

2008

# Utah v. Michael Dan Kerr : 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. :  
 :  
MICHAEL DAN KERR, :  
 : Appellate Court No. 20080768-CA  
Defendant/Appellant. :

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BRIEF OF APPELLANT

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THIS APPEAL IS FROM A CONVICTION AND SUBSEQUENT SENTENCING TO AGGRAVATED ASSAULT, A THIRD DEGREE FELONY; POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON, A THIRD DEGREE FELONY; AND DANGEROUS WEAPON PENALTY ENHANCEMENT AND WAS SENTENCED TO SERVE CONSECUTIVE TERMS OF ONE TO TEN YEARS ON THE FELONIES TOGETHER WITH FIVE TO TEN YEARS ON THE ENHANCEMENT AT THE UTAH STATE PRISON. IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE PARLEY R. BALDWIN PRESIDING.

THE DEFENDANT/APPELLANT IS CURRENTLY INCARCERATED AT THE UTAH STATE PRISON.

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**FILED**  
**UTAH APPELLATE COURTS**

MAY 22 2009

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STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
vs.	:	
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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :

Plaintiff/Appellee, :

vs. :

MICHAEL DAN KERR, : Case No. 20080768-CA

Defendant/Appellant. :

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*BRIEF OF APPELLANT*

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**JURISDICTION AND NATURE OF PROCEEDINGS**

This is an appeal from a conviction for the crimes of Aggravated Assault, Possession of a Dangerous Weapon by a Restricted Person and a Dangerous Weapon Penalty Enhancement. This court has jurisdiction over this appeal pursuant to U.C.A. §78A-4-103(2)(e).

**STATEMENT OF ISSUES ON APPEAL AND STANDARD OF REVIEW**

**POINT I**

**DID THE COURT ERR IN FAILING TO MERGE THE DANGEROUS WEAPON ENHANCEMENT ON BOTH OF THE THIRD-DEGREE FELONY CHARGES TOGETHER WITH THE SEPARATE DANGEROUS WEAPONS PENALTY ENHANCEMENT?**

STANDARD OF REVIEW: A “merger argument is a matter of statutory interpretation, a legal question, which [is] reviewed for correctness.” *State v. Bluff*, 52 P.3d 1210, 1223 (Utah 2002).

The issue was properly preserved at trial through a timely objection to these issues by trial counsel (Tr. 105).

## **POINT II**

### **WERE THE DEFENDANT’S CONSTITUTIONAL RIGHTS UNDER THE CRUEL AND UNUSUAL PROVISION OF ARTICLE I, SECTION 9 OF THE UTAH CONSTITUTION VIOLATED BY THE DOUBLE ENHANCEMENT AND DID THIS VIOLATION CONSTITUTE PLAIN ERROR?**

STANDARD OF REVIEW: The issue of constitutionality is a question of law, and this Court should review the trial court’s ruling for correctness and accord it no particular deference. “Since questions of constitutional rights are questions of law, we give no deference to the trial court’s conclusion . . .” *State v. Mitchell*, 824 P.2d 469, 471 (Utah Ct. App. 1991).

The issue was not properly preserved at trial, although defense counsel objected to the enhancements on a merger or double jeopardy standard. (Tr. 105). Therefore, the plain error standard applies. “To establish plain error, a defendant must show: (1) an error did in fact occur, (2) the error should have been obvious to the trial court, and (3) the error is harmful. *State v. Bradley*,

2002 UT App 348 (See also *State v. Ellifritz*, 835 P.2d 170, 174 (Utah Ct.App. 1992) and *State v. Olsen*, 860 P.2d 332, 334 (Utah 1993)).

