ADDENDUM "A"

AMENDED OPINION*

This opinion is subject to revision before final publication in the Pacific Reporter

2020 UT 39

IN THE

SUPREME COURT OF THE STATE OF UTAH

KEVIN BLANKE,
Petitioner,

v.

UTAH BOARD OF PARDONS AND PAROLE,
Respondent.

No. 20160766
Heard October 7, 2019
Filed June 24, 2020

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* After we issued this opinion, Blanke petitioned for a rehearing. He argued, in part, that we based our "opinion on false information." Blanke's concern is based on statements in the opinion that he admitted in a presentence report to having sexual intercourse with a *fifteen-year-old* girl. *See infra* ¶¶ 1, 15, 25, 33–34. As we discuss in the Background Section, *infra* ¶¶ 4–5, Blanke did admit in his own statement to having had sexual intercourse with an *underage* girl. Additionally, the "Factual Summary of Offense" in the presentence report (which was not written by Blanke) says that Blanke had sex with a fifteen-year-old, and neither Blanke nor his counsel objected at the sentencing to this statement as inaccurate. UTAH CODE § 77-18-1 ("If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived."). We fully understand that Blanke specifically admitted in his presentence report to having sex with an *underage* girl, versus a *fifteen-year-old* girl. But neither he nor his lawyer at sentencing suggested in any way that the underage girl was any age other than fifteen. We thus reject Blanke's petition for rehearing. We do, however, make some minor amendments in response to Blanke's concerns.

Opinion of the Court

On Certiorari to the Utah Court of Appeals

Third District, Salt Lake
The Honorable Ryan M. Harris
No. 150902967

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JUSTICE HIMONAS authored the opinion of the Court, in which CHIEF JUSTICE DURRANT, JUSTICE PEARCE, and JUSTICE PETERSEN joined.

ASSOCIATE CHIEF JUSTICE LEE filed an opinion concurring in the judgment.

JUSTICE HIMONAS, opinion of the Court:

INTRODUCTION

¶1 The Utah Board of Pardons and Parole declined to set a parole date for Kevin Blanke, a Utah prison inmate, because he refused to participate in the prison sex offender treatment program. Blanke is serving a prison sentence for his convictions of attempted child kidnapping and kidnapping. Because of the attempted child kidnapping conviction, Blanke is considered a sex offender under Utah's sex offender registration statute. In addition, at the time he was sentenced for kidnapping, Blanke admitted via his presentence report to having sexual intercourse with a fifteen-year-old, conduct that would also place him, if he were convicted of it, on the sex offender registry. The question presented is whether under these circumstances the Parole Board must afford an inmate the due process protections required in *Neese v. Utah Board of Pardons and Parole*, 2017 UT 89, 416 P.3d 663. We hold that *Neese* does not require it to do so.

BACKGROUND

¶2 Blanke is currently incarcerated for two crimes. He pleaded guilty in 2002 to attempted child kidnapping and received a prison sentence of three years to life. At that time, any

person convicted of attempted child kidnapping had to register as a sex offender. *See infra* ¶ 28 n.13. One year later, Blanke pleaded guilty to kidnapping and received a prison sentence of one to fifteen years for that crime. The two convictions arose from separate incidents—one in 2002 and the other in 1997. The presentence reports in the two cases reflect the following factual bases for the charges.[1]

¶3 The attempted child kidnapping charge arose from events in 2002 involving a child, Elisabeth.[2] Blanke had come across Elisabeth and her older sister one day while the two were playing near a park. Elisabeth crossed the street to talk to Blanke after he called her over, and then she returned to her older sister, saying Blanke had offered to pay them if they would go with him. Her sister declined the offer and returned home, but Elisabeth left with Blanke. Blanke subsequently drove Elisabeth in his truck to get ice cream. When she got scared and told him that she wanted to go home, he dropped her off at the park. She had been gone for about an hour and a half. Upon her return, Elisabeth was taken to the hospital. An examination revealed no physical appearance of abuse, and Elisabeth did not claim that she was physically harmed.

¶4 The kidnapping charge sprang out of an incident in 1997 involving a fifteen-year-old, Michelle. The presentence report says that Blanke—forty-three years old at the time—had given Michelle and her friend a ride and smoked marijuana with them. Soon after her friend left, Michelle decided to leave as well. But Blanke followed her, handed her a threatening note, and demanded that she get in his truck. He then pushed her inside, telling her that he had a gun. Blanke subsequently drove Michelle to another location and allegedly "raped and sodomized her."[3]

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[1] This is an appeal from an order granting summary judgment for the Parole Board and so we summarize the facts in the light most favorable to Blanke. *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 2 n.1, 416 P.3d 663.

[2] For the attempted child kidnapping victim and the kidnapping victim, we use fictional names to protect their privacy and for ease of reference.

[3] Blanke was never charged with rape. Although Michelle reported the rape and Blanke was identified as a suspect, the case

(continued . . .)

Blanke described the incident in his statement in the presentence report: "I got aroused and we had sex. I did not know that she was underage until three days later when I talked to the police."

¶5 At the sentencing hearing for his kidnapping conviction, Blanke's counsel objected to the presentence report's statement that Blanke had "raped and sodomized" Michelle. But counsel did not object to anything else in the presentence report, including the statement that Blanke had sex with a fifteen-year-old. After Blanke's counsel raised that objection, Michelle testified. She said Blanke had "terrorized" and "raped" her. When she finished, the court asked Blanke if he had anything to say. He simply replied, "That's all right, your Honor. I'll just be sentenced and just do my time."

¶6 Blanke's original parole-grant hearing took place in 2006. There, the hearing officer asked Blanke whether he had had "sexual intercourse with" and "basically raped" Michelle. Blanke replied that yes, he had.[4] Then, Elisabeth's father testified, alleging that Blanke had kidnapped Elisabeth with the intent to sexually abuse her, which Blanke denied.

¶7 After Blanke's first hearing, the Parole Board did not set a release date and instead scheduled a rehearing. That rehearing, which is the most relevant hearing to this appeal, took place in 2012. The hearing officer first asked Blanke about the incident with Elisabeth, noting her father's 2006 testimony. Before moving on, the hearing officer asked if Blanke wanted to convey any other information to the Parole Board, and he said, "No sir." And then, just like at the first hearing, the hearing officer inquired about the rape accusation. This time, however, Blanke responded that he did not want to answer that question. He said that he was "never charged" with and "never pled guilty" to rape and that he "believe[d] that the board [had] all the information necessary to . . . [m]ake a decision on that case." He also said that he did not

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"fell through the cracks." By the time Blanke was arrested in 2002, the statute of limitations for rape had expired.

[4] Blanke later said this was a false confession. He claimed that he admitted to raping Michelle only because he "was told by every inmate [he] talked to before [his] 2006 Board Hearing, that a negative answer to a Board question would result in a denile [*sic*] of parole."

believe he was a sex offender. Then, Blanke was allowed to say anything else he wanted to about the kidnapping case; he said that he had nothing to add.

¶8 Concluding the hearing, the hearing officer said that he did not know what the Parole Board's decision on Blanke's parole eligibility would be. He then said that he personally "wouldn't consider any kind of release" until Blanke had been through sex offender treatment. He believed that Blanke "kidnapped [Elisabeth] with the intent of sexually abusing her" and "brutally raped [Michelle]."

¶9 After the 2012 hearing, Blanke was denied a release date yet again. The Parole Board instead scheduled a rehearing for 2032 and ordered a sex offender treatment memorandum. In its written decision, the Parole Board cited some aggravating and mitigating factors but contained no other explanation for its refusal to set a parole date.

¶10 Almost three years later, Blanke filed a petition for extraordinary relief under rule 65B(d) of the Utah Rules of Civil Procedure. Among other things, he alleged that the Parole Board had violated due process by conditioning his parole on completion of sex offender treatment even though he had not committed a sex offense. The district court granted summary judgment for the Parole Board on all claims, holding that the Parole Board did not violate Blanke's due process rights by requiring a sex offender treatment memorandum to be filed before the next hearing. The court of appeals affirmed, and Blanke filed a petition for certiorari with this court.

¶11 We provisionally granted Blanke's petition, pending our decision in *Neese v. Utah Board of Pardons and Parole*, 2017 UT 89, 416 P.3d 663. After we issued our decision in *Neese*,[5] we lifted the provisional qualifier and presented the following issue for review:

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[5] Blanke received another rehearing in 2018, after we issued our decision in *Neese*. There, Blanke flatly denied raping Michelle. He also said he could not participate in sex offender treatment because of his pending lawsuit. The Parole Board again declined to set a parole date. Instead, it set a rehearing for 2024 and indicated it "may consider an earlier release if Mr. Blanke completes Sex Offender Treatment Program."

whether the Parole Board must comply with the due process standards set out in *Neese* under the circumstances of this case.[6]

¶12 We have jurisdiction under Utah Code section 78A-3-102(3)(a).

STANDARD OF REVIEW

¶13 On certiorari, we review the court of appeals' decision and not that of the district court. *State v. Harker*, 2010 UT 56, ¶ 8, 240 P.3d 780. And we review the decision of the court of appeals for correctness, without any deference to its conclusions of law. *Id.* Of course, in determining whether the court of appeals erred, we must be cognizant of the procedural backdrop against which the

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[6] The concurrence would have us "repudiate *Neese*." *Infra* ¶¶ 48, 52. The parties, however, have not asked us to do so, nor have we ordered supplemental briefing on the matter, which is our preferred practice if we are considering overturning or reformulating precedent. *See, e.g., Utah Dep't of Transp. v. Target Corp.*, 2020 UT 10, ¶ 18, --- P.3d ---; *State v. Lujan*, 2020 UT 5, ¶ 3, --- P.3d ---. And although we have the power to revisit precedent at any time, we are extremely reluctant to do so without invitation from the parties and without briefing. *See Neese*, 2017 UT 89, ¶ 59 (providing that we "ought not upend our precedents absent argument from the parties that they be overruled"); *State v. Rowan*, 2017 UT 88, ¶ 23, 416 P.3d 566 (Himonas, J., concurring) ("But having discretion [to decide any issue] is not the same as prudently exercising it."). Of course, as the concurrence suggests, we are free to order supplemental briefing at any time. But we have declined to do so here because, unlike the concurrence, we do not doubt the viability of *Neese*. And we are also free, as the concurrence suggests, to "clarify, refine, or reconcile our past precedent." *Infra* ¶ 85; *Rutherford v. Talisker Canyons Fin., Co., LLC*, 2019 UT 27, ¶ 79 n.27, 445 P.3d 474 ("[W]e are always free to clarif[y] ambiguities in past opinions without overruling their holdings." (second alteration in original) (citation omitted) (internal quotation marks omitted)). That is exactly what we are doing here—refining *Neese* and holding that it does not extend to Blanke's situation. Bottom line: the concurrence has been and remains more willing than the other members of this court to uproot precedent. And to be clear, the concurrence's view when it comes to the proper role of *stare decisis* is principled and consistent. But so is the view of the other members of this court.

issue arose. Here, the district court granted the Parole Board's motion for summary judgment on Blanke's due process claim. The ultimate due process question is an issue of law to be reviewed for correctness. *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 21, 416 P.3d 663. Typically, "[w]hen a due process question requires 'application of facts in the record to the due process standard, we incorporate a clearly erroneous standard for the necessary subsidiary factual determinations.'" *Id.* (quoting *Salt Lake City Corp. v. Jordan River Restoration Network*, 2012 UT 84, ¶ 47, 299 P.3d 990). On summary judgment, however, "all factual inferences must be drawn in favor of the nonmoving party as a matter of law, and we therefore review an award of summary judgment on a due process issue only for correctness." *Id.* (citing *Rupp v. Moffo*, 2015 UT 71, ¶ 5, 358 P.3d 1060).

¶14 Assuming, however, Blanke could establish that the district court erred in granting summary judgment to the Parole Board on his due process claim, he would be only "eligible for, but not entitled to, extraordinary relief." *State v. Barrett*, 2005 UT 88, ¶ 24, 127 P.3d 682; UTAH R. CIV. P. 65B(d)(2)(D) ("Appropriate relief *may* be granted . . . where the Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law." (emphasis added)). And when deciding whether to grant the relief sought in a rule 65B(d) petition, a court "will consider multiple factors" such as "the egregiousness of the alleged error, the significance of the legal issue presented by the petition, [and] the severity of the consequences occasioned by the alleged error." *Barrett*, 2005 UT 88, ¶ 24.

ANALYSIS

¶15 Blanke was convicted of a crime that requires his registration as a sex offender and admitted via his presentence report to having sex with a fifteen-year-old. Still, he contends that the Parole Board must afford him the additional procedural protections discussed in *Neese v. Utah Board of Pardons and Parole*, 2017 UT 89, 416 P.3d 663,[7] before it can determine that he is a sex offender and condition his parole on sex offender treatment.

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[7] We required the Parole Board to use three additional procedural protections in *Neese*: "(1) timely, particularized written notice that allegations [inmates] committed unconvicted sexual (continued . . .)

¶16 In support of his contention, Blanke argues that attempted child kidnapping is not a sex offense. He also urges that, even if attempted child kidnapping is a sex offense, the Parole Board did not base its decision on the attempted child kidnapping charge but instead on the uncharged allegations that Blanke raped Michelle and sexually abused Elisabeth.[8] These arguments are not persuasive.

¶17 For the reasons below, we hold that the Parole Board did not violate Blanke's due process rights when—without using the procedures set out in *Neese*—it found that he was a sex offender and thus conditioned his parole on sex offender treatment. Due process does not require those procedures when an inmate has been convicted of—or, in a procedural setting like a sentencing hearing, has admitted to—a crime that requires him to register as a sex or kidnap offender.

I. DUE PROCESS AT ORIGINAL PAROLE-GRANT HEARINGS

¶18 The Utah Constitution gives to the Parole Board power to "grant parole . . . subject to regulations as provided by statute." UTAH CONST. art. VII, § 12(2)(a). In general, "[d]ecisions of the board in cases involving paroles . . . are final and are not subject to judicial review." UTAH CODE § 77-27-5(3). This court has consistently held, however, that article I, section 7 of the Utah Constitution, which provides that "[n]o person shall be deprived of life, liberty or property, without due process of law," applies to original parole-grant hearings. *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 23, 416 P.3d 663; *Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 911 (Utah 1993); *see also Lancaster v. Utah Bd.*

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offenses will be decided; (2) the opportunity to call witnesses [unless the safe administration of the prison system requires otherwise]; and (3) a written decision adequately explaining [the Parole Board's] basis for determining that [inmates are] sex offenders and asking them to participate in sex offender treatment." 2017 UT 89, ¶¶ 1, 43.

[8] Blanke also urges us to follow the Kentucky Supreme Court's decision in *Ladriere v. Commonwealth*, 329 S.W.3d 278 (Ky. 2010). That decision, however, is not on point because the issue in that case was whether ordering a defendant to complete sex offender treatment was authorized by a Kentucky statute. *Id.* at 281–82. We thus do not address it.

of Pardons, 869 P.2d 945, 947 (Utah 1994) (explaining that courts "review the fairness of the *process* by which the Board undertakes its sentencing function, but [they] do not sit as a panel of review on the result, absent some other constitutional claim, such as cruel and unusual punishment"). That is because Utah uses an indeterminate sentencing scheme. *Neese*, 2017 UT 89, ¶ 23. Under that scheme, the district court "impos[es] the statutorily prescribed range of years for the offense of conviction." *Id.* But then the Parole Board, using its "unfettered discretion," fixes the term of imprisonment within that range. *Id.* (quoting *Labrum*, 870 P.2d at 908). And because of that unfettered discretion, original parole-grant hearings are "analogous to sentencing hearings," requiring "due process to the extent that the analogy holds." *Id.* (quoting *Labrum*, 870 P.2d at 908).

