

2008

# Utah v. Dunn : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH	*	
	*	
Plaintiff / Appellee	*	
	*	
vs.	†	Appellate Case No. 20080576-CA
	*	
LARRY DOUGLAS DUNN, JR.	†	Priority 1
Defendant / Appellant	*	

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**BRIEF OF APPELLANT**

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THIS APPEAL IS FROM A DENIAL OF MOTIONS AND ALFORD GUILTY PLEA AND SENTENCE IN THE FIRST JUDICIAL DISTRICT COURT. THE HONORABLE CLINT S. JUDKINS PRESIDED OVER THE CASE.

APPELLANT IS CURRENTLY INCARCERATED IN THE UTAH STATE PRISON.  
APPELLANT REQUESTS ORAL ARGUMENT

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH	*	
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Plaintiff / Appellee	*	
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vs.	*	Appellate Case No. 20080243-CA
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LARRY DOUGLAS DUNN, JR		*
Defendant / Appellant	*	

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**BRIEF OF APPELLANT**

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**JURISDICTION AND NATURE OF PROCEEDINGS**

This appeal is from the District Court's wrongfully accepting the defendant's plea, the denial of the defendant's withdrawal of his plea, the failure of the court to allow the defendant time to make restitution and the length of his sentence.

**ISSUE ON APPEAL AND STANDARD OF REVIEW**

ISSUE I. DID THE COURT ERROR IN NOT ALLOWING THE DEFENDANT A REASONABLE TIME TO MAKE RESITUTION IN ORDER FOR THE CASE TO BE DISMISSED. Standard of Review: Abuse of discretion. See *State v. Pena*, 869 P. 2d 932 (Utah 1994)

ISSUE II. DID THE STATE FAIL TO PRESENT A FACTUAL BASIS FOR ALL THE ELEMENTS OF THE CRIME. Standard of Review for the trial court's ruling regarding substantial compliance with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness. See *Willet v. Barnes*, **842 P.2d 860, 861** (Utah 1992); *State v. Hoff*, **814 P.2d 1119, 1124-25** (Utah 1991).

ISSUE III. THE DEFENDANT'S SENTENCE IS CRUEL AND UNUSUAL PUNISHMENT. *Standard of Review*: The Court must determine whether the trial court abused its discretion when it sentenced the defendant to prison.. "A sentence will not be overturned on appeal unless the trial court abused its discretion, failed to consider all legally relevant factors, or imposed a sentence that exceeds legally relevant factors, or imposed a sentence that exceeds legally prescribed limits." *State v. Nuttall*, 861 P.2d 454, 4546 (Utah Ct App. 1993).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

### U.C.A. THEFT BY DECEPTION 76-6-405

(1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.

(2) Theft by Deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group.

### Rule 11 Pleas

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.



(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(e)(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(e)(2) the plea is voluntarily made;

(e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(e)(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(e)(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g) If the defendant pleads guilty, no contest, or guilty and mentally ill to a misdemeanor crime of domestic violence, as defined in Utah Code Section 77-36-1, the court shall advise the defendant orally or in writing that, as a result of the plea, it is unlawful for the defendant to possess, receive or transport any firearm or ammunition. The failure to advise does not render the plea invalid or form the basis for withdrawal of the plea.

(h)(1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved or rejected by the court.

(h)(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(i)(1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(i)(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(i)(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(j) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(k) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann. § 77-16a-103.

(l) Compliance with this rule shall be determined by examining the record as a whole. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded. Failure to comply with this rule is not, by itself, sufficient grounds for a collateral attack on a guilty plea.

(Amended effective May 1, 1993; January 1, 1996; November 1, 1997; November 1, 2001; November 1, 2002; April 1, 2005; November 1, 2005; Amended January 14, 2008, Effective January 1, 2008.)

## STATEMENT OF THE CASE

### A. Nature of the Case, Course of Proceedings, and Disposition

The appellant was charged by way of information with eleven counts of Theft by Deception. R. 001. He entered an *Alford* type guilty plea on May 14, 2007. R. 031. The State set forth the factual basis to support the charges. R. 104. The plea was a conditional plea in which the defendant would be able to withdraw his guilty plea upon the payment of restitution and the charges would be dismissed. R. 031.

The defendant was serving a sentence at the Utah State Prison when he entered his plea and was unable to be released from the Department of Correction's custody in order for him to access the funds in which to make restitution. Prior to the defendant's sentencing counsel made a motion to withdraw his guilty plea. The court denied the motion R. 107. The trial court denied the motions. R. 107. The defendant was sentenced on February 5, 2008. R. 086. The court sentenced the defendant to 1 to 15 years at the Utah State Prison on all eleven counts. He ordered that counts 1 through 3 to run consecutive to counts 4 through 7 and counts 8 through 11 will run consecutively to those charges. R. 086,

### B. Statement of Facts

1. On the eleven dates alleged in the information in Cache County, State of Utah, a Mr. Richard Waters transferred money to the defendant totaling \$1,300,000.00 dollars. R. 106 P. 3. These monies were transferred for a specific purpose. These monies were received by Mr. Dunn and Mr. Dunn acknowledged that he received these amounts. R. 104 P. 8.
2. That subsequently, some several months later, Mr. Waters made several demands that the defendant give the monies back and the defendant was not able to return the money because of his incarceration. R. 104 P.8. The State proffered certain facts that if the case were to proceed to trial, they would show these funds were used inconsistent to the purpose that they were given to Mr. Dunn, thereby exercising unauthorized control over the funds. R. 104 P.8. The money was given to Mr. Dunn for a business venture and some other things. R. 104 P. 9. In support of the elements of the case, the State indicated they would present bank records, to show that the monies were used inconsistent for the purpose it was given. R. 104 P. 9.
3. Mr. Dunn did not agree with the facts set forth by the State in support of the guilty plea. R. 104 P.9. He plead guilty on a *Alford* type basis in an attempt to get out of jail. The defendant was on probation in Salt Lake County when the demand for the money was made. R. 104 P.9. Before he could access the funds, his probation was revoked and was incarcerated in the Utah State Prison. R. 104 P. 9.

4. Mr. Dunn plead guilty to eleven counts of Theft by Deception, all second degree felonies. He plead guilty on the basis the Court would release him on his own recognizance pending sentencing and the State of Utah would write a letter to the Board of Pardons asking for his release. R. 36. The defendant agreed to deposit \$1,300,000.00 into the Trust account of his defense attorney, within 90 days of entering the guilty pleas and being released from the Utah State Prison. R. 36.
5. He further agreed to turn his passport over to his attorney and not leave the State of Utah without first obtaining written approval from his probation/parole officer and the State's attorney in this case. R. 36.
6. Mr. Dunn agreed to deposit \$1,300,000.00 (U.S. dollars) into the trust account of his defense attorney, within 90 days of entering the guilty pleas in this case and being released from the Utah State Prison. The money was to be paid to Richard Waters to compensate him for the monies Mr. Waters previously transferred to him during the years 2004 and 2005. The State agreed once it had reasonably verified that Mr. Waters has received the \$1,300,000.00 in legal funds, they would stipulate to withdrawing his plea to the eleven counts and dismiss the charges against him. R. 36 The written plea agreement did not set forth the factual basis for the pleas. It made reference to the facts the prosecutor would state in open court during the plea hearing. R. 32.

7. On August 20, 2007, a status conference was held in the First District Court. Mr. Dunn had not been released from the Utah State Prison and the matter was continued until November, 19<sup>th</sup> 2007. The court date was changed to November 26, 2007. R. 50. The defendant failed to appear for court on November 26, 2007 and a warrant for \$20,000.00 dollars was issued on December 4, 2007. R. 55.
8. On January 14, 2008, the defendant appeared for sentencing and a motion was made to continue the sentencing for another sixty (60) days. The defendant was sure he could access the money and pay Mr. Waters within that time. The court continued sentencing until February 11, 2008. R. 106 P. 4. The defendant is in custody of the Department of Corrections at the Utah State Prison.
9. On February 25, 2008, the defendant appeared for sentencing. His attorney made a motion to withdraw the defendant's guilty pleas. R. 107 P.2. He also asks the Court for additional time for the defendant to read his pre-sentence report. The court denies all motions and requests. R. 107 P. 4. The court sentences the defendant to serve, One to fifteen years at the Utah State Prison on each of the counts. He was ordered to pay a fine on each count of \$1,500.00 and pay restitution in the amount of \$1,149,175.00. plus interest. The court ran counts one through three consecutively. Counts four through seven consecutively and counts eight through eleven consecutively.

