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IN THE SUPREME COURT OF UTAH

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

REPLY BRIEF OF APPELLANT

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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ARGUMENT

I. BLANKE HAS NOT BEEN CONVICTED OF A "SEX OFFENSE."

The Board of Pardons and Parole ("Parole Board") has attempted to muddy the waters by changing the major subject on appeal: whether attempted child kidnapping is a "sex offense." Instead, the Parole Board discusses whether Petitioner Kevin Blanke should be considered a "sex offender."[1] *See* Brief of Resp. at 21–26. The Parole Board even goes so far as to misquote Blanke, stating that "Mr. Blanke also asserts that he is not a 'sex offender' because there was no 'sexual element' to his crime." *Id.* at 22. What Blanke actually argued was that child kidnapping cannot be considered a "sex offense" because it "does not require proof of a sexual element or motive." Brief of Pet. at 12. This point was just one of six reasons Blanke asserted in support of his argument that child kidnapping is not a sex offense.

Only one of Blanke's six points—point 5—addressed sex offender status. Point 5 states that "the Utah Legislature amended section 77-27-21.5 in 2012 to rename the registry as the Sex *and* Kidnap Offender Registry and separately defines 'sex offender' and 'kidnap offender.'" *Id.* The Parole Board completely ignores Blanke's other points and even mischaracterizes point 1. For example, the Parole Board does not even address the Utah Code's various definitions of "sex offense" and "sexual offense" or that child

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[1] Although Blanke disagrees with the Parole Board's analysis on that point for the reasons discussed in his opening brief, that is not the issue before the Court. *See* Brief of Pet. at 11–12 ("Referring to Blanke as a 'sex offender' is a misnomer . . . because he has not been convicted of a sex offense. Regardless, the definition of 'sex offense' is what matters here.").

kidnapping is not codified in the Criminal Code's part on "Sex Offenses." *Id.* The Parole Board also ignores that the Utah Code does not define "sex offense" for purposes of sex offender treatment, *id.*, or that "'Utah's sentencing statutes do not mandate treatment as a condition of parole for sex offenders,'" *id.* at 13 n.7 (quoting *Kimbal v. Dep't of Corrections*, 2015 UT App 139, ¶ 3, 352 P.3d 136). Finally, the Parole Board ignores that "registration is not conclusive of whether a person has committed a 'sex offense,'" *id.* at 12, and ignores Blanke's discussion of *Ladriere v. Kentucky*, 329 S.W.3d 278 (Ky. 2010), which demonstrates that point, *id.* at 16–17.

The Parole Board's dodginess and failure to respond to the vast majority of Blanke's arguments should ring loud and clear: the Parole Board knows that it is on shaky ground and has elected instead to divert the discussion from what is at issue. Even so, the Parole Board's arguments are unavailing.

The Parole Board's discussion of retroactive application of a statute, *see* Brief of Resp. at 21–22, is irrelevant. The Parole Board's argument rests entirely on a false premise and is a mischaracterization both of what Blanke argued in his opening brief and the important question of whether child kidnapping is a "sex offense" for purposes of sex offender treatment. Whether a person must register as an offender is not conclusive of whether a person has committed a "sex offense" such that he can be required to complete sex offender treatment as a condition for parole. *Ladriere* demonstrates this point. And because the Legislature has not spoken to this point by defining "sex offense" for purposes of sex offender treatment, and has hardly addressed sex offender treatment at all, the Court can and should rely on the definitions the Legislature has provided in the

Code. *See LeBeau v. State*, 2014 UT 39, ¶ 34, 337 P.3d 254; *Wasatch Crest Ins. v. LWP Claims Adm'rs Corp.*, 2007 UT 32, ¶ 13, 158 P.3d 548.

Because the Legislature has already defined "sex offense" and "sexual offense" in the Code, the Court has no occasion to consider any definition found in the Adult Sentencing and Release Guidelines as the Parole Board suggests. *See* Brief of Resp. at 23.

The Parole Board also suggests that "Mr. Blanke's conviction for Distribution of Pornographic material [is] a 'sex offense,'" even though "it is not a registrable offense," because "it contains a 'sexual element,' as Blanke asserts is necessary." *Id.* at 27. The Parole Board conflates the difference between a necessary condition and a sufficient condition. The Parole Board does not point to any source that demonstrates that Distribution of Pornographic material, a misdemeanor, is a "sex offense," because it is not.