¶19 Of course, due process does not require every procedural protection for every original parole-grant hearing. *See Labrum*, 870 P.2d at 911. Indeed, we have recognized that procedural rights in the parole-hearing context are "not unlimited." *Neese*, 2017 UT 89, ¶ 62; *Neel v. Holden*, 886 P.2d 1097, 1103 (Utah 1994) ("Just as the requirements of due process are limited in sentencing proceedings, so they are in parole hearings at which an inmate's predicted term of incarceration may be set."). Whether due process calls for the Parole Board to bolster an original parole-grant hearing with more procedural protections "depend[s] on the demands of the particular situation." *Neese*, 2017 UT 89, ¶ 24; *Labrum*, 870 P.2d at 911 ("The extent to which additional due process protections must be afforded inmates in this and other proceedings in the parole system will require case-by-case review. Due process is flexible and calls for the procedural protections that the given situation demands." (citation omitted) (internal quotation marks omitted)). And "[p]recisely what due process requires of the board of pardons cannot be determined in the abstract, but must be determined only after the facts concerning the procedures followed by the board have been [fleshed] out." *Neel*, 886 P.2d at 1102 (second alteration in original) (citation omitted) (internal quotation marks omitted).

¶20 "[T]he touchstone of due process in the context of parole hearings is whether the proposed procedural due process requirement *substantially furthers* the accuracy and reliability of the Board's fact-finding process." *Id.* at 1103 (emphasis added). But we recognize that other factors play into the due process analysis as well. So, to help us decide what procedures the Parole

Board must follow in each situation, "we balance the goals of (1) minimizing errors in the Parole Board's sentencing process and (2) promoting the perception of fairness with (3) ensuring the effective administration of Utah's prison and parole systems." *Neese*, 2017 UT 89, ¶ 53; *see also Labrum*, 870 P.2d at 909 ("At least two critical functions related to fundamental fairness are implicated by a petitioner's request for timely disclosure of information: minimizing error and preserving the integrity of the process itself."). We also strive to "promot[e] uniformity in sentences, reduc[e] the need for trials by encouraging rational plea bargains, and provid[e] incentives for good behavior in prison." *Neese*, 2017 UT 89, ¶ 24 (citation omitted) (internal quotation marks omitted).

¶21 Our opinions in *Neese* and *Labrum* provide examples of the procedural protections required in particular situations. In *Labrum*, the Parole Board withheld from an inmate notice of the "information used against him at the parole determination hearing." 870 P.2d at 904. We held that "due process requires (1) that an inmate receive adequate notice to prepare for a parole release hearing, and (2) that an inmate receive copies or a summary of the information in the Board's file on which the Board will rely." *Id.*

¶22 The procedure in *Labrum*—adequate notice of a hearing and the opportunity to review the Parole Board's information—substantially minimized errors and increased the perception of fairness in the decision-making process by allowing the inmate to "point out errors" that the Parole Board might have otherwise relied on. *Id.* at 909 (citation omitted).

¶23 We required procedural protections in our *Neese* decision beyond those required in *Labrum*. We considered "what procedural protections the Parole Board must respect before it determines that someone who has never before been adjudicated a sex offender is one and effectively conditions his early release on his participation in sex offender treatment." *Neese*, 2017 UT 89, ¶ 25. The inmate in that case "ha[d] never been convicted of a sex offense or adjudicated a sex offender in a disciplinary, juvenile, or any other proceeding." *Id.* ¶ 32. And he "steadfastly maintained that he was innocent of sexual misconduct." *Id.* We held that due process required the Parole Board to give the inmate more procedural protections—advance written notice, the ability to call witnesses and present evidence (unless the safe administration of the prison system requires otherwise), and a written statement—

before it could consider him a sex offender for the purposes of sex-offender-treatment parole conditions. *Id.* ¶ 43.

¶24 The *Neese* procedures substantially "reduce the risk of error and promote the perception of fairness" in three ways: First, they "allow[] inmates to meaningfully present evidence in a situation where they've never before had the opportunity to do so." *Id.* ¶ 44. Second, they "ensur[e] that the Parole Board has carefully considered the evidence." *Id.* ¶ 46. Third, they "creat[e] a record of the Parole Board's adjudication that allows for meaningful due process review." *Id.*

II. APPLICABILITY OF *NEESE*

¶25 Applying the paradigm of *Neese v. Utah Board of Pardons and Parole*, 2017 UT 89, 416 P.3d 663, and its ancestry, we determine that the Parole Board did not violate Blanke's right to due process by considering him a sex offender for the purposes of sex offender treatment. Two facts here strip away the need for additional procedure. First, Blanke was convicted of attempted child kidnapping—a crime that, at the time of his conviction, required him to register as a sex offender. Second, he admitted via his presentence report, while benefiting from the extensive procedures of a sentencing hearing, to having sexual intercourse with a fifteen-year-old. If he were convicted of it, that admitted conduct would constitute a crime that would also require Blanke to register as a sex offender.

¶26 Given the procedural protections that Blanke enjoyed in pleading guilty to attempted child kidnapping and in admitting to having sexual intercourse with a fifteen-year-old, more procedural protections were unnecessary to satisfy due process before the Parole Board could consider Blanke's unconvicted sex offenses for purposes of sex offender treatment.[9] Additional

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[9] The concurrence says that "there is nothing in *Neese* that dictates this result" and that this "is a policy decision that we are making based on the facts of this particular case." *Infra* ¶ 61. We disagree. We are not making a policy decision; rather, we are fulfilling our judicial role, which is to determine what procedural protections due process requires in this case. *Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 911 (Utah 1993) ("Due process is flexible and calls for the procedural protections that the given situation demands." (citation omitted) (internal quotation marks (continued . . .)

procedures would neither substantially reduce the risk of error nor protect the appearance of fairness in the Parole Board's decision that Blanke was a sex offender. Thus under our precedents, the Parole Board owed Blanke no more procedural protections before it decided that he is a sex offender.

A. Blanke Was Adjudicated a Sex Offender

¶27 *Neese*'s "unique procedural protections," 2017 UT 89, ¶ 30, are not required by due process because Blanke was convicted of attempted child kidnapping.[10] As a result of that conviction, he is required under the Utah sex offender registration statute to register as a sex offender. Thus he has been adjudicated a sex offender,[11] and the Parole Board did not violate due process by refusing to afford him additional procedures before considering him to be a sex offender for parole purposes.

¶28 Blanke contends that he deserves the procedures in *Neese*. But the situation in *Neese* was very different from Blanke's

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omitted)); *Foote v. Utah Bd. of Pardons*, 808 P.2d 734, 735 (Utah 1991) ("Precisely what due process requires of the board of pardons cannot be determined in the abstract, but must be determined only after the facts concerning the procedures followed by the board are [fleshed] out."). And the principles of due process voiced in *Neese* and its ancestry require the result we reach today.

[10] The crime of child kidnapping is committed when a person "intentionally or knowingly, without authority of law, and by any means and in any manner, seizes, confines, detains, or transports a child under the age of 14 without the consent of the victim's parent or guardian, or the consent of a person acting in loco parentis." UTAH CODE § 76-5-301.1(1).

[11] The concurrence argues that *Neese* "gave little guidance on what it means to have 'been adjudicated a sex offender.'" *Infra* ¶ 56. Consequently, the concurrence believes that "[i]t is not at all clear that *Neese* provides that Blanke 'has been adjudicated a sex offender.'" *Infra* ¶ 54. Although the concurrence may be correct in that the *Neese* opinion left open what we meant by that phrase (we did not need to define it there), this court may define terms that it has used in past cases. And it is patently reasonable to conclude that a sex offender, as used in *Neese*, means someone who fits the definition of a sex offender under the Utah Code.

situation. Unlike the *Neese* inmate, Blanke has been adjudicated a sex offender. He was convicted of attempted child kidnapping.[12] At the time of his conviction, attempted child kidnapping was a registerable offense under Utah's sex offender registration statute.[13] So as a result of that conviction, Blanke had to register as a sex offender. And thus he has been adjudicated a sex offender.

¶29 In contrast to *Neese*, more procedural protections here would not serve the "critical functions" of due process. *See Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 909 (Utah 1993). Specifically, they would not substantially increase the accuracy of the Parole Board's decision that Blanke is a sex offender since Blanke already had the opportunity to meaningfully present evidence about the events leading to the attempted child kidnapping conviction.[14] *Neese*, 2017 UT 89, ¶ 44. That is, in part,

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[12] Blanke argues that the Parole Board cannot classify him as a sex offender because attempted child kidnapping is not one of the crimes listed under Title 76, Chapter 5, Part 4 of the Utah Code, the part named "Sexual Offenses." But regardless of whether a crime is housed in that part of the Utah Code, we hold that the Parole Board may classify an inmate as a sex offender when the inmate is required to register as a sex offender. *See infra* ¶ 32. He also points out that attempted child kidnapping requires no sexual element or motive. Although true, there is a correlation between attempted child kidnapping and sex offenses. *See infra* ¶ 31.

[13] At the time of Blanke's conviction of attempted child kidnapping, Utah Code section 77-27-21.5 governed sex offender registration. That section required sex offenders to register, defining a "sex offender" to include any person convicted of "Section 76-5-301.1, kidnapping of a child" or "attempting" that crime. UTAH CODE § 77-27-21.5(1)(e) (2002) (repealed 2012).

[14] The concurrence contends that additional procedure is arguably warranted because it "would aid the Parole Board's decision-making to *some* degree." *Infra* ¶ 71. But our precedents require more than that: an inmate must show that "a particular procedural requirement will *substantially further* the [Parole] Board's fact-finding process." *Neese*, 2017 UT 89, ¶ 63 (alteration in original) (emphasis added) (citation omitted); *Monson v. Carver*, 928 P.2d 1017, 1030 (Utah 1996) ("[O]ur decision to extend particular procedural due process requirements under article I,

(continued . . .)

the function of plea and sentencing proceedings. Nor would more procedures substantially further the appearance of fairness in the Parole Board's decision-making: an inmate who pleads guilty to a crime that requires him to register under the sex offender registration statute cannot reasonably think it unfair that the Parole Board would then consider him a sex offender and condition his parole on sex offender treatment.

¶30 We note that under the current statutory scheme, an individual convicted of attempted child kidnapping is considered a kidnap offender—not a sex offender. UTAH CODE § 77-41-102(9), (17). But even if the new Sex and Kidnap Offender Registry were to apply to Blanke, we would still conclude that more procedural protections are unnecessary before the Parole Board determines that he is a sex offender. We hold this for two reasons.

¶31 First, the Utah Legislature added attempted child kidnapping as a registerable sex offense in 1997, noting that it was

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section 7 of the Utah Constitution to certain parole hearings is grounded in the rationale that such requirements will substantially further the accuracy and reliability of the Board's fact-finding process."); *Neel v. Holden*, 886 P.2d 1097, 1103 (Utah 1994) ("[T]he touchstone of due process in the context of parole hearings is whether the proposed procedural due process requirement substantially furthers the accuracy and reliability of the Board's fact-finding process."). Undoubtedly, the robust procedure required in *Neese*—notice, an opportunity to call witnesses, and a written decision—substantially furthers the accuracy of the Parole Board's decision-making, even if we have not explicitly said so. *See also Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 909 (Utah 1993) (holding that due process "requires that the inmate know what information the Board will be considering at the hearing and that the inmate know soon enough in advance to have a reasonable opportunity to prepare responses and rebuttal of inaccuracies," in part, because "researchers and courts have discovered many substantial inaccuracies in inmate files" (citation omitted)). And although this court does not always say out loud that the procedural requirement must *substantially* further the fact-finding process, this court has never held that due process requires additional procedure whenever it aids the Parole Board's decision-making to *some* degree. Such a standard would render the required procedure virtually limitless.

"expanding the definition of sex offender to include other offenses against minors." 1997 Utah Laws 763. Before then, the Legislature had defined sex offender only as someone with a felony conviction under Title 76, Chapter 5, Part 4. UTAH CODE § 77-27-21.5 (1983). The Utah Legislature, then, apparently saw a link between sex offenses and attempted child kidnapping. That view does not lack support, given the apparent significant correlation between child kidnapping and child sex offenses.[15] Second, the crime of child kidnapping carves out an exception for the typical family kidnapping—i.e., conduct that would constitute "custodial interference"[16]—making the conduct underlying child kidnapping more likely to be sexually motivated.

¶32 For these reasons, we hold that the procedural protections in *Neese* do not apply when an inmate must register as a sex or kidnap offender.

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[15] *See* CHILD VICTIMS OF STEREOTYPICAL KIDNAPPINGS KNOWN TO LAW ENFORCEMENT IN 2011, U.S. DEP'T OF JUSTICE 1, 10 (2016), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/249249.pdf (noting that in 2011, 63 percent of stereotypically kidnapped children "were sexually assaulted during detainment" and that "[h]alf of all stereotypical kidnappings in 2011 were sexually motivated crimes against adolescent girls"). Child kidnapping is also often charged with other crimes that require a sexual element. *See, e.g.*, *State v. Strunk*, 846 P.2d 1297, 1299 (Utah 1993) (recounting that the defendant had been charged with child kidnapping and aggravated sexual abuse of a child); *State v. Diaz*, 2002 UT App 288, ¶ 6, 55 P.3d 1131 (noting the defendant had been charged with one count of aggravated kidnapping, or in the alternative, one count of child kidnapping, and one count of aggravated sexual abuse of a child).

[16] *See* UTAH CODE § 76-5-301.1(2) ("Violation of Section 76-5-303 is not a violation of this section."); *id.* § 76-5-303 (2001)-(repealed 2010) (criminalizing, among other things, (1) the taking of a child from its lawful custodian with knowledge that "the actor has no legal right to do so" and "with the intent to hold the child for a period substantially longer than the court-awarded parent-time or custody period" and (2) concealing or detaining a "child with intent to deprive" a person "of lawful parent-time, visitation, or custody rights").

B. Blanke Admitted to Having Sexual Intercourse with an Underage Female in a Setting in Which He Had Enough Procedural Protections

¶33 In addition to Blanke having been adjudicated a sex offender, *Neese*'s procedural protections would not substantially further the "critical functions" of due process because Blanke admitted in his presentence report to sexual misconduct. And the conviction of that misconduct would have required his registration as a sex offender. For that reason alone the Parole Board did not violate due process by determining that Blanke was a sex offender and conditioning his release on sex offender treatment.

¶34 Blanke's admitted conduct constituted a crime that would have required him to register as a sex offender had he been convicted of it. Specifically, he admitted via his presentence report to having sex in 1997 with a fifteen-year-old, when he was forty-three years old. At that time, that conduct constituted the crime of unlawful sexual intercourse, a crime that required registration as a sex offender.[17] By the time of Blanke's kidnapping conviction in 2003, the name of that crime had changed to unlawful sexual activity with a minor, but it still required registration as a sex offender.[18] Regardless of which statute applies—unlawful sexual

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[17] In 1997, a sex offender included any person convicted of a "felony, under Title 76, Chapter 5, Part 4, Sexual Offenses." UTAH CODE § 77-27-21.5(1)(e) (1997). And Utah Code section 76-5-401 (1983) made it a third-degree felony (unlawful sexual intercourse) for a person to have "sexual intercourse with a person . . . who is under sixteen years of age," if the actor was more than three years older than the victim.

