

1996

Utah v. maestras : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 TONY R. MAESTAS, : Case No. 960831-CA
 : Priority No. 2
 Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Unlawful Distribution, Offering, Agreeing, Consenting or Arranging to Distribute a Controlled or Counterfeit Substance, a first degree felony in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (1953 as amended), and Possession of a Controlled Substance, a third degree felony in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable William A. Thorne, Judge, presiding.

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FILED
Utah Court of Appeals

FEB 22

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Clerk of the Court

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TONY R. MAESTAS,	:	Case No. 960831-CA
	:	Priority No. 2
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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

The issues presented for review are as follows:

1. Whether trial counsel for Appellant Tony Maestas ("Maestas") was ineffective for failing to investigate and present evidence at trial that would impeach the credibility of the state's key witness, Tony Waldron, including evidence of his criminal history and evidence of the favorable treatment he received shortly after Maestas' arrest.

Standard of Review: "When, as in this case, the claim of ineffective assistance is raised for the first time on appeal, we resolve the issue as a matter of law." State v. Gallegos, 355 Utah Adv. Rep. 8, 9 (Utah App. 1998) (quoting State v. Strain, 885 P.2d 810, 814 (Utah App. 1994)). Also, "where the trial court has held a Rule 23B hearing and made specific findings relevant to an ineffective assistance of counsel claim," this Court will "defer to the trial court's findings of fact," and then "apply the appropriate legal principles to the facts and

decide, for the first time on appeal, whether the defendant received ineffective assistance of counsel in violation of the Sixth Amendment." State v. Huggins, 920 P.2d 1195, 1198 (Utah App. 1996) (cites omitted).

2. Whether the trial court abused its discretion in revoking Maestas' probation, where the state failed to present evidence that the alleged probation violation was willful.

Standard of Review:

"The decision to grant, modify, or revoke probation is in the discretion of the trial court." State v. Jameson, 800 P.2d 798, 804 (Utah 1990); accord State v. Archuleta, 812 P.2d 80, 82 (Utah App. 1991). Thus, in order to prevail in this case, defendant "must show that the evidence of a probation violation, viewed in a light most favorable to the trial court's findings, is so deficient that the trial court abused its discretion in revoking defendant's probation." Jameson, 800 P.2d at 804 (footnote omitted); Archuleta, 812 P.2d at 82. Moreover, a trial court's finding of a probation violation is a factual one and therefore must be given deference on appeal unless the finding is clearly erroneous. State v. Martinez, 811 P.2d 205, 208-09 (Utah App. 1991).

State v. Peterson, 869 P.2d 989, 991 (Utah App. 1994).

3. Whether the arrest, which did not comply with Utah law, was illegal, thereby invalidating the search incident to arrest.

Standard of Review: A trial court's decision to admit evidence seized as a result of a search implicating a defendant's Fourth Amendment right is a "mixed question of law and fact [] appropriately resolved under a bifurcated examination of, first, the predicate historical facts found by the trial court, weighed against a clearly erroneous standard, and, second, of the emerging legal conclusion, evaluated for correctness." State v. Vigil, 815 P.2d 1296, 1298 (Utah App. 1991) (cites omitted).

PRESERVATION OF ARGUMENT

Maestas has raised the first issue in the context of an ineffective-assistance-of-counsel claim. Ineffective assistance of counsel may be reviewed for the first time on direct appeal by this Court where defendant is "represented by new counsel on appeal," and the record is adequate to review the claim. State v. Chacon, 962 P.2d 48, 50 (Utah 1998). Maestas has met those requirements in this matter.

The second issue, the probation-revocation matter, was preserved in the record on appeal in District Court Case No. 921901600 (hereinafter "R.") at 601-655; 740-41.

The third issue concerning the legality of the arrest was preserved in the record on appeal in District Court Case No. 950902479 (hereinafter "Case No. 950902479") at 160-162. The trial court agreed to allow Maestas to file papers concerning the matter in order to properly preserve the issue for purposes of appeal. (R. 686-88; 690; 718; 730.) However, notwithstanding requests by the defense to rule on the merits of the matter, the trial judge declined to do so and ruled that Maestas would not be allowed to have the issue resolved before sentencing; according to the re-sentencing judge, the issue would have to go to the Court of Appeals for resolution. (R. 734-35.) Thus, in the alternative, Maestas has raised the third issue on appeal in the context of an ineffective assistance of counsel claim, see Chacon, 962 P.2d at 50 (this Court may review matter for the first time on direct appeal), and under the plain error doctrine.

See State v. Palmer, 860 P.2d 339, 342 (Utah App.), cert. denied, 868 P.2d 95 (Utah 1993); State v. Labrum, 925 P.2d 937, 939 (Utah 1996) (appellate court will address issue raised for the first time on appeal under the plain error doctrine).

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following rules, statutes and constitutional provisions will be determinative of the issues on appeal:

Utah Code Ann. §§ 64-13-1 et. seq. (1986 & Supp. 1992)

Utah Code Ann. § 77-18-1 (Supp. 1994)

Utah Const. art. I, § 12

Utah Const. art. I, § 14

U.S. Const. amend. IV

U.S. Const. amend. VI

The text of those provisions is contained in Addendum A.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition in the Court Below.

A. Maestas Was Charged with and Convicted of Drug-Related Offenses.

In March 1992, Maestas was charged with unlawful distribution of a controlled substance within 1000 feet of a public school, a First Degree Felony offense in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (1953 as amended), and unlawful possession of a controlled substance, a Third Degree Felony offense in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1953 as amended). (R. 6-7.) Maestas was represented by private counsel during the proceedings. (R. 25.) The case went to trial

in April 1993 (R. 42, 73), and the jury found Maestas guilty on both charges. (R. 69-72.) Judgment was entered against Maestas (R. 104-06), and the judge stayed the prison sentence and ordered Maestas to serve probation. (R. 138-39.)

B. Private Counsel Failed to Perfect the Appeal.

In June 1993, private counsel filed a notice of appeal in this case (R. 76-77), but failed to take any further action in connection with the appeal. In June 1994, this Court dismissed the appeal. (R. 109; 123-24.)

C. The Trial Court Revoked Probation.

Thereafter, the state filed an order to show cause why probation should not be revoked. In September 1994 the trial court revoked probation and Maestas was sent to prison to serve his sentence. (R. 146-48; 152-53.)

D. Maestas Initiated a Rule 65B Petition for Relief from Conviction and Extraordinary Writ Claiming Ineffective Assistance of Counsel and that His Right to Appeal Had Been Violated.

In October 1994, Maestas filed a second notice of appeal (R. 150), which apparently was dismissed on Maestas' own motion (see R. documents unnumbered in pleadings file between 155 and 157). In addition, in April 1995, Maestas commenced an action by filing a Verified Rule 65B Petition for Relief from Conviction and Extraordinary Writ, wherein he asserted, among other things, that his right to appeal had been violated by counsel's failure to perfect and pursue the appeal. (See Case No. 950902479.)

E. As a Result of the Postconviction Filings, Maestas Was Re-sentenced in Order that He Could Pursue His Original Appeal.

In 1996, the trial court consolidated matters relevant to the trial and raised in the Rule 65B proceedings with the original criminal action. Thereafter, Maestas was re-sentenced. (Case No. 950902479 at 146, 154, 156-64; also R. 174-77.) In accordance with Utah law, Maestas is appealing from the judgments of conviction dated June 17, 1996 (R. 175-78), and attached as Addendum B. See State v. Johnson, 635 P.2d 36, 37-38 (Utah 1981) (if defendant was misled in believing that appeal was being taken and such time lapsed to prevent defendant from pursuing appeal, he should be re-sentenced in the matter nunc pro tunc so as to afford him an opportunity to timely perfect an appeal).

F. This Court Remanded the Matter to the Trial Court for Findings Pursuant to Rule 23B Regarding Ineffective Assistance of Counsel.

In June 1997, this Court granted Maestas' Motion for Remand for Supplementation of the Record and for Determination of Ineffective Assistance of Counsel pursuant to Rule 23B, Utah Rules of Appellate Procedure, and ordered that the case be remanded to the trial court for findings regarding the claim of ineffective assistance of counsel. A copy of that order is attached hereto as Addendum C. Consistent with the Rule 23B remand, Findings were entered in the trial court, and are attached hereto as Addendum D.

STATEMENT OF FACTS

A. The Department of Corrections Initiated an Undercover Operation Targeting Dealers, Who Were Supplying Drugs to Inmates in the Prison; Maestas Was Not a Target of the Operation.

Officials from the Department of Corrections ("DOC") engaged in a clandestine operation to determine the source of unlawful drugs going into the Utah State Prison. (R. 368; 384.) The officers arranged for an inmate, Tony Waldron, to make contact with specific persons outside the facility, who officers believed had been supplying drugs to individuals in the prison. (See R. 255; 358-59; 374.) DOC officials had a list of four or five suppliers who Waldron would contact. (R. 385.) Nothing in the record supports that Maestas was on that list.

Indeed, the record supports that officials and Waldron did not consider Maestas to be a target of the operation. Correctional officers admitted that the operation "had nothing to do with Maestas." (R. 239; see also 266-68; 362-63; 385.) Likewise, the trial judge in this case found that Maestas' involvement in the matter was "an accidental happening." (R. 284.)

On the day of the transaction, Waldron made contact with two women who were to line him up with a targeted supplier. (R. 233.) The women attempted to make contact with the supplier by telephone and pager, but were unsuccessful. (R. 234; 239; 361-62.) Thereafter, the women indicated they may be able to buy drugs from Maestas. (R. 234; 362-63.) Although the DOC had no reason to involve Maestas in the matter, there was no effort to refocus the operation to its intended purpose, and no effort to involve local law enforcement. Rather, Waldron and the women found Maestas, and according to evidence presented at trial, purchased drugs. (R. 234-35; 363; 376-77.)

Thereafter, as Maestas and a second person left in Maestas' car from the apartment where the transaction allegedly occurred, correctional officials followed and engaged overhead lights to pull Maestas over to the side of the road. (R. 270.) Investigator Sundquist arrested Maestas and searched Maestas and the car. (R. 271; 273.) According to Sundquist, in connection with the search, he confiscated approximately \$385 in cash, a white powdery substance, and an additional substance that Sundquist found in Maestas' pockets. (R. 271.) Maestas was charged with one count each of unlawful distribution and unlawful possession of a controlled substance. (R. 006-007.)

B. During the Trial, Defense Counsel Failed to Impeach the State's Key Witness with Evidence that Had a Direct Impact on his Credibility.

The case went to trial. (See R. 295-503.) During cross-examination of Waldron, defense counsel failed to inquire into matters impugning Waldron's character. (R. 374-83.) Specifically, Waldron had been convicted of several counts of forgery, aggravated assault by a prison inmate and felony fleeing; his history included additional forgery-related convictions; he was suspected of smuggling drugs into the prison and had a history of hiding drugs on his person and otherwise possessing drugs while in the prison; he was found to have injection sites on his arm; and Waldron was never charged or disciplined in connection with a drug smuggling investigation that began in the prison in November 1991. (R. 784-89.) Waldron was given a parole date of January 1993. (R. 785.) Yet, approximately two weeks after Waldron's

involvement in the alleged transaction with Maestas, Waldron was paroled from prison. Waldron was paroled 9 months earlier than scheduled, on April 2, 1992. (R. 786.)

C. Maestas' Probation Was Revoked.

In April 1993, the jury found Maestas guilty of the offenses as charged (R. 69, 70), and the judge stayed the prison sentence for 36 months while Maestas served probation in the Odyssey House program. (R. 104-06.)

Thereafter, on June 23, 1994, Adult Probation and Parole filed a Progress/Violation Report with the court alleging that Maestas had "become suicidal, homicidal, and had begun attacking staff and personnel at Odyssey House." (R. 110.) In response, the court issued a warrant for Maestas' arrest and ordered him to show cause why probation should not be revoked. (R. 112-18.)

The order to show cause alleged the following:

[D]efendant has failed to participate and comply to the conditions set forth by the Odyssey House program, which resulted in his removal from said program on June 23, 1994, in violation of condition number 11.5 of the defendant's Probation Agreement and the Court's order.

(R. 118.) At the order to show cause hearing the evidence reflected that on "a couple of different occasions," Maestas indicated that he wanted to kill himself. (R. 615.) He was placed on a suicide watch and eventually taken to the University of Utah Hospital emergency room because of the "ideation" he had "about hurting himself, running in the street, letting someone run over him." (R. 616.)

The clinical director of the Odyssey House program, Tracy

Anderson, told Maestas to let him know if Maestas continued having suicidal thoughts; if Maestas continued, he would not be allowed to stay in the program "because [Odyssey House was] not a psychiatric setting" and was not equipped to handle the matter. (R. 616-19.)

Anderson acknowledged that Maestas did not violate a "hard" rule at Odyssey House; rather, Maestas was notified that he could not engage in "suicide gesturing" since the program was not set up to deal with that. (R. 624-25.) During the hearing, the court asked the Odyssey House counselor, Albert Nieto, if he perceived Maestas' conduct as manipulation. The counselor believed that initially it was, but as it continued, he did not believe Maestas was manipulative. (R. 632-33.) Also, Nieto acknowledged that Odyssey House failed to substantiate certain medical problems suffered by Maestas until after Maestas complained about them, and that the problems were not being attended to. (R 633-34.)

At the conclusion of the hearing, the trial court ruled that "there has been a violation of the terms of the conditions of probation. That violation was knowing and intentional under circumstances where the defendant had the ability to comply with the Court's order on the conditions of probation. Therefore probation will be revoked." (R. 653.) A copy of the trial court's order is attached hereto as Addendum E. This appeal and a 23B remand proceeding followed as set forth in the Statement of the Case, supra.

SUMMARY OF THE ARGUMENT

Maestas' trial counsel provided ineffective assistance of counsel by failing to present evidence at trial directly impacting on the credibility of the state's key witness, Tony Waldron. The evidence concerned Waldron's crimes of dishonesty and the favorable treatment he received shortly after his involvement in securing Maestas' arrest in this matter. Defense counsel likely failed to present the evidence because he was unaware of it, thereby supporting the determination that he was also ineffective for failing to conduct an investigation in this case. Waldron was the only witness to provide direct evidence against Maestas of criminal conduct. Defense counsel's failure to present the credibility evidence prejudiced Maestas.

The state presented insufficient evidence in this case to support the determination that Maestas willfully violated his probation. Rather, the evidence supported that Maestas suffered mental health issues that were beyond his control and not treatable in the Odyssey House program. The trial court abused its discretion in revoking Maestas' probation.

Finally, the DOC exceeded the scope of its statutory authority when it engaged in the undercover operation and arrest in this case involving Maestas. As a result of exceeding the statutory authority, the officers' arrest of Maestas was illegal. The illegal arrest cannot serve to justify the warrantless search under the incident-to-arrest exception to the Fourth Amendment. This case should be reversed and remanded on that basis.

ARGUMENT

POINT I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE THAT HAD A DIRECT IMPACT ON WALDRON'S CREDIBILITY AS A WITNESS FOR THE STATE.

The Sixth Amendment and Article I, Section 12 of the Utah Constitution guarantee criminal defendants the right to assistance of counsel. The right to counsel has been construed to be "the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); accord State v. McNicol, 554 P.2d 203, 204 (Utah 1976). The Court in Strickland v. Washington, 466 U.S. 668 (1984), set forth the proper test for determining whether counsel's performance was ineffective:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687; accord State v. Templin, 805 P.2d 182, 186 (Utah 1990). In this case, defense counsel's performance was deficient in that he failed to cross-examine the state's key witness with evidence that had a direct impact on the witness' credibility.

A. INFORMATION CONCERNING WALDRON'S BACKGROUND WAS ADMISSIBLE TO IMPEACH HIS CREDIBILITY; HOWEVER, THE INFORMATION WAS NEVER PRESENTED TO THE JURY.

The state's key witness, Tony Waldron, testified that Maestas sold cocaine to him for \$100. (R. 376-77.) Waldron

described the transaction to correctional officers through a wire that he was wearing, and he identified Maestas to officers as the supplier for purposes of the arrest. (R. 377.) During cross-examination, counsel for the defense, Victor Gordon, failed to introduce evidence of Waldron's criminal background, which included convictions for crimes of dishonesty, and motive for Waldron's involvement in ensuring Maestas' arrest and conviction. Gordon likely failed to introduce the evidence because he was unaware of it, supporting the determination that Gordon failed to investigate the matter. Gordon's failures constitute ineffective assistance of trial counsel, as set forth below.

Specifically, with respect to Waldron's criminal background, Gordon failed to introduce into evidence information concerning Waldron's crimes of dishonesty and other matters that would impeach his credibility. A copy of that portion of the trial transcript containing Waldron's testimony is attached hereto as Addendum F. As a result of those failures, Maestas requested remand of this matter in order to supplement the record with findings of fact regarding Waldron's criminal history. (See Addendum C hereto.) "In a situation where the trial court has held a Rule 23B hearing and made specific findings relevant to an ineffective assistance of counsel claim, we defer to the trial court's findings of fact." State v. Huggins, 920 P.2d 1195, 1198 (Utah App. 1996) (cites omitted).

On remand, the trial court found that Waldron's prison file reflected the following: Waldron was committed to the prison in

1990 in connection with convictions for two counts of forgery, second degree felony offenses (R. 792). Waldron's record consisted of 9 additional felony convictions for forgery and one felony conviction for fraud. An assessment in Waldron's prison file dated 1987 reflected that Waldron "cannot be trusted at all" and the file showed that in 1987, 1988 and 1989, Waldron was involved in smuggling drugs into the prison and disciplined for possession and use of controlled substances. (R. 793; 794.) In October 1990, Waldron asked to participate in narcotics operations and was rejected on the basis that "it would not be wise to allow him to participate' because of his history of drug dependency and attempted escape." (Id.)

As of November 26, 1991, Waldron was under investigation for suspicion of smuggling drugs from the prison dairy into the D block. On February 21, 1992, Waldron was discovered to have injection sites on his arm. (R. 792.) Waldron's history presented credibility issues that should have been brought to the jury's attention during the trial of this matter.

With respect to evidence of motive, during the 23B remand in this case, the trial judge found that prior to March 14, 1992, Waldron was scheduled to be released from prison on January 14, 1993. (R. 792.) On March 14, 1992, Waldron was recruited to participate in the undercover operation, which resulted in Maestas' arrest. (R. 793.) On April 2, 1992, "a Special Attention Hearing was held by the Board of Pardons. A Special Attention Hearing is a review to grant relief to inmates under special

circumstances where a change of status may be warranted." (R. 793.) Such a hearing may be initiated by the receipt of a written request indicating that special circumstances exist for which a change in status may be warranted. Waldron was paroled on that day. Waldron's parole occurred nine months earlier than scheduled. At the time of his parole, Waldron was serving sentences for felony offenses consisting of forgery and fraud. (R. 793.)

In July 1992, Waldron was back in custody. (R. 794.) In the fall of 1992, Waldron was convicted of forgery, aggravated assault by a prisoner and felony fleeing. (R. 794.)

During the trial of this matter in April 1993, the prosecutor asked Waldron if he was "presently an inmate at the Utah State Prison," to which Waldron responded, "Yes, I am." (R. 374.) The prosecutor then asked, "Directing your attention to the 14th of March of 1992, were you an inmate on that date?" Waldron answered, "Yes, I was." (R. 374.) During cross examination, Waldron indicated that in connection with his involvement in the undercover operation, correctional officers promised they would write a letter of "good recommendation to the board," and "that was it." (R. 379.) Neither the prosecutor nor Waldron disclosed that Waldron actually was released on parole nine months ahead of schedule and within approximately two weeks of his participation in the undercover operation. In fact, the prosecutor's examination improperly suggested that Waldron had not been released.