### **POINT III**

**WAS THE DEFENDANT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTIONS SEVEN AND TWELVE OF THE UTAH CONSTITUTION WHEN HIS ATTORNEY FAILED TO OBJECT TO THE SENTENCE UNDER THE EIGHTH AMENDMENT AND ARTICLE 1 SECTION 9 OF THE UTAH CONSTITUTION.?**

**STANDARD OF REVIEW:** The Appellate Court must determine as a matter of fact and law whether the Defendant was denied his right to effective assistance of counsel. In *Strickland v. Washington*, 466 U.S 668, 80 L.Ed.2d 674 (1984), the United States Supreme Court articulated a two part test, which was adopted in *State v. Templin*, 805 P.2d 182 (Utah 1990), to determine whether counsel was ineffective. The Court held that:

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. *Id.* at 466 U.S. at 687, 80 L.Ed. 2d at 693.

## **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

The following constitutional provisions, statutes and rules are attached in the addendum:

### **UTAH STATUTES**

UCA. §76-1-402(3)

UCA §76-5-103. Aggravated assault.

UCA §76-10-503 Possession of a Dangerous Weapon by a Restricted Person

UCA §76-3-203 Dangerous Weapon Penalty Enhancement

UCA §78A-4-103(2)(e)

### **UTAH CONSTITUTION**

Article 1 Section 7

Article 1 Section 9

Article 1 Section 12

### **UNITED STATES CONSTITUTION**

Fourth Amendment

Fifth Amendment

Sixth Amendment

Eighth Amendment

Fourteenth Amendment

### **STATEMENT OF THE CASE**

The Defendant was charged with the offenses of Aggravated Assault, a third-degree felony in violation of U.C.A. §76-5-103, Possession of a Dangerous Weapon by a Restricted Person, a third-degree felony in violation of U.C.A. §76-10-503, together with a Dangerous Weapon Penalty Enhancement in violation of U.C.A. §76-3-203. Defendant had a bench trial in front of the Honorable Parley R. Baldwin on June 17, 2008. The Defendant was found guilty on the Aggravated Assault Charges and the Possession of a Dangerous Weapon by a Restricted Person together with a Dangerous Weapon Penalty Enhancement in violation of U.C.A. §76-3-203. On August 28, 2008, the Defendant was sentenced to serve consecutive terms of one to ten years on the two third-degree felonies, together with a 5 year to 10 year sentence on the enhancement. (R. 195/3-4)The Defendant is currently incarcerated in the Utah State Prison.

### **STATEMENT OF THE FACTS**

On June 16, 2006, Mr. Brandon Hartley and Brent McKissick were working at the Outlaw Saloon as club security. (R. 7) That evening, Mr. Hartley and his boss, Mr. McKissick, were called by a two-way radio to respond to a fight that was occurring in the club's bathroom. (R. 8). When Mr. Hartley arrived to the bathroom, he observed a man sitting on the floor while Mr. Kerr was punching him. (R. 9) At that point, Mr. Hartley grabbed Mr. Kerr by the

arm and pinned him down to the ground until more security arrived. (R.11) Mr. Hartley then took the Defendant outside and Mr. McKissick took the other individual outside, separating the two in front of the entrance to the club. (R.12) Mr. Kerr was bleeding, so Mr. Hartley went inside to grab some rags for the bleeding while Mr. McKissick looked after Mr. Kerr. (R. 13) Mr. McKissick took Mr. Kerr to the north side of the building where there was less traffic and sat him on the grass. (R. 27) Mr. McKissick noticed that Mr. Kerr's face was really purple and swollen. (R. 27) After checking Mr. Kerr's pupils for reaction to light, Mr. Kerr began to stand up, but once told to sit back down, and he complied. (R. 27) Mr. McKissick then saw that the officers and paramedics pull into the parking lot and walked away from the Defendant for a moment to get the attention of the officers. (R. 28) Defendant had gotten up and begun to walk towards the Flying J parking lot, and Mr. McKissick told him to sit back down. (R. 29) Mr. McKissick walked closer to him and put his hand up to the side of him; and at that point, Mr. Kerr then swung his left hand and hit him in the cheek. (R. 29) Mr. McKissick then spotted a knife, and he and Mr. Kerr began to wrestle around. (R. 30) Mr. McKissick pinned Mr. Kerr belly-faced to the ground and obtained control of the situation. (R. 31) The knife was pointed toward the ground and at some time during the wrestling, Mr. McKissick noticed the knife blade get bent against the asphalt. (R. 31) During the