[18] In 2003, Utah Code section § 77-27-21.5(1)(e) (2002) defined "sex offender" in part as "any person . . . convicted by this state of . . . a felony violation of Section 76-5-401, unlawful sexual activity with a minor." At that time, unlawful sexual activity with a minor included having "sexual intercourse with [a] minor." UTAH CODE § 76-5-401 (1998). A minor was defined as person who was "14 years of age or older, but younger than 16 years of age, at the time the sexual activity . . . occurred." *Id.* This crime was a third-degree felony "unless the defendant establishe[d] by a preponderance of the evidence the mitigating factor that the defendant [was] less than four years older than the minor at the time the sexual activity occurred." *Id.*

intercourse or unlawful sexual activity with a minor—Blanke's admitted conduct constituted a crime that would have required him to register as a sex offender had he been convicted of it.

¶35 With that in mind, we turn to Blanke's contention that *Neese* requires the Parole Board to give him more procedural protections at his parole hearing. It does not. Unlike the inmate in *Neese*, Blanke did not "steadfastly maintain[] that he was innocent of sexual misconduct." *Neese*, 2017 UT 89, ¶ 32. Instead, he admitted via the presentence report to conduct that would require him to register as a sex offender if he were convicted of it. What is more, Blanke had the chance to refute the presentence report at his sentencing hearing. But there he only denied having "raped and sodomized" Michelle. Crucially, he did not dispute having sexual intercourse with her, her identity, or her status as a minor.[19] Put differently, that Blanke had sexual intercourse with a fifteen-year-old was an "undisputed background fact[]." *Id.* ¶ 29.

¶36 Unlike in *Neese*, the critical functions of procedural due process have been tended to here. More specifically, they were fulfilled by virtue of the sentencing proceeding. Blanke's sentencing proceeding greatly "reduce[d] the risk of error" in the Parole Board's decision-making, *id.* ¶ 25, by giving him the opportunity (while being represented by counsel) to refute the presentence report—i.e., to "meaningfully present evidence" to contradict it, *id.* ¶ 44, and to "point out errors," *Labrum*, 870 P.2d at 909 (citation omitted). Indeed, the prosecutor even asked the district court to "allow Mr. Blanke" to "provide anything for the record" and to "let the Court know about any objections he has to the pre-sentence report." The sentencing proceeding also promoted the "appearance of fairness:" an inmate cannot reasonably think it unfair that the Parole Board classifies him as a sex offender when he has admitted to sexual misconduct via the presentence report and then left that admission unchallenged in the sentencing proceeding.

¶37 The bottom line is that the procedural protections of *Neese* do not apply when the Parole Board classifies an inmate as a sex offender and thus conditions the inmate's parole on sex offender

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[19] "Section 76-5-401 makes sexual intercourse with a fourteen or fifteen-year-old a violation of the statute, irrespective of defendant's knowledge of the victim's age . . . ." *State v. Martinez*, 2002 UT 80, ¶ 12, 52 P.3d 1276.

treatment when he has admitted, in a proceeding with procedural protections like those of a sentencing hearing, to conduct that would constitute a crime making him a sex or kidnap offender. Consequently, the Parole Board did not violate due process by categorizing Blanke as a sex offender and conditioning his parole on sex offender treatment.

C. Neese *Does Not Apply, and Blanke Has Not Asked Us to Expand Its Scope*

¶38 Blanke last argues that he deserves the procedural protections of *Neese* because in making its decision the Parole Board was "fixated on alleged, unconvicted sexual misconduct" – the rape and sexual abuse allegations – rather than on his convicted offense (attempted child kidnapping).[20] But this argument misunderstands our decision in *Neese*. *Neese* held only that due process requires "unique procedural protections" when (1) an inmate has *never* been adjudicated a sex offender in any proceeding and (2) the Parole Board considers unconvicted sex offenses in its decision to condition parole on sex offender treatment. *Neese*, 2017 UT 89, ¶ 40. We did not decide in *Neese* whether the Parole Board must afford an inmate additional procedural protections whenever it considers *any* unconvicted sexual misconduct, even when the inmate has been adjudicated a sex offender for *some other* sexual misconduct.

¶39 *Neese* does not apply here because Blanke was adjudicated a sex offender by virtue of his attempted child kidnapping conviction. Beyond that, he admitted via the presentence report to conduct constituting another registerable sex offense. Those two facts push Blanke outside of *Neese*'s protection. The Parole Board thus owed Blanke no additional process before it considered unconvicted sex offenses in its decision to require Blanke to undergo sex offender treatment. Blanke has not asked us to expand the scope of *Neese*, and so we leave that issue for another day.

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[20] Blanke also contends his "false confession" to the rape at the 2006 parole hearing does not obviate his right to *Neese* procedures. This argument is irrelevant, however, because Blanke is not entitled to the *Neese* procedures for two other, independent reasons. *See infra* ¶ 39. We therefore decline to address his argument in further detail.

CONCLUSION

¶40 We conclude that under these circumstances the Parole Board need not afford Blanke the due process protections explained in *Neese*. We therefore affirm the decision of the court of appeals.

ASSOCIATE CHIEF JUSTICE LEE, concurring in the judgment:

¶41 The founding constitution of the State of Utah gave to the "Board of Pardons" the discretion to "commute punishments" with any "limitations and restrictions" that a majority of the Board might "deem proper." UTAH CONST. art. VII, § 12 (1896). This was the founding-era notion of parole in Utah. The Board's authority was subject to "regulations as may be provided by law, relative to the manner of applying for pardons," *id.*, but never to the demands of "due process" as applied in judicial proceedings. Historically, the Parole Board had untrammeled discretion to decide the terms and conditions of early release from incarceration. Because early release on parole was seen as a matter of executive "grace," our law stopped far short of imposing the demands of trial process on parole hearings.[21] That understanding is both reinforced in the constitution as it stands today,[22] and confirmed by longstanding legislation[23] and judicial practice.[24] For

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[21] *See Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 164, 416 P.3d 663 (Lee, A.C.J., dissenting) ("Any decision to impose less than the maximum sentence . . . is an act of grace—a grant of greater liberty than the defendant was entitled to. And on that basis the original understanding of the right to due process does not extend to sentencing proceedings." (footnote omitted)).

[22] *See* UTAH CONST. art. VII, § 12(2)(a) ("The Board of Pardons and Parole, by majority vote *and upon other conditions as provided by statute, may* grant parole, remit fines, forfeitures, and restitution orders, commute punishments, and grant pardons after convictions, in all cases except treason and impeachments, *subject to regulations as provided by statute*." (emphases added)).

[23] *See* UTAH CODE § 77-27-5(3) ("Decisions of the board in cases involving paroles, pardons, commutations or terminations of sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review.").

many decades, the parole process was governed by statutes enacted by the legislature and rules adopted by the Parole Board without interference from this court.

¶42 This court first inserted itself into the Parole Board's procedures in *Foote v. Utah Board of Pardons*, 808 P.2d 734 (Utah 1991). There, we acknowledged that parole decisions in Utah are statutorily committed to the unreviewable discretion of the Board, *id.* at 735 (citing UTAH CODE § 77-27-5(3)), and noted that parole is not generally "a protected liberty interest under the federal due process clause," *id.* at 734 (citing generally *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 14-16 (1979)).[25] But we nonetheless asserted, with no analysis of the language of the Utah Constitution and no attempt to tie our decision to its original understanding, that "the mandate of the due process clause" must apply "to all activities of state government." *Id.* at 735. And we remanded the case to the district court for further proceedings and a determination of "[w]hat may constitute due process" in the context of a parole hearing. *Id.*

¶43 We took up the question of "what may constitute due process," *id.*, in an original parole grant hearing in *Labrum v. Utah State Board of Pardons*, 870 P.2d 902 (Utah 1993). *Labrum* embraced the purported "reality" that original parole grant hearings "are analogous to sentencing hearings." *Id.* at 908. And on the basis of that "reality," *Labrum* held that an inmate in such a hearing has a constitutional "due process" right to "know what information the Board will be considering at the hearing . . . soon enough in

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[24] *See Neese*, 2017 UT 89, ¶ 161 (Lee, A.C.J., dissenting) ("Throughout the late nineteenth and early twentieth centuries, judges and parole boards enjoyed wide discretion to determine the appropriate sentence. Yet sentencing and parole proceedings were never treated like trials."(footnote omitted)).

[25] *See Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) (holding that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence," because "[t]he natural desire of an individual to be released is indistinguishable from the initial resistance to being confined," and "the conviction, with all its procedural safeguards, has extinguished that liberty right").

advance to have a reasonable opportunity to prepare responses and rebuttal of inaccuracies." *Id.* at 909.

¶44 We took the matter a significant step further in *Neese v. Utah Board of Pardons & Parole*, 2017 UT 89, 416 P.3d 663. There we established a new right (among others) of inmates "to call witnesses and present documentary evidence" in original parole grant hearings in which the Parole Board anticipates "classify[ing] as a sex offender an inmate who has never been convicted of a sex offense or otherwise adjudicated a sex offender." *Id.* ¶ 43.

¶45 The new procedural rights established in *Labrum* and *Neese* were not rooted in any historically recognized right to "due process" in parole hearings (or even in sentencing hearings[26]). Instead, these new rights flowed from our court's sense of fairness and equity. We framed our decision as dictated by "'critical functions' of procedural due process" found in our case law—factors that look to whether new procedures will decrease the risk of error and increase the perception of fairness in parole decisions. *See id.* ¶ 28. But those factors are not a test that bridles judicial discretion. They are a one-way ratchet that justifies any new set of procedures that a majority of this court decides to impose on the Parole Board in the name of due process.

¶46 I dissented on these grounds in *Neese*.[27] In so doing I expressed a shared interest in "preserving the ... 'safe and effective administration of the prison system.'" *Id.* ¶ 176 (Lee, A.C.J., dissenting). But I emphasized that we have a ready "means" of doing so—in "respect[ing] the traditional role of the

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[26] *See Neese*, 2017 UT 89, ¶¶ 159-61, (Lee, A.C.J., dissenting) (explaining that sentencing proceedings were not traditionally treated like trials, constrained by due process, or generally subject to the rules of evidence).

[27] *See id.* ¶ 184 (explaining that the court failed to "identify an operative legal principle or legal test," and chose instead to "simply identif[y] grounds for ever-expanding procedural mechanisms"); *id.* (noting that the majority's test "provides no stopping point" and allows "a majority of the court" to decide that any additional procedures it prefers to endorse are "required by the Utah Constitution"); *id.* ¶ 185 (maintaining that "[t]he court's articulated factors" and new standards "are as fuzzy and unworkable as they are unmoored from history").

Parole Board" and the legislature in "adopting rules of procedure in this field," and "leav[ing] the limits of the Due Process Clause to the procedures historically understood to be guaranteed by the constitution." *Id.* And I lamented the fact that *Neese* not only departed from the original understanding of due process but also failed to provide a transparent test or standard that explained our decision.

¶47 My concerns stand. The *Neese* opinion provides no "workable legal standard" that explains the basis for constitutionalizing new procedural rules to impose on the Parole Board. *Id.* ¶ 141. It just gives a "circular confirmation for whatever procedure a majority of this court may deem appropriate." *Id.*

¶48 Today the court declines to extend *Neese* beyond its specific facts. And I endorse the decision to halt any further extensions of our precedent in this area. I write separately, however, to note that today's decision reinforces the concerns that I raised in *Neese* and confirms that the proper course of action is to repudiate *Neese* and return to the originalist first principles of due process set forth in my dissent in that case.

¶49 The majority cites two principal grounds for refusing to extend the procedures established in *Neese* to the facts of this case. First, the court suggests that we have already decided the question presented. It says that the *Neese* procedures apply only to someone who has never been "'adjudicated a sex offender,'" *supra* ¶ 27 (the phrase at issue in *Neese*, 2017 UT 89, ¶ 25), and asserts that Blanke has in fact "been adjudicated a sex offender," *supra* ¶ 28. Second, the court contends that the due process considerations identified in *Neese*—whether additional procedures would "increase the accuracy of the Parole Board's decision[-making]" and "further the appearance of fairness in the Parole Board's decision-making"—counsel against extending *Neese*. *Supra* ¶ 29.

¶50 But the decision today is not dictated by anything set forth in *Neese*—not by our articulation of the holding, and not by our announcement of any governing standard.[28] Here, as in *Neese*,

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[28] The majority seems to acknowledge this point implicitly in its reformulation of the *Neese* standard—in its statement that the *Neese* standard now requires a showing that any additional

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we are making a policy decision. We are concluding that the facts of this case are less sympathetic than the facts in *Neese*, and thus insufficient to justify extending the reach of our newly constitutionalized parole procedures.

¶51 Like the majority, I would hold that there is no basis for a decision granting Blanke the right to call witnesses (and avail himself of the other rights we announced in *Neese*) in his parole hearing. But I would base that decision on a determination—explained in detail in my dissent in *Neese* and elaborated further below—that there is no due process ground that justifies this court taking over a policymaking function that has long been vested in the Parole Board and subject to oversight by the legislature.

¶52 In the paragraphs below I first show that our articulation of the holding in *Neese* does not resolve the question presented today. I then demonstrate that a serious application of the *Neese* factors would lead to a decision in Blanke's favor. And I conclude by explaining why this court can and should repudiate *Neese* and place these sensitive decisions back in the hands of the Parole Board.

I

¶53 The majority first asserts that the concerns that drove the *Neese* decision are not present in the case before us. It says that *Neese* decided "what procedural protections the Parole Board must respect before it determines that someone who has never before been adjudicated a sex offender is one and effectively conditions his early release on his participation in sex offender treatment." *Supra* ¶ 23 (quoting *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 25, 416 P.3d 663 (internal quotation marks omitted)). And it holds that *Neese* does not apply to Blanke's situation because "[u]nlike the *Neese* inmate, Blanke has been adjudicated a sex offender." *Supra* ¶ 28.

¶54 But this is pure *ipse dixit*—a preference for a given policy outcome cloaked in a conclusory statement that the premise holds because we say it does. It is not at all clear that *Neese* provides that Blanke "has been adjudicated a sex offender." Nor is that

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procedure will "substantially" advance the goals set forth in *Neese*. *See supra* ¶ 29.

apparent from the Utah criminal code or the record in this case. This is a question of first impression.

¶55 *Neese* held that a person is a "sex offender" if he committed an offense that justifies a Board decision to "condition[] his early release on his participation in sex offender treatment." *Neese*, 2017 UT 89, ¶ 25. But the Utah Code does not regulate the Board's authority to impose such conditions on early release. And it certainly doesn't define what counts as a "sex offense" for these purposes. It is silent on the matter.[29] The same goes for our case law, which reflects the longstanding discretion of the Board to impose the terms and conditions that it sees fit.

¶56 *Neese* likewise gave little guidance on what it means to have "been adjudicated a sex offender." It told us only that a defendant who has been subject to trial and mistrial on a count of "forcible sodomy," *id.* ¶ 2, cannot be deemed to have been "adjudicated" guilty of the kind of offense that leads to a requirement of sex offender treatment as a precondition of early release, *id.* ¶ 25. But that decision in no way dictates an answer to the question presented in this case. There is no *a priori*, objective sense in which we can conclusively say that Blanke has been "adjudicated a sex offender"—the kind of offender that justifies the Board in conditioning his early release on the completion of sex offender treatment. The standard certainly wasn't articulated in *Neese*.[30] And Blanke credibly argues that at least some of the

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[29] Our criminal code defines a category of "sexual offenses," *see* UTAH CODE § 76-5-401 *et seq.* (Part 4 classifying "Sexual Offenses"), but it nowhere restricts the Parole Board in its identification of which offenses may justify a requirement of sex offender treatment as a precondition of early release on parole.