B. GORDON PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN THAT HE FAILED TO CROSS-EXAMINE WALDRON ABOUT HIS CRIMES OF DISHONESTY AND ABOUT THE FAVORABLE TREATMENT HE RECEIVED APPROXIMATELY TWO WEEKS AFTER HIS INVOLVEMENT IN THE UNDERCOVER OPERATION.

1. Evidence Concerning Waldron's Crimes of Dishonesty Was Admissible.

It is fundamental that pursuant to the Utah Rules of Evidence, "the credibility of a party may be attacked by any party." Utah R. Evid 607 (1993). Further, for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime involving dishonesty or a false statement is admissible, and is not subject to the general balancing considerations of Rule 403. Utah R. Evid. 609(a)(1) and (2)(1993); State v. Ross, 782 P.2d 529, 531 (Utah App. 1989).

Evidence of a witness' prior conviction may be presented through the oral testimony of the witness or by presenting the court record of such conviction. State v. Peterson, 560 P.2d 1387, 1390 (Utah 1977). In this case, evidence of Waldron's crimes of forgery involved dishonesty and would have been automatically admissible to impugn Waldron's credibility. See Ross, 782 P.2d at 531. Likewise, evidence concerning Waldron's fraud conviction was admissible since the crime involved dishonesty or a false statement. See State v. Larsen, 876 P.2d 391, 395 (Utah App. 1994).

During the trial in this matter, Gordon failed to impugn Waldron's character with the important and admissible credibility evidence. Since "[c]ross-examination is the principal means by which the believability of a witness and the truth of his

testimony are tested," State v. Leonard, 707 P.2d 650, 655 (Utah 1985) (quoting Davis v. Alaska, 415 U.S. 308, 316 (1974)), Gordon's deficient performance was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Indeed, Waldron was the state's key witness; he was the only person to provide evidence directly linking Maestas to the alleged transaction. Gordon's cross-examination necessarily should have involved exposing Waldron's crimes of dishonesty.

While the record fails to support a tactical reason for Gordon's failure to impeach Waldron's credibility, the record suggests that Gordon failed to introduce the credibility evidence on cross-examination because he was unaware of Waldron's criminal history. That is, Gordon failed to discover the information.

Such a failure constitutes ineffective assistance of counsel. The record supports that even though Gordon would have known that Waldron was an inmate at the time that Waldron participated in the undercover operation, Gordon did not investigate why Waldron was serving time in prison. Such an investigation should have been obvious to Gordon. In addition, the information was readily available. For example, Gordon could have reviewed court records concerning Waldron's convictions or discovered the information pursuant to the Government Records Access and Management Act, Utah Code Ann. §§ 63-2-101, et. seq. (1993). (See R. 792 (records concerning Waldron's history were

discoverable through GRAMA).)

As a matter of law, failure to investigate constitutes ineffective assistance of counsel. A trial counsel's decision not to investigate the underlying facts of a case cannot be considered a valid tactical decision. Huggins, 920 P.2d at 1198; State v. Gordon, 913 P.2d 350, 356 (Utah 1996) ("a decision not to investigate cannot be considered a tactical decision'") (quoting Templin, 805 P.2d at 188). "[T]he Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions[,] and informed legal choices can be made only after investigation of options.'" State v. Crestani, 771 P.2d 1085, 1090 (Utah App. 1989) (quoting Strickland, 466 U.S. at 680).

The lack of important cross-examination in this case supports the determination that Maestas' trial counsel did not investigate the matter. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Huggins, 920 P.2d at 1199 (quoting Strickland, 466 U.S. at 690-91). In this case, the failure to investigate lead to the failure to expose Waldron's history of dishonesty. Gordon's performance was deficient.

2. Evidence Exposing the Favorable Treatment that Waldron Received in Connection with His Involvement in Ensuring Maestas' Arrest Was Relevant to Waldron's Motives for Testifying Against Maestas.

Evidence that the witness had a motive for participating in the matter and testifying against the defendant is relevant to

the cross-examination. The Utah Supreme Court has "repeatedly recognized the critical effect that a fact finder's perception of a witness' bias may have on the outcome of a case." Leonard, 707 P.2d at 654 (cites omitted). In this case, Gordon elicited testimony that Waldron had assisted officers in undercover operations in the past, resulting in no arrests. Officers claimed that Waldron was "O for 3." (R. 398.) The evidence supports that Waldron may have felt pressure to supply information that would lead to an arrest. Yet, Waldron stated during direct examination that the only benefit he received as a result of his participation in the operation was a "recommendation" from the Department of Corrections to the Board of Pardons & Parole. (R. 379.)

In fact, Waldron was released from prison approximately two weeks from the date of his involvement in the undercover operation. (R. 793.) His release was nine months ahead of schedule. (R. 792-93.) Waldron never disclosed that he was actually paroled early, and the prosecutor allowed the improper suggestion to go to the jury that Waldron did not receive parole. The prosecutor specifically did not correct the suggestion left by his examination that Waldron was in prison from March 1992 to the date of trial.

"It is well settled that deliberate deception of a court and jurors by the presentation of known false evidence cannot be reconciled with the rudimentary demands of justice." Campbell v. Reed, 594 F.2d 4, 7 (4th Cir. 1979) (citing Pyle v. Kansas, 317

U.S. 213 (1942)) (emphasis added). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)). Here, "the prosecution allowed a false impression to be created at trial when the truth would have directly impugned the veracity of its key witness." Campbell, 594 F.2d at 8 (citing U.S. v. Sutton, 542 F.2d 1239, 1243 (4th Cir. 1976)).

The false impressions were allowed in this case to go uncorrected because Gordon failed to raise the matter to the trial court's attention. Gordon's failures constitute ineffective assistance of counsel. In addition, Gordon failed to present evidence that Waldron was released from prison approximately two weeks after his direct involvement in the operation resulting in Maestas' arrest and ultimate conviction. Such evidence would have supported the determination that Waldron was motivated to implicate Maestas in the transaction in order to curry favor with the Department of Corrections and the Board of Pardons and Parole.

Evidence presented in the 23B hearing reflects that officers promised that a letter of good recommendation would be provided to the Board of Pardons "in exchange for [Waldron's] cooperation on an investigation *that resulted in the arrest and conviction of Tony Maestas.*" (R. 783, Exhibit 6 (emphasis added).) "Mr. Waldron was told that if the information that he provided was accurate and led to the arrest and conviction of individuals that were

trafficking narcotics into the Utah State Prison, a favorable recommendation would be written on his behalf to the Board of Pardons & Paroles." (R. 783, Exhibit 6 (emphasis added).)

Since the favorable treatment hinged on Waldron providing information that was accurate, it was all the more imperative for Waldron to maintain that Maestas was involved in a drug transaction at the apartment. Waldron had a motive to see the matter through with his testimony that Maestas sold drugs to him. Waldron was motivated to provide information that would "result" in an arrest and conviction. Only in that instance would the Department of Corrections provide the letter facilitating the early release. Those facts were important to the defense.

Maestas was entitled to cross-examine Waldron with respect to his motives and the special treatment Waldron received so soon after Maestas' arrest. See State v. Chestnut, 621 P.2d 1228, 1233 (Utah 1980); see also Leonard, 707 P.2d at 654. "The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Chestnut, 621 P.2d at 1233.

Again, nothing in the record supports that Gordon had a tactical reason for failing to correct the incorrect impression, or failing to disclose that Waldron was released from prison so soon after his involvement in the undercover operation. Rather, the record supports that Gordon failed to present evidence regarding the matter because he was unaware of the facts. Gordon apparently failed to investigate the records reflecting Waldron's

incarceration. A "blatant lack of investigation indicates a severe deficiency in the performance of trial counsel." Crestani, 771 P.2d at 1090 (quoting Jennings v. Oklahoma, 744 P.2d 212, 214 (Okla. Crim. App. 1987)). As set forth above, Point I.B.1., failure to investigate constitutes ineffective assistance of counsel since the failure cripples counsel's ability to make intelligent choices about the presentation of evidence, and strategic choices at trial.

In this matter, the necessary investigation should have been obvious to Gordon. In addition, the information was readily available. For example, Gordon could have discovered the information pursuant to the Government Records Access and Management Act, Utah Code Ann. §§ 63-2-101, et. seq. (1993). (See R. 792.) Because Gordon failed to investigate Waldron's history, he failed to present important credibility evidence at trial. Gordon's performance was so seriously deficient that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.

3. Since Waldron Was the Only Witness to Link Maestas to the Transaction, Gordon's Failure to Place Waldron's Credibility in Issue Prejudiced Maestas.

Maestas is required to show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. The Utah Supreme Court has recognized that the ability to attack a witness' credibility on cross-examination is an important part of the right of confrontation, guaranteed by

Article I, Section 12 of the Utah Constitution, and the Sixth Amendment of the federal constitution. Chestnut, 621 P.2d at 1233. An attack on credibility means an attack on the substance of the witness' testimony. Also, "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." Napue v. Illinois, 360 U.S. 264, 269 (1959).

Here, Waldron's testimony was extremely important since he was the only witness to directly link Maestas to the drug transaction. An attack on Waldron's credibility as a witness and on his motives would have had an important impact on the jury.

In Templin, 805 P.2d at 188, the Utah Supreme Court considered defense counsel's failure to investigate the availability and testimony of certain witnesses, who would have presented information impacting on the credibility of the state's key witness. There, the Court ruled that the information was important because the key witness was the only person to offer "direct evidence of defendant's guilt." Id. "In reviewing this testimony, it is important to note that because it affects the credibility of the only witness who gave direct evidence of defendant's guilt, the testimony affects the `entire evidentiary picture.'" Id.

Likewise, in this matter, the jury's verdict might have been different had the jury known the extent of Waldron's character for dishonesty and the extent of his motivation to implicate Maestas in the transaction. This case should be reversed and re-

manded for a new trial since counsel's performance was deficient.

POINT II. THE FACTS FAIL TO SUPPORT THE TRIAL COURT'S FINDINGS THAT MAESTAS WILLFULLY VIOLATED PROBATION; THUS, THE TRIAL COURT ABUSED ITS DISCRETION IN REVOKING PROBATION.

After the conviction in this matter, the trial court ordered that it would stay Maestas' prison sentence in order that Maestas may participate in a rehabilitation program. The minute entry reflecting that order states the following: "The court defers sentencing until the defendant can be evaluated by Odyssey House to determine if he is appropriate for this program. If the defendant does not meet Odyssey House treatment program's criteria for acceptance for the program, then Mr. Gordon is instructed by this court to find another alternative program which will meet Judge Murphy's approval." (R. 98; see also 101.)

Thereafter, Odyssey House accepted Maestas as a candidate for the program (R. 594) and the judge stayed the prison sentence on the following terms and conditions:

The period of probation will be 36 months. During the 36 months you are to pay the fine, the surcharge, and any restitution, and there may not be any, in accordance with the schedule set up with Adult Probation and Parole.

You are to enter into and complete the Odyssey House program and any after-care. You're not to use any unlawful drugs. You are not [to] associate with persons who unlawfully use or who are known to unlawfully distribute or use drugs.

You are not to frequent places where drugs are known to be distributed or used. You are to submit your person to testing for the presence of unlawful drugs in your bloodstream. [You are] to submit your person, your effects, your residence to search and seizure for the unlawful drugs.

You are to serve eleven months in the Salt Lake County Jail. I set that at eleven months just so I can comply with consent decree or assist the county in complying with the consent [decree]. But it should be noted specifically that you are to be released to AP&P for transportation to the

Odyssey House once a bed is available for you.

(R. 597-98.)

On June 2, 1994, Maestas began his residency at Odyssey House. On June 24, 1994, the state filed a Progress/Violation Report asserting the following:

[Maestas] had become suicidal, homicidal, and had begun attacking staff and personnel at Odyssey House. The defendant was rushed to the University of Utah Medical Center for medical assistance. The University of Utah staff indicated nothing could be done for the defendant. Odyssey House personnel has requested the defendant be removed immediately from the program. Due to the defendant's criminal history this agency is requesting a No-Bail Bench Warrant be issued to hold the defendant pending an Order to Show Cause Hearing.

(R. 110.) The affidavit filed in support of the violation report stated simply that "[t]he defendant has failed to participate and comply to the conditions set forth by the Odyssey House program, which resulted in his removal from said program on June 23, 1994, in violation of condition number 11.5 of the defendant's Probation Agreement and the Court's order." (R. 117-18.)

During the hearing on the matter, the state was required to provide sufficient evidence to support a willful violation of probation. State v. Hodges, 798 P.2d 270, 278 (Utah App. 1990). The prosecutor called two witnesses to testify: Tracy Anderson, the clinical director of the Odyssey House program, and Albert Nieto, a counselor for the program. The facts "viewed in a light most favorable to the trial court's findings" are set forth herein. State v. Archuleta, 812 P.2d 80, 82 (Utah App. 1991).

Anderson testified that during the first stage of treatment in the program, residents are informed of the rules and tested over a

thirty-day period to determine whether they can conform to those rules. (R. 614.) Anderson testified that in his opinion, Maestas had the ability to comply with the rules. (R. 621.)

Shortly after Maestas began with the program, "some problems" arose. (R. 615.) Anderson described the situation as follows:

He had difficulty with his impulse control. He got escalated on two or three occasions. We're set up to deal with sort of minor anger problems, but he got fairly escalated on one occasion and made some comments about - actually Albert, the other person who is here, knows that a little better. But at any rate, he said that he wanted to kill himself.

On a couple of different occasions, we had to put him on what's called a suicide watch. We're not a psychiatric facility, and we're not set up 24 hours a day with doctors, so we have to provide a service basically, which is difficult to do, and that's watch the person 24 hours a day. At one point [Maestas] was also taken by Albert Nieto and another one of the clinicians up to the University of Utah Hospital Emergency Room because of the ideation that he had about hurting himself, running in the street, letting someone run over him.

At one point I think he made a comment that if he got out he was going to assault his ex-wife.

(R. 615-16.) Anderson testified that the Odyssey House program had very specific rules about "suicide ideation." "I personally spent time with Tony, and delineated to him that if the behavior continued that he will not be able to stay in the program. Two days later it was back and in force." (R. 616.)

Anderson testified that he took Maestas' suicide threat "as real" and he considered the matter to be "a serious affair." (R. 616.) Anderson informed Maestas "very clearly" that he "want[ed] Maestas] to tell me if [he was] having the thoughts, but if the behavior and the thoughts continue and get out of hand we'll not be able to treat [Maestas] in this setting because we're not a psychiatric setting." (R. 618.) Anderson testified that the

Odyssey House program was not equipped to deal with such mental health issues. (R. 618-19.)

Clearly, we're not a psychiatric facility. There are a number of hours during - there are hours in the facility in which there's not a professional doctor or clinician there. There are people on call. So if a person is suicidal or is gesturing, having difficulties that way, or if - well, in that respect, if that's occurring, they need to be watched by someone in the facility. And that's usually done by an upper level resident, meaning someone who's been in the facility quite some time, a level four.

(R. 620.) The problems related only to the mental health issues (R. 622-25); Maestas broke no other rules and was able to comply with the written/specific rules of the program. (R. 619; 621; 623-24.)

Significantly, Anderson offered only the following testimony with respect to whether Maestas had "manipulated" the system or otherwise willfully failed to make a "bona fide" effort to comply with the Odyssey House rules: He stated that he considered the suicide threat to be "real" and that it was "a serious affair." (R. 616.) The fact that staff members transported Maestas to the University of Utah Medical Center emergency room further supports the seriousness and reality of the situation.

With respect to Nieto's testimony, he described the situation as follows:

We had had a graduation party for the graduates of the program, and on that day - where the location of the party was at a park on the west side of town.

And according to Tony, his ex-wife lives across the street from the park, which he had gotten very emotional over it. Upon returning to the facility, he had trouble throughout the whole [day] that way. Upon returning to the facility he demanded to talk to me, and which we went into one of the offices, and had a discussion where he began to escalate.

He didn't want to hear what was being said to him, in terms of just slowing down, and things can be taken care of, but we can't do nothing right now, per se. And at that point

it - another what we call all - group, where he has a peer present, I decided to turn it into a group situation rather than a one-on-one. Or actually, there was another counselor involved.

I got Tony and one of his peers during that time to run a group with him and try to de-escalate the situation, and so that his peers could be aware of what was going on with Tony, and this could become a group issue.

At that point during that group is when the suicide ideation was made present by Tony.

(R. 627-28.) According to Nieto, at that point Maestas was placed on suicide watch and eventually taken to the University of Utah Medical Center. (R. 628-29.)

Nieto testified that after doctors examined Maestas and checked for ulcers, they discharged him. (R. 629.) Maestas was returned to the Odyssey House and the suicide threats continued. (R. 629-30.) Because the Odyssey House was not equipped to handle such problems, the staff determined the program could not serve Maestas. (R. 630.) The trial court continued Nieto's examination as follows:

[COURT:] Did you perceive any of Mr. Maestas's acting out as being manipulative?

[NIETO:] I would say that at first, I would say so, yes. As it continued, I would have to say no.

[COURT:] And is that because after he initially began it he then found himself in such a frenzy? Would that be a fair statement?

[NIETO:] You're - regarding his escalation and his - yes. Yes.

(R. 632.) Nieto admitted that Maestas also had complained about ulcers, but that the staff had not checked into the medical problem. Subsequently, the staff learned that in fact Maestas suffered ulcers that apparently went untreated. (R. 629; 633-34.)

With respect to whether Maestas willfully violated a rule, Nieto's testimony supports that he did not. Both witnesses

acknowledged that the program could handle some level of "suicidal ideation," but that if it continued, the resident would not be allowed to participate in the program. (R. 618-20.)

As the evidence reflects, Nieto believed that Maestas was not manipulative. (R. 632-33.) Simply, the Odyssey House program was not able to treat or monitor the mental health and medical issues presented by Maestas.

Notwithstanding Nieto and Anderson's testimony on the matter, and the absence of any facts to support the determination that Maestas willfully violated Odyssey House rules, the trial judge found the following:

The Court finds there has been a violation of the terms of the conditions of probation. That violation was knowing and intentional under circumstances where the defendant had the ability to comply with the Court's order on the conditions of probation. Therefore probation will be revoked. It will not be reinstated. There are only so many chances that the Court has the disposition or the opportunity to grant them in one case and deny them in another because there are only limited resources out there. We need to provide those resources to the people who have indicated they will take advantage of that. And that is not so in this case.

(R. 653.) The trial court found a willful violation of the terms of probation. The trial court abused its discretion in making such a finding since the evidence is insufficient to support it.

Pursuant to Utah Code Ann. § 77-18-1(10)(a)(i) (Supp. 1994), probation may be terminated at any time at the discretion of the court. This Court has ruled that such discretion may be exercised only in cases where defendant has willfully violated the conditions of his parole. Hodges, 798 P.2d at 277.

In Hodges, defendant was placed on probation and ordered to

participate in and successfully complete the sex offender program at the Bonneville Community Correctional Center. Id. Eight months into the defendant's participation in the program, the staff concluded he was not making sufficient progress in treatment, and requested an order to show cause why probation should not be revoked. Id.

State witnesses testified that defendant had "physical and mental problems that interfered with his ability to effectively participate in treatment." Id. at 272. In that case, one witness for the state testified that defendant's lack of improvement related to his "manipulative behavior." Id. Other than that, "no specific instances of undesirable behavior or non-compliance with Bonneville program rules were described." Id. The trial court revoked probation and this Court reversed and remanded the case for further findings regarding the matter. In reversing the case, the Court "address[ed] the question of what evidence may be sufficient to justify the modification or revocation of appellant's probation." Id. at 275.