## SUMMARY OF ARGUMENTS

The defendant/appellant alleges on appeal he should have been given more time to get the funds sought for by the State in behalf of Mr. Richard Waters.

Because of his confinement in the Utah State Prison he was never given the opportunity to access the funds transferred to him and return them to Mr. Waters.

He further alleges that the State failed to set forth a proper factual basis to support the *alford* pleas that he entered and that the court did not strictly comply with Rule 11. The plea affidavit did not contain the elements of the crime and the court did not explain them to the defendant.

He further alleges that his guilty pleas that the court should have allowed his guilty plea be withdraw.

Finally, the defendant asserts that the courts imposition of consecutive sentences was cruel and unusual punishment.

## ARGUMENTS

### ISSUE I. DID THE COURT ERROR IN NOT ALLOWING THE DEFENDANT A REASONABLE TIME TO MAKE RESITUTION IN ORDER FOR THE CASE TO BE DISMISSED

Mr. Dunn, the appellant entered into an unusual plea agreement with the State of Utah. He entered *Alford* pleas to the Eleven counts of Theft by Deception against him. The only consideration he received in return was the State agreed to allow him to withdraw his plea upon the payment of full



restitution. The State did not dismiss any of the Counts or reduce their severity.

The defendant in essence entered in a contract with the State if Utah and the Court to repay the restitution owing to Mr. Waters. The defendant was unable to perform on the contract. Mr. Waters continued incarceration at the Utah State Prison prohibited him from obtaining access to the funds to re-pay them to Mr. Waters, thus it was impossible for him to perform on the contract.

In *State v. Stringham*, 17 P.3d 1153 (Utah) suggests that an agreement just between the State and the defendant is just an executory agreement until the Court signs off on the agreement. Once the Court has accepted a defendant's guilty plea the agreement is analogous to a contract and legally binding agreement has been reached. Mr. Dunn could not perform on the contract because of his continued incarceration and the prohibitions place on him in his very short stay in a half-way house setting.

The essential elements of contract formation were present here. *See Golden Key Realty, Inc. v. Mantas*, 699 P.2d 730, 732 (Utah 1985) (indicating that the essential elements of a contract include "offer and acceptance, competent parties, and consideration") The offer from the State was that if the defendant will plead guilty to all eleven Second Degree Felonies and make restitution the State will allow the defendant to withdraw his plea and dismiss the charges. This defendant was

not able to make the restitution because he could not access the funds while incarcerated at Utah State Prison and released shortly to a half-way house. Thus, it was impossible for him to perform on the contract. Once the Court realized the contemplated plea-bargain was impossible for him to perform, he should have allowed the defendant to withdraw his plea and allow him to exercise his right to a trial. The defendant attempted, prior to sentencing to withdraw his plea but the court denied his request. See Addendum D.

Wherefore, the appellant requests the court to allow him withdraw his plea or extend the timeframe so he can transfer the money back to Mr. Waters.

ISSUE II. THE STATE FAILED TO PRESENT A FACTUAL BASIS FOR ALL THE ELEMENTS OF THE CRIME. THE COURT SHOULD NEVER ACCEPTED THE PLEA. THE COURT FAILED TO STRICTLY COMPLY WITH RULE 11.

The Trial Court erred when they accepted the defendant's plea to theft by deception. In setting forth a factual basis for the plea the State failure to proffer evidence of all the elements of the crime.

**(1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.**

**(2) Theft by Deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by**

**statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group.**

In *State v. Wallace*, 2006 UT App 262 the court held to commit theft by deception, a party must exercise control over another's property by means of a deception. The trial judge did not bind the defendant over on the charge because the State failed to show any deception on the part of the defendant. The Utah Court of appeals affirmed his decision.

In the current case Mr. Waters gave the defendant some money. See Addendum C. Mr. Dunn did not deceive Mr. Waters into giving him the money. When Mr. Waters asked for the money back, Mr. Dunn was not able to return the money because he was incarcerated. The essential element of deception on the part of the defendant is absent based upon the facts tendered by the State.

Mr. Dunn entered an *Alford* plea to the charges because he did not agree to the facts set forth by the State. He plead guilty in order to gain his freedom and gain access to the funds and transfer them back to Mr. Waters. The court should never have accepted the Alford plea.

Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution

that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea, see, *e. g.*, *Griffin v. United States*, 132 U.S.App.D.C. 108, 110, 405 F.2d 1378, 1380, (1968); *Bruce v. United States, supra*, at 342, 379 F.2d at 119 (1967); *Commonwealth v. Cottrell*, 433 Pa. 177, 249 A.2d 294 (1969); and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence. See, *e. g.*, *People v. Serrano*, 15 N.Y.2d 304, 308-309, 206 N.E.2d 330, 332 (1965); *State v. Branner*, 149 N.C. 559, 563, 63 S.E. 169, 171 (1908). See also *Kreuter v. United States*, 201 F.2d 33, 36 (CA10 1952).

To satisfy due process rights and Rule 11 of the Utah Rules of Criminal Procedure, a trial court must adequately ensure, by way of colloquy with the defendant, that he understands all rights waived and retained under Rule 11(e) *Bluemel v. State*, 134 P.3d. 185 (2006). Moreover, to ensure a defendant's due process rights, the Utah Supreme Court has held that trial courts must strictly comply with the elements of Rule 11(e) See *State v. Gibbons*, 740 P.2d 1309 (Utah 1987). A court's strict compliance with Rule 11 requires the trial court to establish (1) that "the defendant's guilty plea is truly knowing and voluntary," and (2) that "the defendant knowingly waived

his constitutional rights and understood the elements of the crime.” *State v. Abeyta*, 852 P.2d 993, 995 (Utah 1993). Furthermore, in applying the Rule 11(e) strict compliance analysis, the factual elements of the charges against a defendant must be explained so that the defendant understands and admits each element of each offense. *Gibbons* at 1313.

The plea affidavit did not contain a recitation of the facts the State would rely upon or the elements of the offense(s) to which the Defendant was pleading guilty, nor did the Court review the elements of the offense during the plea colloquy. The failure to advise the Defendant of the elements of the crimes to which he was pleading guilty was error. It was also error to fail to advise the Defendant that he had a time-limited right to withdraw his plea of guilty in violation of Rule 11(e)(7).

Rule 11 (e)(4)(B) of the Utah Rules of Criminal Procedure states:

**(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;**

In the Federal courts, Fed. Rule Crim. Proc. 11 expressly provides that a court "shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." *North Carolina v.*

*Alford*, 400 U.S. 25, 91 S.Ct 160 (1970). In the *Alford* case the state had the investigating police officer testify under oath as to the evidence the State would rely on if the case were to go to trial. The State had the officer testify as to all the elements of the crime to substantiate the guilty plea. In Mr. Dunn's case the State set forth some facts, but did not allege these facts in sufficient detail as satisfy all the elements of the alleged offense.(see facts above).

It would have been wise for the State to have either Mr. Waters testify or the investigating officer testify as to his investigation of the actions of Mr. Dunn. This may have created a sufficient record the Mr. Dunn somehow committed the crimes with which he was charged. Absent such a record the Court can only speculate whether or not a factual basis exists for the plea. The State definitely did not set forth the element of deception as required under the statute. Therefore the appellant asks this court to set aside his plea.

### ISSUE III. THE DEFENDANT'S CONSECUTIVE SENTENCES IS CRUEL AND UNUSUAL PUNISHMENT.

The sentencing decision of a trial court is reviewed for an abuse of discretion. *State v. Houk*, 906 P.2d 907, 909 (Utah Ct. App. 1999)(per curium). This includes the decision to grant or deny probation. See, *State v.*

*Chapoose*, 985 P.2d 915 (Utah 1999). An abuse of discretion occurs when “the judge fails to consider all legally relevant factors or if the sentence imposed is clearly excessive.” *State v. McCovey*, 803 P.2d 1234, 1235 (Utah 1990)(citations and quotations omitted.) Furthermore, an appellate court can only find an abuse of discretion ‘if it can be said that no reasonable [person] would take the view adopted by the trial court.’ *State v. Houk*, 906 P.2d at 909 (alteration in original) (quotations omitted).