[30] The majority acknowledges that *Neese* "left open" what it means to be "adjudicated a sex offender," but insists that "it is patently reasonable" to treat anyone "who fits the definition of a sex offender under the Utah Code" as having been "adjudicated a sex offender." *Supra* ¶ 27 n.11. But this makes my point. I am not saying that what the court is doing today is *unreasonable*. I am just saying that its decision is not dictated by existing law (by *Neese* or the Utah Code). Again, the code does not define "sex offender" for *any* purpose—let alone for mandatory, Board-imposed sex offender treatment purposes. *Supra* ¶¶ 53–54. It tells us only who must register as one. The majority is thus making new policy in its

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differences between his case and Neese's support the conclusion that he deserves additional procedure at least as much as Neese did.

¶57 Neese was charged with and tried on a crime our code classifies as a "sexual offense."[31] And the crime in question required proof of a non-consensual "sexual act . . . involving the genitals of one individual and the mouth or anus of another individual."[32] He also had the opportunity to defend against that charge in a full-blown criminal trial—with all the procedural rights that accompany such a proceeding (including the right to call, confront, and cross-examine witnesses).

¶58 Blanke's case is different in several respects. But many of the differences cut in his favor—and cannot themselves justify distinguishing *Neese*. The charges against Blanke (on which he pleaded guilty) were for kidnapping and attempted child kidnapping. Neither of those crimes is classified as a "sexual offense" in the code or requires proof of a non-consensual "sexual act." On these grounds, Blanke may be in a stronger position than Neese to complain about the Parole Board branding him a "sex offender" and prescribing sex offender treatment as a precondition of early release.

¶59 Granted, Neese was never convicted of the conduct for which he was required to undergo sex offender treatment. But neither was Blanke. He was convicted of attempted child kidnapping and kidnapping, crimes that, again, were neither classified as "sexual offenses" nor required proof of a non-consensual "sexual act."

¶60 The majority dismisses these arguments, noting that the crime of attempted child kidnapping "was a registerable offense under Utah's sex offender registration statute" at the time of Blanke's guilty plea, *supra* ¶ 28, and asserting that "there is a correlation between attempted child kidnapping and sex offenses," *supra* ¶ 28 n.12. On these bases, the court concludes that

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decision today. It may be reasonable policy. But it is not a decision mandated by *Neese* or the code.

[31] *See* UTAH CODE § 76-5-401 *et seq.* (Part 4 classifying "Sexual Offenses"); *id.* § 76-5-403 (elements of forcible sodomy).

[32] *Id.* § 76-5-403(1).

Blanke "has been adjudicated a sex offender." *Supra* ¶ 28. It also notes that Blanke did not object to allegations in a presentence report that he engaged in conduct that "constituted the crime of unlawful sexual intercourse" (statutory rape) under Utah Code section 76-5-401 (1983). *Supra* ¶ 34. And because that conduct "constituted a crime that would have required him to register as a sex offender had he been convicted of it," *supra* ¶ 34, the court suggests that Blanke's circumstances fall outside the holding of *Neese*.

¶61 But again, there is nothing in *Neese* that dictates this result. *We* might wish to treat Blanke as a "sex offender" of the sort that may justly be required to undergo sex offender treatment as a precondition of early release on parole. But that crucial definition of "sex offender" is nowhere stated in *Neese* and nowhere provided in our statutes governing parole. This is a policy decision that we are making based on the facts of this particular case. Attempted child kidnapping is neither classified as a sexual offense nor requires proof of a non-consensual sexual act. The same goes for kidnapping. And although there was conduct mentioned in the presentence report in the kidnapping case that could have constituted a sexual offense *if it had been charged, see supra* ¶ 34, there was no charge and thus no conviction. If we justify the Board's decision based on the fact that Blanke could have been convicted of statutory rape and required to register as a sex offender, Blanke is in a worse position than Neese was—he is being required to undergo treatment for conduct for which he was never even charged or tried, let alone convicted. Clearly, then, Blanke's failure to "object" to the allegation in the presentence report does not show that he has been "adjudicated a sex offender" under *Neese*.

¶62 I am not suggesting that Blanke has a clear-cut case under *Neese*. I am just noting that *Neese* does not tell us who counts as the kind of "sex offender" that the Board may require to participate in sex offender treatment as a precondition of early release. I have cited a difference between this case and *Neese* that seems to make Blanke's case the more sympathetic one—that Neese was charged with and tried on a crime classified as a "sexual offense" and requiring proof of a non-consensual "sexual act," while Blanke was charged with and pleaded guilty to crimes with neither of those features. The majority, by contrast, cites differences that seem to cut in the opposite direction—that Neese pleaded guilty only to charges of obstruction of justice, theft, and

burglary, while Blanke pleaded guilty to one "registrable offense" and failed to contest allegations of misconduct that would have constituted another. Fair enough. But none of this tells us whether Blanke has been "adjudicated" of the kind of sex offense that should require him to participate in sex offender treatment as a precondition of early release.

¶63 This is because there is no law governing the imposition of such a precondition. Again, this is unsurprising because these decisions have long been matters of discretion for the Parole Board. We cut back on that discretion in *Neese* when we held that a person charged with and tried on a sex offense resulting in a mistrial could not be subjected to sex offender treatment by the Parole Board without additional procedures mandated by this court. And in so ruling we characterized the imposition of such a condition as a determination by the Board that an inmate is an "adjudicated . . . sex offender." But that does not tell us whether a person charged only with attempted child kidnapping and kidnapping has been "adjudicated" of the kind of "sex offense" that should require him to go through sex offender treatment as a precondition of early release on parole.

¶64 The court is thus making a new policy decision in ruling that "the Parole Board may classify an inmate as a sex offender" (and therefore require sex offender treatment as a condition of early release on parole) "when the inmate is required to register as a sex offender," *supra* ¶ 28 n.12, or when an inmate fails to deny conduct that *would have* constituted a registrable offense (*if* he had been charged and convicted), *supra* ¶ 33. Nothing in *Neese*, and certainly nothing in the statutes and regulations governing parole, dictates the court's decision.

II

¶65 The majority also insists that its decision follows from the legal "paradigm" set forth in *Neese v. Utah Board of Pardons & Parole*, 2017 UT 89, 416 P.3d 663. *Supra* ¶ 25. Citing the "'critical functions' of due process" identified in that case, the court says that "more procedural protections here" would neither "substantially increase the accuracy of the Parole Board's decision that Blanke is a sex offender" nor "substantially further the appearance of fairness." *Supra* ¶ 29.

¶66 If we apply the plain language of *Neese*—which does not require that procedures do *anything* "substantially"[33]—I can't see how that could be so. It would be a rare case indeed where additional precautions would not increase accuracy, and an even rarer one where such safeguards would not enhance the inmate's "reasonable," *see supra* ¶¶ 29, 36, perception of fairness. *See Neese*, 2017 UT 89, ¶ 141 (Lee, A.C.J., dissenting) ("*Any* additional procedure, after all, can be said to 'minimiz[e] error' and 'preserv[e] the integrity of the [parole] process.'" (alterations in original)). And this does not strike me as such a case.

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[33] The majority insists that our case law has always required an inmate to show "that 'a particular procedural requirement will *substantially further* the [Parole] Board's fact-finding process.'" *Supra* ¶ 29 n.14 (alteration in original) (citing *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 63, 416 P.3d 663). And it seems to attach this qualifier to *Neese*'s "appearance of fairness" factor as well. *See supra* ¶ 29. But this is a reformulation of the *Neese* standard. In *Neese*, we repeatedly asserted that due process demands additional procedures whenever they will "reduce the risk of error," 2017 UT 89, ¶¶ 24, 25, 29, 44, "minimiz[e] error," *id.* ¶¶ 28, 31; *see also id.* ¶¶ 53, 55, or ensure "factual accuracy," *see id.* ¶ 62 (citation omitted). And we held that additional safeguards were necessary in Neese's case because we "lack[ed] confidence in the accuracy of the[] proceedings," *id.* ¶ 34, and had "concerns for accuracy in meting out punishment," *id.* ¶ 113. In the past, we have cited a standard of "substantially" furthering accuracy or "meaningfully" reducing error only when *rejecting* requests for more procedure. *See id.* ¶¶ 54, 63; *see also Padilla v. Utah Bd. of Pardons & Parole*, 947 P.2d 664, 670 (Utah 1997) (rejecting an inmate's request that his counsel be allowed to "speak for him" and "confer with him" during portions of a Board hearing); *Monson v. Carver*, 928 P.2d 1017, 1030 (Utah 1996) (rejecting an inmate's request for counsel); *Neel v. Holden*, 886 P.2d 1097, 1103 (Utah 1994) (rejecting an inmate's request that his counsel be allowed to address the Board). So the majority's new, heightened standard underscores the internal inconsistency and ultimate unworkability of the *Neese* framework. And today's decision continues the sad tradition of invoking one standard when we decide to *require* new procedural safeguards and another when we decide to *reject* such safeguards.

¶67 Even if we apply the majority's new and improved "substantially increases" standard, it is not clear to me that Blanke should lose. The *Neese* factors, after all, are "not a legal test." *Id.* ¶ 182. They are just a recitation of the "*benefits* of additional procedure." *Id.* And when our test cites "only the benefits—the upsides—of additional procedure[,] we will have a one-way ratchet that will always result in *more* constitutionally required procedure."[34] *Id.* This "mode of reasoning" thus "provides no stopping point," except in any limits that may be found in the fluid and opaque policy preferences of a "majority of the court." *See id.* ¶ 184. That is the only real limit that I can find in the *Neese* framework—whatever a majority of this court thinks will increase ("substantially" or otherwise) accuracy and the perception of fairness. And I think we need to own it if that is our standard. *See id.* ¶ 147 (noting that if our due process standard is simply

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[34] In *Labrum* we gave an after-the-fact nod to the idea that additional requirements "may add administrative burdens for the limited staff of the Board." *Labrum v. Utah State Bd. of Pardons*, 870 P.2d 902, 911 (Utah 1993). But we immediately dismissed that concern, stating that "[i]t has never been an option for the government to argue that constitutional due process need not be provided because it creates administrative burdens." *Id.* Our "test" thus stands in contrast to the balancing test sometimes applied as a matter of federal law. That test, under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), seems problematic to the extent it allows judges to constitutionalize new procedures on the basis of their case-by-case sense of the process that seems due in a given circumstance. *See In re Discipline of Steffensen*, 2016 UT 18, ¶ 7, 373 P.3d 186 (noting that "the Due Process Clause is not a free-wheeling constitutional license for courts to assure fairness on a case-by-case basis" but a "constitutional standard . . . measured by reference to 'traditional notions of fair-play-and substantial justice'" (citation omitted)). But at least the federal standard entails an actual balance—with costs to weigh against benefits. *See Mathews*, 424 U.S. at 335 (balancing the importance of the interest affected, risk of error, and probable value of additional or substitute procedural safeguards against "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

"anything a majority of us deem[s] necessary is required," "we should say so" (internal quotation marks omitted)).

¶68 I flesh out these concerns below. First I show that the *Neese* concern for accuracy seems to cut in Blanke's favor. Then I make a parallel point about the concern for an inmate's perception of fairness.

A

¶69 The court says that Blanke's requested procedures will not "substantially" enhance accuracy because he "already had the opportunity to 'meaningfully present evidence'" of relevance to the parole decision in earlier sentencing proceedings. *Supra* ¶ 29. Blanke had counsel in those proceedings and was aware of the contents of the presentence report. *Supra* ¶ 36. And the court notes that he could have but failed to challenge the State's allegations against him. *Supra* ¶ 36.

¶70 I can't see how this means that the accuracy of the Parole Board's decision would not be "substantially" enhanced by additional procedure. In the attempted child kidnapping case, the presentence report would have told Blanke that he was charged with an offense that would require him to register as one convicted of that crime. In the kidnapping case, the presentence report would have told him that the allegations *could have led* to a separate charge of "unlawful sexual intercourse" under Utah Code section 76-5-401 (1983). But in neither case would Blanke have known that he needed to challenge the allegations to preserve procedural rights in objecting to sex offender treatment as a precondition of his early release on parole. The majority does not contend otherwise. It simply says it is enough that Blanke "had the chance to refute the presentence report," *supra* ¶ 35, "while being represented by counsel," *supra* ¶ 36.

¶71 But the mere existence of a previous "chance" to put on evidence does not defeat Blanke's right to additional procedure under *Neese*. The first *Neese* factor simply asks whether additional procedures would "reduce the risk of error" in the Parole Board's decision-making, *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 24, 416 P.3d 663, and additional procedure would surely help the Parole Board make a more informed decision as to whether Blanke committed an act justifying a requirement of sex offender treatment as a precondition of early release. The majority insists that Blanke "admitted" that he committed "conduct that would have required him to register as a sex offender had he been

convicted of it." *Supra* ¶ 34. But he didn't expressly "admit" to anything in that proceeding. He just failed to deny every allegation in a presentence report. And those remaining allegations have never been "adjudicated," at least if that means ruled on after a full and fair trial (as *Neese* suggests). Ultimately, moreover, there remains a significant, disputed question about *what facts* are sufficient to justify the imposition of a requirement of sex offender treatment as a precondition of early release. *See supra* ¶¶ 55–62. Surely additional procedure would aid the Parole Board's decision-making to *some* degree. And that is all that the first *Neese* factor requires.[35]

¶72 The majority's contrary conclusion cannot be reconciled with our opinion in *Neese*. After all, in that case the inmate had been openly charged with forcible sodomy and afforded the full range of procedural protections available *at trial*. *See Neese*, 2017 UT 89, ¶ 2. True, the trial did not result in a conviction; but neither

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[35] The majority disagrees with my assertion that *Neese* demands additional procedure whenever it would increase the accuracy of the Board's decisions to "*some* degree." *Supra* ¶ 29 n.14. But my reading is borne out by the terms of the *Neese* majority opinion. *See supra* ¶ 66 n.33. Today's majority's reframing, moreover, doesn't meaningfully raise the bar. A requirement that a procedure "substantially" increase accuracy (or the perception of fairness) still "render[s] the required procedure virtually limitless." *Supra* ¶ 29 n.14. Not much will change so long as the standard weighs only a procedure's benefits (and not its costs), *supra* ¶ 67 n.34, and fails to tie the required parole hearing procedures to the original meaning of "due process."

The addition of "substantially" may do little more than encourage inmates to demand ever more robust procedures. *See supra* ¶ 29 n.14 ("Undoubtedly, the robust procedure required in *Neese*—notice, an opportunity to call witnesses, and a written decision—substantially furthers the accuracy of the Parole Board's decision-making, even if we have not explicitly said so."). The implication of today's majority seems to be this: Ask for too little protection, and your procedures will be dismissed for not "substantially" increasing the accuracy of the Board's decision-making. But ask for more, and your procedures may be mandated by this court.

did it result in an acquittal. The result was a mistrial, *id.*, and the record of the trial would have been available to the Parole Board when Neese sought early release on the lesser charges on which he pleaded guilty and was eventually sentenced. So if the question is just whether an inmate has had a prior "chance" or "opportunity" to voice his opposition to a sex offense allegation that the Board is using to justify a requirement of sex offender treatment, then surely Neese had that. The majority cannot claim that Blanke's opportunity was somehow *better* than Neese's.

¶73 When Blanke pleaded guilty to kidnapping and attempted child kidnapping, he would have had no notice that he was agreeing to subject himself to sex offender treatment as a precondition of early release. He would have had little, if any, incentive to contest the allegations on those grounds. Neese, by contrast, knew that he had been charged with a crime classified as a "sexual offense" and requiring proof of a non-consensual "sexual act." *See supra* ¶ 58. And that knowledge arguably put him on greater notice that the Parole Board might require sex offender treatment as a precondition of early release.