Specifically, this Court ruled that "in order to revoke probation, a violation of a probation condition must, as a general rule, be willful." Id. at 276. Where defendant's failure to progress in the program is beyond his control, probation cannot be revoked "unless it is also found that, because of this failure, appellant poses a present danger to others." Id. at

277.¹ A finding of willfulness "merely requires a finding that the probationer did not make *bona fide* efforts to meet the conditions of his probation." State v. Peterson, 869 P.2d 989, 991 (Utah App. 1994) (quoting Archuleta, 812 P.2d at 84).

In this matter, the evidence presented at the order to show cause proceeding was insufficient to support a willful violation. Instead, the evidence supported that Maestas made *bona fide* efforts to meet the conditions of his probation, but suffered medical and mental issues that were beyond his control and not treatable in the Odyssey House program.

In other cases, this Court has found a "willful" violation under the following circumstances: In Peterson, 869 P.2d at 991-92, defendant failed to obtain full-time employment. Rather, he started up his own business without authority, and only worked on and off as he wanted to. In addition, defendant failed to make *bona fide* efforts toward paying the fine associated with the punishment. Id.

In Archuleta, 812 P.2d at 83, after defendant was ordered as a condition of probation to maintain full-time employment, he obtained employment at the Red Lion Hotel, then voluntarily quit his job when he was accused of stealing eyeglasses. The trial court determined the voluntary termination was willful, and the willful violation continued since there were jobs available in Salt Lake during the period of defendant's probation and

¹ The trial court did not find that Maestas was a present danger to others. Thus, that is not an issue in this case.

defendant failed to secure a job. Id.

In State v. Ruesga, 851 P.2d 1229, 1231-33 (Utah App. 1993), the defendant refused to sign the probation agreement that would initiate probation, "despite warning by the court." Id.

Maestas' case is similar to Hodges, where the record reflects Maestas suffered medical and mental issues beyond his control. The issues were important enough to prompt the staff to transport Maestas to the hospital. The witnesses for the state testified that Maestas otherwise was capable of complying with the rules, and that Maestas was not manipulating the system. Because the issues were beyond Maestas' control, the program could not facilitate his needs. The alleged violation was not "willful." The trial court's finding to that effect is insupportable and clearly erroneous.

Nothing in the record supports the determination that Maestas failed to make a bona fide effort to work within the parameters of the Odyssey House program. In accordance with the cases concerning probation revocation, the evidence was insufficient to support a willful violation. The trial court abused its discretion in terminating Maestas' probation. This case should be reversed on that basis.

POINT III. THE ARREST IN THIS CASE VIOLATED UTAH LAW; CONSEQUENTLY, IT CANNOT SERVE TO SUPPORT THE SEARCH.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Utah counterpart is identical in relevant part to the federal provision and is given as much, if not more, force. Utah Const. Art. I, sec. 14; State v. Larocco, 794 P.2d 460, 465-68 (Utah 1990); accord State v. Gardiner, 814 P.2d 568, 571 (Utah 1991).²

Unless officers have secured a valid warrant to search, under the federal and state constitutional provisions the search is per se unreasonable -- "subject only to a few specifically established and well-delineated exceptions." Katz v. U.S., 389 U.S. 347, 357 (1967); Payton v. New York, 445 U.S. 573, 586 (1980) (warrantless searches and seizures are presumptively unreasonable); Gardiner, 814 P.2d at 571 (recognizing warrantless searches are per se unreasonable under art. I, sec. 14); State v. Northrup, 756 P.2d 1288, 1290-91 (Utah App. 1988).

Also, where officers fail to procure a warrant, "[t]he State carries the burden of showing that a warrantless search was lawful." Larocco, 794 P.2d at 470 (citations omitted); see also State v. James, 361 Utah Adv. Rep. 49, 50 (Utah App. 1999) (the state carries the burden of establishing that the trooper's action was lawful); State v. Beavers, 859 P.2d 9, 13 (Utah App.

² In determining whether the warrantless search was justified, the Fourth Amendment of the federal Constitution and Art. I, § 14 of the Utah Constitution are equally persuasive, and compel the determination that the evidence seized in this case must be suppressed. Maestas is not seeking a distinct analysis under Art. I, § 14.

1993); State v. Ramirez, 814 P.2d 1131, 1135 (Utah App. 1991).

In this matter, the trial court justified the warrantless search as "incident to arrest." (R. 285.) Because the state failed to establish that the arrest was lawful, the warrantless search cannot be upheld as set forth below.

A. THE ARREST VIOLATED UTAH LAW.

As set forth above, this matter involved an operation initiated by the DOC. Correctional officers determined to stop drug trafficking in the prison by focusing on persons outside the correctional facility who were suspected of supplying drugs to inmates. (R. 255-56; 358-59; 374.) Officials identified specific persons as the offending suppliers, and organized a drug purchase focusing on those persons in order to arrest them and to end the trafficking. (R. 239; 266-68; 284; 362-63; 385.) The correctional officers recruited Waldron to organize buys with identified suppliers during an undercover operation in March 1992. (R. 255; 358-59; 374.)

At some point during the undercover operation, it became apparent to correctional officers that identified suppliers were not available, and/or were not able to provide drugs. (R. 234; 239; 361-62.) Thus, the operation diverted, and officials allowed Waldron to arrange a purchase from Maestas. Nothing in the record supports that Maestas was an intended target of the operation. In fact, correctional officers admitted the operation "had nothing to do with Maestas" (R. 239; see also 266-68; 362-63; 385), and the trial judge found that Maestas' involvement in the matter was

"an accidental happening." (R. 284.) Thus, at the time that correctional officers diverted from their intended operation, they were acting outside the scope of their authority under Utah law.

Utah statutory law in effect in 1992 governed the DOC and its operations outside correctional facilities. Section 64-13-6 recognized that the "primary purposes" of the DOC were to protect the public by caring for and confining offenders; implementing court-ordered punishment for offenders; providing programs to assist offenders; managing programs to take into account "the needs and interests of victims, where reasonable"; and supervising probationers and parolees. Utah Code Ann. § 64-13-6 (Supp. 1992).³ An "offender" was defined as a person who had been convicted of a crime for which he may be committed to the custody of the DOC. Utah Code Ann. § 64-13-1(8) (Supp. 1992).⁴

³ In 1993, that provision was amended to include the following additional duties: "the department shall:" "investigate criminal conduct involving offenders incarcerated in a state correctional facility;" and "cooperate and exchange information with other state, local, and federal law enforcement agencies to achieve greater success in prevention and detection of crime and apprehension of criminals."

⁴ In 1993, the statutes were amended to include an additional, substantive statute, identified as Section 64-13-21.5. It states the following:

(1) Employees of the department who are designated by the executive director as correctional officers may exercise the powers and authority of a peace officer *only when needed to properly carry out the following functions:*

- (a) performing the officer's duties within the boundaries of a correctional facility;
- (b) supervising an offender during transportation;
- (c) when in fresh pursuit of an offender who has escaped

(continued...)

The "duties" of the DOC were specifically limited to management of adjudicated offenders and the operation of correctional facilities as follows: "The department shall provide probation supervision programs, parole supervision programs, correctional facilities, community correctional centers, and other programs or facilities as necessary and as required to accomplish its purposes." Utah Code Ann. § 64-13-10 (Supp. 1992).

Utah Code Ann. § 64-13-12 also allowed the DOC to assist county sheriffs "in the development of jail standards, in the review of jail facilities," and in providing "other services as requested by the sheriffs." Utah Code Ann. § 64-13-12 (Supp. 1992).

Utah Code Ann. §§ 77-1a-1 and 77-1a-2 specified that a "corrections officer" only had "peace officer authority" while

(...continued)

from the custody of the department; or

(d) when requested to assist a local, state or federal law enforcement agency.

(2) Employees of the department who are POST certified and who are designated as correctional enforcement or investigation officers are peace officers and may have the following duties, as specified by the executive director:

(a) providing investigative services for the department;

(b) conducting criminal investigations and operations in cooperation with state, local, and federal law enforcement agencies; and

(c) providing security and enforcement for the department.

Utah Code Ann. § 64-13-21.5 (1993). Utah statutory law specifically provides that unless newly enacted legislation specifies that it shall be applied retroactively, such legislation may be applied only prospectively. Utah Code Ann. § 68-3-3 (1996). Since Section 64-13-21.5 was not in effect at the time of the alleged offense in this case, it does not apply in this matter.

engaged in the performance of his duties. Utah Code Ann. §§ 77-1a-1 (Supp. 1992) and 77-1a-2 (1990).

The Utah Legislature amended Utah law governing the duties of the DOC in 1993. See notes 3, and 4, herein. Because the events giving rise to the matter in this case occurred in 1992, the law in effect at that time is applicable to this Court's analysis. See State v. Fixel, 744 P.2d 1366 (Utah 1987).⁵

In 1992, Utah statutory law did not authorize correctional officers to conduct criminal investigations or operations outside correctional facilities. See Utah Code Ann. §§ 64-13-1, *et. seq.* (1986 & Supp. 1992); see also Fixel, 744 P.2d at 1368 (statutory sections encompass the total spectrum of a police officer's acts and authority). By engaging in such an operation, the correctional officers in this case acted outside the scope of their authority in violation of the law. Fixel supports such a determination.

In Fixel, a Provo City police officer arranged and participated in a drug transactions in Pleasant Grove, Utah. When the transaction was completed, "[a]n arrest warrant was

⁵ In Fixel, 744 P.2d at 1366, the Utah Supreme Court considered whether an officer acted beyond the scope of his authority under Utah statutory law, where the officer conducted an undercover drug transaction outside his jurisdiction. The Court applied the statutes in effect at the time of the transaction, and noted that statutory amendments to the provisions became effective one month thereafter. Id. The court did not consider the effect of the later amendments.

As in Fixel, the statutes in effect at the time of the DOC undercover operation in this case must be considered to determine if officers acted outside the scope of their statutory authority in arresting Maestas.

later issued, and defendant was arrested and charged twice for distributing a controlled substance for value." Id. at 1367. Defendant argued that because the officer involved in the transaction was outside his jurisdictional limits at the time of the purchase, he acted beyond the scope of his authority. Id. The state countered defendant's argument by asserting that the statutes governing peace officer conduct did not apply because the officer "acted as a private citizen when he participated in the drug transactions." The Utah Supreme Court was "not persuaded." Id. at 1368.

The court recognized that Utah statutory law encompassed "the total spectrum of a police officer's acts and authority." Id. In that regard,

[Officer] Guinn was discharging the functions of his office, and in doing so, his activities involved the exercise of his official duties and authority. Indeed, the record indicates that Guinn was on duty during the time he participated in at least the first drug transaction. Moreover, Guinn himself testified that on both occasions, he was operating in his official capacity as an undercover police officer assigned to investigate narcotics offenses. As such, he was conducting an authorized official investigation. He filed reports and apparently advised his supervisor of the two transactions. He also delivered the contraband to a superior at regularly scheduled meetings.

In light of the above, we cannot sanction the State's approach of avoiding the intended statutory proscriptions by conveniently classifying Guinn's investigation as that of a private citizen without the mantle of police authority. We conclude, therefore, that Guinn clearly acted outside the scope of his statutory authority when he conducted the investigations in Pleasant Grove.

Id. Pursuant to Fixel and the Utah statutory law in effect at the time of the undercover operation in Maestas' case, the correctional officers were acting outside the scope of their

statutory authority at the time of Maestas' arrest. The warrantless arrest was invalid since the officers lacked authority to participate in the operation and/or to make the arrest. The search cannot be upheld as incident to the illegal arrest.

B. THE EXCLUSIONARY RULE IS APPLICABLE TO THIS CASE.

Since the warrantless, unlawful arrest served as the basis for justifying the warrantless search, the exclusionary rule is appropriate as a remedy. Maestas has raised this issue on appeal as a Fourth Amendment violation, and he specifically is challenging the validity of the arrest as the basis for the search. Thus, suppression of the evidence confiscated in connection with the warrantless search is appropriate.

Suppression is automatic in the search-and-seizure context since the "prime purpose" of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the 4th Amendment against unreasonable searches and seizures." Michigan v. Tucker, 417 U.S. 433, 446 (1974) (quoting U.S. v. Calandra, 414 U.S. 338, 347 (1974)). The exclusionary rule applies when police have engaged in willful or negligent, unlawful conduct. Tucker, 417 U.S. at 447. Such conduct existed here.

In Fixel, since the defendant did not claim that the officer violated a constitutional right, or that the arrest was invalid, the Utah Supreme Court was unwilling to automatically apply the exclusionary rule as an appropriate remedy. "Defendant does not

argue or show that the later arrest failed to satisfy section 77-9-3 or that it was otherwise unlawful. His claim is limited to the officer's conduct in making the drug buys. We reject any suggestion that the buys in this case were the equivalent of an official search by the police." Fixel, 744 P.2d at 1369 n. 10.

Although the court did not apply the exclusionary rule in Fixel, it ruled that suppression of the evidence would serve as a remedy for a statutory violation under the following circumstances.

Only a "fundamental" violation of [a rule of criminal procedure] requires automatic suppression, and a violation is "fundamental" only where it, in effect, renders the search unconstitutional under traditional fourth amendment standards. Where the alleged violation ... is not "fundamental" suppression is required only where:

- (1) there was "prejudice" in the sense that the search might not have occurred or would not have been so abrasive if the [r]ule had been followed, or
- (2) there is evidence of intentional and deliberate disregard of a provision of the [r]ule...

... It is only where the violation also implicates fundamental, constitutional concerns, is conducted in bad-faith or has substantially prejudiced the defendant that exclusion may be an appropriate remedy.

Id. at 1368-69 (alterations in original; notes omitted) (quoting Commonwealth v. Mason, 490 A.2d 421 (Pa. 1985)). This Court has identified the above analysis as the "`persuasive' standard." State v. Ribe, 876 P.2d 403, 410 (Utah App. 1994).

Again, Maestas maintains that the exclusionary rule automatically applies in this case since the unlawful arrest served as the basis for justifying the warrantless search. Thus, the analysis under the "persuasive standard" in Fixel is not relevant. To the extent this Court determines the Fixel,

persuasive-standard analysis applies, the evidence in this case should have been suppressed for at least two reasons.

First, "the search might not have occurred" if the statutes had been followed. Fixel, 744 P.2d at 1368-69. Since statutory law did not permit officers to engage in the undercover operation outside the correctional facility, if officers had followed the law, the undercover operation would not have occurred, and Maestas never would have been searched.

To the extent such an operation by the DOC was permissible for the purpose of ending drug trafficking in the prison, the officers exceeded the scope of their authority when they involved Maestas in the transaction, since he was not a targeted supplier. That is, since Maestas was not a target of the operation, but was an "accidental happening" (R. 284), correctional officers either should have terminated the operation when it diverted from its intended purpose, or obtained the cooperation of the local law enforcement. There is no evidence that any local law agency was involved in or aware of, or would have approved the undercover operation. Thus, again, the search would not have occurred if officers had followed the law.

In other cases concerning application of the "persuasive standard," Utah appellate courts have been unwilling to find that under the circumstances, "the search might not have occurred." Those cases are distinguishable as follows.

In State v. Rowe, 850 P.2d 427 (Utah 1992), the Utah Supreme Court ruled that under the Fixel "persuasive standard,"

suppression was not an appropriate remedy in that case for violations of the statute authorizing nighttime searches. In that case, the magistrate issued a warrant to search a third-person's apartment. The warrant was supported by an affidavit that failed to contain sufficient evidence to support the nighttime search provision. Id. at 428-29. The magistrate also issued a proper arrest warrant that permitted entry into the apartment during nighttime hours to arrest the third person. "[O]nly the timing of the actual search of the apartment was improperly authorized." Id. at 430.

In considering the "persuasive standard" and whether the search otherwise would have occurred if the rule had been followed, the Utah Supreme Court stated the following:

In order to show prejudice, defendant must establish that absent the nighttime entry, "the search would not otherwise have occurred or would not have been so abrasive if the Rule had been followed." Defendant has shown no such prejudice. Even without the erroneous inclusion of nighttime search authority, the officers had authority to enter [the third-person's apartment] during nighttime hours pursuant to a valid arrest warrant. The magistrate's erroneous approval of nighttime search authority for [the third-person's home] was harmless, as the officers could have rightfully taken steps to secure the house pursuant to the arrest warrant, to ask defendant to leave the house, and to search the house in the daylight hours. The erroneous issuance of the warrant did not therefore prejudice defendant, whose property would have been searched regardless of the time of the warrant's execution.

Rowe, 850 P.2d at 430 (footnotes omitted). "The holding in Rowe[] turned on the fact that the officers possessed a daytime search warrant, and a day or nighttime arrest warrant. In short, the officers essentially were authorized to enter the dwelling at any time to arrest an occupant and to secure the premises."

State v. Simmons, 866 P.2d 614, 618 (Utah App. 1993). Thus, the defendant in Rowe could not show prejudice under Fixel.

In Simmons, defendants argued that the warrant failed to comply with statutory requirements authorizing nighttime searches, but that the warrant otherwise was valid. Because the defendants did not assert that the search would not have occurred if officers had complied with the law, this Court ruled that the defendants failed to show prejudice. Id. at 618.

In State v. Buck, 756 P.2d 700 (Utah 1988), defendant argued the search was unlawful because the officers failed to knock and announce their presence in executing the otherwise appropriate search warrant. According to the defendant, such conduct violated Utah statutory law concerning the execution of a search warrant, and the violation required suppression of the evidence obtained in connection with the search. The Utah Supreme Court determined the officers violated the statute, but refused to suppress the evidence under an analysis similar to the "persuasive standard"; the court found that the search would have occurred even if officers had executed the warrant in accordance with Utah statutory law:

Here, there was no claim that either the fact of entry or the search and seizure was otherwise unlawful. The claim is only that the manner of entry was unlawful. However, the manner of entry in this case had nothing to do with the extent of the intrusion on defendant's privacy. The officers had a search warrant and executed it on the same day it was obtained. Although their unannounced entry was not authorized by the warrant, it did not contribute appreciably to the invasion of privacy already authorized by the warrant. Furthermore, the officers made a proper announcement and gave proper notice when Buck arrived on the scene. Under the circumstances, the officers' conduct was

not unreasonable, and the trial court did not err in refusing to suppress the evidence seized.

Id. at 703 (cites and footnotes omitted).

In Maestas' case, if officers had complied with Utah statutory law, the search never would have occurred. The officers did not otherwise have statutory or other authority to proceed with the undercover operation involving Maestas. Under Utah law, officers should have terminated the operation before it exceeded statutory limits. Compliance with Utah law would have terminated the operation before Maestas' involvement in the matter. Under the analysis in Fixel, Maestas has shown that the search would not have occurred if the law had been followed. See Fixel, 744 P.2d at 1368.

Second, "there is evidence of intentional and deliberate disregard of a provision of the rule." Id. at 1368-69. The evidence supports that prior to Waldron's alleged transaction with Maestas, officers knew that Waldron was having difficulties arranging a purchase from targeted suppliers, and they knew that Maestas was not a target of the operation. (See R. 239.) The officers' knowledge and continued involvement in the operation without advising local law enforcement agencies supports an intentional and deliberate disregard for the statutory law. Since the arrest was unlawful in this case and the evidence supports application of the exclusionary rule, the evidence obtained during the warrantless search should have been suppressed.