The trial court abused its discretion in this case because it failed to consider all the legally relevant factors and it imposed an excessive sentence.

The Defendant pled guilty to eleven counts of Theft by Deception Second Degree Felonies. The decision of the Trial court to run them consecutive constitutes an abuse of discretion..

In *State v. Galli*, 967 P.2d 30 (Utah 1998), the Utah Supreme Court outlined four mitigating factors that the trial court failed to consider. The Court reversed the trial courts’ decisions to impose consecutive sentences. The Supreme Court’s reasoning was sound and should be applied in this case to determine if there was an abuse of discretion. In *Galli*, the Supreme Court found that the trial courts abused their discretion. “The record shows

that Judges Iwasaki and Rigtrup may no have given adequate weight to certain mitigating circumstances.” *Id.* at 938.

In *Galli* there were four mitigating factors that the trial courts failed to consider that caused them to abuse their discretion. All of the four factors can be applied favorably to the Defendant’s situation. The first factor was that Galli had not inflicted physical injuries on his victims. *Id.* Galli had used a gun, but it was a pellet gun that was incapable of inflicting a serious injury. *Id.* In the case at bar, the Defendant pled guilty to property crimes.

The second factor in *Galli* was that his criminal history did not support the imposition of consecutive sentences. *Id.* In the case at bar, the Defendant does not have a lengthy criminal record for violence but does have a history of writing bad checks and fraud.

The third factor was that Galli had voluntarily confessed and admitted responsibilities for his crimes. “The record suggests that he has expressed a commitment and hope to improve himself.” *Id.* In the case of the bar, the Defendant stated in the sentencing hearing that he came up with idea of the plea bargain so that he could return the money to Mr. Waters. R.107 P 6.

The fourth and final *Galli* factor was that consecutive sentences were not in accord with Galli’s rehabilitative needs. The Supreme Court believed



that Galli's conduct in Minnesota showed that he had the ability to improve himself and be a productive law abiding citizen. *Id.*

The trial court did not consider the Defendant's rehabilitative needs. In the sentence given by the trial court there is no mention that the defendant could benefit from counseling for theft. R. 107.

The trial court should have considered all of the factors outlined by the Supreme Court in *Galli*. The trial court failed to consider these factors, and therefore abused its discretion when it sentenced the Defendant to the Utah State Prison on consecutive counts. For these reasons, the Defendant respectfully requests this Court to remand this case back to the trial court so he can be re-sentenced.

## **CONCLUSION**

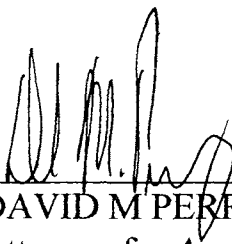
The defendant would like to transfer the funds back to Mr. Waters but he is unable to do so while in custody of the Department of Corrections. He is unable to perform his part of the bargain and requests that court grant him additional time to do so or allow him to withdraw his plea.

The trial court did not strictly follow Rule 11. There was not a sufficient factual basis given to support the plea. Furthermore, the elements

of the crime were not contained in the plea agreement and he was never informed of his rights to withdraw his plea.

The trial court abused its discretion when it imposed consecutive sentences on the defendant. The Court should have looked at the defendant's rehabilitative needs. For these reasons the Defendant respectfully requests this Court to remand his case back to the trial court to either allow his plea to be set aside, given more time to perform on the contract or to be re-sentenced.

DATED this 9<sup>th</sup> day of February, 2009.



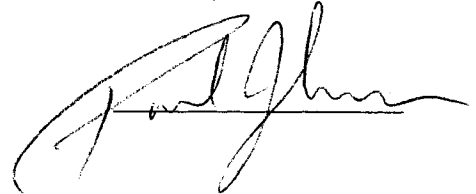
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DAVID M PERRY  
Attorney for Appellant

2008 05 26 - 09

CERTIFICATE OF SERVICE

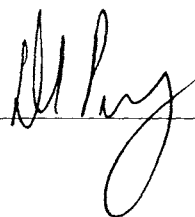
I hereby certify that I mailed true and correct copies of the Appellate Brief, postage prepaid, to the office of the Attorney General, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140833, Salt Lake City, Utah 84114-0833 on this 9 day of February, 2009.

A handwritten signature in black ink, appearing to read "Paul J. Hume", written over a horizontal line.

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT postage prepaid to the Attorney General's Office, 160 East 300 South, 5<sup>th</sup> Floor, P.O. Box 140814, Salt Lake City, Utah 84114-0814

DATED this 9<sup>th</sup> day of February, 2009.

A handwritten signature in black ink, appearing to be "M. King", is written over a horizontal line.

## **ADDENDUM A**

FIRST DISTRICT - CACHE  
CACHE COUNTY, STATE OF UTAH

---

STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT  
 :  
 :  
vs. : Case No: 071100069 FS  
 :  
LARRY DOUGLAS DUNN, : Judge: CLINT S. JUDKINS  
Defendant. : Date: February 25, 2008

---

PRESENT

Clerk: lindac  
Prosecutor: BAIRD, TONY C  
Defendant  
Defendant's Attorney(s): PERRY, DAVID M

DEFENDANT INFORMATION

Date of birth: January 19, 1968  
Video

CHARGES

1. THEFT BY DECEPTION - 2nd Degree Felony  
Plea: Guilty - Disposition: 05/11/07 Guilty
2. THEFT BY DECEPTION - 2nd Degree Felony  
Plea: Guilty - Disposition: 05/11/07 Guilty
3. THEFT BY DECEPTION - 2nd Degree Felony  
Plea: Guilty - Disposition: 05/11/07 Guilty
4. THEFT BY DECEPTION - 2nd Degree Felony  
Plea: Guilty - Disposition: 05/11/07 Guilty
5. THEFT BY DECEPTION - 2nd Degree Felony  
Plea: Guilty - Disposition: 05/11/07 Guilty
6. THEFT BY DECEPTION - 2nd Degree Felony  
Plea: Guilty - Disposition: 05/11/07 Guilty
7. THEFT BY DECEPTION - 2nd Degree Felony  
Plea: Guilty - Disposition: 05/11/07 Guilty
8. THEFT BY DECEPTION - 2nd Degree Felony  
Plea: Guilty - Disposition: 05/11/07 Guilty
9. THEFT BY DECEPTION - 2nd Degree Felony  
Plea: Guilty - Disposition: 05/11/07 Guilty
10. THEFT BY DECEPTION - 2nd Degree Felony  
Plea: Guilty - Disposition: 05/11/07 Guilty

Case No: 071100069  
Date: Feb 25, 2008

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11. THEFT BY DECEPTION - 2nd Degree Felony  
Plea: Guilty - Disposition: 05/11/07 Guilty

SENTENCE PRISON

Based on the defendant's conviction of THEFT BY DECEPTION a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of THEFT BY DECEPTION a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

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Case No: 071100069  
Date: Feb 25, 2008

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State Prison.

Based on the defendant's conviction of THEFT BY DECEPTION a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of THEFT BY DECEPTION a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of THEFT BY DECEPTION a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the CACHE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Charges 1 through 3 will run consecutive to charges 4 through 7, and charges 8 through 11 will run consecutive to those charges.