II. ANY ADMISSIONS OF SEXUAL MISCONDUCT RELATING TO UNCONVICTED SEX OFFENSES CANNOT STRIP BLANKE OF DUE PROCESS.

The Parole Board asserts that various statements made by Blanke "make[] him guilty of [a] 'sex offense.'" Brief of Resp. at 17. But statements or even confessions do not "make" a person guilty—that can only be done through a guilty plea or a jury verdict. Blanke has never pleaded guilty or been found guilty of a "sex offense." Accordingly, Blanke should be afforded a *Neese* hearing where he will (1) be given particularized notice of the unconvicted sexual conduct that the Parole Board intends to consider and effectively decide, (2) be able to present evidence and call witnesses, including his

accusers, and (3) be given a written decision by the Parole Board articulating the evidence it relied on and the reasons it concluded that Blanke committed unconvicted sexual conduct.

In an attempt to avoid a *Neese* hearing, the Parole Board asserts that it relied on statements by Blanke in the Presentence Investigation Addendum ("PSI") that amount to an admission of statutory rape and that therefore Blanke is not entitled to a *Neese* hearing. Brief of Resp. at 15, 18. That is incorrect.

There is no evidence that the Parole Board relied on Blanke's statements in the PSI in making its parole determination. What matters is what the Parole Board did, not what it could have done. The evidence from the record demonstrates that the Parole Board was not concerned with the alleged statutory rape but rather the alleged rape of Victim 2, which Blanke disputed and continues to dispute.

As the Parole Board correctly points out, statutory rape, codified as "Unlawful Sexual Activity with a Minor" at Utah Code § 76-5-401, is at worst a third-degree felony. Absent an enhancement—and no enhancement would apply to Blanke—statutory rape carries a maximum sentence of five years. *See id.* § 76-5-401(3)(a); *id.* § 76-3-203(3). Rape, on the other hand, carries a sentence of five years to life. *See id.* § 76-5-402(3)(a).

At the time of the 2012 parole hearing, Blanke had already served one more year than the sentencing guidelines suggested and had received positive reports for his good behavior and the significant programming he had completed. Yet, the Parole Board made its parole decision the same day as the 2012 hearing and set Blanke's next hearing for 2032.

For all practical purposes, the Parole Board imposed a sentence of *twenty* years on Blanke. That could not have been the result of "relying" on statements by Blanke of alleged statutory rape, which carries a maximum sentence of five years. Twenty years equates to *four* times the maximum sentence of a statutory rape conviction. The Parole Board's decision was not about statutory rape, it was about an alleged rape.

At the 2012 hearing, the hearing officer made clear where he stood:

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

(R. 188.) That same day, the Parole Board made its decision to set a rehearing for 2032..

The Parole Board takes issue with Blanke pointing out that it made its parole decision the same day as suggesting that the Parole Board "merely rubber-stamped the hearing officer's recommendations and views without any independent analysis of their own." Brief of Resp. at 29 n.7. But that is precisely what the Parole Board did.

The Parole Board also points out that it did not *issue* its decision until one week after the hearing. *Id.*; (R. 191–93). But that does not change the undisputable fact that the Parole Board *reached* its decision the day of the hearing. Both the notice of the Parole Board's decision and the rationale sheet provide that the decision was made on July 3, 2012, the day of the hearing. (R. 191, 193.) July 10, 2012, was merely the date on which

the Chairman of the Parole Board "affixed [his] signature" to the notice of its decision. (R. 191.)

In addition to there being no evidence that the Parole Board relied on the PSI to conclude that Blanke committed statutory rape, the cases the Parole Board cites in support of its assertion that the Parole Board could rely on such statements are inapposite. *See* Brief of Resp. at 15 (citing *State v. Maestas*, 2002 UT 123, ¶ 32, 63 P.3d 621; *McCammon v. Board of Pardons*, 2016 UT App 119, ¶ 5, 378 P.3d 106). Both *Maestas* and *McCammon* involve situations in which the defendant made statements about convicted conduct. Here, Blanke's statements relate to unconvicted conduct. Moreover, context matters.

The Parole Board points to one line in the PSI to argue that Blanke "confirmed he had sex with his then fifteen-year old kidnapping victim." Brief of Resp. at 13. The context of Blanke's statement in the PSI is that he had pled guilty to kidnapping and was taking responsibility for that crime. He was not facing, and had never faced, a charge of statutory rape or any other charges in connection with kidnapping Victim 2.

The night in question, Blanke was with two women—one adult and one minor. (R. 127.) Blanke was high on marijuana that night, (*id.*), and was also regularly high on methamphetamine, (R. 137, 179). Blanke remembered having sex with one of the two women, but he did not know which woman it was—in fact, *the police* told Blanke that he had raped one of the women, but "they did not say which one." (R. 127.) Of course, Blanke disputes the alleged rape, and he also disputes the statutory rape.