¶74 The majority seeks to avoid this problem by noting that Neese "steadfastly maintain[ed] that he was innocent" while Blanke effectively "admitted" to unlawful sexual intercourse with a minor. *Supra* ¶ 35 (citation omitted). But the first *Neese* factor does not ask whether the inmate seeking additional procedural protections previously admitted to the conduct the Board cites as its reason for requiring sex offender treatment. It asks whether those additional protections would increase the objective accuracy of the Parole Board's decision-making. *See Neese*, 2017 UT 89, ¶ 25. And once we have held that the Board's accuracy is improved by the right to call more witnesses *in addition* to those called at a previous trial, we cannot hold that accuracy is not enhanced by the same right in a case where the inmate never called *any* witnesses and had little incentive to do so.

B

¶75 The second *Neese* factor points toward the same conclusion. The majority says that Blanke "cannot reasonably think it unfair" that the Parole Board is requiring sex offender treatment as a precondition of his early release on parole based on (a) a conviction of an offense (attempted child kidnapping) requiring registration as a sex offender, or (b) allegations in a presentence report evidencing an uncharged crime (of "unlawful sexual intercourse") that were left unchallenged in a prior

sentencing proceeding but also would have required registration. *Supra* ¶¶ 29, 36. But Blanke clearly does "think it unfair," as evidenced by his resilient prosecution of his case in both the court of appeals and this court. And if pure gut-level "fairness" is the test, I can hardly blame him.

¶76 In *Neese* we highlighted a broad range of harms and stigmas that result when an inmate is labeled a "sex offender" in the prison system. *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 31, 416 P.3d 663 (explaining, *inter alia*, the invasive nature of sex offender treatment and research showing that inmates classified as sex offenders are more likely to be physically and sexually abused). And we imposed new procedural requirements on parole decisions based on our concern for the reliance interests of a person in Neese's circumstances. We emphasized that Neese could not have known that allegations "not logically implicit in the factual basis of the[] allocution" leading to his guilty plea could "come roaring back at [a] parole hearing and result in a sentence decades longer than the sentence all parties contemplated based on the sentencing matrix at the time." *Id.* ¶ 33.

¶77 If we really believed all that, we would extend the protections established in *Neese* to Blanke. When Blanke pleaded guilty to attempted child kidnapping, he could not have known that the registration requirement for that offense would "come roaring back" and result in a requirement of sex offender treatment as a precondition to his early release—a precondition that will significantly extend the sentence that everyone would have contemplated "based on the sentencing matrix at the time." *See id.* Nor could he have anticipated that an attempted child kidnapping plea would lead to his classification in prison as a sex offender—and all the various harms and stigmas we warned of in *Neese*.

¶78 The majority attempts to skirt this issue by citing statistics that show an "apparent significant correlation between child kidnapping and child sex offenses," and by noting that the Utah Legislature "saw" such a correlation when it required registration for child kidnapping offenses. *Supra* ¶ 31. There may indeed be *a* correlation. But that is not the question. The question is whether there is a *sufficient* correlation to justify the Parole Board's decision to require sex offender treatment as a precondition of early release for inmates convicted of child kidnapping offenses. Blanke could not have anticipated the imposition of such a condition—at least

not any more than Neese could have anticipated that he would be subject to that condition when he secured a mistrial on a forcible sodomy charge and pleaded guilty to lesser, nonsexual crimes. At bottom, the question in both cases is a policy question—one long left to the Parole Board and legislature, but seized by this court in *Neese*. And to the extent the answer to that policy question turns on the inmate's perception of fairness, I see little room for the court's conclusion that Blanke "cannot reasonably think" the Parole Board's process in this case as "unfair" as the one we condemned in *Neese*.

¶79 The same goes for the majority's reliance on Blanke's failure to refute allegations in the kidnapping presentence report. The majority notes that the allegations in that report evidenced the uncharged crime of "unlawful sexual intercourse" under Utah Code section 76-5-401 (1983), a crime that "required registration as a sex offender." *Supra* ¶ 34. And it emphasizes that Blanke never "refute[d]" the allegations of sexual intercourse in the presentence report, but only "denied having 'raped and sodomized'" the victim. *Supra* ¶ 35. In the majority's view, this establishes that Blanke's "sexual intercourse with a fifteen-year-old was an 'undisputed background fact[].'" *Supra* ¶ 35 (alteration in original) (citation omitted). With this in mind, the court concludes that Blanke "cannot reasonably think it unfair" for the Parole Board to accept that "fact" as a basis for requiring sex offender treatment as a precondition of early release on parole. *Supra* ¶ 36.

¶80 I disagree. Blanke was never even *charged* with "unlawful sexual intercourse." At the time of his plea allocution on the charge of kidnapping, moreover, he could not have known that allegations that could sustain such an uncharged offense would "come roaring back," *Neese*, 2017 UT 89, ¶ 33, to substantially increase the sentence that he otherwise expected (and no doubt took into account when deciding to plead guilty). At that time, Blanke would have seen no correlation between a failure to oppose these allegations and the extent of his eventual prison time—not to mention his classification as a sex offender in prison and exposure to all the stigmas and harms associated with that classification.

¶81 So if we really believe that the answer to whether more procedure is required turns on an "inmate's perception of fairness," *id.* ¶ 25, we should rule in Blanke's favor. The *Neese* factors ultimately can point in only one direction. If we take them

seriously here, we need to recognize the strength of Blanke's position.

III

¶82 None of the above should be interpreted as an endorsement of the standards set forth in *Neese* or of Blanke's position on appeal. I stand by the view set forth in my dissenting opinion in *Neese*. I find the standards laid out in *Neese* "as fuzzy and unworkable as they are unmoored from history." *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 185, 416 P.3d 663 (Lee, A.C.J., dissenting). Absent an originalist basis for constitutionalizing our preferred procedure for parole proceedings, I would reject the *Neese* framework and leave the matter to those whose discretion and expertise have long governed in this sensitive field—the Parole Board, with oversight by the legislature.

¶83 The majority contends that we should not repudiate the framework set forth in *Neese* because the parties "have not asked us to do so" and we have declined to order supplemental briefing on the matter. *See supra* ¶ 11 n.6. But the parties do not dictate when we revisit our precedents.[36] *See supra* ¶ 11 n.6. And while it is wise practice to seek the parties' input through supplemental

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[36] It is emphatically and uniquely *our* prerogative and responsibility to "say what the law is." *See McDonald v. Fid. & Deposit Co. of Md.*, 2020 UT 11, ¶ 33, --- P.3d ---. Admittedly, the parties dictate the claims and issues presented for our review. *See Utah Stream Access Coal. v. V.R. Acquisitions, LLC*, 2019 UT 7, ¶ 36, 439 P.3d 593, (noting that a "core component of our adversary system" is "the notion that the plaintiff is the master of the complaint," and that we "leave it to the parties to plead claims and defenses"). But they have no authority to dictate or stipulate the terms of our law. *See McDonald*, 2020 UT 11, ¶ 33 (holding that "we are not limited to a choice between the parties' competing positions" because "[w]e must get the law right, even if in so doing we establish a standard that differs from either of the approaches presented in the briefing on appeal"); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

briefing,[37] there is no hard-and-fast rule that we do so, as the majority acknowledges.[38] *See supra* ¶ 11 n.6 (recognizing that "we have the power to revisit precedent at any time" even if it is our "preferred practice" to order supplemental briefing "if we are considering overturning or reformulating precedent").

¶84 Today's majority may prefer to decide this case without any briefing on whether and to what extent we should reformulate or repudiate our decision in *Neese*. That is the court's prerogative. But having made that decision, the majority is in no position to fault me for explaining why I think we should do so. And the court is likewise in no position to blame the decision not

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[37] *See Utah Dep't of Transp. v. Target Corp.*, 2020 UT 10, ¶ 18 n.2, --- P.3d --- (explaining that "we are reluctant to resolve a case on the basis of a revised legal standard without giving the parties an opportunity to first be heard on the matter" and often choose to order supplemental briefing because we assume parties "would rather have input in our process instead of seeing a revised legal standard for the first time in a published opinion").

[38] This is confirmed by the course we have taken in a number of recent decisions. Important examples include *Target*, 2020 UT 10, and *State v. Lujan*, 2020 UT 5, --- P.3d ---. In these cases, the parties' initial briefing left us concerned that our decision might require the overruling or reformulation of one or more of our precedents. No party had asked us to take that course. But we recognized that our disposition of the questions presented would require us to interpret and apply some precedents of concern. And our concerns about the viability of those precedents, combined with our acknowledged responsibility to get the law right, led to our issuance of *sua sponte* supplemental briefing orders—orders *requiring* the parties to brief whether our precedents should be overruled, repudiated, or reformulated. *See* Supplemental Briefing Order (Jan. 7, 2019), *Target*, 2020 UT 10 (asking whether "any of the standards set forth in our cases [should] be refined or reformulated in any way"); Supplemental Briefing Order (Aug. 20, 2018), *Lujan*, 2020 UT 5 (asking whether "our decision in *State v. Ramirez* [should] be overruled if it runs counter to the original understanding of due process" or if the "factors set forth in that decision [are] . . . subject to revision or refinement").

to reconsider *Neese* on a lack of briefing—the lack of such briefing is a result of its own decision.

¶85 My proposed approach, moreover, does not require an outright reversal of the judgment in the *Neese* decision. It just requires us to own the unworkability of the standards set forth in that decision and to announce our intention to decline to extend it any further. And there is no question that we have the power to do that. As the majority explains, there is no single category of "overruling." *See supra* ¶ 11 n.6. A decision to clarify, refine, or reconcile our past precedent is not the same thing as a decision to flatly reverse a prior judgment. In the latter circumstance, we are more openly implicating the central underpinnings of the doctrine of *stare decisis*—reliance interests of parties and the public.[39] *See Eldridge v. Johndrow*, 2015 UT 21, ¶ 35, 345 P.3d 553 (explaining that in deciding whether to overrule a case we consider "the extent to which people's reliance on the precedent would create injustice or hardship if it were overturned"). But these concerns are less obvious (and sometimes not at all present) when we are just clarifying or refining our precedent,[40] and even less so when we are just limiting a prior decision to its facts.[41] That kind of move is entirely consistent with the notion of *stare decisis*—Latin

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[39] Even then, recent precedent makes clear that we may overrule a case without the request or input of the parties. In *Thomas v. Hillyard*, 2019 UT 29, ¶ 18, 445 P.3d 521, for example, we overruled *Jensen v. Young*, 2010 UT 67, 245 P.3d 731, without invitation from the parties because we identified "two lines of cases" that had "taken inconsistent and confusing paths." And in *State v. Steed*, 2015 UT 76, ¶ 8, 357 P.3d 547, we noted that a prior "articulation" of an element of our mootness exception in our past cases was "overly broad." We thus "clarif[ied]" the "proper articulation" and "disavow[ed] any language in our prior cases stating otherwise"—again without invitation from the parties. *Id.*

[40] *See, e.g.*, *Target*, 2020 UT 10, ¶¶ 18–19, 22 (clarifying and refining an area of our takings jurisprudence and explaining that "we have broader license to reformulate and clarify our law . . . where we are merely reformulating and clarifying, and not outright overruling a prior decision").

[41] *See M.J. v. Wisan*, 2016 UT 13, ¶ 29 n.5, 371 P.3d 21 (repudiating the analysis of a prior decision and limiting it to its facts in the absence of any party asking us to revisit the case).

for "stand[ing]" by what is "decided." *Stare decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019). We clearly stand by what is decided when we preserve the square holding of a prior decision. And nothing in the doctrine requires us to take statements in our prior decisions and extend them to their logical extreme.

¶86 The upshot is that we do not need to be asked by the parties—or order the parties to chime in—before we can decide to limit our precedent. The discretion to refine and curtail the reach of our prior precedents is central to the judicial function of an appellate court. It is a core element of what we do. And that discretion is not cabined by the terms of the parties' briefing—or our own decision not to order supplemental briefing.

IV

¶87 For these reasons I endorse the majority's decision to stop short of any further intrusion into the longstanding prerogatives of the Parole Board. But I lament the effect of the court's opinion on the coherence of our law in this field. And I suggest that it is time to end our ongoing, standardless extension of problematic precedent.

¶88 *Neese* seemed to mandate an ever-expanding set of procedural requirements for parole proceedings involving a requirement of sex offender treatment as a precondition of early release. But *Blanke* now stands as a reminder that new procedures may not be required when a majority of this court decides to impose a limit. And this will leave the Parole Board and lower courts without any guideposts for what procedures are necessary going forward except their best guess at what a majority of this court might find "reasonably" fair.

¶89 We should avoid this dissonance and confusion by returning to the originalist first principles set forth in my dissenting opinion in *Neese*. We can do so here without running afoul of the doctrine of *stare decisis*. That doctrine calls for respect for precedent in the interest of preserving stability in our law. But as I have explained, we are always free to stop extending our decisions. And in any case, our law as it stands is anything but stable. Today's decision leaves inmates and the Parole Board more confused about what our precedent is in this area. This uncertain state leaves us free to revise and clarify our law. *See Eldridge v. Johndrow*, 2015 UT 21, ¶¶ 43–44, 345 P.3d 553 (arguing that we should overturn precedent that is highly "fact-intensive" and leaves lower courts "without guidance"). I would do so in a

manner that restores the original deference given to the Parole Board and the legislature in this important field.

ADDENDUM "B"

IN THE UTAH COURT OF APPEALS
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KEVIN BLANKE, Appellant, *v.* ALFRED BIGELOW, AND BOARD OF PARDONS, Appellees.	ORDER OF SUMMARY AFFIRMANCE Case No. 20160298-CA

Before Judges Christiansen, Toomey, and Mortensen.

Kevin Blanke appeals the district court's order granting summary judgment on his petition for extraordinary relief under rule 65(B) of the Utah Rules of Civil Procedure. This matter is before the court on a sua sponte motion for summary disposition. We affirm.

"The decision to grant or deny a petition for extraordinary writ is discretionary." *Krejci v. City of Saratoga Springs*, 2013 UT 74, ¶ 10, 322 P.3d 662. Unlike a party filing a direct appeal, a petitioner seeking extraordinary relief has no right to receive a remedy that corrects a lower court's decision. Rather, whether relief is ultimately granted is left to the sound discretion of the court hearing the petition. *See State v. Barrett*, 2005 UT 88, ¶ 23, 127 P.3d 682. "In sum, if a petitioner is able to establish that a lower court abused it discretion, that petitioner becomes eligible for, but not entitled to, extraordinary relief." *Id.* ¶ 24.

Ordinarily, the Board's decisions "are final and are not subject to judicial review." Utah Code Ann. § 77-27-5(3) (LexisNexis 2012). There are only two limited exceptions permitting judicial review of the Board's decisions. Review is permitted to assure that procedural due process was not denied, and a court may review whether there has been a clear abuse of the Board's discretion. *See Labrum v. Utah State Bd. of*

Appendix B

Pardons, 870 P.2d 902 (Utah 1993). With regard to procedural due process, an inmate must receive adequate notice to prepare for the parole hearing, and an inmate must have knowledge of the information upon which the Board will rely in deciding whether to grant parole. *See Peterson v. Utah Bd. of Pardons*, 931 P.2d 147, 150 (Utah App. 1997).