Case No: 071100069  
Date: Feb 25, 2008

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SENTENCE FINE

Charge # 1           Fine: \$1500.00  
                  Suspended: \$0.00  
                  Surcharge: \$702.70  
                  Due: \$1500.00

Charge # 2           Fine: \$1500.00  
                  Suspended: \$0.00  
                  Surcharge: \$702.70  
                  Due: \$1500.00

Charge # 3           Fine: \$1500.00  
                  Suspended: \$0.00  
                  Surcharge: \$702.70  
                  Due: \$1500.00

Charge # 4           Fine: \$1500.00  
                  Suspended: \$0.00  
                  Surcharge: \$702.70  
                  Due: \$1500.00

Charge # 5           Fine: \$1500.00  
                  Suspended: \$0.00  
                  Surcharge: \$702.70  
                  Due: \$1500.00

Charge # 6           Fine: \$1500.00  
                  Suspended: \$0.00  
                  Surcharge: \$702.70  
                  Due: \$1500.00

Charge # 7           Fine: \$1500.00  
                  Suspended: \$0.00  
                  Surcharge: \$702.70  
                  Due: \$1500.00

Charge # 8           Fine: \$1500.00  
                  Suspended: \$0.00  
                  Surcharge: \$702.70  
                  Due: \$1500.00

Charge # 9           Fine: \$1500.00

Case No: 071100069  
Date: Feb 25, 2008

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Suspended: \$0.00  
Surcharge: \$702.70  
Due: \$1500.00

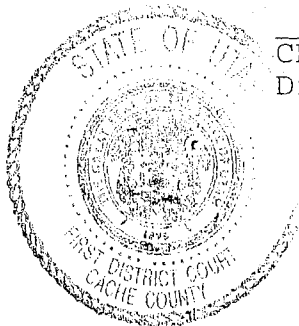
Charge # 10      Fine: \$1500.00  
Suspended: \$0.00  
Surcharge: \$702.70  
Due: \$1500.00

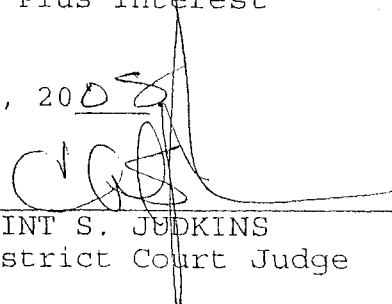
Charge # 11      Fine: \$1500.00  
Suspended: \$0.00  
Surcharge: \$702.70  
Due: \$1500.00

Total Fine: \$16500  
Total Suspended: \$0  
Total Surcharge: \$7729.7  
Total Principal Due: \$16500  
Plus Interest

Restitution      Amount: \$1149175.00 Plus Interest

Dated this 28 day of FEB, 2008



  
CLINT S. JUDKINS  
District Court Judge

## **ADDENDUM B**

---

IN THE FIRST JUDICIAL DISTRICT COURT  
CACHE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,  
vs.

LARRY D. DUNN,

Defendant.

STATEMENT OF DEFENDANT  
IN SUPPORT OF GUILTY PLEA  
AND CERTIFICATE OF COUNSEL

Case No. 071100069

Judge: Clint S. Judkins

---

I, Larry D. Dunn, hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights:

**Waiver of Preliminary Hearing**

I understand that I am waiving my right to a preliminary hearing. A preliminary hearing is a procedure to determine probable cause and to inform an accused of the charges against him or her. Competent evidence which shows probable cause that the charged crime was committed and that the defendant committed it is sufficient to hold an accused to answer. The evidence does not have to be sufficient for a conviction at trial.

I understand that at a preliminary hearing, an accused has the right to be represented by counsel. If an accused cannot afford an attorney, one will be appointed to represent him or her.

I understand, that an accused may call and compel witnesses to testify on his or her behalf, and confront and cross examine any witnesses the State may call to testify. I understand that an accused may testify on his or her behalf, or remain silent and say nothing. In order to proceed with my plea today, I waive my preliminary hearing.

ENT'D MAY 14 2007

## Notification of Charges

I am pleading guilty (or no contest) to the following crimes:

Crime & Statutory Provision	Degree	Punishment Min/Max and/or Minimum Mandatory
A. <u>Theft by Deception (Eleven Counts)</u>	2 <sup>nd</sup> Felony	1-15 yrs Prison \$10,000 Fine + 85% surcharge

I have received a copy of the (Amended) Information against me. I have read it, or had it read to me, and I understand the nature and the elements of the crimes(s) to which I am pleading guilty (or no contest).

The elements of the crime(s) to which I am pleading guilty (or no contest) will be as stated in the criminal information filed in this case. *See* Information on file in this case.

I understand that by pleading guilty I will be admitting that I committed the crimes listed above. (Or, if I am pleading no contest, I am not contesting that I committed the foregoing crimes). I stipulate and agree (or, if I am pleading no contest, I do not dispute or contest) that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the court to accept my guilty (or no contest) pleas and prove the elements of the crimes(s) to which I am pleading guilty (or no contest): The facts are those stated by the prosecutor in open court during the plea hearing.

## Waiver of Constitutional Rights

I am entering these pleas voluntarily. I understand that I have the following rights under the constitutions of Utah and of the United States. I also understand that if I plead guilty (or no contest) I will give up all the following rights:

**Counsel:** I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the court at no cost to me. I understand that I might alter, if the judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I have not waived my right to counsel. I am represented by David Perry.

I certify that I have read this statement and that I understand the nature and elements of the charges and crimes to which I am pleading guilty (or no contest). I also understand my rights in this case and other cases and the consequences of my guilty (or no contest) plea(s).

My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty (or no contest) plea(s).

**Jury Trial.** I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty (or no contest).

**Confrontation and cross-examination of witnesses.** I know that if I were to have a jury trial, a) I would have the right to see and observe the witnesses who testified against me and b) my attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me.

**Right to compel witnesses.** I know that if I were to have a jury trial, I could call witnesses if I chose to, and I would be able to obtain subpoenas requiring the attendance and testimony of those witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

**Right to testify and privilege against self-incrimination.** I know that if I were to have a jury trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, no one could make me testify or make me give evidence against myself. I also know that if I chose not to testify, the jury would be told that they could not hold my refusal to testify against me.

**Presumption of innocence and burden of proof.** I know that if I do not plead guilty (or no contest), I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead “not guilty,” and my case will be set for a trial. At a trial, the State would have the burden of proving each element of the charge(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

I understand that if I plead guilty (or no contest), I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

**Appeal.** I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty (or no contest).

**I know and understand that by pleading guilty or no contest, I am waiving and giving up all the statutory and constitutional right as explained above.**

## **Consequences of Entering a Guilty (or No Contest) Plea**

**Potential penalties.** I know the maximum sentence that may be imposed for each crime to which I am pleading guilty (or no contest). I know that by pleading guilty (or no contest) to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

I know that in addition to a fine, an eight-five percent (85%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

**Consecutive/concurrent prison terms.** I know that if there is more than one crime involved the sentences may be imposed one after another (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty (or no contest), my guilty (or no contest) plea(s) now may result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the court to impose consecutive sentences unless the court finds and states on the record that consecutive sentences would be inappropriate.

**Plea bargain.** My guilty (or no contest) plea(s) (is/are) (is/are not) the result of a plea bargain between myself and the prosecuting attorney. All the promises, duties, and



provisions of the plea bargain, if any, are fully contained in this statement, including those explained below:

A. I agree to plead guilty to the eleven counts of Theft by Deception as charged in the Information in the present case, each a second degree felony.

B. If not already in the possession of my probation/parole officer, I agree to turn my passport(s) over to my attorney, David Perry, until this case is concluded. I further agree not leave the State of Utah without first obtaining written approval from my probation/parole officer and the State's attorney in this case.

C. I agree to deposit \$1,300,000.00 (U.S. dollars) into the trust account of my defense attorney, David Perry, within 90 days of entering the guilty pleas in this case and being released from the Utah State Prison. This money will be paid to Richard Waters to compensate him for the monies Mr. Waters previously transferred to me during the years of 2004 and 2005 (as outlined in the State's discovery). These monies are the subject of the eleven counts in the present case.

D. The State agrees that upon me entering guilty pleas to the eleven counts discussed above, it will stipulate to an own recognisance release for a period of 90 days.

*Further more, the state will write a letter to the Board of Pardons REC his release.*  
E. The State further agrees that once it has reasonably verified that Mr. Waters has received the \$1,300,000.00 in legal funds, it will stipulate to me withdrawing my pleas to the eleven counts and the present case will be dismissed.

TB.

**Trial Judge not bound.** I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecuting attorney are not binding on the judge. I also know that any opinions they express to me as to what they believe the judge may do are not binding on the judge.