C. THE FOURTH AMENDMENT ISSUE WAS PROPERLY PRESERVED FOR APPEAL.

The defense in this case raised the issue of the legality of the arrest in the trial court prior to re-sentencing. (Case No. 950902479 at 160-62.) The trial court specifically refused to address the matter, and ordered Maestas to raise the issue on appeal for a determination by this Court. (See R. 677-78; 686-88; 690; 718; 730; 734-35.) Inasmuch as Maestas raised the issue in the trial court, it is properly preserved. The trial court erred in failing to address the matter.

In the event this Court determines that the issue was not properly preserved for purposes of appeal, Maestas asserts ineffective assistance of counsel and plain error. This Court may reach the merits of the warrantless search under those doctrines.

1. The Trial Court Committed Plain Error in Failing to Suppress Evidence Confiscated in Connection with the Warrantless Search.

The plain-error doctrine considers whether the trial court failed to comply with the plain requirements of the law.

In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.^[1] See State v. Verde, 770 P.2d 116, 122 (Utah 1989); State v. Bell, 770 P.2d 100, 105-06 (Utah 1988); State v. Knight, 734 P.2d 913, 919-20 (Utah 1987); State v. Fontana, 680 P.2d 1042, 1048 (Utah 1984); see also [State v. Eldredge, 773 P.2d 29, 35-36 (Utah 1989)]; cf. Utah R. Evid. 103(d); Utah R. Crim. P. 19(c). If any one of these requirements is not met, plain error is not established. Cf. State v. Hamilton, 827 P.2d 232, 240 (Utah 1992); Verde, 770 P.2d at 123.

State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993). In this case,

the trial court committed plain error in failing to suppress the evidence where the arrest was unlawful.

First, for the reasons set forth above, Point III.A., an error existed. Utah statutory provisions and case law plainly provide that an officer engaged in an undercover operation outside his jurisdiction is acting outside the scope of his authority. Since the officers here were acting outside the scope of their authority, the warrantless arrest was unlawful. The unlawful arrest invalidates the warrantless search.

Second, the error was obvious. The plain statutory law and Fixel, reflect that officers in this matter acted beyond the scope of their authority in involving Maestas in the undercover operation. In addition, the trial judge in this case sat through the evidentiary hearing concerning suppression of the evidence. The judge asked the officers particular questions going to the statutory "scope-of-authority," and concerning Maestas' involvement in the matter. Specifically, the judge asked the following:

[COURT]: Who was the target or targets of your investigation?

[OFFICER LUCEY]: The original targets were involved within the facility who'd been using this informant to mule narcotics into the facility.

[COURT]: And by "facility," you're talking about the corrections facility?

[LUCEY]: Utah State Prison, yes. And their agents on the street.

* * *

[COURT]: What was the Department of Corrections doing involved in this [operation]?

[OFFICER ALLEN]: My understanding, the [confidential informant] had agreed to purchase cocaine and other narcotics from several individuals that day. He was released from the prison and was being monitored by the Department of Corrections to make these purchases.

[COURT]: Well, did you have any information which indicated

that any of the purported or proposed sellers knew that they were selling to an inmate of the prison, and therefore the drugs would likely end up in the prison?

[ALLEN]: I [knew] earlier there [were] a couple of conversations with the individual that day, talking about that he was from the prison. One of the individuals that we talked to earlier that day had talked about how they get it back in the prison. But I -

[COURT]: Did you hear anything over this wire that indicated anything to you from this transaction, in which it's claimed Mr. Maestas sold drugs to the informant, that indicated Mr. Maestas knew that the confidential informant was an inmate at the prison or that the drugs would likely end up in the prison?

[ALLEN]: I don't think there was any conversation that they would likely end up in the prison. I think that there was a conversation that he was an inmate on work release.

(R. 255-56; 266-68.)

The examination reflects that the judge was aware that by involving Maestas in the operation, the officers were acting outside the scope of authority, rendering their involvement in the operation and the arrest invalid. Indeed, the judge specifically made a finding to that effect when he ruled that Maestas' involvement in the undercover operation was an "accidental happening." (R. 284.) Further, at the conclusion of the motion to suppress hearing, the judge expressed an interest in resolving this issue, but did not intend to make it part of the record. The judge stated the following to the prosecutor: "... [C]an I speak to you generally in my office about the Department of Corrections and the manner in which they go about these things?" (R. 287.) The record reflects that the judge was aware of the jurisdictional problems presented by the officers' involvement of Maestas in the undercover operation.

With respect to the third prong of the plain-error analysis,

in this case, the error was harmful since suppression of the evidence would have substantially weakened the state's case. The state would have been prevented from offering evidence concerning the items confiscated in connection with the warrantless search, and suppression would have rendered Sundquist's testimony inadmissible. The state would be left without any evidence to support the possession charge, and little evidence to support distribution. Thus, this Court may conclude beyond a reasonable doubt that if the evidence had been suppressed, there would have been a very different result in this case. The error was harmful.

2. Trial Counsel Was Ineffective for Failing to Seek Suppression of the Evidence on the Basis that the Arrest Was Invalid.

As set forth above, Maestas was entitled to the effective assistance of counsel. See Point I.A., supra. Trial counsel failed to seek suppression during pre-trial proceedings of the evidence on the basis that the arrest was unlawful since the officers were acting outside the scope of their authority. The argument was obvious under Utah statutory and case law. See Point III.C.1. Because trial counsel failed to seek suppression of the evidence on that basis, Maestas commenced a 65B proceeding claiming ineffective assistance of counsel (Case No. 950902479), and he has been forced in this matter to argue plain error on appeal. Trial counsel's failure to argue the matter was deficient.

The record fails to support any possible tactical reason for failing to raise the matter. "[W]here a defendant can show that

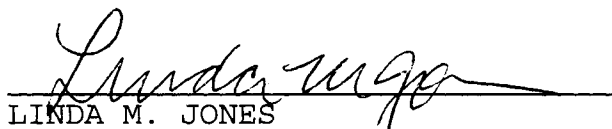
there was no conceivable legitimate tactical basis for counsel's deficient actions, the first prong of Strickland is satisfied." State v. Snyder, 860 P.2d 351, 359 (Utah App. 1993) (citing State v. Tennyson, 850 P.2d 461, 468 (Utah App. 1993)). Trial counsel could have requested suppression of the evidence at any time prior to or during trial, on the basis that the arrest was unlawful, thereby invalidating the search.

Because trial counsel failed to properly raise the matter, Maestas has been prejudiced. He was prejudiced because the illegally obtained evidence was presented to the jury. Even if the trial court had improperly denied the suppression motion, Maestas is prejudiced by the heightened requirement that he show plain error or exceptional circumstances on appeal. This Court should address the suppression issue de novo to alleviate the prejudice.

CONCLUSION

For the reasons set forth herein, Maestas respectfully requests reversal of the convictions in this matter, and remand for further proceedings, as this Court may deem appropriate.

SUBMITTED this 22nd day of February, 1999.


LINDA M. JONES
Counsel for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, 140230, Salt Lake City, Utah 84114-0230 and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, this 22nd day of February, 1999.


LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals Court as indicated above this ____ day of February, 1999.

ADDENDA

Tab A

CHAPTER 13

DEPARTMENT OF CORRECTIONS — STATE PRISON

Sunset Act. — Section 63-55-264 provides that Chapters 13 and 13a, the Department of Corrections, are repealed July 1, 1993.

Section		Section	
64-13-1.	Definitions.		sentence investigations and diagnostic evaluations.
64-13-2.	Creation of department.	64-13-21.	Supervision of sentenced offenders placed in community.
64-13-3.	Executive director.	64-13-22.	Repealed.
64-13-6.	Purposes of department.	64-13-23.	Offender's income and finances.
64-13-7.	Offenders in custody of department.	64-13-24.	Standards for staff training.
64-13-7.5.	Persons in need of mental health services — Contracts.	64-13-25.	Standards for programs.
64-13-8.	Designation of employee powers.	64-13-26.	Private providers of services.
64-13-9.	Repealed.	64-13-27.	Records — Access.
64-13-10.	Department duties.	64-13-28.	Hearings involving staff or offenders.
64-13-12.	Assistance to sheriffs.	64-13-29.	Violation of parole or probation — Detention — Hearing.
64-13-13.	Administrators.	64-13-30.	Expenses incurred by offenders — Payment to department.
64-13-14.	Secure correctional facilities.	64-13-31.	Emergencies.
64-13-14.5.	Limits of confinement place — Release status — Work release.	64-13-32.	Discipline of offenders — Use of force.
64-13-14.7.	Victim notification of offender's release.	64-13-34.	Safety of offenders.
64-13-15.	Property of offender — Storage and disposal.	64-13-35.	Items prohibited in correctional facilities — Penalties.
64-13-16.	Inmate employment.	64-13-36.	Testing of prisoners for AIDS and HIV infection — Segregation — Medical care — Department authority.
64-13-17.	Visitors to correctional facilities — Correspondence.		
64-13-19.	Labor at correctional facilities.		
64-13-20.	Investigative services — Pre-		

64-13-1. Definitions.

As used in this chapter:

- (1) "Community correctional center" means a nonsecure correctional facility operated by the department.
- (2) "Correctional facility" means any facility operated by the department to house offenders, either in a secure or nonsecure setting.
- (3) "Council" means the Corrections Advisory Council.
- (4) "Department" means the Department of Corrections.
- (5) "Emergency" means any riot, disturbance, homicide, inmate violence occurring in any correctional facility, or any situation that presents immediate danger to the safety, security, and control of the department.
- (6) "Executive director" means the executive director of the Department of Corrections.
- (7) "Inmate" means any person who is committed to the custody of the department and who is housed at a correctional facility or at a county jail at the request of the department.

(8) "Offender" means any person who has been convicted of a crime for which he may be committed to the custody of the department and is at least one of the following:

- (a) committed to the custody of the department;
- (b) on probation; or
- (c) on parole.

(9) "Secure correctional facility" means any prison, penitentiary, or other institution operated by the department or under contract for the confinement of offenders, where force may be used to restrain them if they attempt to leave the institution without authorization.

History: C. 1953, 64-13-1, enacted by L. 1985, ch. 198, § 1; 1987, ch. 116, § 1; 1989, ch. 224, § 1.

Amendment Notes. — The 1987 amendment added present Subsections (1), (2) and (6) through (8), and redesignated former Subsec-

tions (1) and (2) as present Subsections (4) and (5).

The 1989 amendment, effective April 24, 1989, added present Subsection (5) and redesignated former Subsections (5) to (8) as Subsections (6) to (9).

COLLATERAL REFERENCES

A.L.R. — State prisoner's right to personally appear at civil trial to which he is a party—state court cases, 82 A.L.R.4th 1063.

Validity, construction, application, and ef-

fect of Civil Rights of Institutionalized Persons Act, 42 USCS §§ 1997-1997j, 93 A.L.R. Fed. 706.

64-13-2. Creation of department.

There is created a Department of Corrections, under the general supervision of the executive director of the department. The department is the state authority for corrections and assumes all powers and responsibilities formerly vested in the Board of Corrections and the Division of Corrections in the Department of Human Services.

History: C. 1953, 64-13-2, enacted by L. 1985, ch. 198, § 2; 1990, ch. 183, § 47.

Amendment Notes. — The 1990 amend-

ment, effective April 23, 1990, substituted "Human Services" for "Social Services" at the end of the second sentence.

64-13-3. Executive director.

(1) The executive director shall be appointed by the governor with the advice and consent of the Senate.

(2) The executive director shall be experienced and knowledgeable in the field of corrections and shall have training in criminology and penology.

(3) The governor shall establish the executive director's salary within the salary range fixed by the Legislature in Title 67, Chapter 22, State Officer Compensation.

History: C. 1953, 64-13-3, enacted by L. 1985, ch. 198, § 3; 1991, ch. 114, § 29.

Amendment Notes. — The 1991 amend-

ment, effective July 1, 1991, added Subsection (3).

64-13-4. Repealed.

Repeals. — Section 64-13-4 (L. 1977, ch. 253, § 4), relating to the oath, bond and per diem and expense allowances of board members, was repealed by Laws 1979, ch. 102, § 17.

64-13-4.1. Creation of Corrections Advisory Council.

(1) There is created within the Department of Corrections a Corrections Advisory Council consisting of seven members. Each member shall be appointed by the governor for a term of four years, with the advice and consent of the Senate. Terms of the council members shall be staggered, with no more than two terms expiring in any one year. Each council member shall be a resident of the state. No more than four members may be from the same political party and no member may hold any office connected with the Department of Corrections. A vacancy occurring on the council for any reason shall be filled by the governor with the advice and consent of the Senate for the unexpired term of the vacated member.

(2) Membership of the council should be chosen to reflect:

- (a) geographical distribution;
- (b) expertise or personal experience with subject matters in the field of corrections;
- (c) diversity of opinion and political preference; and
- (d) gender, cultural, and ethnic diversity.

(3) Council members may be appointed for no more than two consecutive terms unless the governor deems an additional term is in the best interest of the state.

(4) Council members serve in a part-time capacity and without salary, but members shall receive a per diem allowance established by the director of the Division of Finance and all actual and necessary expenses incurred in the performance of official duties.

(5) A member of the council may not hold any other office in the government of the United States or of this state or of any municipal corporation within the state.

(6) Any member may be removed at any time by the governor for official misconduct, habitual or wilful neglect of duty, or for other good and sufficient cause.

(7) A council member shall disclose any conflict of interest to the council and if the conflict involves a direct or financial interest in either the subject under consideration or an entity or asset that could be substantially affected by the outcome of council action, the member shall refrain from voting on the matter.

(8) Current members of the Board of Corrections shall continue in office as members of the Corrections Advisory Council until expiration of their terms and until their successors are chosen.

History: C. 1953, 64-13-4.1, enacted by L. 1985, ch. 198, § 4. Per diem rates and travel expenses, §§ 63-1-14.5, 63-1-15.

Cross-References. — Governor's appointive power, Utah Const., Art. VIII, Sec. 10.

COLLATERAL REFERENCES

C.J.S. — 72 C.J.S. Prisons § 5.

Key Numbers. — Prisons ⇨ 4.

64-13-5. Council duties.

- (1) The Corrections Advisory Council shall review and make recommendations to the executive director of the Department of Corrections concerning:
 - (a) the role and responsibility of the department and its programs;
 - (b) existing and proposed policies of the department;
 - (c) the annual budget request for the department prior to submission to the governor;
 - (d) development and implementation of master plans for the department's programs and facilities, including facility siting;
 - (e) any subject deemed appropriate by the council, except the council may not become involved in administrative matters; and
 - (f) any subject concerning the department, as requested by the executive director.
- (2) The council shall encourage citizen awareness and input regarding programs in the field of corrections.
- (3) The council shall prepare an annual report for the governor and the Legislature on the status of the department and its programs.
- (4) The director of the department shall provide staff assistance and any information necessary for the Corrections Advisory Council to fulfill its responsibilities under this chapter.

History: C. 1953, 64-13-5, enacted by L. 1985, ch. 198, § 5.

Repeals and Enactments. — Laws 1985, ch. 198, § 5 repeals former § 64-13-5, as

enacted by Laws 1977, ch. 253, § 5, creating division of corrections, and enacts the above section.

COLLATERAL REFERENCES

C.J.S. — 72 C.J.S. Prisons § 5.

Key Numbers. — Prisons ⇌ 4.

64-13-6. Purposes of department.

The primary purposes of the Department of Corrections include:

- (1) protection of the public through institutional care and confinement, and supervision in the community of offenders where appropriate;
- (2) implementation of court-ordered punishment of offenders;
- (3) provision of program opportunities for offenders;
- (4) management of programs to take into account the needs and interests of victims, where reasonable; and
- (5) supervision of probationers and parolees as directed by statute and implemented by the courts and Board of Pardons.

History: C. 1953, 64-13-6, enacted by L. 1985, ch. 211, § 1; 1987, ch. 116, § 2.

Amendment Notes. — The 1987 amendment substituted "purposes" for "purpose" and "include" for "includes the following" in the introductory language; inserted "of offenders" in Subsection (1); substituted "offenders" for "the criminal offender for the purpose of maintaining a law-abiding and productive society" in Subsection (2); substituted "program" for "re-

habilitation" and "for offenders" for "to assist the criminal offender in functioning as a law-abiding and productive member of society" in Subsection (3); deleted former Subsection (4), which read "individualized treatment of the offender; and"; redesignated former Subsection (5) as present Subsection (4); made punctuation changes and added "and" to the end, in Subsection (4); and added present Subsection (5).

64-13-7. Offenders in custody of department.

All offenders committed for incarceration in a state correctional facility, for supervision on probation or parole, or for evaluation, shall be placed in the custody of the department. The department shall establish procedures and is responsible for the appropriate assignment or transfer of public offenders to facilities or programs.

History: C. 1953, 64-13-7, enacted by L. 1985, ch. 211, § 2; 1987, ch. 116, § 3.

Amendment Notes. — The 1987 amend-

ment substituted "correctional" for "prison" in the first sentence.

64-13-7.5. Persons in need of mental health services — Contracts.

(1) Except as provided for in Subsection (2), when the department determines that a person in its custody is in need of mental health services, the department shall contract with the Division of Mental Health, local mental health authorities, or the state hospital to provide mental health services for that person. Those services may be provided at the Utah State Hospital or in community programs provided by or under contract with the Division of Mental Health, a local mental health authority, or other public or private mental health care providers.

(2) If the Division of Mental Health, a local mental health authority, or the state hospital notifies the department that it is unable to provide mental health services under Subsection (1), the department may contract with other public or private mental health care providers to provide mental health services for persons in its custody.

History: C. 1953, 64-13-7.5, enacted by L. 1989, ch. 245, § 5; 1991, ch. 193, § 1.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, added the Subsection (1) designation and added Subsection (2); substituted "Except as provided for in Subsection (2), when the department determines that a person in its custody is" for "For persons in the custody of the department who the de-

partment has determined to be" and made a stylistic change in the first sentence in Subsection (1); and inserted "or other public or private mental health care providers" and made related changes in the second sentence in Subsection (1).

Effective Dates. — Laws 1989, ch. 245, § 8 makes the act effective on July 1, 1989.

COLLATERAL REFERENCES

A.L.R. — Right of state prison authorities to administer neuroleptic or antipsychotic drugs

to prisoner without his or her consent—state cases, 75 A.L.R.4th 1124.

64-13-8. Designation of employee powers.

The department shall designate by policy which of its employees have the authority and powers of peace officers, the power to administer oaths, and other powers the department considers appropriate, including but not limited to the responsibility to bear firearms.

History: C. 1953, 64-13-8, enacted by L. 1985, ch. 211, § 3; 1987, ch. 116, § 4.

Amendment Notes. — The 1987 amendment deleted the former first sentence; and

substituted "its" for "those" and "considers" for "deems" and inserted "authority and" in the remaining sentence.

COLLATERAL REFERENCES

A.L.R. — Probation officer's liability for negligent supervision of probationer, 44 A.L.R.4th 638.

64-13-9. Repealed.

Repeals. — Laws 1987, ch. 116, § 28 repeals § 64-13-9, as enacted by Laws 1985, ch. 211,

§ 4, relating to department services to other agencies, effective April 27, 1987.

64-13-10. Department duties.

The department shall provide probation supervision programs, parole supervision programs, correctional facilities, community correctional centers, and other programs or facilities as necessary and as required to accomplish its purposes.

History: C. 1953, 64-13-10, enacted by L. 1985, ch. 211, § 5; 1987, ch. 116, § 5.

Amendment Notes. — The 1987 amendment substituted "correctional" for "prison"

and "necessary and as required to accomplish its purposes" for "required for the safe management of public offenders."