Blanke does not assert that he was denied adequate notice of the Board's hearing. Rather, he claims that the Board relied upon incorrect information that had not been provided to him. The district court reviewed each of Blanke's claims and properly rejected each one. First, one victim's father testified at the 2006 hearing that the victim revealed that Blanke forced her to apply lotion to his penis. The second allegedly false statement-that Blanke flashed a police badge- was also addressed during the 2006 parole hearing. The third allegedly false statement-that Blanke confessed to having intercourse with a 15-year-old girl- was also addressed at the 2006 parole hearing. Because the record demonstrates that Blanke was previously questioned regarding these allegations, the district court properly determined that Blanke had knowledge of this information, and he had an ample opportunity to respond to it. Thus, the district court correctly determined that he failed to demonstrate a due process violation. *See Alvillar v. Board of Pardons and Parole*, 2014 UT App 61, ¶ 5, 322 P.3d 1204.

With respect to the fourth allegedly false statement, that Blanke was sentenced to prison for possession of child pornography, the record shows that Blanke immediately corrected the misstatement and clarified that he pleaded guilty to distribution of pornographic material. Because Blanke was provided with an opportunity to correct the misstatement, he failed to demonstrate a violation of his due process rights.

Regarding the fifth allegedly false statement, alleging sexual abuse of the "attempted kidnapping victim," the Board was within its right to consider the victim's father's testimony from the 2006 hearing regarding allegations of sexual abuse. Blanke also asserted that he was interrupted while answering questions during the 2012 hearing. However, the record demonstrates that the hearing officer repeatedly asked Blanke if there was anything more that he would like to add. The district court did not err by determining that Blanke failed to establish a deprivation of his due process rights.

Turning to whether the Board clearly abused its discretion, Blanke asserts that the Board punished him for crimes for which he had not be convicted but were discussed at the prior hearing. In conducting parole hearings, it is within the Board's discretion to "rely on any factors known... or later adduced at [a] hearing, and the weight to be afforded such factors." *See Northern v. Barnes*, 825 P.2d 696, 699 (Utah Ct. App. 1992). The claims raised by Blanke "are precisely the kinds of issues that are not subject to judicial review." *Id.*

Blanke next asserts that his Fifth Amendment rights were violated "by the Board ask[ing] [him] under oath to confess to crimes not convicted." However, the Board has discretion to consider numerous factors in granting parole, including a defendant's acceptance of responsibility of his crimes and any inducement this creates does not compel an accused to make self-incriminating statements within the meaning of the Fifth Amendment. *See State v. Maestas*, 2002 UT 123, ¶ 118, 63 P.3d 621.

Finally, Blanke asserts that the Board's decision to require him to obtain sex offender treatment prior to his 2032 hearing violates the Double Jeopardy Clause and ex post facto laws. However, a parole proceeding is not a criminal proceeding that subjects a prisoner to jeopardy. *See Padilla v. Utah Bd. of Pardons and Parole*, 947 P.2d 664, 671 (Utah 1997). Blanke also fails to establish any abuse of discretion with regard to his ex post facto claim.

Blanke fails to demonstrate that the district court abused its discretion by denying his petition for extraordinary relief. Accordingly, IT IS HEREBY ORDERED that the March 9, 2016 order is affirmed.

Dated this 18th day of July, 2016.

FOR THE COURT:

Michele M. Christiansen

Michele M. Christiansen, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of July, 2016, a true and correct copy of the attached ORDER OF SUMMARY AFFIRMANCE was sent by standard or electronic mail to be delivered to:

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Judicial Secretary

TRIAL COURT: THIRD DISTRICT, SALT LAKE, 150902967
APPEALS CASE NO.: 20160298-CA

ADDENDUM "C"

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

KEVIN BLANKE, **Petitioner,** **vs.** **ALFRED BIGELOW; and UTAH BOARD OF PARDONS,** **Respondents.**	**MEMORANDUM DECISION AND ORDER** **Case No. 150902967** **March 9, 2016** **Judge Ryan M. Harris**

Before the Court is a Motion for Summary Judgment ("the Summary Judgment Motion") filed by Respondents Alfred Bigelow and the Utah Board of Pardons (collectively, "Respondents"). The Summary Judgment Motion and accompanying memorandum with exhibits "1" through "11" attached were filed on or about October 13, 2015. Petitioner Kevin Blanke ("Petitioner") filed a memorandum in opposition to the Summary Judgment Motion on or about January 28, 2016.[1] Respondents filed a reply memorandum in support of the Summary Judgment Motion on or about February 3, 2016. The Summary Judgment Motion is therefore fully briefed and ready for decision.

Also before the Court is Petitioner's Motion for Rehearing of the Motion to Strike ("the Motion for Rehearing").[2] The Motion for Rehearing was filed on or about January 27, 2016. Respondents filed a memorandum in opposition to the Motion for Rehearing on or about January 28, 2016. Petitioner filed a reply memorandum in support of the Motion for Rehearing

[1] Petitioner filed the Memorandum in Opposition to the Summary Judgment Motion pursuant to an October 28, 2015 Minute Entry—wherein the Court granted Petitioner an extension until January 29, 2016 to respond to Respondents' Summary Judgment Motion.

[2] Petitioner also filed a Motion to Stay Proceedings ("the Motion to Stay") on or about January 29, 2016. In the Motion to Stay, Petitioner requested that the Court reserve decision with regard to Respondents' Summary Judgment Motion pending resolution of the Motion for Rehearing. Accordingly, in resolving the Motion for Rehearing, the Court also resolves the Motion to Stay.

with accompanying declaration on or about February 9, 2016. The Motion for Rehearing is therefore fully briefed and ready for decision.

Petitioner has requested oral argument with regard to both the Summary Judgment Motion and the Motion for Rehearing (collectively, "the Motions"). However, the Court does not believe oral argument will substantially assist the Court in deciding the Motions. Therefore, the Court respectfully denies Petitioner's request for oral argument.

INTRODUCTION

The Motions present three questions: first, whether Petitioner has established a genuine issue of material fact regarding whether his due process rights—or any other rights afforded by the United States or Utah Constitutions—were violated at a Utah Board of Pardons and Parole ("the Board") hearing held on July 3, 2012 ("the 2012 Hearing"); second, whether Petitioner has established a genuine issue of material fact regarding whether the decision the Board issued following the 2012 Hearing constituted a clear abuse of the Board's discretion; and third, whether Petitioner's allegations of inaccuracies in the Court's January 15, 2016 Minute Entry require the Court to revisit the decision set forth therein.

The Court's review of a Board hearing is limited—indeed, the Court may only review such hearings to assure that procedural due process was not denied and that there has not been a clear abuse of the Board's discretion. Therefore, because Petitioner has failed—in either the Petition for Extraordinary Relief ("the Petition") or the memorandum opposing the Summary Judgment Motion—to establish any genuine issue of material fact regarding a violation of his due process rights or the Board's clear abuse of discretion, Respondents are entitled to judgment as a matter of law with regard to the claims set forth in the Petition. Furthermore, in reviewing the context of the statement in the Presentence Investigation Addendum that Petitioner contends is ambiguous—which serves as the basis for the Motion for

Rehearing—the Court determines that no such ambiguity exists. Accordingly, the Court declines to revisit the issues addressed in its January 15, 2016 Minute Entry.

UNDISPUTED FACTS

1. In or around 2003, Petitioner was committed to the Utah State Prison ("prison") based on his conviction of "Attempted Child Kidnapping," a First Degree Felony, and was sentenced to an indeterminate term of not less than three years and which may be life in prison. Mem. in Supp. of Mot. for Summ. J. Ex. 1.

2. In or around 2004, Petitioner was committed to prison based on another conviction of "Kidnapping," a Second Degree Felony, and was sentenced to an indeterminate term of not less than one year nor more than fifteen years. This sentence was ordered to run consecutive to his earlier sentence. Id. Ex. 2.

3. Petitioner's Presentence Investigation Addendum ("PIA") for the 2004 "Kidnapping" conviction states that he was convicted in 1992 of "Possession of Marijuana" and "Possession of an Unregulated Firearm," and that he served 90 months in Federal Prison followed by 36 months of supervision. Id. Ex. 3, at 2.

4. The PIA also states that Petitioner served one year for "Distribution of Pornographic Material," a Class A Misdemeanor. Id. Ex. 3, at 2.

5. The 2004 PIA's "Factual Summary of Offense" states that, in December 1997, Petitioner met his 15-year-old victim and her friend at a Circle K Convenience Store, and then drove them to a nearby business where he parked his truck. The victim's friend then decided she needed to leave and got out of the truck. Id. Ex. 3, at 2.

6. The victim also decided she needed to leave, got out of Petitioner's truck, and went to find her friend. But Petitioner followed the victim in his truck and tried to get her to stay with him. He got out of his truck, confronted the victim, and handed her a note which "said something to the effect of 'if you are reading this note you need to comply with my commands.'"

Petitioner told the victim to get into his truck because he had a gun, and he drove the victim to an unknown location in West Valley, where he raped and sodomized her. Id. Ex. 3, at 2.

7. The victim provided police with a physical description of Petitioner, did a composite drawing, and picked Petitioner's picture out of a photo lineup. Id. Ex. 3, at 2.

8. In the PIA's "Defendant's Statement," Petitioner stated as follows: "I got aroused and we had sex. I did not know that she was under age until three days later when I talked to the police." Id. Ex. 3, at 3.

9. Petitioner was provided a copy of his 2004 PIA on June 20, 2006, as part of his Board disclosure packet provided to him prior to his original hearing before the Board, held on July 6, 2006. Id. Ex. 4

10. At Petitioner's July 6, 2006 hearing, the hearing officer asked Petitioner, "Bottom line is you forced her into your truck and ah, took her some place, I guess also in the West Valley area or Kearns, and had sexual intercourse with her, basically raped her. That what occurred?" To which Petitioner answered, "Yes, your honor." Id. Ex. 5, at 5:18-23.

11. The hearing officer also asked "Did she protest as to what you were doing?" To which Petitioner answered, "Yes, your honor." Id. Ex. 5, at 5:24-25.

12. The victim also testified at the July 6, 2006 hearing, stating that "I thought I was going to die. He threatened me numerous times, told me he would kill me if I told anybody, um, and that he had connections and they would find me, um, he had it planned, cause he had a note, if it wasn't me it would have been somebody else, and um, he's not, I don't believe he's sorry at all." Id. Ex. 5, at 7:14-20.

13. The prosecuting attorney in both of Petitioner's cases wrote a letter to the Board, dated May 8, 2006, stating "[i]n my opinion, Mr. Blanke is a predator who represents a serious threat to our community," and urged the Board to keep Petitioner in custody, stating that "[Petitioner] is a man that cannot be rehabilitated and cannot be trusted to live within the bounds

of our society." Addressing Petitioner's "Kidnapping" conviction, the letter states "the Board should be aware that [Petitioner] not only kidnapped his victim, but also brutally raped her after threatening to shoot and kill her if she ran away or screamed. After the rape, [Petitioner] also told [the victim,] who was only fifteen years old at the time, that if she reported the rape, he would track her down and kill her." Id. Ex. 6, at 1.

14. The letter further explains that even though Petitioner was identified as a possible suspect in the rape, the case "fell through the cracks" when the investigating detective was transferred to another division, and it was only after Petitioner was arrested in 2002 for kidnapping a seven-year-old girl that he was linked to the other victim's rape back in 1997. The letter states that "[b]y the time of [Petitioner's] apprehension in 2002, the statute of limitations for rape had expired and the State was legally precluded from charging [Petitioner] with [the victim's] rape," so Petitioner was only charged with "Aggravated Kidnapping," which has no statute of limitations. Id. Ex. 6, at 1.

15. With his letter, the prosecuting attorney provided a letter written by Judge Reese, which had previously been sent to the Board, dated February 9, 2004. Id. Ex. 6, at 2.

16. Judge Reese's letter states that before imposing sentence for Petitioner's Kidnapping conviction, he carefully read the Presentence Report, listened to comments by the prosecuting attorney and defense counsel, and based on that information, it was his belief that Petitioner "is a threat to our community and that he should serve the full term permitted by Utah law, and [the Board's] rules and guidelines, in the Utah State Prison." Id. Ex. 7.

17. The "Factual Summary of Offense" in Petitioner's Presentence Investigative Report ("PIR") for his 2003 "Attempted Child Kidnapping" conviction states that the victim's mother reported to police that, in June 2002, her two daughters had been playing outside, when the older child told her the victim had left with a man with red hair. The PIR further states the older child reported Petitioner told the children that if they went with him he would pay them, that the

victim had met Petitioner before at the Trax Station, and that she allowed Petitioner to put her and her bicycle into his white truck. Id. Ex. 8, at 3.

18. The PIR states a search of the area was conducted by police officers and volunteers, with a witness reporting she saw a white pick-up truck pull into the parking lot near where the victim was abducted, but when she approached the truck to ask what the driver was doing, the driver sped off. The witness gave the truck's license plate number to the police. The license plate number corresponded to a truck owned by Petitioner, and a search of that vehicle revealed a knife and a pellet gun. Id. Ex. 8, at 3-4.

19. After she was found unharmed in Harmony Park, near where she had been abducted, the victim was taken to Primary Children's Hospital for examination, but there was no physical appearance of abuse, and the victim did not disclose any information about being physically harmed." Id. Ex. 8, at 3-4.

20. At Petitioner's July 6, 2006 Original Board hearing, the victim's father testified that when a teacher at the victim's church asked the victim to write down bad things that had happened to her in her life the victim wrote "when I was kidnapped he took out his lotion and tried to make me rub it on his ding dong." At the 2006 hearing, however, Petitioner denied asking the victim to "rub lotion on [his] ding dong." Id. Ex. 5, at 14:25-27; 16:20-26.

21. At Petitioner's 2012 Hearing, Petitioner was asked whether he had been provided his "disclosure packet," whether he had an opportunity to review it, and whether he received it at least seven days prior to the hearing. Petitioner answered "Yes, I did." Id. Ex. 9, at 2:4-10.

22. At the 2012 Hearing, the hearing officer asked Petitioner directly if he had raped the "Kidnapping" victim back in 1997, and Petitioner stated he did not want to answer that question. Id. Ex. 9, at 7:26-8:5.

23. Petitioner's "Kidnapping" victim testified at the 2012 Hearing, and told the Board that the kidnapping was "the worst night, day of my life," and that the day after was the "second

worst day of my life, I had to a, um, I had to take, they had to get me a bunch, I think it was morning after pills to make sure I didn't get pregnant and I was at the hospital and the cops station . . . . I don't think I don't remember if I even slept." Id. Ex. 9, at 10:28-11:5.

24. The hearing officer asked if Petitioner thought he was a sex offender, and Petitioner replied "I don't believe I am your honor." Nevertheless, when asked if he would be willing to complete sex offender treatment if the Board required it, Petitioner answered "[i]f necessary, yes, I would." Id. Ex. 9, at 16:10-13.

25. The hearing officer stated it was his feeling that until Petitioner had been through sex offender treatment, he would not consider release, and he thought Petitioner had kidnapped the child victim with the intent of sexually abusing her, and also thought Petitioner had brutally raped his 15-year-old victim. Id. Ex. 9, at 16:19-22.

26. Next, after making some cautionary remarks as to the need for Petitioner to be truthful, the hearing officer asked Petitioner if there was "[a]nything you'd like me to take back to the Board, anything more?" Petitioner answered "No sir." Id. Ex. 9, at 17:8-10.

27. On or about July 3, 2012, the Board held a "Rehearing," and on or about July 10, 2012, the Board scheduled a rehearing for June 1, 2032, with a note that a "Sex Offender Treatment Memo [was] due to the Board of Pardons by 5/01/2032." Id. Ex. 10.

28. The Board's "Rationale for Decision," as to the July 10, 2012 order, found seven aggravating factors and four mitigating factors. The aggravating factors included (1) multiple incidents and/or victims; (2) motive (intentional, premeditated); (3) extent of injury (physical, emotional, financial, social); (4) relatively vulnerable victim; (5) denial or minimization; (6) overall rehabilitative progress; and (7) lengthy history of alcohol/drug abuse. The mitigating factors include (1) first incarceration; (2) programming (effort to enroll, nature of programming); (3) disciplinary problems or other defiance of authority; and (4) degree of meaningful support system. Id. Ex. 11.

