KERRY ROSS BOREN, PRO SE  
P.O. BOX 250  
DRAPER, UTAH 84020

**IN THE SUPREME COURT FOR THE STATE OF UTAH**

KERRY ROSS BOREN,  
Plaintiff and Appellant,

Case No. 900646-CA

v.

APPLICATION FOR WRIT  
OF CERTIORARI

GARY W. DELAND, Director  
Utah State Department of  
Corrections  
Defendant and Appellee

**COVER SHEET**

**PARTIES**

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

R. Paul Van Dam  
Attorney General  
Dan. R. Larsen  
Assistant Attorney General  
236 State Capitol Bldg.  
Salt Lake City, Utah 84114

**APPLICATION FOR WRIT OF CERTIORARI**

**TABLE OF AUTHORITIES**

<b><u>Authority Cited</u></b>	<b><u>page</u></b>
1. <b><u>State v. Boren</u></b> , No. 890328-CA (Utah Ct. App. Oct. 11, 1989 unpub.)	2
2. <b><u>State v. Butterfield</u></b> , 784 p.2d 153, 156, 157 (Utah 1989)	3
3. <b><u>State v. Casarez</u></b> , 656 p.2d 1005,1007 (Utah 1982)	3,4
4. <b><u>State v. Lipsky</u></b> , 608 p.2d 1241,1244 (Utah 1980)	3
5. <b><u>Tollett v. Henderson</u></b> , 411 U.S. 258,267 (1973)	3,4
6. <b><u>U.S. Contitution</u></b> , Amendments 4,5,6,8 and 14	3
7. <b><u>Utah Code Ann.</u></b> & 76-5-203 (1) (a) (b) (c) (Supp. 1983)	2,3
8. <b><u>Utah Code Ann.</u></b> & 77-18-1 (4) (Supp. 1986)	3

KERRY ROSS BOREN, PRO SE  
P.O. BOX 250  
DRAPER, UTAH 84020

**IN THE SUPREME COURT FOR THE STATE OF UTAH**

KERRY ROSS BOREN,  
Plaintiff and Appellant

Case No. 900646-CA

v.

APPLICATION FOR WRIT  
OF CERTIORARI

GARY W. DELAND, Director  
Utah State Department of  
Corrections,  
Defendant and Appellee

COMES NOW the Plaintiff and Appellant and Moves the Court for  
a Writ of Certiorari and a review of the decision of the Utah Court  
of Appeals on the following grounds:

1) Whether it was proper for the Supreme Court to return  
Plaintiff's appeal to the Utah Court of Appeals to rule upon its  
own decision to deny Plaintiff's appeal and/or original petition.

2) Whether it was proper for the Utah Court of Appeals to  
rule upon Plaintiff's appeal to the Utah Supreme Court from a  
decision by the Utah Court of Appeals on Plaintiff's original  
petition.

3) Whether the Supreme Court offered proper guidance to the  
Utah Court of Appeals in directing their jurisdiction.

4) Whether the denial of Plaintiff's petition and subsequent  
appeal presents an undecided question whether Plaintiff's  
constitutional rights were violated.

5) Whether a serious violation of Plaintiff's legal and  
constitutional rights was affected by improper jurisdiction,  
procedure, and/or unwarranted decision on the part of the Utah  
Court of Appeals.

**CERTIORARI -2-**

6) Whether each and every issue was addressed by both Courts effecting decision adverse to Plaintiff's legal and constitutional rights, privileges, and/or immunities.

7) Whether the denial of Plaintiff's petition and/or appeal, whereas the Court has ruled in favor of other petitioners concerning the same issue, constitutes an abuse of discretion on the part of the Court.

**STATEMENT OF CASE**

On September 15, 1983, appellant was arrested and charged with second degree murder, a first degree felony, in violation of Utah Code Ann. & 76-5-203(1) (a) and (b) (Supp. 1983). On April 16, 1984, appellant entered a plea of "guilty" to an amended information charging second degree murder under subsection (c), the depraved indifference subsection. Appellant was sentenced to five years to life in the Utah State Prison.

Appellant filed a Motion to Withdraw Plea of Guilty on August 20, 1987, claiming that the "Presentence Report was made available to Defense Counsel but the contents and information and evidence therein were never disclosed to the defendant." The trial court denied appellant's motion concluding that appellant freely, voluntarily and knowingly entered his guilty plea. On appeal, the Supreme Court affirmed the denial of the motion to withdraw guilty plea, but did not address the issue of the presentence report, which was raised in the motion to withdraw guilty plea. See State v. Boren, No. 890328-CA (Utah Ct. App. Oct. 11, 1989) - unpublished.

**CERTIORARI -3-**

Appellant filed a Petition for Post Conviction Relief in the Third Judicial District Court on March 16, 1988, claiming that his guilty plea was affected by defense counsel's non-disclosure of the presentence report. The petition was dismissed by Judge Noel on June 6, 1988, as an attempt to circumvent the appellant process.