wrestling, Mr. McKissick's face was cut by the knife. (R. 31) Once Mr. McKissick gained further control of the situation, Mr. McKissick radioed Mr. Hartley to have the sheriffs come over because he had been stabbed in the face. (R. 31) Officer Nealy Adams and Mr. Hartley were discussing the incident when, Mr. McKissick called out over the two-way radio that he had been stabbed. (R. 14) Mr. McKissick had Mr. Kerr pinned to the ground, and Mr. Hartley grabbed the knife out of his hand and pulled his arm behind his back and placed him in an ankle lock with the help of Officer Jones applying pressure to Mr. Kerr's bicep. (R. 14, 31, 59) Deputy Jones then placed Mr. Kerr into custody. (R. 78) Deputy Jones and Officer Adams placed the knife into evidence, and Officer Adams then waited by Mr. Kerr until medical arrived and were able to examine him and take him to the jail. (R. 79-80)

The Defendant was found guilty on the Aggravated Assault Charges and the Possession of a Dangerous Weapon by a Restricted Person. Upon the Court's finding of guilt, the State asked the Court to look at U.C.A. §76-3-203.8 for an enhancement of a dangerous weapon.

### **SUMMARY OF ARGUMENTS**

The Defendant has the constitutional right to be free from double jeopardy, as set forth in the Fifth Amendment to the United States Constitution. The Defendant was denied this right when the trial court failed to merge charges

and convicted him of aggravated assault, possession of a dangerous weapon by a restricted person and then enhanced the sentence with the addition of a dangerous weapon penalty enhancement.

The possession of a dangerous weapon is an essential element to both aggravated assault and possession of a dangerous weapon by a restricted person. Using a weapons enhancement is doubly enhancing the Defendant's sentence and that is double jeopardy, a violation of Defendant's Fifth Amendment rights.

Furthermore the imposition of the two weapons enhancement violated the Defendant's constitutional right against cruel and unusual punishment as protected under Article 1 Section 9 of the Utah Constitution and the Eighth Amendment the United States Constitution. This constitutional violation is premised upon the fact that the legislature, after reviewing all of the ramifications of a possession of the weapon by a restricted person, declared the sentence to be 0 to 5 years in prison. By adding the two separate enhancements, the Defendant is being punished three times for the same crime, with a resulting increase of over 400% to the original sentence as enacted by the Utah State Legislature. Finally, the Defendant's Sixth Amendment constitutional rights to effective assistance of counsel were violated by counsel's failure to recognize and raise the cruel and unusual constitutional challenge.



## ARGUMENT

### POINT I

**THE COURT ERRED IN FAILING TO MERGE THE DANGEROUS WEAPON ENHANCEMENT ON BOTH OF THE THIRD-DEGREE FELONY CHARGES TOGETHER WITH THE SEPARATE DANGEROUS WEAPONS PENALTY ENHANCEMENT WHICH VIOLATED DEFENDANT’S DOUBLE JEOPARDY RIGHT.**

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution forbids multiple punishments when two offenses do not each require proof of an additional fact. *State v. Wood*, 868 P.2d 70, 90-91 (Utah 1993)<sup>1</sup>. Put another way, when a greater offense cannot be proved without the lesser, conviction of the lesser may not follow conviction of the greater. *Id.*

“[M]erger is a judicially-crafted doctrine available to protect criminal defendants from being twice punished for committing a single act that may violate more than one criminal statute. “ *State v. Diaz*, 2002 UT App 288, ¶ 17, 55 P.3d 1131. The motivating principle behind the merger doctrine is to prevent violations of constitutional double jeopardy protection. This Court in *State v. Lopez*, 2004 UT App 410, ¶ 8 stated “Courts apply the merger doctrine as one

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<sup>1</sup> Overruled on other grounds, see *State v. Mirquet*, 914 P.2d 1144 (Utah Mar. 27, 1996).

means of alleviating the concern of double jeopardy that a defendant should not be punished twice for the same crime.”