COLLATERAL REFERENCES

A.L.R. — Constitutional right of prisoners to abortion services and facilities — federal cases, 90 A.L.R. Fed. 683.

64-13-10.5, 64-13-11. Repealed.

Repeals. — Laws 1992, ch. 90, § 2 repeals § 64-13-10.5, as enacted by L. 1987, ch. 157, § 2, relating to education of persons in custody of Department of Corrections, contracting for services, transfer of supplies, equipment, furniture, and budget, and joint committee, effective

April 27, 1992. For present comparable provisions, see § 53A-1-403.5.

Laws 1987, ch. 116, § 28 repeals § 64-13-11, as enacted by Laws 1985, ch. 211, § 6, relating to evaluation programs, effective April 27, 1987.

64-13-12. Assistance to sheriffs.

Where resources permit, the department may assist county sheriffs in the development of jail standards, in the review of jail facilities, and shall provide other services as requested by the sheriffs.

History: C. 1953, 64-13-12, enacted by L. 1985, ch. 211, § 7; 1987, ch. 116, § 6; 1988, ch. 100, § 2.

Amendment Notes. — The 1987 amendment divided the section into subsections; added "Where resources permit" to the beginning of Subsection (1), substituted "may assist" for "shall assist" and "in the review of jail facilities, and shall provide" for "review of facilities, and" and deleted "where available re-

sources permit" following "by the sheriffs" in Subsection (1); and substituted "of" for "for" preceding "an offender" in Subsection (2)(a).

The 1988 amendment, effective July 1, 1990, deleted former Subsection (2), pertaining to reimbursement of a county for the incarceration of a felon, and deleted the Subsection (1) designation from the remaining paragraph.

64-13-13. Administrators.

The executive director shall appoint deputy directors, wardens, regional administrators, and other administrators as necessary to administer correctional programs. Deputy directors, wardens, and regional administrators shall have experience in corrections, related criminal justice fields, law, or criminology, and experience in administration.

History: C. 1953, 64-13-13, enacted by L. 1985, ch. 211, § 8; 1987, ch. 116, § 7.

Amendment Notes. — The 1987 amendment inserted "wardens, regional administrators, and other administrators" and made a

punctuation change in the first sentence and deleted the former second sentence, authorizing the appointment of regional administrators and wardens.

64-13-14. Secure correctional facilities.

(1) The department shall maintain and operate secure correctional facilities for the incarceration of offenders.

For each compound of secure correctional facilities, as established by the executive director, wardens shall be appointed as the chief administrative officers by the executive director.

(2) The department may transfer offenders from one correctional facility to another and may, with the consent of the sheriff, transfer any offender to a county jail.

History: C. 1953, 64-13-14, enacted by L. 1985, ch. 211, § 9; 1987, ch. 116, § 8.

Amendment Notes. — The 1987 amendment rewrote this section.

64-13-14.5. Limits of confinement place — Release status — Work release.

(1) The department may extend the limits of the place of confinement of an inmate when, as established by department policies and procedures, there is cause to believe the inmate will honor his trust, by authorizing him under prescribed conditions:

(a) to leave temporarily for purposes specified by department policies and procedures to visit specifically designated places for a period not to exceed 30 days;

(b) to participate in a voluntary training program in the community while housed at a correctional facility or to work at paid employment;

(c) to be housed in a nonsecure community correctional center operated by the department; or

(d) to be housed in any other facility under contract with the department.

(2) The department shall establish rules governing offenders on release status. A copy of the rules shall be furnished to the offender and to any employer or other person participating in the offender's release program. Any employer or other participating person shall agree in writing to abide by the rules and to notify the department of the offender's discharge or other release from a release program activity, or of any violation of the rules governing release status.

(3) The willful failure of an inmate to remain within the extended limits of his confinement or to return within the time prescribed to an institution or facility designated by the department is an escape from custody.

(4) If an offender is arrested for the commission of a crime, the arresting authority shall immediately notify the department of the arrest.

(5) The department may impose appropriate sanctions upon offenders who violate rules, including prosecution for escape under Section 76-8-309 and for unauthorized absence.

(6) An inmate who is housed at a nonsecure correctional facility and on work release may not be required to work for less than the current federally established minimum wage, or under substandard working conditions.

History: C. 1953, 64-13-14.5, enacted by L. 1987, ch. 116, § 9.

64-13-14.7. Victim notification of offender's release.

(1) As used in this section:

(a) "Offender" means a person who committed an act of criminally injurious conduct against the victim and has been sentenced to incarceration in the custody of the department.

(b) "Victim" means a person against whom an offender committed criminally injurious conduct as defined in Section 63-63-2, and who is entitled to notice of hearings regarding the offender's parole under Section 77-27-9.5. "Victim" includes the legal guardian of a victim, or the representative of the family of a victim who is deceased.

(2) (a) A victim shall be notified of an offender's release under Section 64-13-14.5, or any other release to or from a half-way house, to a program outside of the prison such as a rehabilitation program, state hospital, community center other than a release on parole, commutation or termination for which notice is provided under Section 77-27-9.5, transfer of the offender to an out-of-state facility, or an offender's escape, upon submitting a signed written request of notification to the Department of Corrections. The request shall include a current mailing address and may include current telephone numbers if the victim chooses.

(b) The department shall advise the victim of an offender's release or escape under Subsection (2)(a), in writing. However, if written notice is not feasible because the release is immediate or the offender escapes, the department shall make a reasonable attempt to notify the victim by telephone if the victim has provided a telephone number under Subsection (2)(a) and shall follow up with a written notice.

(3) Notice of victim rights under this section shall be provided to the victim in the notice of hearings regarding parole under Section 77-27-9.5. The department shall coordinate with the Board of Pardons to ensure the notice is implemented.

(4) A victim's request for notification under this section and any notification to a victim under this section is private information that the department may not release:

(a) to the offender under any circumstances; or

(b) to any other party without the written consent of the victim.

(5) The department may make rules as necessary to implement this section.

(6) The department or its employees acting within the scope of their employment are not civilly or criminally liable for failure to provide notice or improper notice under this section unless the failure or impropriety is willful or grossly negligent.

History: C. 1953, 64-13-14.7, enacted by L. 1991, ch. 11, § 1. came effective on April 29, 1991, pursuant to Utah Const., Art. VI, Sec. 25.

Effective Dates. — Laws 1991, ch. 11 be-

64-13-15. Property of offender — Storage and disposal.

(1) (a) Offenders may retain personal property at correctional facilities only as authorized by the department. An offender's property which is retained by the department shall be inventoried and placed in storage by the department and a receipt for the property shall be issued to the offender. Offenders shall be required to arrange for disposal of property retained by the department within a reasonable time under department rules. Property retained by the department shall be returned to the offender at discharge, or in accordance with Title 75, Utah Uniform Probate Code, in the case of death prior to discharge.

(b) If property is not claimed within one year of discharge, or it is not disposed of by the offender within a reasonable time after the department's order to arrange for disposal, it becomes property of the state and may be used for correctional purposes or donated to a charity within the state.

(c) If an inmate's property is not claimed within one year of his death, it becomes the property of the state in accordance with Section 75-2-105.

(d) Funds which are contraband and in the physical custody of any prisoner, whether in the form of currency and coin which are legal tender in any jurisdiction or negotiable instruments drawn upon a personal or business account, shall be subject to forfeiture following a hearing which accords with prevailing standards of due process. All such forfeited funds shall be used by the department for purposes which promote the general welfare of prisoners in the custody of the department. Money and negotiable instruments taken from offenders' mail under department rule and which are not otherwise contraband shall be placed in an account administered by the department, to the credit of the offender who owns the money or negotiable instruments.

(2) Upon discharge from a secure correctional facility, the department may give an inmate transition funds in an amount established by the department with the approval of the director of the Division of Finance. At its discretion, the department may spend the funds directly on the purchase of necessities or transportation for the discharged inmate.

History: C. 1953, 64-13-15, enacted by L. 1985, ch. 211, § 10; 1987, ch. 116, § 10; 1988, ch. 191, § 1; 1991, ch. 124, § 1.

Amendment Notes. — The 1987 amendment, in Subsection (1), substituted references to "offender" for references to "inmate" throughout the subsection, substituted "personal property at correctional facilities only as authorized" for "property only as is authorized" in the first sentence, made a punctuation change in the third sentence, substituted "one year" for "two years" and "and may be used for correctional purposes or donated to a charity within the state" for "consistent with the provisions of Chapter 44, Title 78" in the fourth sentence, and rewrote the last sentence; in Subsection (2), substituted "a secure correctional facility, the department may give an inmate" for "prison, inmates shall receive" in the first sentence, substituted "its discretion, the department may spend the funds" for "the discretion of the department, the funds may be spent" in the second sentence, and added "for the discharged inmate" to the end of the subsection.

The 1988 amendment, effective April 25, 1988, in Subsection (1) divided the subsection

into the present paragraphs and added the designations; in Subsection (1)(a), inserted the third sentence and, in the fourth sentence, substituted at the beginning "Property retained by the department" for "The property"; in Subsection (1)(b), inserted "or it is not disposed of by the offender within a reasonable time"; and, in Subsection (1)(c), deleted "held by the department" following "instruments" at the end of the subsection.

The 1991 amendment, effective April 29, 1991, substituted "shall be required" for "may be required" in the third sentence and "in accordance with Title 75, Utah Uniform Probate Code" for "to the offender's legal representative" in the fourth sentence in Subsection (1)(a); deleted "death or" after "year of" and inserted "after the department's order to arrange for disposal" in Subsection (1)(b); and added present Subsection (1)(c) and the first two sentences in Subsection (1)(d) making former Subsection (1)(c) the final sentence in Subsection (1)(d) and substituting "offenders' mail under department rule and which are not otherwise contraband" for "offenders or from their mail under department rule" therein.

COLLATERAL REFERENCES

A.L.R. — Validity and construction of prison regulation of inmates' possession of personal property, 66 A.L.R.4th 800.

64-13-16. Inmate employment.

Unless incapable of employment because of sickness or other infirmity or for security reasons, the department may employ inmates to the degree that funding and available resources allow. An offender may not be employed on work which benefits any employee or officer of the department.

History: C. 1953, 64-13-16, enacted by L. 1985, ch. 211, § 11; 1987, ch. 116, § 11.

Amendment Notes. — The 1987 amendment substituted "the department may employ inmates to the degree that funding and available resources allow" for "inmates shall be em-

ployed on a regular basis, as is practicable" at the end of the first sentence, substituted "An offender may not" for "No inmate may" at the beginning of the second sentence, and deleted the former third, fourth, and last sentences.

64-13-17. Visitors to correctional facilities — Correspondence.

(1) (a) The following persons may visit correctional facilities without the consent of the department: the governor; attorney general; judges of the circuit, district, and appellate courts; members of the Corrections Advisory Council; members of the Board of Pardons; members of the Legislature; and any other persons authorized under rules prescribed by the department or court order.

(b) Any person acting under a court order may visit or correspond with any inmate without the consent of the department.

(c) The department may limit access to correctional facilities when the department or governor declares an emergency or when there is a riot or other disturbance.

(2) A person may not visit with any offender at any correctional facility, other than under Subsection (1), without the consent of the department. Offenders and all visitors may be required to submit to a search or inspection of their persons and properties as a condition of visitation.

(3) Offenders housed at any correctional facility may send and receive correspondence, subject to the rules of the department. All correspondence is subject to search, consistent with department rules.

History: C. 1953, 64-13-17, enacted by L. 1985, ch. 211, § 12; 1987, ch. 116, § 12.

Amendment Notes. — The 1987 amendment divided Subsection (1) into present Subsections (1)(a) and (1)(b) and added present Subsection (1)(c); in Subsection (1)(a), substituted "correctional" for "state prison" near the beginning of the subsection; in Subsection (2), substituted "A person may not" for "No person may", "offender at any correctional facility" for

"inmate", and "under" for "those provided for in" in the first sentence, substituted "Offenders" for "Inmates" and deleted "exercising" preceding "visitation" in the second sentence, and deleted the former third sentence as set out in the bound volume; and, in Subsection (3), substituted "Offenders housed at any correctional facility" for "Inmates" in the first sentence.

COLLATERAL REFERENCES

A.L.R. — Validity and construction of prison regulation of inmates' possession of personal property, 66 A.L.R.4th 800.

64-13-18. Sentence of incarceration.

The officer delivering any offender for incarceration shall deliver to the department a certified copy of the sentence received by the officer from the clerk of the court. The department shall give the officer a certificate of delivery and shall submit to the Board of Pardons a copy of the commitment order. The certified copy of sentence is conclusive evidence of the facts contained in it.

History: C. 1953, 64-13-18, enacted by L. 1985, ch. 211, § 13.

Repeals and Enactments. — Laws 1985, ch. 211, § 13 repeals former § 64-13-18, as enacted by Laws 1977, ch. 253, § 18, relating

to repair of damaged property, and enacts the above section.

Cross-References. Pardons and paroles, Chapter 27 of Title 77.

64-13-19. Labor at correctional facilities.

The department shall determine the types of labor to be pursued, and what kind, quality, and quantity of goods, materials, and supplies shall be produced, manufactured, or repaired at correctional facilities. Contracts may be made for the labor of offenders, including contracts with any federal agency for a project affecting national defense. As many offenders as practicable may be employed to produce, manufacture, or repair any goods, materials, or supplies for sale to the state or its political subdivisions. Prices for all goods, materials, and supplies shall be fixed by the department.

History: C. 1953, 64-13-19, enacted by L. 1985, ch. 211, § 14; 1987, ch. 116, § 13.

Amendment Notes. — The 1987 amendment substituted "correctional facilities" for

"the prisons" at the end of the first sentence and "offenders" for "inmates" in the second and third sentences, and inserted "sale to" in the third sentence.

64-13-20. Investigative services — Presentence investigations and diagnostic evaluations.

- (1) The department shall:
 - (a) provide investigative and diagnostic services and prepare reports to:
 - (i) assist the courts in sentencing;
 - (ii) assist the Board of Pardons in its decision-making responsibilities regarding offenders;
 - (iii) assist the department in managing offenders; and
 - (iv) assure the professional and accountable management of the department;
 - (b) establish standards for providing investigative and diagnostic services based on available resources, giving priority to felony cases;
 - (c) employ staff for the purpose of conducting:
 - (i) thorough presentence investigations of the social, physical, and mental conditions and backgrounds of offenders;
 - (ii) examinations when required by the court or Board of Pardons; and
 - (iii) thorough diagnostic evaluations of offenders as the court finds necessary to supplement the presentence investigation report under Section 76-3-404.
- (2) The department may provide recommendations concerning appropriate measures to be taken regarding offenders.
- (3) (a) The presentence diagnostic evaluation and investigation reports prepared by the department are confidential as defined in Section 77-18-1 and after sentencing may not be released except by express court order or by rules made by the Department of Corrections.
 - (b) The reports are intended only for use by:
 - (i) the court in the sentencing process;
 - (ii) the Board of Pardons in its decision-making responsibilities; and
 - (iii) the department in the supervision, confinement, and treatment of the offender.
- (4) Presentence diagnostic evaluation and investigation reports shall be made available upon request to other correctional programs within the state if

the offender who is the subject of the report has been committed or is being evaluated for commitment to the facility for treatment as a condition of probation or parole.

(5) (a) The presentence investigation reports shall include a victim impact statement in all felony cases and in misdemeanor cases if the defendant caused bodily harm or death to the victim.

(b) Victim impact statements shall:

- (i) identify the victim of the offense;
- (ii) itemize any economic loss suffered by the victim as a result of the offense;
- (iii) identify any physical, mental, or emotional injuries suffered by the victim as a result of the offense, and the seriousness and permanence;
- (iv) describe any change in the victim's personal welfare or familial relationships as a result of the offense;
- (v) identify any request for mental health services initiated by the victim or the victim's family as a result of the offense; and
- (vi) contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

(6) If the victim is deceased; under a mental, physical, or legal disability; or otherwise unable to provide the information required under this section, the information may be obtained from the personal representative, guardian, or family members, as necessary.

(7) The department shall employ staff necessary to pursue investigations of complaints from the public, staff, or offenders regarding the management of corrections programs.

History: C. 1953, 64-13-20, enacted by L. 1985, ch. 211, § 15; 1987, ch. 116, § 14; 1991, ch. 206, § 4.

Amendment Notes. — The 1987 amendment redesignated Subsections (1) through (3) as present Subsections (1)(a) through (1)(c), Subsection (4) as present Subsections (1)(d) through (1)(f), and Subsection (5) as present Subsection (2), respectively; designated the former introductory language as the introductory language of present Subsection (1); substituted "investigative services" for "investigative functions," "to assist" for "functions, and" preceding "the Board of Pardons" and "offenders" for "the offender" and inserted "to assist" preceding "the department" in the introductory language of Subsection (1); deleted "subject to the limitations of Subsection 64-13-15 (1)" from the end of the first sentence of Subsection (1)(b); substituted "regarding" for "on behalf of" in the second sentence of Subsection (1)(b); deleted the former third sentence of Subsection (1)(b) as set out in the bound volume; rewrote

Subsection (1)(c); deleted "the defendant, his attorney, the state's attorney, and" preceding "other correctional programs" in Subsection (1)(d); redesignated Subsections (4)(a) through (4)(f) as present Subsections (1)(e)(i) through (1)(e)(vi); substituted "and" for "along with" in Subsection (1)(e)(iii).

The 1991 amendment, effective April 29, 1991, rewrote Subsection (1) as Subsections (1) through (6), adding or changing the subsection designations, adding Subsections (1)(c)(iii) and (3)(b), inserting references to "diagnostic services" in Subsections (1)(a) and (1)(b), inserting references to "presentence diagnostic evaluation and investigation reports" in Subsections (3)(a) and (4), substituting the language beginning with "as defined" in Subsection (3)(a) for "under Chapter 2, Title 63, regarding information practices," and making several stylistic changes throughout Subsections (1) through (6), and redesignated Subsection (2) as Subsection (7).

NOTES TO DECISIONS

Cited in *State v. Thurston*, 781 P.2d 1296 (Utah Ct. App. 1989).

64-13-21. Supervision of sentenced offenders placed in community.

The department, except as otherwise provided by law, shall supervise sentenced offenders placed in the community on probation by the courts, on parole by the Board of Pardons, or upon acceptance for supervision under the terms of the Interstate Compact for the Supervision of Parolees and Probationers. Standards for the supervision of offenders shall be established by the department, giving priority, based on available resources, to felony offenders.

History: C. 1953, 64-13-21, enacted by L. 1985, ch. 211, § 16; 1987, ch. 116, § 15. **Amendment Notes.** — The 1987 amendment rewrote the first sentence and made a minor phraseology change in the second sentence.

64-13-22. Repealed.

Repeals. — Laws 1987, ch. 116, § 28 repeals § 64-13-22, as enacted by Laws 1985, ch. 211, § 17, relating to community-based programs, effective April 27, 1987.

64-13-23. Offender's income and finances.

The department may require each offender, while in the custody of the department or while on probation or parole, to place funds received or earned by him from any source into an account administered by the department or into a joint account with the department at a federally insured financial institution.

(1) The department may require each offender to maintain a minimum balance in either or both accounts for the particular offender's use upon discharge from the custody of the department or upon completion of parole or probation.

(2) If the funds are placed in a joint account at a federally insured financial institution:

(a) any interest accrues to the benefit of the offender account; and

(b) the department may require that the signatures of both the offender and a departmental representative be submitted to the financial institution to withdraw funds from the account.