### **Defendant's Certification of Voluntariness**

I am entering this plea of my own free will and choice. No force, threats, of unlawful influence of any kind have been made to get me to plead guilty (or no contest). No promises except those contained in this statement have been made to me.

I have read this statement, or I have had it read to me by my attorney, and I understand its contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

I am satisfied with the advice and assistance of my attorney.

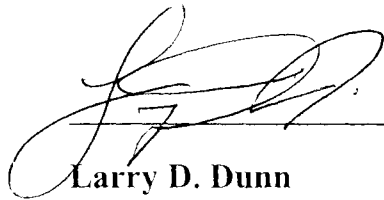
I am 39 Years of age. I have attended school through the 17 grade. I can read and understand the English language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgment when I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgment.

I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my plea. I am free of any mental disease, defect, or impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my plea.

**I understand that if I want to withdraw my guilty (or no contest) plea(s), I must file a written motion to withdraw my plea(s) before sentence is announced. I**

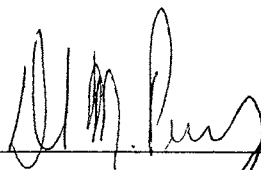
understand that for a plea held in abeyance, a motion to withdraw from the plea agreement must be made within 30 days of pleading guilty (or no contest). I will only be allowed to withdraw my plea if I show that it was not knowingly and voluntarily made. I understand that any challenge to my plea(s) made after sentencing must be pursued under the Post-Conviction Remedies Act in title 78, Chapter 35a, and Rule 65C of the Utah Rules of Civil Procedure.

Dated this 11 Day of May, 2007.

  
\_\_\_\_\_  
Larry D. Dunn

### Certificate of Defense Attorney

I certify that I am the attorney for \_\_\_\_\_, the defendant above, and that I know he/she has read the statement or that I have read it to him/her; I have discussed it with him/her and believe that he/she fully understand the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly state; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.



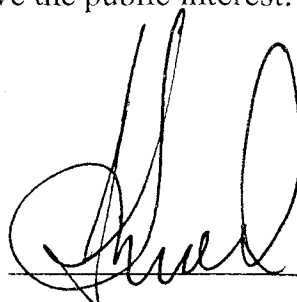
\_\_\_\_\_  
ATTORNEY FOR DEFENDANT

David Perry

Bar No.: \_\_\_\_\_

### Certificate of Prosecuting Attorney

I certify that I am the attorney for the State of Utah in the case against \_\_\_\_\_, defendant. I have reviewed this Statement of Defendant and find that the factual basis of the defendant's criminal conduct which constitutes the offense(s) is true and correct. No improper inducements, threats, or coercion to encourage a plea has been offered defendant. The plea negotiations are fully contained in the Statement and in the attached Plea Agreement or as supplemented on the record before the Court. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense(s) for which the plea(s) is/are entered and that the acceptance of the plea(s) would serve the public interest.



PROSECUTING ATTORNEY

Tony C. Baird

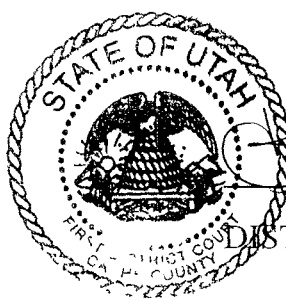
Bar No.: \_\_\_\_\_

**Order**

Based on the facts set forth in the foregoing Statement and the certification of the defendant and counsel, and based on any oral representations in court, the Court witnesses the signatures and finds that defendant's guilty (or no contest) plea(s) is/are freely, knowingly, and voluntarily made.

It IS HEREBY ORDERED that the defendant's guilty (or no contest) plea(s) to the crime(s) set forth in the Statement be accepted and entered.

Dated this 11 Day of MAY, 2007.



  
DISTRICT COURT JUDGE

## **ADDENDUM C**

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IN THE FIRST JUDICIAL DISTRICT COURT

CACHE COUNTY, STATE OF UTAH

STATE OF UTAH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 071100069
	)	Transcript of Videotape.
LARRY DOUGLAS DUNN,	)	
	)	
Defendant.	)	

-----

**Transcript of Entry of Plea.**  
Honorable Clint S. Judkins presiding.  
First District Court Courthouse  
Logan, Utah  
May 11, 2007

\* \* \*

APPEARANCES:

For the Plaintiff: TONY C. BAIRD  
Deputy County Attorney

For the Defendant: DAVID M. PERRY  
Attorney at Law

RODNEY M. FELSHAW  
Registered Professional Reporter  
First District Court

COPY



1           **THE COURT:** Let's take the case of State of Utah  
2 versus Larry Douglas Dunn. This is the time set for a  
3 pretrial conference. Mr. Perry, obviously your negotiations  
4 have been successful. Will you verbalize for me your  
5 arrangement, please.

6           **MR. PERRY:** Your Honor, we prepared a written plea  
7 agreement. In that agreement it sets forth all of the terms.  
8 The court has the copy. What basically Mr. Dunn is going to  
9 plead guilty to is the 11 counts. He's going to waive his  
10 right to a preliminary hearing and plead guilty to the 11  
11 counts. The state will then release him on his own  
12 recognizance. We'll waive our right to be sentenced within  
13 90 days, or within 45 days. And we'll set sentencing in 90  
14 days.

15           During that 90 day time frame Mr. Dunn, if he has a  
16 passport, will turn it over to me or his probation or parole  
17 officer. He agrees to deposit \$1.3 million in my trust  
18 account. And this money will be paid to the victim Richard  
19 Waters to compensate him for the monies Mr. Waters previously  
20 transferred to Mr. Dunn during the years of 2004 and 2005.  
21 And they are the monies subject to the 11 counts in the  
22 present case.

23           The state agrees that upon entering the guilty pleas to  
24 the 11 counts they will stipulate to his own recognizance for  
25 a period of 90 days. The state further agrees that once it

1 has verified that Mr. Waters has received the 1.3 million in  
2 legal funds, it will stipulate to the defendant withdrawing  
3 his pleas to the 11 counts and the present case will be  
4 dismissed.

5 They've also agreed that if he has any problems with --  
6 he had a parole date last week. The Board should release him  
7 based upon this agreement. The state has also agreed to  
8 write a letter to the Board recommending that he be released  
9 for this time period so he can get these monies together.

10 **THE COURT:** So it's anticipated that with this  
11 agreement he will be released from the Utah State Prison?

12 **MR. BAIRD:** Yeah. We'll ask the court to make sure  
13 that there's an OR release in this case, his own recognizance  
14 release.

15 **THE COURT:** What is he in prison for now?

16 **MR. BAIRD:** A bad check, I think, a bad check  
17 offense.

18 **THE COURT:** Out of which court?

19 **MR. BAIRD:** Salt Lake.

20 **MR. PERRY:** Third District.

21 **THE COURT:** Mr. Dunn, you understand and realize  
22 that if the court approves this thing here today and I  
23 release you on your own recognizance on this case, I don't  
24 have any control over whatever that other case is down at the  
25 prison?

1           **THE DEFENDANT:** Absolutely. I'm still on parole  
2 until 2027.

3           **THE COURT:** But you understand that?

4           **THE DEFENDANT:** Yes.

5           **THE COURT:** The state is comfortable that he will be  
6 released and can follow through on this arrangement that has  
7 been made.

8           Mr. Dunn, you've been incarcerated, but have you consumed  
9 any alcohol or drugs before coming in here today?

10           **THE DEFENDANT:** Not drugs, but I take medications.  
11 And they're nonpsychotropic.

12           **THE COURT:** Those medications that you are taking do  
13 not affect your ability to make a reasoned decision right  
14 now; is that correct?

15           **THE DEFENDANT:** They don't.

16           **THE COURT:** Do you feel you've had ample opportunity  
17 to discuss this matter with your attorney, Mr. Perry?

18           **THE DEFENDANT:** Very much so.

19           **THE COURT:** Do you feel that you understand what is  
20 going on here today?

21           **THE DEFENDANT:** Very well, yes.

22           **THE COURT:** Has anyone promised you or threatened  
23 you with anything to get you to plead guilty to these 11  
24 counts other than as set forth in this document or  
25 represented to the court by your attorney?

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**THE DEFENDANT:** No, sir.