On September 26, 1989, appellant filed the present petition for writ of habeas corpus. On March 27, 1990, Judge Scott Daniels dismissed appellant's claims regarding alleged pro-guilty plea Miranda and search and seizure issues and denying the remaining claim that a constitutional error occurred when defense counsel waived an opportunity to rebut the presentence report. The present appeal in question is from that order. Appellant claimed on appeal that (1) his constitutional rights were violated because the presentence report was disclosed to his attorney but not personally to appellant and (2) his rights under the Miranda ruling and the constitutional guarantees against illegal search and seizure should have been considered by the trial court in ruling on the petition.

Appellant contends that the trial court erred in concluding that it is sufficient to provide access to the presentence report only to defense counsel prior to sentencing.

On January 15, 1991, appellant's appeal to the Utah Supreme Court was assigned to the Court of Appeals. On April 4, 1991, the Utah Court of Appeals issued a memorandum decision affirming the judgement of the Board of Review, PER CURIAM.

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES & REGULATIONS**

1. U.S. Constitution, Amendments 5, 6, 8, 14, and 4
2. Utah Code Ann. § 76-5-203 (1) (a) and (b) (Supp. 1983)
3. Utah Code Ann. § 77-18-1 (4) (Supp. 1986)
4. **State v. Casarez**, 656 p.2d 1005-7 (Utah 1982)
5. **State v. Lipsky**, 608 p.2d 124-4 (Utah 1980)
6. **State v. Butterfield**, 784 p.2d 153,156-7 (Utah 1989)
7. **Tollett v. Henderson**, 411 U.S. 258,267 (1973)

**ARGUMENT**

Appellant's petition was denied by the lower court and on September 26, 1989, appellant filed the present writ of habeas corpus. On March 27, 1990, this motion was dismissed by Judge Scout Daniels, after which appellant filed an appeal to the Utah Supreme Court. The Supreme Court assigned the appeal to the Utah Court of Appeals for a review and decision, which court affirmed the lower court ruling. Appellant appealed the decision to the Utah Supreme Court which court assigned this appeal back to the Court of Appeals for review. This effectively allowed the Court of Appeals to rule on its own decision upon appeal, and appellant contends that this constitutes an abuse of discretion by the Court as regards jurisdiction and fairness.

The decision to deny Appellant's petition and appeal does not decide the question whether Appellant's constitutional rights were violated. The State has argued that defense counsel's failure to



**CERTIORARI - 5 -**

raise any objection to the presentence report constituted an effective waiver of defendant's claims (State v. Butterfield, 784 p.2d 153 [Utah 1989] ).

Appellant, however, contends that the failure to provide defendant with access to information contained in the presentence report effectively blocked his ability to provide defense counsel with information upon which to raise a formal objection. It is not logical to conclude that the defense counsel could independently be aware of serious errors, mistakes, false or misleading information contained in the report, unless it was pointed out by defendant after a careful review. Casarez clearly indicates that failure to disclose the report could result in an impairment of a defendant's constitutional right to the effective assistance of counsel (656 p.2d at 1007).

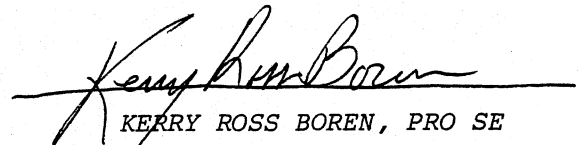
The Court of Appeals, in its memorandum decision dated April 4, 1991, states at page 4: "Appellant's remedy would be a claim of ineffectiveness of counsel, which has not been urged by him." This is erroneous inasmuch as appellant brought up the issue of ineffective assistance of counsel in the initial petition.

Appellant contends that to deny Appellant's claims to Miranda violations and/or search and seizure violations on the grounds that such rights were waived by entry of the plea (Tollett v. Henderson, 411 U.S. 258, 267 [1983] ) denies a defendant important constitutional rights, viz. equal protection, cruel and unusual punishment, et al.

CERTIORARI - 6 -

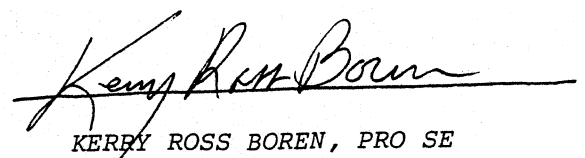
The important of the issues, the lack of guidance from the Supreme Court to the lower court, and any conflicts on the issue in the lower courts, as well as the fairness implied, should merit the Court's review.

DATED this 24th day of April, 1991.

  
KERRY ROSS BOREN, PRO SE

**CERTIFICATE OF MAILING**

I hereby certify that on the 24th day of April, 1991, a true and correct copy of the forgoing **Application for Writ of Certiorari** was mailed, postage pre-paid, to R. Paul Van Dam, Attorney General, and Dan R. Larsen, Assistant Attorney General, 236 State Capitol Bldg., Salt Lake City, Utah 84114.

  
KERRY ROSS BOREN, PRO SE

**FILED**

APR 4 1991

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Kerry Ross Boren,  
Plaintiff and Appellant,  
v.  
Gary W. Deland, Director,  
Utah State Department of  
Corrections,  
Defendant and Appellee.