(3) If the funds are placed in an account administered by the department, the department may by rule designate a certain portion of the offender's funds as interest-bearing savings, and another portion as non-interest-bearing to be used for day-to-day expenses.

(4) The department may withhold part of the offender's funds in either account for expenses of incarceration, supervision, or treatment; for court-ordered restitution, reparation, fines, alimony, support payments or similar court-ordered payments; for department-ordered restitution; and for any other debt to the state.

(5) (a) Offenders shall not be granted free process in civil actions, including petitions for a writ of habeas corpus, if, at any time from the

date the cause of action arose through the date the cause of action remains pending, there are any funds in either account which have not been withheld or are not subject to withholding under Subsection (3) or (4).

(b) The amount assessed for the filing fee, service of process and other fees and costs shall not exceed the total amount of funds the offender has in excess of the indigence threshold established by the department but not less than \$25 including the withholdings under Subsection (3) or (4) during the identified period of time.

(c) The amounts assessed shall not exceed the regular fees and costs provided by law.

(6) The department may disclose information on offender accounts to the Office of Recovery Services and other appropriate state agencies.

History: C. 1953, 64-13-23, enacted by L. 1987, ch. 116, § 16; 1991, ch. 125, § 1; 1992, ch. 217, § 1.

Repeals and Reenactments. — Laws 1987, ch. 116, § 16 repeals former § 64-13-23, as enacted by Laws 1985, ch. 211, § 18, relating to compensation for inmate employment, and enacts the present section.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, inserted "while in the custody of the department or while on probation or parole" and substituted "funds re-

ceived or earned by him from any source" for "his income from employment while in the custody of the department or while on probation or parole" in the introductory paragraph and deleted "in its discretion" after "department may" in Subsection (5).

The 1992 amendment, effective April 27, 1992, inserted "the funds are" after "If" in Subsections (2) and (3); made a stylistic change in Subsection (4); added Subsection (5); and redesignated former Subsection (5) as Subsection (6).

64-13-24. Standards for staff training.

To assure the safe and professional operation of correctional programs, the department shall establish policies setting minimum standards for the basic training of all staff upon employment, and the subsequent regular training of staff. The training standards of correctional officers who are designated as peace officers shall be not less than those established by the Peace Officer Standards and Training Council.

History: C. 1953, 64-13-24, enacted by L. 1985, ch. 211, § 19; 1987, ch. 116, § 17.

Amendment Notes. — The 1987 amendment substituted "staff upon employment" for "newly employed staff," inserted "subsequent,"

and made a punctuation change in the first sentence; and inserted "correctional officers who are designated as" and substituted "shall be not" for "may not be" in the second sentence.

64-13-25. Standards for programs.

(1) To promote accountability and to ensure safe and professional operation of correctional programs, the department shall establish minimum standards for the organization and operation of its programs.

(a) The standards shall be promulgated according to state rulemaking provisions. Those standards that apply to offenders are exempt from the provisions of Title 63, Chapter 46a, the Utah Administrative Rulemaking Act. Offenders are not a class of persons under that act.

(b) Standards shall provide for inquiring into and processing offender complaints.

(2) There shall be an audit for compliance with standards according to policies and procedures established by the department, for continued operation of correctional programs.

(a) At least every three years, the department shall internally audit all programs for compliance with established standards.

(b) All financial statements and accounts of the department shall be reviewed during the audit. Written review shall be provided to the managers of the programs and the executive director of the department.

(c) The reports shall be classified as confidential internal working papers and access is available at the discretion of the executive director or the governor, or upon court order.

History: C. 1953, 64-13-25, enacted by L. 1985, ch. 211, § 20; 1987, ch. 116, § 18.

Amendment Notes. — The 1987 amendment substituted "its" for "the" near the end of the introductory paragraph of Subsection (1); deleted "and shall encompass all aspects of the department operations" from the end of the first sentence of Subsection (1)(a); added the second sentence of Subsection (1)(a); deleted "a means of" preceding "inquiring" in Subsection (1)(b); substituted "There shall be an audit for" for "Certification of" and a comma for "is re-

quired" in the introductory paragraph of Subsection (2); substituted "three years" for "two years" and "for compliance" for "and certify compliance or noncompliance" in Subsection (2)(a); substituted "available at the discretion of the executive director or the governor, or upon court order" for "governed by the State Information Practices Act" in Subsection (2)(c); and deleted former Subsection (2)(d), denying certification to programs not complying with standards.

64-13-26. Private providers of services.

(1) The department may contract with private providers or other agencies for the provision of care, treatment, and supervision of offenders committed to the care and custody of the department.

(2) (a) The department shall:

(i) establish standards for the operation of the programs; and

(ii) annually review the programs for compliance.

(b) The reviews shall be classified as confidential internal working papers.

(c) Access to records regarding the reviews is available upon the discretion of the executive director or the governor, or upon court order.

History: C. 1953, 64-13-26, enacted by L. 1985, ch. 211, § 21; 1987, ch. 116, § 19; 1989, ch. 224, § 2.

Amendment Notes. — The 1987 amendment substituted "The department may contract" for "Nothing in this chapter prohibits the department from contracting" and "reviewed for compliance with standards set by the department" for "certified to be in compliance with the departmental standards" in the first sentence, added "and annually thereafter" to the end of the first sentence, and added the second and third sentences.

The 1989 amendment, effective April 24, 1989, designated the first sentence as present Subsection (1); deleted "if the programs are reviewed for compliance with standards set by the department within six months after commencing operation and annually thereafter" at the end of Subsection (1); added Subsection (2)(a); designated the former second sentence of the section as Subsection (2)(b); and designated the former third sentence of the section as Subsection (2)(c) and inserted "to records regarding the reviews" therein.

64-13-27. Records — Access.

(1) (a) The State Bureau of Criminal Identification, county attorneys' offices, and state and local law enforcement agencies shall furnish to the department upon request a copy of records of any person arrested in this state.

(b) The department shall maintain centralized files on all offenders under the jurisdiction of the department and make the files available for review by other criminal justice agencies upon request in cases where offenders are the subject of active investigations.

(2) All records maintained by programs under contract to the department providing services to public offenders are the property of the department.

History: C. 1953, 64-13-27, enacted by L. 1985, ch. 211, § 22; 1987, ch. 116, § 20; 1989, ch. 224, § 3.

Amendment Notes. — The 1987 amendment deleted "public" preceding "offenders" in the second sentence of Subsection (2).

The 1989 amendment, effective April 24, 1989, designated the first and second sentences of Subsection (1) as Subsections (1)(a) and (b)

and, in Subsection (2), deleted "and shall be returned to it when the offender is terminated from the program" at the end of the present provision and a second sentence that read "The department shall maintain an accurate audit record of information provided to other programs or agencies regarding offenders under its jurisdiction."

64-13-28. Hearings involving staff or offenders.

(1) The department shall maintain an administrative hearing office to conduct hearings regarding offenders in the custody of the department, issues involving staff, or any other administrative matters as assigned by the executive director of the Department of Corrections. The hearing officer may issue subpoenas, compel attendance of witnesses and the production of books, papers, and other documents, administer oaths, and take testimony under oath.

(2) The hearing officer shall maintain a summary record of all hearings and provide timely written notice to participants of the decision and the reasons for the decision.

History: C. 1953, 64-13-28, enacted by L. 1985, ch. 211, § 23; 1987, ch. 116, § 21; 1988, ch. 191, § 2.

Amendment Notes. — The 1987 amendment substituted "may issue" for "shall be appointed by the executive director and has the power to issue" in the second sentence.

The 1988 amendment, effective April 25, 1988, divided the former provisions into present Subsection (1) and Subsection (2); in

the first sentence of Subsection (1), substituted "hearings regarding offenders in the custody of the department, issues involving staff, or any other administrative matters as assigned by the executive director of the Department of Corrections" for "investigative hearings regarding offenders under supervision, staff matters in dispute, or other administrative matters in dispute"; and, in Subsection (2), inserted "timely."

64-13-29. Violation of parole or probation — Detention — Hearing.

(1) The department shall ensure that the court is notified of violations of the terms and conditions of probation in the case of probationers under the department's supervision, or the Board of Pardons in the case of parolees under the department's supervision. In cases where the department desires to detain an offender alleged to have violated his parole or probation and where

it is unlikely that the Board of Pardons or court will conduct a hearing within a reasonable time to determine if the offender has violated his conditions of parole or probation, the department shall hold an administrative hearing within a reasonable time, unless the hearing is waived by the parolee or probationer, to determine if there is probable cause to believe that a violation has occurred. If there is a conviction for a crime based on the same charges as the probation or parole violation, or a finding by a federal or state court that there is probable cause to believe that an offender has committed a crime based on the same charges as the probation or parole violation, the department need not hold its administrative hearing.

(2) The appropriate officer or officers of the department shall, as soon as practical following the department's administrative hearing, report to the court or the Board of Pardons, furnishing a summary of the hearing, and may make recommendations regarding the disposition to be made of the parolee or probationer. Pending any proceeding under this section, the department may take custody of and detain the parolee or probationer involved for a period not to exceed 72 hours excluding weekends and holidays.

(3) If the hearing officer determines that there is probable cause to believe that the offender has violated the conditions of his parole or probation, the department may detain the offender for a reasonable period of time after the hearing or waiver, as necessary to arrange for the incarceration of the offender. Written order of the department is sufficient authorization for any peace officer to incarcerate the offender. The department may promulgate rules for the implementation of this section.

History: C. 1953, 64-13-29, enacted by L. 1985, ch. 211, § 24; 1987, ch. 116, § 22.

Amendment Notes. — The 1987 amendment divided the section into subsections; substituted "violations" for "any violation," "probation" for "supervision," "probationers under the department's" for "probation offenders under probation," and "parolees under the department's" for "offenders under parole" in the first sentence of Subsection (1); substituted the language beginning "In cases where the department desires" and ending "his conditions of parole or probation" for "Prior to giving any notification" and "probable cause" for "reasonable cause" in the second sentence of Subsection (1); added the third sentence of Subsection (1); substituted "the department's administrative hearing" for "termination of any hearing" and "may make" for "making" in the first sentence of Subsection (2); substituted "under" for "pur-

suant to" and deleted "prior to the hearing" following "holidays" in the second sentence of Subsection (2); substituted "the hearing officer determines that there is probable cause to believe that the offender has violated the conditions of his parole or probation, the department may detain the offender" for "it appears to the hearing officer or officers that retaking or reincarceration is likely to follow, the parolee or probationer may be detained" and "incarceration of the offender" for "retaking or reincarceration" in the first sentence of Subsection (3); substituted "incarcerate the offender" for "effect retaking or reincarceration" in the second sentence of Subsection (3); and substituted "may promulgate rules" for "is authorized to promulgate appropriate policies and procedures" in the last sentence of Subsection (3).

64-13-30. Expenses incurred by offenders — Payment to department.

(1) The department shall establish and collect from offenders on work release programs reasonable costs of maintenance, transportation, and incidental expenses incurred by the department on behalf of the offenders. Priority shall be given to restitution and family support obligations.

(2) The department, under its rules, may advance funds to any offender as necessary to establish the offender in a work release program.

History: C. 1953, 64-13-30, enacted by L. 1985, ch. 211, § 25; 1987, ch. 116, § 23.

Amendment Notes. — The 1987 amendment deleted the second sentence of Subsection

(1) and substituted "its rules" for "rules it prescribes" and made a punctuation change in Subsection (2).

64-13-31. Emergencies.

In the case of riots, disturbances, or other emergencies at correctional facilities, the Department of Corrections has authority to direct the resolution of the emergencies. The department may request and coordinate the assistance of other state and local agencies in responding to the emergencies.

History: C. 1953, 64-13-31, enacted by L. 1985, ch. 211, § 26; 1987, ch. 116, § 24.

Amendment Notes. — The 1987 amend-

ment substituted "at" for "in" preceding "correctional facilities" in the first sentence.

64-13-32. Discipline of offenders — Use of force.

If an offender offers violence to an officer or other employee of the Department of Corrections, or to another offender, or to any other person; attempts to damage or damages any corrections property; attempts to escape; or resists or refuses to obey any lawful and reasonable command; the officers and other employees of the department may use all reasonable means, including the use of weapons, to defend themselves and department property and to enforce the observance of discipline and prevent escapes. An inmate in the act of escaping from a secure correctional facility is presumptive evidence that he poses a threat of death or serious bodily injury to an officer or others if apprehension is delayed.

History: C. 1953, 64-13-32, enacted by L. 1985, ch. 211, § 27; 1987, ch. 116, § 25.

Amendment Notes. — The 1987 amend-

ment substituted "offender, or to any" for "inmate or" and made punctuation changes in the first sentence and added the second sentence.

64-13-33. Restitution for offenses.

Following an administrative hearing, the department is authorized to require restitution from an offender for expenses incurred by the department as a result of the offender's violation of department rules. The department is authorized to require payment from the offender's account or to place a hold on it to secure compliance with this section.

History: C. 1953, 64-13-33, enacted by L. 1985, ch. 211, § 28.

64-13-34. Safety of offenders.

In case of disaster or acts of God that threaten the safety of inmates or the security of a secure correctional facility, inmates may be moved to a suitable place of security. Inmates shall be returned to a correctional facility as soon as it is practicable.

History: C. 1953, 64-13-34, enacted by L. 1985, ch. 211, § 29; 1987, ch. 116, § 26.

Amendment Notes. — The 1987 amendment substituted "a secure correctional facility" for "the prison" and deleted "where those

who are ill shall receive necessary medical care and attention" following "place of security" in the first sentence; and substituted "a correctional facility" for "the prison" and "practicable" for "safe" in the second sentence.

64-13-35. Items prohibited in correctional facilities — Penalties.

(1) Except as provided by department policy, no firearm, dangerous weapon, implement of escape, explosive, drug, spirituous or fermented liquor, medicine, or poison may be:

(a) transported to or upon a correctional facility or its appurtenant grounds;

- (b) sold or given away at any correctional facility or in any building appurtenant to a secure correctional facility, or on land granted to the state for the use and benefit of the department; or
- (c) given to, or used by, any offender at a correctional facility.
- (2) (a) Any person who transports to or upon a correctional facility or its appurtenant grounds any firearm, dangerous weapon, implement of escape, or explosive, with intent to provide or sell it to any offender, is guilty of a second degree felony.
- (b) Any person who provides or sells to any offender at a correctional facility any firearm, dangerous weapon, implement of escape, or explosive, is guilty of a second degree felony.
- (c) Any offender who possesses at a correctional facility any firearm, dangerous weapon, implement of escape, or explosive, is guilty of a second degree felony.
- (3) As used in this section, "drug" means any chemical or physical substance in any of its physical or chemical states as defined in the Controlled Substances Act.
- (4) Penalties for drug violations under this section are as provided in Section 58-37-8, Controlled Substances Act.

History: C. 1953, 64-13-35, enacted by L. 1985, ch. 211, § 30; 1987, ch. 116, § 27; 1990, ch. 238, § 1.

Amendment Notes. — The 1987 amendment substituted "by department policy, no firearm, dangerous weapon, explosive" for "in Subsection (2), no" and made a punctuation change in the introductory language of Subsection (1); substituted "a correctional facility or its appurtenant grounds" for "corrections premises" in Subsection (1)(a); substituted "at any correctional facility" for "in any prison",

"secure correctional facility" for "prison," and "the department" for "prisons" in Subsection (1)(b); substituted "offender at a correctional facility" for "inmate in the prison except under direction of department medical authorities" in Subsection (1)(c); and rewrote Subsection (2).

The 1990 amendment, effective April 23, 1990, inserted "implement of escape" throughout this section and added Subsection (4).

Cross-References. — Sentencing for felonies, §§ 76-3-201, 76-3-203, 76-3-301.

64-13-36. Testing of prisoners for AIDS and HIV infection — Segregation — Medical care — Department authority.

- (1) For purposes of this section:
 - (a) "Prisoner" means a person who has been adjudicated and found guilty of a criminal offense, who is in the custody of and under the jurisdiction of the department.
 - (b) "Test" or "testing" means a test or tests for Acquired Immunodeficiency Syndrome or Human Immunodeficiency Virus infection in accordance with standards recommended by the Department of Health.
- (2) (a) Within 90 days after July 1, 1989, the effective date of this act, the department shall test or provide for testing of all prisoners who are under the jurisdiction of the department, and subsequently test or provide for testing of all prisoners who are committed to the jurisdiction of the department upon admission or within a reasonable period after admission.
- (b) At the time that test results are provided to persons tested, the department shall provide education and counseling regarding Acquired Immunodeficiency Syndrome and Human Immunodeficiency Virus infection.

(3) (a) The results of tests conducted under Subsection (2) shall become part of the inmate's medical file, accessible only to persons designated by the department by rule, and in accordance with any other legal requirement for reporting of Acquired Immunodeficiency Syndrome or Human Immunodeficiency Virus infection.

(b) Medical and epidemiological information regarding results of tests conducted under Subsection (2) shall be provided to the Department of Health.

(4) (a) The department shall house prisoners who test positive for Acquired Immunodeficiency Syndrome or Human Immunodeficiency Virus infection in a single cell or room or provide for segregation of that person from members of the prison population. No person who tests negative for Acquired Immunodeficiency Syndrome or Human Immunodeficiency Virus infection may be placed or housed in a cell or room with a person who has tested positive for either of those conditions, except upon his written request.

(b) The department shall provide reasonable and adequate medical care for members of the prison population who test positive for Acquired Immunodeficiency Syndrome or Human Immunodeficiency Virus infection.

(c) The department has authority to take action with regard to any prisoner who has tested positive for Acquired Immunodeficiency Syndrome or Human Immunodeficiency Virus infection, as it deems reasonable and necessary for the safety and security of the prison population and prison staff.

(d) This subsection does not require or suggest that prisoners who test positive for Acquired Immunodeficiency Syndrome or Human Immunodeficiency Virus infection be placed in separate cell blocks or cell areas separate from the general prison population, unless such separation is medically necessary for the protection of the general prison population or staff.

(e) Prisoners who test positive for Acquired Immunodeficiency Syndrome or Human Immunodeficiency Virus infection may not be excluded from common areas of the prison that are accessible to other prisoners, solely on the basis of that condition, unless it is medically necessary for protection of the general prison population or staff.

(5) If the department complies with Subsections (2), (3), and (4) it shall be considered to have discharged its duty and to have taken reasonable and necessary precautions to prevent transmission of Acquired Immunodeficiency Syndrome and Human Immunodeficiency Virus infection.

History: C. 1953, 64-13-36, enacted by L. 1989, ch. 234, § 1.

Effective Dates. — Laws 1989, ch. 234, § 2 makes the act effective on July 1, 1989.

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Legislative Enactments — Health Law, 1990 Utah L. Rev. 261.

Section

of order — Redaction — Receipt
of order — Administrative pro-
ceedings — Division require-
ments.

Section

77-18-15.

77-18-16.

77-18-17.

Retention of expunged records —
Fee — Agencies.

Penalty.

Retroactive application.

77-18-1. Suspension of sentence — Pleas held in abeyance — Probation — Supervision — Presentence investigation — Standards — Confidentiality — Terms and conditions — Restitution — Termination, revocation, modification, or extension — Hearings.

(1) On a plea of guilty or no contest entered by a defendant in conjunction with a plea in abeyance agreement, the court may hold the plea in abeyance as provided in Title 77, Chapter 2a, Pleas in Abeyance, and under the terms of the plea in abeyance agreement.

(2) (a) On a plea of guilty, guilty and mentally ill, no contest, or conviction of any crime or offense, the court may suspend the imposition or execution of sentence and place the defendant on probation. The court may place the defendant:

(i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;

(ii) on probation with an agency of local government or with a private organization; or

(iii) on bench probation under the jurisdiction of the sentencing court.