**THE COURT:** You understand that any recommendation made to me as to what sentence you should receive would be a recommendation only and I may or may not accept the recommendation, do you understand that?

**THE DEFENDANT:** After I've done X, Y and Z you still would have the authority to not dismiss the case?

**THE COURT:** That's correct. I'm inclined to do that, but you need to understand that these are all recommendations, everything that has been said. I can see no reason at this point in time -- I understand that this is a result of much negotiation, et cetera, that has gone on and the court in all probability would follow through on that. But you need to understand that I have the last word and if I get additional information I may do something different. You understand that?

**THE DEFENDANT:** Yes, sir.

**THE COURT:** Very well. Has the defendant waived his preliminary hearing?

**MR. PERRY:** No, Your Honor.

**MR. BAIRD:** No. He needs to do that.

**THE COURT:** You understand that this statement of defendant sets forth the rights you have as relates to a preliminary hearing?

**THE DEFENDANT:** Yes.

1           **THE COURT:** And the purpose of a preliminary hearing  
2 is to ascertain whether or not the state can show that  
3 there's probable cause to believe that the offenses you were  
4 charged with were committed and you were the person who  
5 committed those. This sets forth those rights. By signing  
6 this document you give up your right to that preliminary  
7 hearing, you understand that?

8           **THE DEFENDANT:** Yes, sir.

9           **THE COURT:** This document does appear to bear your  
10 signature. You signed this before it was submitted to me; is  
11 that correct?

12          **THE DEFENDANT:** Immediately, right now.

13          **THE COURT:** Very well. The counts that I understand  
14 you will be pleading guilty to are all second degree  
15 felonies. They appear to all be theft by deception. I'll  
16 read count one. Theft by deception, a second degree felony,  
17 in violation of Utah Code Annotated section 76-6-405. The  
18 information alleges that the defendant did, on or about May  
19 18th, 2004, obtain or exercise unauthorized control over the  
20 property of another by deception with the purpose to deprive  
21 the owner thereof. The value of the property or services was  
22 or exceeded \$5000. Or the property was stolen from the  
23 person of another.

24          Count two is exactly the same as the first, except the  
25 date there is July 16th, 2004. Count three is the same as

1 count two, including the date. As is count four and count  
2 five is the same. Count six is the same as those previously  
3 described except the date there is July 26th, 2004. Count  
4 seven is also the same, theft by deception. The date there  
5 is January 20th of 2005. Count eight is the same as  
6 previously set forth, except the date is January 21st, 2005.  
7 Count nine is the same, except the date is January -- excuse  
8 me, July 23rd, 2005. Count ten is theft by deception as  
9 previously described, with the date being August 8th, 2005.  
10 And count 11 is, again, theft by deception, the same as  
11 previously described, except the date is January 6th, 2006.

12 To those 11 counts, Mr. Dunn, how do you plead?

13 **THE DEFENDANT:** Can I make a suggestion?

14 **THE COURT:** Go ahead.

15 **THE DEFENDANT:** What's the date on the first one?

16 **THE COURT:** The date on the first one is May 18th,  
17 2004.

18 **THE DEFENDANT:** You might want to have me plead  
19 guilty -- you said the first one, have me just do the second  
20 ones. I was incarcerated then. It's just a matter of dates.  
21 I was incarcerated at that time. I'm pleading guilty to all  
22 of them, but --

23 **MR. BAIRD:** It's on or about.

24 **THE DEFENDANT:** I still plead guilty.

25 **THE COURT:** All right. To those 11 counts how do

1 you plead?

2 **THE DEFENDANT:** Guilty.

3 **THE COURT:** Mr. Baird, give us the factual basis for  
4 the 11 counts.

5 **MR. BAIRD:** On the dates -- on or about the dates  
6 alleged in the information, from a source here in Cache  
7 County, state of Utah, Mr. Richard Waters transferred monies  
8 from here to accounts under the control of Mr. Dunn. Each  
9 one of these transfers was in excess of \$5,000.

10 Mr. Waters, if called to testify, would testify that  
11 these monies were transferred for a specific purpose. And  
12 that these monies were received by Mr. Dunn and Mr. Dunn  
13 acknowledged that he received these amounts.

14 That subsequently, some several months later, Mr. Waters  
15 demanded that the defendant give the monies back and the  
16 defendant has not returned those funds. The state would  
17 present evidence that these funds were used inconsistently --  
18 inconsistent to the purpose that they were given to Mr. Dunn  
19 for. Thus Mr. Dunn exercised unauthorized control over the  
20 funds. Along with the other elements, those are the facts  
21 that we would prove.

22 **THE COURT:** When you indicate to us, Mr. Baird, that  
23 the money was used for other purposes than what was  
24 originally designated by Mr. Waters, apparently that was for  
25 the purpose of depriving Mr. Waters of the benefit of that

1 money; is that correct? Is that what you're maintaining?

2 **MR. BAIRD:** When the money was used inconsistent for  
3 the purpose for which Mr. Waters gave it to Mr. Dunn, and  
4 then subsequently not returning the money, refusing to return  
5 it, it shows an intent to permanently deprive -- there were  
6 several demands made. Mr. Dunn may not agree with all of  
7 these facts, but this is the evidence we would present, that  
8 the money was given to him for, among other things, a  
9 business venture and some other things. But in any event the  
10 monies -- the state would present evidence, bank records, to  
11 show that the monies were used inconsistent for the purpose  
12 for which it was given to him.

13 **THE COURT:** And that Mr. Waters was deprived of the  
14 money?

15 **MR. BAIRD:** Yes. He's never received the money  
16 back.

17 **THE COURT:** Mr. Dunn, you've heard the facts as  
18 related to us by Mr. Baird. Are you pleading guilty because  
19 you committed the offenses as he described them?

20 **MR. PERRY:** I don't think he would agree to that.  
21 Maybe we might have to do it on an Alford basis. He's  
22 pleading guilty to get out of jail. The reason he couldn't  
23 get the money back once the demand was made was his probation  
24 officer -- his probation got violated down in Salt Lake  
25 County and he got incarcerated so he wasn't able to access



1 the money.

2           **MR. BAIRD:** We would agree to an Alford type plea.  
3 I understand Mr. Dunn may not agree with all of the  
4 representations that the state has made. Nonetheless, that's  
5 the evidence we would present. We would present bank records  
6 and whatnot to show that the money was used inconsistently.

7           I think Mr. Dunn realizes that there's some give and take  
8 here. He understands that this is in his best interest to do  
9 this, to make this arrangement. So I think for purposes of  
10 resolving it and looking at the likelihood of conviction and  
11 weighing all those sorts of things, I think that he believes  
12 that this is in his best interest. At least I think so from  
13 our conversations. Is that right, Mr. Dunn, you believe this  
14 is in your best interest?

15           **THE DEFENDANT:** Yes.

16           **THE COURT:** Mr. Dunn, the court can't accept a  
17 guilty plea to something unless somebody committed the  
18 offense and you're telling me you didn't commit the offense.  
19 But there's an exception to that and that exception is what  
20 we call an Alford type plea. That is where, after  
21 consultation with your attorney, you have determined that it  
22 is in your best interest to accept the plea bargain that the  
23 state has proposed because you think if you went to trial  
24 your chances of being convicted are such that you're better  
25 off to take this plea. Is that what you're telling me here

1 in this case?

2 **THE DEFENDANT:** Yes, sir.

3 **THE COURT:** Very well. The court will accept the  
4 plea, designating it as an Alford type plea. But I need to  
5 assure you that in doing that, if you don't follow through on  
6 this arrangement and it becomes necessary for this court to  
7 pass sentence, you are sentenced the same as if you admitted  
8 you performed the acts. The court will accept it as a guilty  
9 plea, you understand that?

10 **THE DEFENDANT:** Yes, sir.

11 **THE COURT:** Very well. The court will accept and  
12 designate it as an Alford type plea. I will sign the order  
13 containing the statement of defendant and incorporate that  
14 into the record. Pursuant to your agreement, the court will  
15 authorize the defendant's release on his own recognizance  
16 pursuant to the terms and conditions in the statement of  
17 defendant.

18 Counsel, how are we going to review this? How do you  
19 want to handle that?

20 **MR. PERRY:** Set it for a sentencing date in 90 days,  
21 I guess.