DISCUSSION

A. The Summary Judgment Motion

Rule 56 of the Utah Rules of Civil Procedure provides that summary judgment shall be granted if "the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." UTAH R. CIV. P. 56(a). Utah courts have clarified that Rule 56 contains a presumption in favor of the nonmoving party, stating that "the moving party [must meet] its initial burden to present evidence establishing that no genuine issue of material fact exists" before the court should obligate the nonmoving party "to demonstrate that there is a genuine issue for trial." See Orvis v. Johnson, 2008 UT 2, ¶16, 177 P.3d 600 (citations omitted). As addressed, *infra*, Respondents have satisfied their initial burden to present evidence establishing that no genuine issue of material fact exists. Accordingly, the burden has shifted to Petitioner to demonstrate that there is a genuine issue for trial. In this context Petitioner, as the non-moving party, "must set forth specific facts showing that there is a genuine issue for trial" to survive a summary judgment motion. See Peterson v. Coca-Cola USA, 2002 UT 42, ¶20, 48 P.3d 941. Finally, in addressing a summary judgment motion, a court is required "to draw all reasonable inferences in favor of the nonmoving party." IHC Health Serv., Inc. v. D & K Mgmt., Inc., 2008 UT 73, ¶19, 196 P.3d 588.[3]

The Court also notes that, in filing the Petition, Petitioner has requested this Court to review a Board decision involving Petitioner's parole. The Utah Code provides that "[d]ecisions of the board in cases involving paroles, pardons, commutations, or terminations of sentence, restitution, or remission of fines or forfeitures are final and are not subject to judicial review."

[3] The Court also notes that Petitioner appears before this Court *pro se*. Accordingly, Petitioner "should be accorded every consideration that may reasonably be indulged." State v. Burdick, 2014 UT App 34, ¶25, 320 P.3d 55. Nevertheless, "a party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar." State v. Winfield, 2006 UT 4, ¶19, 128 P.3d 1171. The Court therefore examines Petitioner's arguments in accordance with these principles.

Utah Code Ann. § 77-27-5(3). Nevertheless, "[t]his statute does not preclude judicial review of such decisions by way of extraordinary writ. However, [] review is limited to the process by which the Board undertakes its sentencing function. [The court] do[es] not sit as a panel of review on the result, absent some other constitutional claim." Preece v. House, 886 P.2d 508, 512 (Utah 1994) (citations omitted). Thus, "[j]udicial review by the trial court is [] limited to procedural due process violations committed by the Board [] or a clear abuse of the Board's discretion." See Walker v. State Dep't of Corr., 902 P.2d 148, 150 (Utah Ct. App. 1995). It is in this context the Court examines the Petition to determine whether Respondents are entitled to judgment as a matter of law with regard to the claims set forth therein.

a. Due Process

The Utah Constitution provides that "[n]o person shall be deprived of life, liberty or property, without due process of law." UTAH CONST. art. I, § 7.[4] In the context of Board hearings, due process "requires that an inmate know what information the Board will be considering at the hearing, and that the inmate know soon enough in advance to have a reasonable opportunity to prepare responses and rebuttal of inaccuracies." See Alvillar v. Bd. of Pardons & Parole, 2014 UT App 61, ¶ 5, 322 P.3d 1204. These standards apply both "to original parole grant hearings" as well as "those parole hearings at which an inmate's release date is fixed or extended." Neel v. Holden, 886 P.2d 1097, 1101 (Utah 1994). Accordingly, as Petitioner's release date was fixed or extended at the 2012 Hearing, the standards addressed in Alvillar will apply.

Having thus determined that Due Process protections apply, the Court next turns to the Due Process violations alleged in the Petition. Petitioner alleges that, at the 2012 Hearing, the

[4] Similarly, the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Accordingly, any analysis regarding the Utah Constitution will apply with equal weight to the Due Process Clause of the United States Constitution.

Board "brought false, or incorrect, accusations that were not in Petitioner's disclosure packet," listed as "(1) Petitioner may have ask[ed] child victim [] to touch his penis; (2) There was some indication Petitioner flashed a badge; (3) Petitioner confessed to police at Cornell Halfway House to having intercourse with a 15 year old girl; (4) Petitioner was sentenced to prison for possession of child pornography; and (5) sexual abuse of victim []." Pet. for Writ of Extraordinary Relief 2, May 4, 2015. Finally, Petitioner alleges "[the] Board cut Petitioner off from answering questions" on four occasions during the 2012 Hearing. Id. at 3. The Court will address each of Petitioner's allegations in turn.

With regard to the first allegedly false statement—that Petitioner may have asked the child victim to touch his penis—the Court notes that the victim's father testified at the 2006 hearing that a teacher at the victim's church asked the victim to write down bad things that had happened to her in her life and the victim wrote "when I was kidnapped he took out his lotion and tried to make me rub it on his ding dong." See Mem. in Supp. of Mot. for Summ. J. Ex. 5, at 14:25-27. Petitioner was later directly questioned regarding this testimony and denied it. See id. Ex. 5, at 16:20-26. Likewise, the second allegedly false statement—that there was some indication Petitioner flashed a badge—was also addressed at the 2006 hearing. Indeed, Petitioner's "Kidnapping" victim testified that Petitioner "showed [her] a police badge." See id. Ex. 5, at 7:27-28. Petitioner was given the opportunity to respond to the victim's statement and chose not to. See id. Ex. 5, at 9:8-11. The third allegedly false statement—that Petitioner confessed to police at Cornell Halfway House to having intercourse with a 15-year-old girl—was also addressed at the 2006 hearing.[5] Indeed, although the Summary Judgment Motion

[5] Petitioner claims the mistaken inclusion of the allegation that Petitioner confessed *to police* precludes summary judgment. However, this misstatement has previously been addressed in a January 15, 2016 Minute Entry wherein the Court struck those portions of Respondents' Motion for Summary Judgment containing the inaccuracy "regarding where and to whom Petitioner made the admission set forth in the [PIA]." See Minute Entry 5, Jan. 15, 2016. This misstatement of fact does not alter the relevant portion of Petitioner's admission in the PIA that "I got aroused and we had sex. I did not know that she was under

originally misstated where and to whom Petitioner made his confession, Petitioner admitted in the PIA that "I got aroused and we had sex. I did not know that she was under age until three days later when I talked to the police." See id. Ex. 3, at 3.[6] Petitioner was provided a copy of the PIA by the Board on June 20, 2006. See id. Ex. 4. Furthermore, the confession contained in the PIA was discussed at length during the 2006 hearing and Petitioner was provided ample opportunity to address it. See id. Ex. 5, at 5:18-26.

That Petitioner was questioned regarding these three allegations during the 2006 hearing establishes Petitioner's knowledge that the allegations were part of the record the Board would review at the 2012 Hearing. Moreover, Petitioner knew of these allegations in 2006—well in advance of the 2012 Hearing—and therefore had ample opportunity to "prepare responses and rebuttal of inaccuracies" with regard thereto. See Alvillar, 2014 UT App 61, ¶ 5, 322 P.3d 1204. Accordingly, that the Board made these statements at the 2012 Hearing does not establish a Due Process violation.

The Court next turns to the fourth allegedly false statement—that Petitioner was sentenced to prison for possession of child pornography. At the 2012 Hearing, the hearing officer stated that he "guess[ed]" that Petitioner was sentenced to one year "for possession of child pornography." See Mem. in Supp. of Mot. for Summ. J. Ex. 9, at 14:5-6. Petitioner immediately corrected the hearing officer's misunderstanding, stating "I was never convicted of child pornography your honor. I was, I pled guilty to distribution of pornographic material." See id. Ex. 9, at 14:10-11. Accordingly, because Petitioner was provided an opportunity to correct

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age until three days later when I talked to the police." See Mem. in Supp. of Mot. for Summ. J. Ex. 3, at 3. Accordingly, the inclusion of this misstatement will not preclude summary judgment.

[6] The Utah Code provides "[i]f a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived." Utah Code Ann. § 77-18-1(6)(b). Accordingly, any issue Petitioner wishes to raise with regard to the PIA is considered waived at this point based on Petitioner's failure to challenge the accuracy thereof at the time of sentencing.

the misstatement, Petitioner's Due Process rights were not violated by the inclusion of this statement in the 2012 Hearing.

The same is true with regard to the fifth allegedly false statement—alleging sexual abuse of the "Attempted Child Kidnapping" victim. A review of the 2012 Hearing transcript reveals that the hearing officer did not unequivocally state that Petitioner sexually abused the "Attempted Child Kidnapping" victim. Indeed, in addressing the allegation that Petitioner had "asked [the victim] to touch [his] penis," the hearing officer stated "I don't know whether you did or not." See id. Ex. 9, at 4:9-10. Such equivocation does not amount to an accusation. However, even if it did, the Board may "rely on any factors known . . . or later adduced at [a] hearing, and the weights to be afforded such factors . . . [is] within the discretion of the Board." See Northern v. Barnes, 825 P.2d 696, 699 (Utah Ct. App. 1992). Accordingly, the Board was within its right in relying on the victim's father's testimony from the 2006 hearing regarding allegations of sexual abuse, and the Board's inclusion of such statement in the 2012 Hearing did not violate Petitioner's Due Process rights.

Finally, Petitioner alleges that he was cut off while answering questions on four occasions over the course of the 2012 Hearing. However, in reviewing the 2012 Hearing Transcript, it appears to the Court that there are only two occasions where the hearing officer interrupted Petitioner while Petitioner was in the process of answering a question. See, e.g., Mem. in Supp. of Mot. for Summ. J. Ex. 9, at 7:27; 15:23. Notwithstanding this discrepancy, Petitioner has correctly alleged that he was interrupted while giving answers during the 2012 Hearing. Nevertheless, the hearing officer repeatedly asked Petitioner if there was anything more he would like to add. See id. Ex. 9, at 5:23-24; 8:9; 17:9. Thus, Petitioner was provided ample opportunity to respond notwithstanding the hearing officer's interruptions. Accordingly, the hearing officer's interruptions during the 2012 Hearing do not represent a violation of Petitioner's Due Process rights.

As addressed, *supra*, Petitioner has failed to set forth "specific facts showing that there is a genuine issue for trial" with regard to each of his Due Process claims. See Peterson, 2002 UT 42, at ¶20, 48 P.3d 941. Accordingly, Respondents are entitled to judgment as a matter of law with regard to these claims. See UTAH R. CIV. P. 56(a).

b. Abuse of Discretion

The Board's decision is also subject to judicial review for "clear abuse of the Board's discretion." See Walker, 902 P.2d at 150. "Generally, an abuse of discretion is found where an unprejudiced person, considering the facts on which the decisionmaker acted, would say there is no justification or excuse for the ruling." Hopkins v. Mich. Parole Bd., 604 N.W.2d 686, 689 (Mich. Ct. App. 1999). Courts have further clarified the term "abuse of discretion," equating it with "arbitrary and capricious action." See McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 813 (10th Cir. 1997). It is in this context that the Court examines Petitioner's claims that the Board abused its discretion in punishing him for crimes for which he has not been convicted, and requiring that a Sex Offender Treatment Memo be filed before Petitioner's 2032 hearing.

Petitioner first alleges that the Board is punishing him for crimes for which he has not been convicted—specifically, the alleged rape of the "Kidnapping" victim, and sexual abuse of the child victim.[7] However, in conducting parole hearings, the Board may "rely on any factors known . . . or later adduced at [a] hearing, and the weights to be afforded such factors . . . [is] within the discretion of the Board." See Northern, 825 P.2d at 699. Thus, the Board properly relied on the testimony provided at the 2006 hearing—including both the child victim's father's

[7] Petitioner also asserts the imposition of this requirement runs afoul of the state sentencing guidelines. In addressing the deference afforded the state sentencing guidelines, courts have clarified that "[t]he state sentencing guidelines used by the board of pardons do not have the force and effect of law. Consequently, any expectation of release derived from the guidelines is at best tenuous." See State v. Todd, 2013 UT App 231, ¶8, 312 P.3d 936. Thus, Petitioner's term of imprisonment is governed by the indeterminate sentence imposed following trial—of three years to life—and not the state sentencing guidelines. Accordingly, insofar as Petitioner's claims are based on the Board's alleged failure to comply with the sentencing guidelines, Respondents are entitled to judgment as a matter of law.

testimony regarding sexual abuse and Petitioner's admission regarding the rape of the "Kidnapping" victim—in making its parole determination at the 2012 Hearing. Such proper reliance on prior testimony is not arbitrary and capricious, and therefore does not amount to a clear abuse of discretion.

Petitioner next argues that the Board's requirement that a Sex Offender Treatment Memo be filed before Petitioner's 2032 Hearing constitutes a clear abuse of discretion.[8] In support of this argument, Petitioner asserts that he possesses a liberty interest affected by the imposition of such requirement. However, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979). Indeed, "so long as the period of incarceration decided upon by the board of pardons falls within an inmate's applicable indeterminate range, e.g., five years to life, then that decision, absent unusual circumstances, cannot be arbitrary and capricious." Preece, 886 P.2d at 512. Moreover, "it is established that the Parole Board may require sex offender therapy even in cases where an inmate was not convicted of, or served time for, a sex crime." Ross v. Pa. Bd. of Prob. & Parole, No. CV-10-0926, 2012 WL 3560819, at *4 (M.D. Pa. Aug. 16, 2012). Indeed, "recommending a sexual abuse treatment program is a legitimate exercise of the Parole Board's discretion in fulfilling its obligation to ensure that an inmate is suitable for release on parole and serves the legitimate penological objective of rehabilitation." Id.

[8] Petitioner also argues that the imposition of this requirement violates his Due Process rights. However, in the context of a parole hearing, Due Process requires only "that the inmate know what information the Board will be considering at the hearing and that the inmate know soon enough in advance to have a reasonable opportunity to prepare responses and rebuttal of inaccuracies." Labrum v. Utah State Bd. of Pardons, 870 P.2d 902, 909 (Utah 1993). Petitioner knew of the testimony provided at the 2006 hearing—including both the child victim's father's testimony concerning sexual abuse and his own admission to rape of the Kidnapping victim—well in advance of the 2012 Hearing. Indeed, Petitioner presumably knew of this testimony in 2006—six years before the 2012 Hearing. Accordingly, the consideration of these allegations during the 2012 Hearing—and subsequent requirement that a Sex Offender Treatment Memo be filed prior to Petitioner's 2032 hearing—did not constitute a violation of Petitioner's Due Process rights.