The allegations of sexual misconduct against Blanke are disputed, contrary to the Parole Board's assertions.[2] As Blanked pointed out in his principal brief, there is evidence that suggests he did not rape or even have sexual intercourse with Victim 2. Victim 2 went to the hospital the day after the alleged rape to be evaluated, but there were no reported signs of rape or even any traces of semen. (R. 272.) This evidence cannot be ignored. Due process requires that Blanke be afforded a *Neese* hearing where he can mount a defense to the allegations of unconvicted sexual conduct. At that hearing, the Parole Board may certainly question Blanke about his false confession at the 2006 hearing—or any other statements it is concerned with—and the circumstances behind the false confession, if the Parole Board wishes to do so. But it is inappropriate to decide unconvicted conduct without a *Neese* hearing, and doing so violates due process.

III. THE PAROLE BOARD'S ACTIONS DEMONSTRATE THAT IT MADE ITS PAROLE DECISION BASED ON A DETERMINATION THAT BLANKE RAPED VICTIM 2.

The Parole Board accuses Blanke of putting words into its mouth in arguing that it determined that Blanke committed unconvicted sexual conduct. Brief of Resp. at 28. Had the Parole Board issued a written decision articulating its rationale for setting Blanke's rehearing for 2032, Blanke and the Court would have more evidence of the Parole Board's decision. But as the popular adage goes, actions speak louder than words.

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[2] Blanke made this clear in his most recent parole hearing in December 2018. Blanke denied even having sexual intercourse with Victim 2. *See* Brief of Pet. at Add. E at 7. If the Parole Board was concerned about the statutory rape allegation, you would have expected the hearing officer to make it a point of emphasis at the hearing, but he did not.

What we know for sure is that the Parole Board set Blanke's rehearing out twenty years and required Blanke to complete sex offender treatment, and the Parole Board did so even though Blanke had already surpassed the suggested prison sentence and had maintained a stellar prison record throughout his stay. We know that the alleged rape was the major topic at the hearing and was almost certainly the reason the media was in attendance.[3] We also know that the Parole Board reached its decision the same day of the hearing in which the hearing officer stated that he believed Blanke brutally raped Victim 2.

To be precise, the hearing officer stated of Blanke, "He hasn't admitted to rape, but he raped [Victim 2]. Is ten years enough justice for those crimes? I would say no." (R. 181.) The hearing officer later stated, "I don't buy your story, . . . I think you . . . kidnapped [Victim 1] with the intent of sexually abusing her. I think you brutally raped [Victim 2,] and I think because of those two cases, you need to do treatment before we consider any kind of a release into the community." (R. 188.)

The Parole Board diminishes the hearing officer's statements and, in the process, understates and undermines the hearing officer's role. The hearing officer's role cannot be completely detached from the Parole Board's decision, especially when the Parole

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[3] The media's impact at the hearing cannot be overstated. Victim 2 had been attributed with playing a significant role in the Legislature's changing of the statute of limitations for rape. *See* R. 184. The hearing officer's opinion and the public's and media's perception was that Blanke raped Victim 2. But Blanke has disputed the allegation, there is direct evidence that supports Blanke's position of innocence, and Blanke deserves due process.

Board made a decision the same day and accepted the hearing officer's recommendation, and then some.

Notably, the hearing officer concluded the hearing by saying, "I'll be recommending another rehearing, and I'm kinda looking at a ten-year mark. So we'll talk to you again in ten years." (R. 189.) Those are not the words of someone who has no idea what the Parole Board is going to do. But more importantly, we know what the hearing officer's recommendation was and the basis for it—that he believed Blanke brutally raped Victim 2. That same day, the Parole Board went even further than the hearing officer's recommendation and set Blanke's rehearing, not for ten years, but for twenty years.

It is simply not credible to assert that the Parole Board's decision to set Blanke's rehearing for 2032 was based on anything but a determination that Blanke raped Victim 2.

The Parole Board once again tries to rationalize its decision based on supposed reliance of statements in Blanke's PSI. *See* Brief of Resp. at 29. For the reasons articulated in Section II, *supra*, that argument is unpersuasive.[4] At best, the Parole Board can show that Blanke made false confessions, which Blanke readily admits and has explained and has even pointed to evidence that supports his claim of innocence. But

[4] The Parole Board also asserts that this case presents no risk of error or reasonable perception of unfairness or that its decision undermines sentence uniformity, rational plea bargaining, or good prison behavior. *See* Brief of Resp. at 31. Blanke strongly disputes the Parole Board's position. Blanke already addressed this point in his principal brief and incorporates those arguments here. *See* Brief of Pet. at 19–22.

criminal defendants who make false confessions are not sent straight to sentencing—they are afforded a trial and due process. That is what Blanke deserves and has not been given.

CONCLUSION

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

DATED this 25th day of July, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(a)(11), I certify that this brief complies with the word count limitations of Rule 24(g) because, excluding parts of the document exempted by Rule 24(g)(2), this document contains 2,815 words. I further certify that this brief complies with the requirement of Rule 21 governing public and private records.

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CERTIFICATE OF SERVICE

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

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