22 **THE COURT:** Set it for sentencing, is that what you  
23 want to do? I guess there's no need for a PSI in this case.  
24 Who is going to report back to the court if he's performed  
25 all of the obligations?

1           **MR. BAIRD:** We will. I guess, frankly, what we  
2 probably ought to do, because otherwise he'll have to be  
3 referred to AP&P for a statement and that sort of thing. I  
4 would suggest that we set it for a status hearing 90 days  
5 out, 90 days from this coming Monday. And then at that time  
6 we'll know whether everything has been fulfilled. If not, I  
7 guess set it for sentencing.

8           **THE DEFENDANT:** Can I ask a question?

9           **THE COURT:** Ask your attorney and he can bring it to  
10 my attention.

11           (Pause in the proceedings.)

12           **MR. PERRY:** His question was if he has the money  
13 sooner than 90 days can we come back before the court and  
14 have this dismissed. My answer was I'm sure the state  
15 wouldn't oppose a dismissal if the money is returned.

16           **THE COURT:** Mr. Dunn, we handle routine matters  
17 every Monday. If you get this thing taken care of before  
18 that, notify your attorney. Mr. Perry knows how to put it on  
19 the next Monday's calendar.

20           All right. We'll schedule it for the 20th of August at  
21 ten. The court will designate that as a status conference.  
22 I'll expect the parties to come prepared at that time to  
23 represent to me whether or not -- in as much as we don't have  
24 AP&P or someone monitoring it, the attorneys will have to be  
25 prepared to come and tell me what the status of the case is

1 that day.

2 All right. Have we covered all of the bases?

3 **MR. PERRY:** I did say this earlier on the record,  
4 but, Mr. Dunn, are you willing to waive your right to be  
5 sentenced within 45 days?

6 **THE DEFENDANT:** Yes.

7 **THE COURT:** I appreciate that Mr. Perry. Anything  
8 else that we should take care of?

9 **MR. PERRY:** Nothing that I have.

10 **THE COURT:** Mr. Baird, have we covered everything in  
11 this matter?

12 **MR. BAIRD:** I believe so, yes.

13 **THE COURT:** Very well.

14 **THE BAILIFF:** Court is in recess.

15 (Hearing concluded.)

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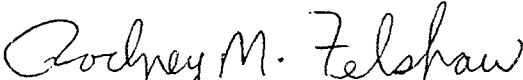
C E R T I F I C A T E

THIS IS TO CERTIFY that the videotaped hearing was transcribed by me, Rodney M. Felshaw, a Certified Court Reporter and Certified Court Tape Transcriber in and for the State of Utah.

That a full, true and correct transcription of the hearing, to the best of my ability, is set forth in the pages numbered 2 to 13, inclusive.

I further certify that the original transcript was filed with the Court Clerk, First District Court, Cache County, Logan, Utah.

Dated this 5th day of September, 2008.

  
Rodney M. Felshaw, C.S.R., R.P.R.

## **ADDENDUM D**

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IN THE FIRST JUDICIAL DISTRICT COURT

CACHE COUNTY, STATE OF UTAH

STATE OF UTAH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 071100069
	)	Transcript of Videotape.
LARRY DOUGLAS DUNN,	)	
	)	
Defendant.	)	

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**Transcript of Sentencing Hearing.**  
Honorable Clint S. Judkins presiding.  
First District Court Courthouse  
Logan, Utah  
February 25, 2008

\* \* \*

APPEARANCES:

For the Plaintiff:	TONY C. BAIRD
	Deputy County Attorney

For the Defendant:	DAVID M. PERRY
	Attorney at Law

RODNEY M. FELSHAW  
Registered Professional Reporter  
First District Court

COPY

1           **THE COURT:** Let's take State versus Larry Douglas  
2           Dunn. Mr. Perry, I show that this is the time set for  
3           sentencing on 11 counts, all theft by deception, all second  
4           degree felonies. Any reason why sentence should not be  
5           passed at this time?

6           **MR. PERRY:** Your Honor, I think this is a case that  
7           we ought to maybe have Mr. Dunn examined to see if he's  
8           competent to proceed. I'll file the petition and ask the  
9           court to stay sentencing until the state can look at him and  
10          see if he understood what he was doing when he entered his  
11          plea or not.

12          **THE DEFENDANT:** Can I ask for an attorney that would  
13          vigorously defend me? I deserve that whether I'm guilty or  
14          not.

15          **THE COURT:** Mr. Baird, input from the state on Mr.  
16          Perry's motion?

17          **MR. BAIRD:** May we approach?

18          **THE COURT:** Come forward.

19          (Sidebar, not recorded.)

20          **THE COURT:** The court has had an opportunity to  
21          visit with counsel at the bench. Mr. Perry, anything  
22          further?

23          **MR. PERRY:** Mr. Dunn needs a few minutes to read the  
24          presentence report. I haven't talked to him since he was  
25          here last.



1           **THE COURT:** You've had ample opportunity to visit  
2 with him. It's time to proceed.

3           **MR. PERRY:** I make a motion to withdraw his guilty  
4 pleas that he entered.

5           **THE COURT:** The motion will need to be made in  
6 writing. You can do that at a later time.

7           **MR. PERRY:** We object to proceeding with sentencing  
8 at this time because in order for him to -- once he's  
9 sentenced he's not able to withdraw his plea. So we'd like  
10 to make a motion prior to sentencing to see if the plea can  
11 be withdrawn. I want to supplement that by having him  
12 examined by two examiners at the state hospital to see if he  
13 was competent at the time he entered his plea.

14           **THE COURT:** Mr. Baird, the court has heard your  
15 comments at the bench, but I'll hear what you have to say on  
16 the record.

17           **MR. BAIRD:** We oppose that. We'd like to go ahead  
18 with sentencing today. If counsel wants to file a motion at  
19 a later time, we'll respond to it then.

20           **THE COURT:** Anything further, Mr. Perry?

21           **MR. PERRY:** We object to proceeding with sentencing  
22 today because we've made -- we want to make a petition to  
23 determine whether he's competent to proceed. Once we make  
24 that petition, Your Honor, as you well know that stays all  
25 proceedings. So we can't proceed with anything further until

1 that issue is resolved, unless you want to have a hearing to  
2 see whether the petition is valid. That still stays all  
3 proceedings.

4 I make that petition at this time in behalf of Mr. Dunn  
5 to stay all proceedings so that we can determine whether he  
6 was competent at the time he entered his plea and whether his  
7 plea should be withdrawn or not.

8 **THE COURT:** Mr. Perry, this matter has been pending  
9 for I'm not sure how long. The court finds that your motions  
10 are untimely. I'll allow you to file those in writing if you  
11 so desire, but the court will proceed with sentencing today.  
12 Anything else you'd like to place on the record?

13 **MR. PERRY:** Mr. Dunn entered into an agreement where  
14 he was hopeful that he could get out of prison and get over  
15 to the Isle Mann where he's indicated he has the one point  
16 three million dollars to pay Mr. Waters. He was unable to  
17 get out of prison and get access to these funds in order to  
18 pay the restitution to Mr. Waters.

19 Because he's been unable to get out of prison to get  
20 access to this money, he has not had the benefit of the  
21 bargain that was entered into in this case. That being that  
22 once he paid the 1.3 million the state would stipulate to him  
23 being able to withdraw his plea and the charges be dismissed.  
24 Because of his inability to have access to this money that's  
25 in the Isle Mann, an off shore trust, because of his

1 incarceration status, he's been unable to make restitution.  
2 Had he been able to make restitution we wouldn't be  
3 proceeding with sentencing today and the charges would be  
4 dismissed.

5 Mr. Dunn is confident that he has that money there. He  
6 believes the money is there. He just needs to be able to  
7 access the money and then Mr. Waters can be made whole. By  
8 sentencing him to prison it will delay that. And plus it  
9 will -- he may be in prison a long time. He pled straight up  
10 to the charges with the understanding that he thought he  
11 would be able to get out of prison and get the money. The  
12 state wrote a letter and tried to help him in that matter.