Petitioner's 2003 conviction for Attempted Child Kidnapping carried an indeterminate sentence of not less than three years to life in prison. Accordingly, the imposition of a requirement that a Sex Offender Treatment Memo be filed prior to the 2032 hearing does not extend Petitioner's period of incarceration beyond the applicable indeterminate range. Moreover, the Board's decision and rationale therefor are fully supported. Petitioner previously admitted to raping the Kidnapping victim. Furthermore, the "Rationale for Decision" sets forth seven aggravating factors and four mitigating factors in support of the Board's decision to set a 20-year rehearing date. Thus, the Board's decision is amply supported and no unusual circumstances exist here. Accordingly, the Board's action cannot be "arbitrary and capricious." See Preece, 886 P.2d at 512. Furthermore, the Board, in fulfilling its obligation to ensure Petitioner is suitable for release on parole, properly ordered a Sex Offender Treatment Memo be filed notwithstanding that Petitioner has not been convicted of a sex crime. See Ross, 2012 WL 3560819, at *4. Accordingly, Respondents are entitled to judgment as a matter of law with regard to Petitioner's claims that the Board's actions constituted a clear abuse of discretion.

c. Other Allegations

Petitioner alleges that his Fifth Amendment rights were violated "by the Board ask[ing] Petitioner under oath to confess to crimes not convicted," including rape and sexual abuse.[9] See Pet. for Writ of Extraordinary Relief 2. "The Fifth Amendment Self-Incrimination Clause, which applies to the states via the Fourteenth Amendment, provides that no person shall be

[9] Petitioner also alleges that "equal protection and cruel and unusual punishment was violated by the Board." See Pet. for Writ of Extraordinary Relief 2. However, Petitioner provides no further support for these conclusory allegations. Courts have reasoned that "[c]onclusory allegations are insufficient to state a claim." See Patterson v. Am. Fork City, 2003 UT 7, ¶34 n.4, 67 P.3d 466. Accordingly, the Court need not further address these claims. Nevertheless, the Court notes that, as addressed *supra*, the imposition of a requirement that a Sex Offender Treatment Memo be filed prior to Petitioner's 2032 hearing is a legitimate exercise of the Board's discretion and serves the penological objective of rehabilitation. See Ross, 2012 WL 3560819, at *4. Accordingly, the imposition of such requirement cannot have violated Petitioner's right to equal protection or the Eighth Amendment's prohibition against cruel and unusual punishment.

compelled in any criminal case to be a witness against himself." McKune v. Lile, 536 U.S. 24, 35 (2002). Therefore, both compulsion and incrimination must exist to establish a violation of a party's Fifth Amendment right.

The protection against self-incrimination is "confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." Hoffman v. U.S., 341 U.S. 479, 486 (1951). Petitioner has set forth specific facts creating a genuine issue of material fact regarding this element. Petitioner alleges that he believed that an intervening amendment to the Utah Code extended the statute of limitations applicable to a rape charge. Petitioner therefore believed that, were he to answer the questions posed at the 2012 Hearing regarding his rape of the Kidnapping victim, those statements could be used to charge Petitioner with rape. Although Respondents argue that such belief is unreasonable, the Court notes "[q]uestions of reasonableness are typically questions of fact." EDSA/Cloward, L.L.C. v. Klibanoff, 2005 UT App 367, ¶21, 122 P.3d 646.

Nevertheless, Petitioner has failed to establish a genuine issue of fact regarding his compulsion to testify at the 2012 Hearing. Courts have clarified that, although the Board has "discretion to consider numerous factors in [granting parole], including a defendant's acceptance of responsibility, any inducement this creates does not compel an accused to make self-incriminating statements within the meaning of the Fifth Amendment." See State v. Maestas, 2002 UT 123, ¶ 118, 63 P.3d 621. Indeed, "the privilege against compelled self-incrimination is not offended when a defendant yields to the pressure to testify on the issue of punishment in the hope of leniency." Harvey v. Shillinger, 76 F.3d 1528, 1535 (10th Cir. 1996). Therefore, that Petitioner yielded to the pressure to answer questions regarding the rape and sexual abuse allegations the hearing officer posed to him during Board hearings did not constitute a violation

of Petitioner's Fifth Amendment Right, and Respondents are entitled to judgment as a matter of law with regard to this claim.[10]

Petitioner also asserts that the requirement that a Sex Offender Treatment Memo be filed prior to Petitioner's 2032 hearing violates the Double Jeopardy Clause. "The [Double Jeopardy] Clause protects only against the imposition of multiple criminal punishments for the same offense." Hudson v. U.S., 522 U.S. 93, 99 (1997). "[A] parole proceeding is not a criminal proceeding that subjects a prisoner to jeopardy, and guarantees against double jeopardy are [therefore] not applicable." See Malek v. Friel, No. 20031017, 2004 WL 1534690, at *3 (Utah Ct. App. July 9, 2004). Accordingly, any requirement imposed by the Board at the 2012 Hearing cannot have implicated the Double Jeopardy Clause. Respondents are therefore entitled to judgment as a matter of law with regard to this claim.

Petitioner next argues that the Board violated the *Ex Post Facto* Clause in extending his sentence and requiring a Sex Offender Treatment Memo be filed prior to Petitioner's 2032 hearing. Courts have clarified that

> [a]n ex post facto law is one that punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense according to law at the time when the act was committed.

See Monson v. Carver, 928 P.2d 1017, 1026 (Utah 1996). Petitioner has presented no evidence that the Board's actions at the 2012 Hearing implicated any of these concerns. Indeed, Petitioner simply argues that the Board impermissibly extended his sentence following the 2012 Hearing and improperly required a Sex Offender Treatment Memo be filed prior to his

[10] A review of the 2012 Hearing transcript further reveals that Petitioner was fully aware that he was not compelled to answer questions regarding rape or sexual abuse. When asked if he raped the Kidnapping victim, Petitioner responded "I've never pled guilty to that your honor," and telling the Board that he did not want to answer questions about rape. See Mem. in Supp. of Mot. for Summ. J. Ex. 9, at 7:27-8:5. Moreover, Petitioner had previously admitted, at the 2006 hearing, to raping the Kidnapping victim. With regard to the sexual abuse allegation, the hearing officer simply stated that he believed Petitioner had kidnapped the child victim with the intent of sexually abusing her. Such determination is within the Board's discretion at a parole hearing, and did not constitute compulsion. See Northern, 825 P.2d at 699.

2032 hearing. However, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz, 442 U.S. at 7. Thus, the Board's decision to set a 20-year rehearing date did not extend Petitioner's sentence, because the scheduled rehearing falls within Petitioner's indeterminate sentence of three years to life in prison. Accordingly, the Board's actions did not violate the Ex Post Facto Clause, and Respondents are entitled to judgment as a matter of law with regard to this claim.

Finally, Petitioner argues that the Board's actions breached Petitioner's plea agreements. However, in entering the plea agreements, Petitioner simply acceded to the convictions to which he pled guilty, each carrying an indeterminate sentence—with the sentence for Attempted Child Kidnapping extending to life in prison. Utah courts have clarified that, "[i]n setting parole dates, the Board merely exercises its constitutional authority to commute or terminate an indeterminate sentence that, but for the Board's discretion, would run until the maximum period is reached." See Kelly v. Bd. of Pardons, 2012 UT App 279, ¶ 4, 288 P.3d 39. Accordingly, because the Board's decision falls within Petitioner's indeterminate sentence, there is no breach of the plea agreements. Respondents are therefore entitled to judgment as a matter of law with regard to this claim.

B. The Motion for Rehearing

Finally, Petitioner requests that the Court reconsider its January 15, 2016 Minute Entry based on his assertion that the statements contained in the PIA regarding Petitioner having engaged in sexual relations with the "Kidnapping" victim are ambiguous and therefore present factual questions. Petitioner also seeks to amend the "Defendant's Statement" in the PIA to read "However if the girl was underage." The Utah Code precludes such amendment. See Utah Code Ann. § 77-18-1(6)(b) (providing that "[i]f a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived"). Accordingly, Petitioner may not now amend the PIA.

Nevertheless, even were the Court to permit such amendment, the Petitioner unambiguously admitted in the PIA that he had sex with the Kidnapping victim. Defendant stated in the PIA that "I got aroused and we had sex. I did not know that she was under age until three days later when I talked to the police." See Mem. in Supp. of Mot. for Summ. J. Ex. 3, at 3. Faced with this unambiguous admission, the Court need not take additional evidence on the issue. Accordingly, the Motion for Rehearing and corresponding Motion to Stay are both denied.

CONCLUSION

Petitioner has failed to set forth specific facts establishing a genuine issue of material fact with regard to any of the claims asserted in the Petition. Accordingly, even drawing all reasonable inferences in Petitioner's favor, Respondents are entitled to judgment as a matter of law with regard to those claims. Moreover, because the statement contained in the PIA—that Petitioner had sex with the "Kidnapping" victim—is an unambiguous admission, the Court need not take further evidence on that issue. Therefore, the Court declines to revisit the decision set forth in its January 15, 2016 Minute Entry.

Based on the foregoing, Respondents' Summary Judgment Motion is GRANTED. Furthermore, Petitioner's Motion for Rehearing and corresponding Motion to Stay are DENIED. The claims set forth in the Petition are therefore DISMISSED, with prejudice and on the merits.

This Memorandum Decision and Order is the order of the Court, and no further writing is necessary to effectuate this decision.

DATED this 9th day of March, 2016.

RYAN M. HARRIS
District Court Judge

ADDENDUM "D"

Kevin Blanke #154364
OQS-G28
Utah State Prison
P.O. Box 250
Draper, UT 84020

(COPY)

IN THE SUPREME COURT OF THE STATE OF UTAH

Kevin Blanke Petitioner, Prose V. UTAH BOARD OF PARDONS Respondent	PETITION FOR REHEARING Case No. 20160766

I Kevin Blanke, Petitioner, Prose, do hearby petition this court for a rehearing of the above case in good cause and in the intrest of Justice. Counsel of record has terminated our agreement. Petitioner now Prose moves this court For a rehearing based on the follow in reasons.

(1) This court based its decision and opinion on a case that was never properly adjudicated in the lower courts. In a minute entry dated 8-20-2015, the district court found that Petitioners 65-B Petition does indeed involve complicated issues of law requiring assistance of counsel For proper adjudication, See Petitioners motion, memorandum in opposition to Summary disposition Case No. 20160298-CA Also 18 U.S.C. 3006 A (a)(2)(B). Had this court remanded this case back to the district court for proper adjudication with assistence of counsel at that level, the outcome would have been different.

(2) This court based its decision and opinion on false information see opinion of the Court ¶5 page 3 "At the sentencing hearing for his kidnapping conviction, Blanke's Counsel objected to the presentence reports statment that Blanke had "raped and sodomized "Michelle, but counsel did not object to anything else in the presentence report, including the statment that Blanke had sex with a fifteen year old.

This court relies on this statement in its opinion and decision, this statement dose not exist in petitioners presentence report. this statement was introduced by the State and can only be considerd fraud upon this court. The respondent admits this statement is false, see Reply to opposition to motion For summary Judgment case No 150902967 statement of controverted facts: "while factualy true that petitioner did not mention the victims name in his Defendents statement or her age, Petitioner stated "I did not know she was under age untill thee day later when I talked to police" however "if" (The if should have been included.) "The girl was under age and I was the adult then I take full responsibility. At this point I will remined the court that no evedence has ever been adjudicated that would show petitioner to be guilty of rape or having sex with the under age girl. Petitioner would also remined this court that there are Two women involved in this case and that one was a consenting adult. Petitioner now believes that he had sex with the adult. this court has based their decision and opinion on false information and aligations with no facts to suport them.

(3) This court states in its opinion I. Due process at original parole grant hearings. "11.18 The Utah constitution gives to the parole Board power to grant parole subject to regulations as provided by statute" UT const Art VII § 12 (2)(a). In general, decisions of the Board in cases involving paroles are final and are not subject to Judicial review UT code 77-27-5 (3). Paroles and Pardons can only extend to crimes convicted by a Justice court. There is no language in the UT const. or in statute 77-27-5 (3) that gives the UT Board of Pardons Jurisdiction in crimes not convicted in a Justice court and any statute that denies Judicial review of decisions that might be predJudice or discriminatory

is unconstitutional by a watershed of federal law and should be considered so by this Court.

In this Courts Applicability of Neese page 10 ll 25 the Court states that two facts strip away the need for additional procedure. First Blanke was convicted of attempted child kidnapping, a crime that at the time of conviction required him to register as a sex offender. Second he admitted in his presentence report hearing, to having sexual intercourse with a fifteen year old. If convicted of it Blanke would be required to register as a sex offender (not verbatum). This is a false statement (supra) However the Board has no Jurisdiction over crimes not convicted in a Justice court. A Blanke was adjudicated a sex offender. Blanke was convicted of attempted child kidnapping as a result of that conviction, he is required to register as a sex offender, thus he has been adjudicated a sex offender. This Court has confused registration for conviction. This Court by its decision and opinion has ruled that the Board can require sex offender treatment for a crime with no sexual componant. Without a sexual componant petitioner will not be accepted into treatment and will not be able to complete sex offender therapy. This Court must now define the sexual componant in child kidnapping or in the process of registry. So that petitioner can obide by this ruling. This Court and the Board has placed petitioner in a situation where he would have to fabricate a sexual crime in order to gain parole. Petitioner believes that to place him in this position violates his Constitutional right under Art I sec 7 and 9 of the Ut Const and the 5th, 8th, and 14th amendments of the U.S. Constitution. Also without a sexual componant Colman V. Dretke, 395 F.3d 216 (2004 U.S. App.) would apply to this case.

(4.) This court failed to enter a decision or opinion on the other true constitutional issues brought befor this court in the petition for writ of certiorary See Argument for Issuance of writ (b), (c), (D), (E) (F) and the case laws that validate petitioners arg- uments.

CONCLUTION

For all of the above reasons petitioner would respectfully move this court to revisit its oath of office and article (6) of the United States Constitution and then based on those principles, fairness and in the intrest of Justice expand on reese and rehear the above case.

Dated this 29 day of April, 2020

Respectfully

Kevin Blanks

ADDENDUM "E"

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

KEVIN BLANKE, **Petitioner,** **vs.** **ALFRED BIGELOW; and UTAH BOARD OF PARDONS,** **Respondents.**	**MINUTE ENTRY** **Case No. 150902967** **October 28, 2015** **Judge Ryan M. Harris**

Before the Court is a Motion for Enlargement of Time (the "Motion") filed by Petitioner Kevin Blanke ("Petitioner"). By the Motion, Petitioner asks for an extension of time to respond to Respondents' Motion for Summary Judgment, which was filed on October 13, 2015. Petitioner wants some additional time to respond in the hopes that he can procure counsel to represent him. Indeed, in a footnote in this Court's August 20, 2015 Minute Entry, the Court indicated that it would refer this case to the pro bono coordinator at the Utah State Bar to see if counsel could be found to assist Petitioner in this case. See August 20, 2015 Minute Entry, at 2 n.2. However, due to an oversight, that request was never made, until today.

Accordingly, the Court believes an extension of time is appropriate under the circumstances. However, the Court declines Petitioner's invitation to extend time until 30 days following the entry of counsel's appearance on behalf of Petitioner. The Court hopes that the Utah State Bar will be able to locate pro bono counsel for Petitioner. But the Bar is not always able to do so, and may not be able to in this case. The Court is unwilling to tie Petitioner's response deadline to an event that may never actually occur. Rather, the Court will allow Petitioner approximately 90 days, until January 29, 2016, to respond to the pending Motion for Summary Judgment, whether counsel is able to be located or not.

ADDENDUM "F"

IN THE SUPREME COURT OF THE STATE OF UTAH

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Kevin Blanke,

Petitioner,

v. Case No. 20160766-SC

Utah Board of Pardons,

Respondents.

ORDER

On December 19, 2016, the Court provisionally granted Petitioner's petition for certiorari pending its decision in 2017 UT 89, Neese v. Board of Pardons, which was issued on December 14, 2017. The Court now lifts the provisional qualifier to its grant of the petition and remands to the district court for appointment of pro bono counsel pursuant to Utah Code 78B-9-109, provided Mr. Blanke qualifies as an indigent litigant. Upon notification that counsel has been appointed, the Court intends to conduct a scheduling conference prior to specifying the issues for review and establishing the briefing schedule. The Clerk of Court will notify the parties of the date and time for that conference.

FOR THE COURT:

Jan. 3, 2018
Date

Thomas R. Lee
Associate Chief Justice