) MEMORANDUM DECISION  
) (Not For Publication)

) Case No. 900646-CA

) F I L E D  
) (April 4, 1991)

Before Judges Orme, Garff, and Bench.

-----

PER CURIAM:

This is an appeal from the denial of a petition for writ of habeas corpus. We affirm.

The facts, as relevant to this appeal, are as follows. On September 19, 1983, appellant was arrested and charged with second degree murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203(1)(a) and (b) (Supp. 1983). On April 16, 1984, appellant entered a plea of "guilty" to an amended information charging second degree murder under subsection (c), the depraved indifference subsection. Appellant was sentenced to five years to life in the Utah State Prison.

On August 20, 1987, appellant filed a Motion to Withdraw Plea of Guilty, claiming that the "Presentence Report was made available to Defense Counsel but the contents and information and evidence therein were never disclosed to the defendant." After an evidentiary hearing, the trial court denied appellant's motion concluding that plaintiff freely, voluntarily and knowingly entered his guilty plea. On appeal, this court affirmed the denial of the motion to withdraw guilty plea in an unpublished opinion. See State v. Boren, No. 890328-CA (Utah Ct. App. Oct. 11, 1989).<sup>1</sup>

---

1. The opinion of this court does not address the issue concerning the presentence report, which was raised in the motion to withdraw guilty plea.

Both appellant and the State rely upon State v. Casarez, 656 P.2d 1005 (Utah 1982) and State v. Lipsky, 608 P.2d 1241 (Utah 1980) in this appeal. State v. Casarez considered a constitutional challenge to the language of Utah Code Ann. § 77-18-1(4)(Supp. 1986) allowing the trial court discretion in disclosure of the report. In upholding the statute, the Utah Supreme Court drew no distinction between disclosure to the defendant personally as opposed to disclosure to defense counsel. Casarez does indicate that failure to disclose the report could result in an impairment of a defendant's constitutional right to the effective assistance of counsel. 656 P.2d at 1007. State v. Lipsky, decided prior to enactment of any statutory provisions dealing with presentence reports, also refers to disclosure of the presentence report "to the defendant" without distinguishing between disclosure to the defendant personally as opposed to defense counsel. 608 P.2d at 1244. Under Utah Code Ann. § 77-18-1(4) as applicable at the time of appellant's conviction and sentencing, the trial court had discretion to disclose all or portions of the report to defendant or defense counsel. In addition, the case law imposed no affirmative duty on the trial court to make disclosure personally to a criminal defendant. There is no dispute in this case that defense counsel had an opportunity to read and investigate the presentence report and raise objections.

The State next argues that defense counsel's failure to raise any objection to the report constituted an effective waiver of defendant's claims, relying upon State v. Butterfield, 784 P.2d 153 (Utah 1989). In Butterfield, the Utah Supreme Court held that "failure of a defendant and his or her counsel to object to a closure order constitutes waiver" of the right to a public trial under the federal and state constitution. The court enumerated those rights as to which a defendant must make a personal waiver: the right to trial, the right to be present at trial, the right to trial by jury and the right to an interpreter at trial. 784 P.2d at 156. The court noted that "[a] unifying characteristic of these rights appears to be that they are of central importance to the quality of the guilt-determining process and the defendant's ability to participate in that process." Id. On that basis, the court determined in Butterfield that the right to a public trial did "not necessarily affect qualitatively the guilt-determining process or the defendant's ability to participate in the process." Id. Thus, the possibility of prejudice from counsel's failure to object to closure of the trial did not "warrant the imposition of a requirement of personal waiver . . . in all cases", but is better dealt with

OFFICE OF  
THE ATTORNEY GENERAL



STATE OF UTAH

R. PAUL VAN DAM - ATTORNEY GENERAL

236 STATE CAPITOL • SALT LAKE CITY, UTAH 84114 • TELEPHONE: 801 538-1015 • FAX NO. 801-538-1121

JOSEPH E. TESCH  
CHIEF DEPUTY ATTORNEY GENERAL

June 3, 1991

FILED

JUN 3 1991

CLERK SUPREME COURT,  
UTAH

Geoffrey J. Butler, Esq.  
Clerk of the Court  
332 State Capitol Building  
Salt Lake City, Utah 84114

Re: State v. Menzies, Case No. 880161

Dear Mr. Butler:

This letter is to supplement the State's brief pursuant to rule 24(j), Utah Rules of Appellate Procedure. In defendant's reply brief, he cites, for the first time, rule 3-305, Code of Judicial Administration, for the proposition that a transcript prepared by a note reader cannot be used as an official transcript. The rule cited reads:

**Applicability:**

This rule shall apply to trial courts of record in the use of electronically recorded proceedings. This rule does not apply to court reporters' use of transcribers.

Thank you for your assistance in providing this supplemental authority to the Court.

Sincerely,

CHARLENE BARLOW  
Assistant Attorney General  
Criminal Appeals Division

CB/pg