13 Because of different factors he's been unable to -- he  
14 was released to a halfway house, but they would not allow him  
15 telephone access or any type of pass to be able to access  
16 this money. Therefore he's still in prison. I believe he  
17 has a Board date, or maybe not.

18 **THE DEFENDANT:** I went to the Board.

19 **MR. PERRY:** You went to the Board and don't have a  
20 date?

21 **THE DEFENDANT:** The Board said I needed to figure  
22 out this second thing, which I haven't got to talk to you  
23 about yet. Then go back and tell them what happened.  
24 They're pending right now posing you a question, but I  
25 haven't even spoken to my attorney.

1           **THE COURT:** Anything further?

2           **MR. PERRY:** Anything you want to say to the Judge?  
3 This is the time for sentencing, Mr. Dunn.

4           **THE COURT:** Mr. Baird, input from the state?

5           **MR. BAIRD:** I think the report done by the AP&P  
6 agent, Mr. Feltenberger, was excellent. I thought he did a  
7 great job of explaining what Mr. Dunn is all about. Mr. Dunn  
8 is a complete fraud and he continues to try to -- even today  
9 it's continually a fraud. He's unlike many defendants, or  
10 any defendant, frankly, I've ever prosecuted. I think Mr.  
11 Feltenberger's recommendation is very appropriate. I ask the  
12 court to sentence the defendant to prison. I'll submit it.

13           **THE DEFENDANT:** Can I say something, Your Honor?

14           **THE COURT:** Go ahead.

15           **THE DEFENDANT:** I came up with this idea. I asked  
16 originally for a pow wow to all get together so the  
17 prosecution could see that Richard was all on board and  
18 understanding. The prosecution saw that. Mr. Baird listened  
19 to Richard, what he said. Everything that I've said is  
20 exactly one line linear after the next.

21           I said that this deal had to be done before May 8th. The  
22 prison did not transport me on -- was it the 5th? The Friday  
23 beforehand I had court here and for no reason at all the  
24 prison didn't transport me. Your assistant sent it in, maybe  
25 this lady here sent it in, but I wasn't transported.

1           The deal needed to be done before May 8th is what the  
2 Board said and then I would be released on May 8th last year.  
3 It wasn't done before May 8th. I came actually on Friday, a  
4 week after -- four days after I was to be released. So now I  
5 lost that May 8th Board date. I even said to you on that  
6 date, and it's on the video or the transcript, I said I could  
7 be another three to six months before I get released.

8           I come back and meet with you and I was still cheery. I  
9 said to you I've seen the Board, they told me I'd be released  
10 July 31st, but it's now August 20th. Clearly something is  
11 arrears.

12           I went back and my captain, Hughes, who doesn't like  
13 inmates, threatened me saying if I'm not telling the truth  
14 I'd go to max. He took me at my word and called the Board.  
15 The Board lost my file. They said that they misplaced it.  
16 They misplaced it during the summer time, whatever happened.  
17 They said we'll get right on it. It wasn't done. I finally  
18 wrote to Deputy Warden Bouseo and asked for his help. And I  
19 contacted Officer Valdez, our caseworker. They called the  
20 Board and a Ms. Cheryl, and I don't know if that's Ms. Cheryl  
21 Hansen or not, but a Ms. Cheryl said, oh, my gosh, and I  
22 heard, it was on the speaker phone, this deal isn't done yet.  
23 If I can find a Board member it will be done by this  
24 afternoon. And the next day I had my Board date for the  
25 13th.

1           Now, the next mess up -- I haven't done anything wrong  
2 yet. Everybody keeps saying I'm such a bad person, but I  
3 never get to perform. My dad gets involved because I had to  
4 have another angiogram. I don't know if he got involved with  
5 Mr. Baird, but I got emails in my pocket that these gentlemen  
6 brought up, that my dad sent around saying junior needs to be  
7 watched, make sure he's taking his blood, everything for the  
8 angiogram.

9           I got sent to a halfway house which I never asked to go.  
10 The Board actually, when I went to them, they didn't know I'd  
11 went to the halfway house. They said why did you ask to go  
12 there. I didn't ask to go there. At a halfway house it's  
13 like still being in prison, but you can get your own food and  
14 stuff like that.

15           **THE COURT:** Mr. Dunn, I have other matters that need  
16 to be taken care of.

17           **THE DEFENDANT:** But you need to knowing everything  
18 was mixed up.

19           **THE COURT:** Make your comments relevant to --

20           **THE DEFENDANT:** These are relevant. These are  
21 exactnesses. Now I get to the halfway house and they say I  
22 can't come to court unless I receive a fax from you in the  
23 morning time. I called every morning that morning and they  
24 faxed something down. My boss brings me up and I see you. I  
25 now have a \$20,000 bail. I come back. I don't run away.

1 They had seven men run away from the halfway house.

2 I'm trying to resolve this. If I go to prison right now  
3 Mr. Waters won't get his money. I've been in prison right  
4 now not because I've done another crime or something, but  
5 because of this.

6 His attorney, Mr. Brown, this is very important, these  
7 are exacts, went to my agent. They called the judge and said  
8 I'm a bad person, let's send him to prison on this stuff  
9 right here. So I've served two years on something I should  
10 never have done in the beginning. Richard and I should have  
11 sat down and got it worked out instead of him going to my  
12 parole agent. Now I'm here facing 11 felony twos. I gave  
13 you the opportunity to hang me if I didn't perform, but I've  
14 never performed.

15 Moreover, the court attorney, I haven't even seen this --  
16 what is this called? -- the PSI. I haven't even seen the PSI  
17 yet. But PSI agent at the hearing -- the attorney at the  
18 hearing, Manny Garcia, said this isn't even acceptable to the  
19 court because Mr. Feltenberger lied to the Board and  
20 misrepresented stuff that we've already defended before the  
21 Board and that they threw out. So this actually isn't even  
22 admissible in your court upon some law that they said.

23 **THE COURT:** Mr. Dunn, you have another 30 seconds.  
24 Finish it up.

25 **THE DEFENDANT:** So you want to resolve this and I

1 want to resolve this. I thought in the beginning when I met  
2 you you signed on this as being a good deal. Everybody keeps  
3 saying I'm such a bad guy. When do I get to perform? I've  
4 been incarcerated now for two years on something I didn't do,  
5 this right here. An Alford plea where I say I'm not guilty,  
6 but the other guy says I am, so we figure out a way to  
7 resolve it. If you want to resolve it -- I don't need  
8 anybody to determine if I'm crazy. I invented this little  
9 plan here. So why are you sentencing me -- to take it out of  
10 the Board's hands and sentencing me to probation for the same  
11 90 days when I'm released from prison?

12 **THE COURT:** Very well. Mr. Dunn, your 30 seconds is  
13 up. Anything further, Mr. Perry?

14 **MR. PERRY:** I just wonder if the court would  
15 continue this for like an hour setting to hear all of the  
16 facts?

17 **THE COURT:** No, counsel. This thing has gone on and  
18 on and talking about fairy tales. All of his life he's been  
19 able to dupe people into things like this.

20 **THE DEFENDANT:** Name one thing where I've messed up.

21 **THE COURT:** That's enough, Mr. Dunn. This court  
22 isn't going to be provoked any further. Counsel, if you have  
23 motions to file, file them. You could have filed those in  
24 the past and you didn't. Mr. Dunn has all of these big  
25 stories that he'd like everybody to believe. He's done that



1 all his life. This court won't be manipulated further. Mr.  
2 Waters isn't going to get his money. He keeps trying to  
3 dangle that as a carrot. If he had any money that he wanted  
4 to give Mr. Waters he could have done that in the past. We  
5 tried that and it didn't work.

6 Anything further?

7 **MR. PERRY:** Ask the court to at least run them  
8 concurrent.

9 **THE COURT:** It will be ordered that the defendant on  
10 the 11 counts serve not less than one nor more than 15 years  
11 in the Utah State Penitentiary. On each count he's to pay a  
12 fine in the amount of \$1500. Pay restitution in the amount  
13 of \$1,149,175, plus interest.

14 The court will run counts one through three  
15 consecutively. Counts four through seven consecutively and  
16 counts eight through 11 consecutively. Very well. That will  
17 be the order of the court.

18 (Hearing concluded.)  
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