(b) (i) The legal custody of all probationers under the supervision of the department is with the Department of Corrections.

(ii) The legal custody of all probationers under the jurisdiction of the sentencing court is vested as ordered by the court. The court has continuing jurisdiction over all probationers.

(3) (a) The Department of Corrections shall establish supervision and presentence investigation standards for all individuals referred to the department. These standards shall be based on:

(i) the type of offense;

(ii) the demand for services;

(iii) the availability of agency resources;

(iv) the public safety; and

(v) other criteria established by the Department of Corrections to determine what level of services shall be provided.

(b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and the Board of Pardons and Parole on an annual basis for review and comment prior to adoption by the Department of Corrections.

(c) The Judicial Council and the department shall establish procedures to implement the supervision and investigation standards.

(d) The Judicial Council and the department shall annually consider modifications to the standards based upon criteria in Subsection (3)(a) and other criteria as they consider appropriate.

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(e) The Judicial Council and the department shall annually prepare an impact report and submit it to the appropriate legislative appropriations subcommittee.

(4) Notwithstanding other provisions of law, the Department of Corrections is not required to supervise the probation of persons convicted of class B or C misdemeanors or infractions or to conduct presentence investigation reports on class C misdemeanors or infractions. However, the department may supervise the probation of class B misdemeanants in accordance with department standards.

(5) (a) Prior to the imposition of any sentence, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the Department of Corrections or information from other sources about the defendant.

(b) The presentence investigation report shall include a victim impact statement describing the effect of the crime on the victim and the victim's family. The victim impact statement shall:

(i) identify the victim of the offense;

(ii) include a specific statement of pecuniary damages, accompanied by a recommendation from the Department of Corrections regarding the payment of restitution by the defendant;

(iii) identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

(iv) describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(v) identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

(vi) contain any other information related to the impact of the offense upon the victim or the victim's family that is relevant to the trial court's sentencing determination.

(c) The presentence investigation report shall include a specific statement of pecuniary damages, accompanied by a recommendation from the Department of Corrections regarding the payment of restitution by the defendant.

(d) The contents of the presentence investigation report, including any diagnostic evaluation report ordered by the court under Section 76-3-404, are confidential and are not available except by court order for purposes of sentencing as provided by rule of the Judicial Council or for use by the Department of Corrections.

(6) The Department of Corrections shall make the presentence investigation report available for review at the court ten days in advance of sentencing and shall mail or deliver copies to the defendant, defendant's attorney, and prosecutor ten days in advance of sentencing. Any inaccuracies in the presentence investigation report, which have not been resolved by the parties and Department of Corrections prior to sentencing, shall be brought to the attention of the sentencing judge, and a determination of relevance or accuracy shall be made by the judge on the record. If a party fails to raise an objection at the time of sentencing, that matter shall be considered to be waived.

(7) At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant.

(8) While on probation, and as a condition of probation, the defendant may be required to perform any or all of the following:

- (a) pay, in one or several sums, any fine imposed at the time of being placed on probation;
- (b) pay amounts required under Title 77, Chapter 32a, Defense Costs;
- (c) provide for the support of others for whose support he is legally liable;
- (d) participate in available treatment programs;
- (e) serve a period of time in the county jail not to exceed one year;
- (f) serve a term of home confinement;
- (g) participate in community service restitution programs, including the community service program provided in Section 78-11-20.7;
- (h) pay for the costs of investigation, probation, and treatment services;
- (i) make restitution or reparation to the victim or victims in accordance with Subsections 76-3-201(3) and (4); and
- (j) comply with other terms and conditions the court considers appropriate.

(9) (a) The Department of Corrections is responsible, upon order of the court, for the collection of fines, restitution, and any other costs assessed under Section 64-13-21 during the probation period in cases for which the court orders supervised probation by the department.

(b) The prosecutor shall provide notice of the restitution order to the clerk of the court.

(c) The clerk shall place the order on the civil docket and shall provide notice of the order to the parties.

(d) The order is considered a legal judgment enforceable under the Utah Rules of Civil Procedure.

(10) (a) (i) Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions.

(ii) If the defendant, upon expiration or termination of the probation period, owes outstanding fines, restitution, or other assessed costs, the court may retain jurisdiction of the case and continue the defendant on bench probation or place the defendant on bench probation for the limited purpose of enforcing the payment of fines, restitution, and other amounts outstanding.

(iii) Upon motion of the prosecutor or victim, or upon its own motion, the court may require the defendant to show cause why his failure to pay should not be treated as contempt of court or why the suspended jail or prison term should not be imposed.

(b) The Department of Corrections shall notify the sentencing court and prosecuting attorney in writing in advance in all cases when termination of supervised probation will occur by law. The notification shall include a probation progress report and complete report of details on outstanding fines, restitution, and other amounts outstanding.

(11) (a) (i) Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation.

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(ii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.

(b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court.

(12) (a) (i) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.

(ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

(b) (i) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified.

(ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended.

(c) (i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing.

(ii) The defendant shall show good cause for a continuance.

(iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent.

(iv) The order shall also inform the defendant of a right to present evidence.

(d) (i) At the hearing, the defendant shall admit or deny the allegations of the affidavit.

(ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations.

(iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.

(iv) The defendant may call witnesses, appear and speak in his own behalf, and present evidence.

(e) (i) After the hearing the court shall make findings of fact.

(ii) Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew.

(iii) If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.

(13) Restitution imposed under this chapter is considered a debt for willful and malicious injury for purposes of exceptions listed to discharge in bankruptcy as provided in Title 11 U.S.C.A. Sec. 523, 1985.

(14) The court may order the defendant to commit himself to the custody of the Division of Mental Health for treatment at the Utah State Hospital as a

condition of probation or stay of sentence, only after the superintendent of the Utah State Hospital or his designee has certified to the court that:

- (a) the defendant is appropriate for and can benefit from treatment at the state hospital;
 - (b) treatment space at the hospital is available for the defendant; and
 - (c) that persons described in Subsection 62A-12-209(2)(g) are receiving priority for treatment over the defendants described in this subsection.
- (15) Presentence investigation reports, including presentence diagnostic evaluations, are classified private in accordance with Title 63, Chapter 1, Government Records Access and Management Act. Notwithstanding Sections 63-2-403 and 63-2-404, the State Records Committee may not order the disclosure of a presentence investigation report. Except for disclosure at the time of sentencing pursuant to this section, the department may disclose the presentence investigation only when:
- (a) ordered by the court pursuant to Subsection 63-2-202(7);
 - (b) requested by a law enforcement agency or other agency approved by the department for purposes of supervision, confinement, and treatment of the offender;
 - (c) requested by the Board of Pardons and Parole; or
 - (d) requested by the subject of the presentence investigation report or the subject's authorized representative.

History: C. 1953, 77-18-1, enacted by L. 1980, ch. 15, § 2; 1981, ch. 59, § 2; 1982, ch. 9, § 1; 1983, ch. 47, § 1; 1983, ch. 68, § 1; 1983, ch. 85, § 2; 1984, ch. 20, § 1; 1985, ch. 212, § 17; 1985, ch. 229, § 1; 1987, ch. 114, § 1; 1989, ch. 226, § 1; 1990, ch. 134, § 2; 1991, ch. 66, § 5; 1991, ch. 206, § 6; 1992, ch. 14, § 3; 1993, ch. 82, § 7; 1993, ch. 220, § 3; 1994, ch. 13, § 24; 1994, ch. 198, § 1; 1994, ch. 230, § 1.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, added Subsection (11).

The 1991 amendment by ch. 66, effective April 29, 1991, in present Subsection (2)(a) substituted "guilty, guilty and mentally ill, no contest" for "guilty or no contest" in the first sentence.

The 1991 amendment by ch. 206, effective April 29, 1991, added present Subsection (1), redesignating the following subsections accordingly; subdivided Subsections (2)(b), (3), (5)(a), (7), (8)(a), (9)(a), and (10); substituted "appropriations subcommittee" for "appropriations committee" at the end of Subsection (3)(e); substituted the language beginning with "presentence" and ending with "court order" for "report are confidential and not available except" in Subsection (5)(a)(iii); inserted "evidence" in the first and second sentences of Subsection (5)(b); added Subsections (5)(c) and (13); and made several punctuation and stylistic changes throughout the section.

The 1992 amendment, effective April 27, 1992, added "including the community service program provided in Section 78-11-20.7" to the

end of Subsection (6)(g).

The 1993 amendment by ch. 82, effective May 3, 1993, added Subsection (2) and redesignated former Subsections (2) through (13) as Subsections (3) through (14).

The 1993 amendment by ch. 220, effective May 3, 1993, added "and any other costs assessed under Section 64-13-21" in present Subsection (8), substituted "owes" for "has" and "or other assessed costs" for "owing" and added "and other amounts outstanding" in present Subsection (9)(a)(ii), substituted "and other amounts outstanding" for "orders" in present Subsection (9)(b), and made stylistic changes.

The 1994 amendment by ch. 13, effective May 2, 1994 substituted "Board of Pardons and Parole" for "Board of Pardons" in Subsections (1)(c) and (4)(b); substituted "Title 77, Chapter 2a, Pleas in Abeyance" for "Sections 77-2a-1 through 77-2a-4" in Subsection (2); substituted "Subsection (4)(a)" for "Subsection (a)" in Subsection (4)(d); and made stylistic changes.

The 1994 amendment by ch. 198, effective May 2, 1994, added Subsection (6)(a)(ii), renumbering former Subsections (6)(a)(ii) and (iii) as (iii) and (iv), and made a stylistic change.

The 1994 amendment by ch. 230, effective May 2, 1994, deleted former Subsection (1) which defined "confidential"; inserted "and Parole" in Subsection (3)(b); added Subsection (6); designated former Subsection (6)(b) as Subsection (7); deleted former Subsection (6)(c) pertaining to the disposition of the presentence investigation report after the sentencing; deleted former Subsection (14), relating to disclosure of presentence diagnostic evaluation and

investigation report and made related a

This section is set Office of Legislative Counsel.

Compiler's Note proposes amending and proposes adding article. If approved

Due process of law. Extension of probat Restitution.

— Death of defenda
Revocation of proba
— Nature of violati
— Notice of ground.
— Standard of proo
— Time for proceed
— Written findings.
Suspension of prob
Termination of prol
Cited.

Due process of la

Trial court did no process rights by r tion to continue sen examination and e facilities that had dant had full and sentence report and almost two weeks the opportunity to ceived factual ina 818 P.2d 1048 (Ute

Extension of pro

Proceedings for menced prior to : term gave the cour dant until conclu State v. Rawlings, 1992).

Restitution.

The state can e condition of proba as a separate and the court's judgme nal sentence unc 76-3-201.1(1). The risdiction to requi condition of proba minish the enforc independent com creed in the judgn 1203 (Utah Ct. A P.2d 897 (Utah 19

CONSTITUTION OF UTAH

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Sec. 14. [Unreasonable searches forbidden — Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Tab B

JUDGEMENT

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

JUN 17 1996

THE STATE OF UTAH,

By MA SMOER
2188519 Deputy Clerk

Plaintiff,

vs.

Tony B. Maestas
DOB 9-24-61

Defendant.

**JUDGMENT, SENTENCE
(COMMITMENT)**

Case No. 921901600
Count No. I
Honorable William Thorne
Clerk MGS
Reporter Video; 2:30 pm
Bailiff Gene Unsworth
Date 6-17-96

☐ The motion of _____ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☒ a jury; ☐ the court; ☐ plea of guilty; ☐ plea of no contest; of the offense of unlawful distribution, offering, agreeing of, a felony of the 1 degree, ☐ a class _____ misdemeanor, being now present in court and ready for sentence and represented by Lynn Brown, and the State being represented by Meister, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

- ☒ to a maximum mandatory term of 5 years and which may be for life;
☐ not to exceed five years;
☐ of not less than one year nor more than fifteen years;
☐ of not less than five years and which may be for life;
☐ not to exceed _____ years;
☐ and ordered to pay a fine in the amount of \$ _____;
☐ and ordered to pay restitution in the amount of \$ _____ to _____

- ☒ such sentence is to run concurrently with Count II
☐ such sentence is to run consecutively with _____
☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) _____ are hereby dismissed.
☒ Previous judgment set aside
☐ Defendant is granted a stay of the above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of _____, pursuant to the attached conditions of probation.
☒ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☒ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.
☒ Commitment shall issue Forthwith

DATED this 17 day of June 1996

APPROVED AS TO FORM:

Defense Counsel

[Signature]
DISTRICT COURT JUDGE

JUN 17 1996

SALT LAKE COUNTY

By M. Smith Deputy Clerk

2108579

JUDGEMENT

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

THE STATE OF UTAH,

Plaintiff,

vs.

Tony R Maestas
DOB 9-24-61

Defendant.

JUDGMENT, SENTENCE
(COMMITMENT)

Case No. 921901600
Count No. II
Honorable William Thorne
Clerk MGS
Reporter Video, 2:36 pm
Bailiff Gene Unsworth
Date 6-17-96

☐ The motion of _____ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☒ a jury; ☐ the court; ☐ plea of guilty; ☐ plea of no contest; of the offense of loss of cjs, a felony of the 3 degree, ☐ a class _____ misdemeanor, being now present in court and ready for sentence and represented by Brown, and the State being represented by Meister, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

☐ to a maximum mandatory term of _____ years and which may be for life;

☒ not to exceed five years;

☐ of not less than one year nor more than fifteen years;

☐ of not less than five years and which may be for life;

☐ not to exceed _____ years;

☐ and ordered to pay a fine in the amount of \$_____;

☐ and ordered to pay restitution in the amount of \$_____ to _____

☒ such sentence is to run concurrently with with count I

☐ such sentence is to run consecutively with _____

☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) _____ are hereby dismissed.

☒ previous judgment is set aside

☐ Defendant is granted a stay of the above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of _____, pursuant to the attached conditions of probation.

☒ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☒ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.

☒ Commitment shall issue Forthwith

DATED this 17 day of June, 19 96

APPROVED AS TO FORM:

DISTRICT COURT JUDGE

Defense Counsel

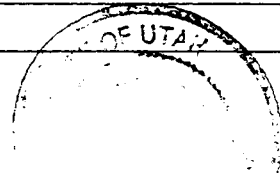
JUDGE'S PRISON TERM RECOMMENDATION

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

Comments, including mitigating or aggravating circumstances:

The court Recommends Credit For time served.

DATED this 17 day of June, 19 96



[Signature]
DISTRICT COURT JUDGE

Tab C

Julia D'Alesandro
Clerk of the Court

-----ooOoo-----

921901600

CERTIFICATE OF MAILING

I hereby certify that on June 24, 1997, a true and correct copy of the foregoing ORDER was hand-delivered to a personal representative of the Legal Defender's Office to be delivered to the party listed below:

Lynn R. Brown
Rebecca C. Hyde
Salt Lake Legal Defender Association
424 E. 500 S., #300
Salt Lake City, UT 84111

and a true and correct copy of the foregoing ORDER was hand-delivered to a personal representative of the Attorney General's Office to be delivered to the party listed below:

James H. Beadles
Assistant Attorney General
PO Box 140854
Salt Lake City UT 84114-0854

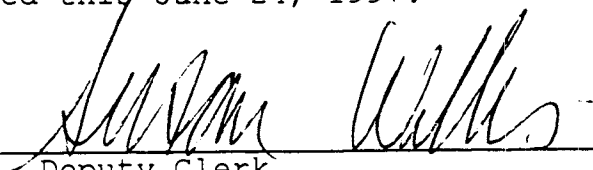
and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

Honorable William A. Thorne
Third District Court
240 E. 400 S.
Salt Lake City, UT 84111

Third District Court
Attn: Suzie Carlson
240 E. 400 S.
Salt Lake City, UT 84111

Dated this June 24, 1997.

By


Deputy Clerk

Case No. 960831
Third District, Salt Lake Dept., Div. I, #921901600

Tab D

REBECCA C. HYDE, #6409
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

FILED DISTRICT COURT
Third Judicial District

DEC 22 1997

SALT LAKE COUNTY

By

Deputy Clerk

DEC 15 1997

DISTRICT ATTORNEY

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH,
SALT LAKE DEPARTMENT, DIVISION I

STATE OF UTAH,	:	FINDINGS OF FACT
Plaintiff,	:	
v.	:	
TONY MAESTAS,	:	Case No. 921901600FS
Defendant.	:	JUDGE WILLIAM A. THORNE

On October 17, 1997, an Evidentiary Hearing was held in the above-entitled matter pursuant to Rule 23B, Utah R. App. Pro. for the purpose of entering Findings of Fact relevant to Appellant's claim of ineffective assistance of counsel. Both parties were present. Pursuant to Rule 23B(e), Utah R. App Pro. and based upon the evidence presented by Appellant, this Court enters the following Findings of Fact:

FINDINGS OF FACT

1. The Defendant, Tony Maestas, was represented at trial by Mr. Victor Gordon.
2. The Court has reviewed records contained in Tony Waldron's prison file maintained by the Utah Department of Corrections.

3. Defense counsel gained access to said records pursuant to the Government Records Access and Management Act, Utah Code Ann. § 63-2-101 et. sec. (1993).

4. The Court has reviewed records maintained by the Investigations Bureau of the Utah Department of Corrections relating to the arrest and conviction of Tony Maestas, and the use of Tony Waldron as a confidential informant.

5. Defense counsel gained access to said records pursuant to the Government Records Access and Management Act, Utah Code Ann. § 63-2-101 et. sec. (1993).

6. The aforementioned records contain the following information:

7. Tony Waldron (Waldron) was committed to the prison on November 5, 1990, on a conviction of two counts of Forgery, second degree felonies.

8. Waldron's expected release date from prison was January 14, 1993.

9. As late as February 7, 1992, Waldron's expected release date remained unchanged.

10. On August 15, 1991, Waldron was assigned to work at the prison dairy.

11. On November 26, 1991, Waldron was one of three inmates suspected of smuggling drugs at the dairy into D block.

12. On February 21, 1992, Waldron was found to have injection sites on his arm. Waldron admitted he had been injecting steroids at the dairy.

13. Waldron was recruited by Leo Lucy, an investigator with the Department of Corrections to work as a confidential informant.

14. On March 14, 1992, Waldron was moved from D-block on a temporary restriction order because he was "under investigation".

15. On March 14, 1992, Waldron was released on a home visit where he agreed to purchase drugs to be smuggled into the prison as part of an undercover operation for the Investigations Bureau of the Department of Corrections.

16. On March 14, 1992, Tony Maestas was arrested for allegedly selling cocaine to Tony Waldron.

17. On April 2, 1992, a Special Attention Hearing was held by the Board of Pardons. A Special Attention Hearing is a review to grant relief to inmates under special circumstances where a change of status may be warranted.

18. Waldron was paroled that day. He was serving time for ten counts of Forgery, second degree felonies, one count of Fraud, a third degree felony, and an additional count of Forgery, a third degree felony.

19. Waldron was never formally disciplined for possession of a controlled substance or drug paraphernalia.

20. Waldron was never charged with Possession of a Controlled Substance or Drug Paraphernalia.

21. Waldron was never charged as a result of the Department of Corrections' investigation that began November 26, 1991, of his involvement in smuggling drugs into D-block.

22. Leo Lucy, the investigator with the Department of Corrections who recruited Waldron, in a written statement, claimed that the only compensation Waldron received for his role as a confidential informant was a letter of recommendation to the Board of Pardons that Waldron not lose his parole date as a result of a dirty urine test.

23. A review of Waldron's prison files also revealed the following information relevant to his credibility:

a. Waldron was convicted on September 14, 1992, of Forgery, a second degree felony, as well as Aggravated Assault by a Prisoner and Felony Fleeing.

b. Waldron was convicted on December 12, 1990, of two counts of Forgery, second degree felonies.

c. On August 7, 1986, Waldron was committed to the Utah State Prison on one count of Possession of a Forged Writing, a third degree felony, seven counts of Forgery, second degree felonies, and one count of Forgery, a third degree felony.

d. Waldron had been assessed by the Department of Corrections in 1987 and had been described as an inmate who "cannot be trusted at all".

e. In October of 1990, Waldron approached Lon Brian with the Davis County Metro Narcotics wanting to furnish information. Agent Brian requested use of Waldron for an undercover investigation. AP&P determined that "it would not be wise to allow him to participate" because of his history of drug dependency and attempted escape. Waldron was told "there would be no special consideration".

24. Also relevant to Waldron's credibility was the following information regarding his experience and skill at obtaining and hiding drugs on his person in the prison:

a. The investigation into Waldron and other inmates that began in November of 1991 involved allegations that inmates were smuggling drugs by either hiding them in balloons in the mouth, or by "keistering" the drugs by hiding them in the anal cavity.

b. On November 10, 1989, Waldron was disciplined for a positive urinalysis for marijuana and for hiding a white object in his mouth which he swallowed before guards could retrieve it.

c. On November 20, 1989, Waldron admitted hiding two marijuana joints in his mouth while being searched, slipping them from his mouth into a "pocket" he had cut inside his coat when the guard was not looking.

d. On January 1, 1988, Waldron was disciplined for Possession of a Controlled Substance found hidden in his sock.

e. On May 29, 1988, Waldron was disciplined for possession of a controlled substance.

f. On June 7, 1988, Waldron was disciplined for a positive urinalysis for marijuana.

g. On March 30, 1987, Waldron was disciplined for possession of a controlled substance.

25. A review of Waldron's prison file also revealed the following information suggesting that he had worked as confidential informant in the past:

a. On July 15, 1992, Waldron had safety concerns at the Weber County Jail because he had testified against other inmates.

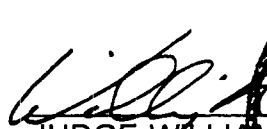
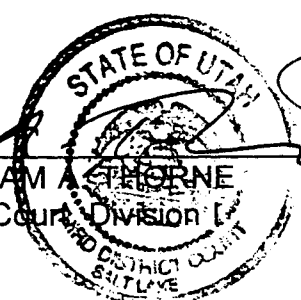
b. On November 5, 1990, Waldron asked to be moved because of involvement in past drug dealing at the prison.

c. Waldron's Offender Reassessment forms indicate he had safety concerns in February of 1990 and also in July of 1991.

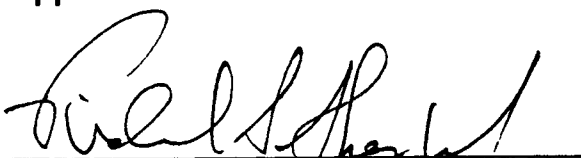
26. In respect to the chain of custody in Mr. Maestas' case, it was also discovered that money booked into evidence with the alleged cocaine was likely stolen by the custodian of the evidence.

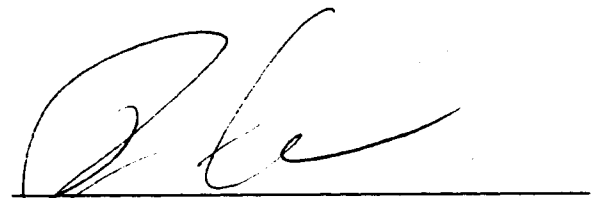
DATED this 22 day of December, 1997.

BY THE COURT:


JUDGE WILLIAM A. ASTHORNE
Third District Court, Division I


Approved as to form:


RICHARD S. SHEPHERD
Deputy District Attorney


REBECCA C. HYDE
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing to the office of the District Attorney, 2001 South State Street, Salt Lake City, Utah 84190-1200 this ____ day of December, 1997.

Tab E

1 THE COURT: The Court finds there has
2 been a violation of the terms of the conditions of
3 probation. That violation was knowing and
4 intentional under circumstances where the defendant
5 had the ability to comply with the Court's order on
6 the conditions of probation. Therefore probation
7 will be revoked. It will not be reinstated. There
8 are only so many chances that the Court has the
9 disposition or the opportunity to grant them in one
10 case and deny them in another because there are only
11 limited resources out there. We need to provide
12 those resources to the people who have indicated they
13 will take advantage of that. And that is not so in
14 this case.

15 I do think, however, given the amount of
16 delay that has occurred and since the feeling of the
17 affidavit is in support of the order to show cause
18 and this is a unique case, the defendant is entitled
19 to credit for time served in the Salt Lake County
20 Jail. I would ask the clerk to note specifically in
21 the minute entry and in the order -- well, you're
22 going to have to prepare papers for me on this, Mr.
23 Shepherd. Would you note specifically in there that
24 the Court is aware of the view of the Department of
25 Corrections that credit for time served is not

1 normally granted by them when the time served is a
2 result of an order to show cause. And the credit for
3 time served normally is limited only to pretrial
4 time. And it's my recommendation that he be given
5 credit for time served during the pendency of this
6 matter.

7 Is there anything else? If not, we'll be
8 in recess.

9 (Concluded at 4:45 p.m.)

10 --oOo--

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Tab F

1 HAVE SPONTANEOUS TESTIMONY.

2

3 TONY WALDRON.

4 CALLED AS A WITNESS, BEING FIRST DULY SWORN, WAS

5 EXAMINED AND TESTIFIED AS FOLLOWS:

6

7 DIRECT EXAMINATION.

8 BY MR. SHEPHERD:

9 Q. WOULD YOU PLEASE STATE YOUR NAME.

10 A. TONY WALDRON.

11 Q. WILL YOU SPELL THAT, PLEASE.

12 A. W-A-L-D-R-O-N.

13 Q. MR. WALDRON, ARE YOU PRESENTLY AN INMATE AT
14 THE UTAH STATE PRISON?

15 A. YES, I AM.

16 Q. DIRECTING YOUR ATTENTION TO THE 14TH OF
17 MARCH OF 1992, WERE YOU AN INMATE ON THAT DATE?

18 A. YES, I WAS.

19 Q. AND ON THAT DATE DID YOU ASSIST LEO LUCEY
20 IN A DEPARTMENT OF OF CORRECTIONS INVESTIGATION
21 RELATIVE TO ATTEMPTING TO LOCATE SOME PEOPLE WHO
22 WERE PROVIDING SOURCES FOR NARCOTICS IN THE PRISON?

23 A. YES. I DID.

24 Q. DID YOU GO IN THE COMPANY OF AN AGENT NAMED
25 TERESA GABALDON?

1 A. YES, I DID.

2 Q. ON THAT DATE DID YOU HAVE OCCASION TO GO TO
3 AN APARTMENT LOCATED ON APPROXIMATELY FIFTH EAST
4 JUST SOUTH OF 33RD SOUTH. I BELIEVE IT WAS THE
5 APARTMENT OF JEANETTE APPLEMAN?

6 A. YES, SIR.

7 Q. NOW, DID YOU HAVE OCCASION TO GO INTO
8 MS. APPLEMAN'S APARTMENT WHILE TERESA GABALDON
9 REMAINED IN THE CAR?

10 A. YES.

11 Q. AND WERE YOU AWARE THAT MS. GABALDON AND
12 JEANETTE APPLEMAN WERE ATTEMPTING TO MAKE CONTACT
13 WITH SOMEONE TO SEE IF THEY COULD ARRANGE THE
14 PURCHASE OF COCAINE?

15 A. YES.

16 Q. WHILE YOU WERE IN THE APARTMENT, DID
17 SOMEONE COME TO THE APARTMENT AND MAKE SOME CONTACT
18 WITH HE YOU THERE?

19 A. YES, THEY DID.

20 Q. WAS ANYONE ELSE IN THE APARTMENT AT THE
21 TIME?

22 A. THERE WAS.

23 Q. WHO WAS THAT?

24 A. MR. CHACON AND A COUPLE OF CHILDREN.

25 Q. DID SOMEONE ELSE COME TO THE APARTMENT?

1 A. YES, THEY DID.

2 Q. WHO WAS THAT?

3 A. MR. MAESTAS.

4 Q. MR. MAESTAS?

5 A. AND ANOTHER FELLOW.

6 Q. ANOTHER PERSON?

7 A. YES.

8 Q. WHEN THEY CAME TO THE APARTMENT, WHAT DID
9 THEY DO?

10 A. THEY COME AND ASKED FOR JEANETTE, AND WE
11 SAID THAT SHE WAS MAKING A PHONE CALL TRYING TO GET
12 SOME COCAINE.

13 Q. WHAT HAPPENED THEN?

14 A. HE PULLED OUT A LITTLE BAG AND SAYS, "I
15 HAVE THIS RIGHT HERE."

16 Q. WHO SAID THAT?

17 A. MR. MAESTAS.

18 Q. NOW, HE SAID WHAT?

19 A. HE PULLED OUT A LITTLE BAG AND SAYS, "I
20 HAVE THIS."THIS.

21 Q. "I HAVE THIS"?

22 A. YES. ASKED ME I WAS A COP.

23 Q. AND WHAT DID YOU TELL HIM?

24 A. I TOLD HIM I WASN'T.

25 Q. WHAT DID YOU TELL HIM THAT YOU WERE, IF

1 ANYTHING?

2 A. ON A HOME VISIT.

3 Q. THEN WHAT HAPPENED?

4 A. WELL, WHEN HE BROUGHT OUT -- HIS FRIEND
5 LEFT. HE SHOWED ME THE COCAINE, AND I GAVE HIM ONE
6 HUNDRED DOLLARS. HE SAYS, "WELL, I'M GOING TO GO."
7 AND HE LEFT.

8 I WENT IN THE BATHROOM, BECAUSE I WAS
9 WIRED, AND TOLD LEO AND THEM TO GET THE TWO MEXICANS
10 THAT LEFT THE APARTMENT BUILDING.

11 Q. WHERE DID YOU OBTAIN THE MONEY? FROM LEO?

12 A. YES, SIR.

13 Q. HAD YOU BEEN SEARCHED PRIOR TO THIS
14 OPERATION BEGINNING?

15 A. YES.

16 Q. WHO DID THAT SEARCH?

17 A. LEO LUCEY.

18 Q. WERE YOU SEARCHED AFTER THE OPERATION?

19 A. YES.

20 Q. AND WAS THAT BY ALSO LEO?

21 A. YES.

22 Q. NOW, AFTER YOU OBTAINED THE ALLEGED
23 COCAINE, AND INDICATED ON THE WIRE THAT IT HAD
24 HAPPENED, WHAT DID YOU DO THEN?

25 A. JUST REMAINED IN THE APARTMENT.

1 Q. THEN WHAT HAPPENED?

2 A. THEN WE -- I GUESS THEY WENT AND PULLED HIM
3 OVER. THEN SOME RELATION OF HIS LIVES NEXT DOOR,
4 AND WE WERE GIVEN SOME MARIJUANA FROM THEM.

5 Q. WHAT DID YOU DO WITH THE COCAINE?

6 A. I TOOK IT DOWN TO TERESA AND GIVE TO HER.

7 Q. YOU GAVE IT TO HER?

8 A. YES.

9 Q. THEN DID YOU GO BACK TO THE APARTMENT?

10 A. YES.

11 Q. I WILL SHOW YOU WHAT'S BEEN MARKED AS
12 EXHIBIT TWO FOR IDENTIFICATION PURPOSES. IF YOU'D
13 JUST LIKE TO LOOK AT THAT. DOES THAT APPEAR TO BE
14 THE SAME OR SIMILAR TO THE PACKAGE THAT YOU OBTAINED
15 FROM MR. MAESTAS?

16 A. YES.

17 MR. SHEPHERD: THANK YOU. I HAVE NO
18 FURTHER QUESTIONS.

19

20 CROSS-EXAMINATION.

21 BY MR. GORDON:

22 Q. WERE YOU USING DRUGS THAT DAY?

23 A. NO.

24 Q. HAVE YOU USED DRUGS IN THE PAST?

25 A. YES, I HAVE.

1 Q. SO YOU KNOW WHAT THEY LOOK LIKE?

2 A. YES, I DO.

3 Q. HAVE YOU USED ANY DRUGS SUBSEQUENT TO THAT?

4 MR. SHEPHERD: I OBJECT. I DON'T THINK
5 THAT'S RELEVANT TO THIS.

6 THE COURT: WHAT'S THE RELEVANCE?

7 MR. GORDON: WELL, IT'S A CONTINUING
8 PATTERN. HE'S A HABITUAL USER, AND I WANTED TO SHOW
9 THAT.

10 THE COURT: SUSTAINED. YOU DON'T NEED TO
11 ANSWER THE QUESTION.

12 Q. (BY MR. GORDON) ARE YOU CURRENTLY SERVING
13 TIME ON A DRUG-RELATED OFFENSE.

14 A. NO, I'M NOT.

15 Q. OKAY. WHEN DID YOU HAVE YOUR HOME VISIT?
16 WHY DID YOU TAKE YOUR HOME VISIT TIME TO INVOLVE
17 YOURSELF IN -- IN A RISKY KIND OF PROJECT?

18 A. I WAS -- MR. LEO SAID HE'D WRITE ME A GOOD
19 RECOMMENDATION TO THE BOARD.

20 Q. SO YOU WERE PROMISED A GOOD RECOMMENDATION
21 IF YOU HELPED OUT?

22 A. I WAS PROMISED A LETTER. THAT WAS IT.

23 Q. NOW--

24 THE COURT: MR. WALDRON, YOU NEED TO KEEP
25 YOUR VOICE UP. IT'S HARD TO HEAR YOU.

1 THE WITNESS: OKAY.

2 Q. (BY MR. GORDON) NOW LET ME ASK YOU-- LET
3 ME SEE -- DESCRIBE TO ME WHAT HAPPENED ON THAT
4 PARTICULAR DAY? YOU STARTED OUT AT WHAT, ABOUT
5 EIGHT O'CLOCK IN THE MORNING?

6 A. YES.

7 Q. YOU WERE SEARCHED AT EIGHT O'CLOCK IN THE
8 MORNING?

9 A. YES.

10 Q. OKAY. AND HOW MUCH MONEY WERE YOU GIVEN?

11 A. I THINK IT WAS THREE HUNDRED DOLLARS.

12 Q. AND A WIRE WAS PLACED ON YOU AT THAT TIME?

13 A. YES, IT WAS.

14 Q. HOW MANY TIMES WERE YOU SEARCHED THAT DAY?

15 A. APPROXIMATELY FIVE.

16 Q. WHAT KIND OF SEARCH WAS THAT?

17 A. PAT DOWN.

18 Q. PAT DOWN?

19 A. I TOOK MY SHOES OFF.

20 Q. SO THEY DIDN'T REALLY -- NO BODY CAVITIES
21 WERE SEARCHED ON ANY OF THOSE?

22 A. NO.

23 Q. NO. OKAY. LET ME ASK YOU THIS. YOU WERE
24 SITTING UP IN AN APARTMENT AT THE VILLA FRANCAIS,
25 MAYBE AROUND NOON, EVERYBODY HAD GONE. YOU WERE

1 WATCHING CHILDREN?

2 A. I WAS WITH MS. CHACON.

3 Q. SHE FINALLY LEFT, AND YOU WERE BY YOURSELF?

4 A. NO. SHE NEVER LEFT.

5 Q. THERE WAS NO TIME THAT YOU BY YOURSELF?

6 A. NO, THERE WASN'T.

7 Q. LET ME -- SO IF I CAN REFRESH YOUR MEMORY,

8 YOU ARE SPEAKING OVER THE WIRE AND YOU'RE SAYING,

9 "HOW'RE YOU DOING? I AM TALKING TO A BABY, SO YOU
10 DON'T THINK I AM HERE TALKING TO MYSELF."

11 A. YES. MS. CHACON WAS IN THE BATHROOM.

12 Q. SHE WAS IN THE BATHROOM, SO YOU WERE ACTUAL
13 BY YOURSELF, HUH?

14 A. IN THE LIVING ROOM. YES.

15 Q. HUH?

16 A. YES. I WAS TEN FEET AWAY FROM HER.

17 Q. THIS SAYS, "TERESA AND THE LADY THAT LIVES
18 HERE WENT TO GO PAGE THE GUY TO GET SOME COKE."

19 A. YES.

20 Q. DO YOU RECALL THAT?

21 A. YES.

22 Q. "THEY SHOULD BE BACK IN A MINUTE. THEY
23 HAVE GOT ME HERE LISTENING TO NIGGER MUSIC." DO YOU
24 REMEMBER THAT?

25 A. YES.

1 Q. DO YOU REMEMBER SAYING THAT?

2 A. YES, I DO.

3 Q. WHY WOULD YOU MAKE A STATEMENT LIKE THAT?

4 DO YOU HAVE A PROBLEM WITH BLACK PEOPLE? MEXICANS?

5 A. NO. I LIVE WITH THEM.

6 Q. THAT WAS PLAIN LANGUAGE. FROM WHEN YOU ARE
7 IN PRISON?

8 A. YES.

9 Q. WERE YOU EVER STRIPPED?

10 A. WHEN I WENT TO PRISON -- BACK TO PRISON
11 THAT NIGHT, YES, I WAS.

12 Q. BUT YOU WEREN'T STRIPPED DURING THE DAY?

13 A. NO.

14 Q. WHY WERE YOU RECRUITED? DID YOU VOLUNTEER?

15 A. YES.

16 Q. YOU VOLUNTEERED FOR THIS PROJECT.

17 A. YES.

18 MR. GORDON: NO FURTHER QUESTIONS.

19 MR. SHEPHERD: NO FURTHER QUESTIONS.

20 THE COURT: MAY MR. WALDRON BE EXCUSED,
21 THEN?

22 MR. SHEPHERD: I HAVE NO OBJECTION TO THAT.

23 MR. GORDON: NO.

24 THE COURT: THANK YOU, MR. WALDRON. YOU
25 MAY STEP DOWN. YOU MAY BE EXCUSED.

1 MR. SHEPHERD: ASK LEO LUCEY TO COME IN
2 PLEAS.

3
4 LEO LUCEY.
5 CALLED AS A WITNESS, BEING FIRST DULY SWORN, WAS
6 EXAMINED AND TESTIFIED AS FOLLOWS:

7
8 DIRECT EXAMINATION

9 BY MR. SHEPHERD:

10 Q. WILL YOU STATE YOUR FULL NAME, PLEASE.

11 A. LEO S. LUCEY.

12 Q. WHERE ARE YOU EMPLOYED?

13 A. DEPARTMENT OF CORRECTIONS, STATE OF UTAH.

14 Q. HOW LONG HAVE YOU BEEN EMPLOYED BY THE
15 DEPARTMENT OF CORRECTIONS?

16 A. FIVE YEARS.

17 Q. WHAT IS YOUR PRESENT ASSIGNMENT?

18 A. I'M AN INVESTIGATOR FOR THE DEPARTMENT OF
19 CORRECTIONS.

20 Q. HOW LONG HAVE YOU BEEN EMPLOYED AS AN
21 INVESTIGATOR?

22 A. A LITTLE OVER A YEAR.

23 Q. WHAT SORT OF TRAINING HAVE YOU HAD, AND
24 BACKGROUND THAT QUALIFIES YOU FOR THAT POSITION?

25 A. I'M A CERTIFIED PEACE OFFICER IN THE STATE