In *State v. Ross*, 951 P.2d 236, 241 (Utah Ct. App. 1997), the Court held “The [statutory] prohibition on conviction for lesser-included offenses flows from the double jeopardy clauses of the Utah and the United States Constitutions.” U.C.A. §76-1-402(3) provides that “[a] defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense.” The subsection further states that lesser included offenses are “established by proof of the same or less than all the facts required to establish the commission of the offense charged.” *Id.* Thus, “where the two crimes are ‘such that the greater cannot be committed without necessarily having committed the lesser,’ then as a matter of law they stand in the relationship of greater and lesser offenses, and the defendant cannot be convicted or punished for both.” *State v. Hill*, 674 P.2d 96, 97 (Utah 1983)

In *Hill*, the court set forth a two-part test for determining whether a conviction for a second offense arising out of the same set of facts violates §76-1-402(3), requiring a comparison of “the statutory elements of the two crimes [first] as a theoretical matter and [second], where necessary, by reference to the facts proved at trial.” *Id.* A third part to the test was later added in *State v.*

*McCovey*, 803 P.2d 1234 (Utah 1990) which stated that in cases where the legislature intended a statute to be an enhancement statute, the merger doctrine set forth in §76-1-402(3) does not apply.

In the instant case, it is ambiguous what the legislature intended in regards to the Dangerous Weapons Penalty Enhancement. The possession of a dangerous weapon was the sole factor in Defendants Aggravated Assault charge, and the Dangerous Weapon Penalty Enhancement under §76-3-203. There was no way to obtain the convictions of Aggravated Assault and Possession of a Dangerous Weapon by a Restricted Person without the possession of a weapon. Accordingly, the dangerous weapon penalty enhancement must merge into the greater offenses of aggravated assault and possession of a dangerous weapon by a restricted person. See *Wood, supra*.

Here, the Defendant was charged with the crime of Aggravated Assault, Possession of a Dangerous Weapon by a Restricted Person in addition to a Dangerous Weapon Penalty Enhancement. The facts of this case show that the Defendant did get into an altercation with Mr. McKissick which resulted in a knife wound to Mr. McKissick's face. Defendant's only weapon used was a Leatherman-type knife. The Defendant was charged and convicted of aggravated assault and possession of dangerous weapon (the Leatherman knife) by a

restricted person. Each of those charges resulted in a sentence of one to five years. It was essential that a weapon be used in order to get the conviction of those crimes. Allowing a Dangerous Weapon Penalty Enhancement in violation of U.C.A. §74-3-203, for the possession of a Leatherman knife is doubly enhancing the sentence for the possession of a tool.

The Illinois Supreme Court defines double enhancement and stated: “Double enhancement exists “when a factor previously used to enhance an offense or penalty is again used to subject a defendant to a further enhanced offense or penalty.” *People v. Koppa*, 184 Ill.2d 159, 703 N.E.2d 91 (1998).

The Illinois Supreme Court further defined the problem of double enhancement in *People v. Haron*, 422 N.E.2d 627 (Ill. 1981), stating: In the context of armed violence, the State cannot seek to enhance an offense through the presence of a weapon and then use the weapon as a basis for an armed violence charge. *Id.* In *Haron*, the trial court found an impermissible double enhancement because the presence of a weapon enhanced a misdemeanor battery offense to felony aggravated battery and additionally served as a basis for an armed violence charge. *Id.*

The *Haron* court, further went on to say: “[W]here a defendant possesses a weapon during the commission of a felony, an armed violence charge does not

constitute improper enhancement if the elements of the predicate felony require no presence or use of a weapon. *Id. Haron*,

Here, the crimes the Defendant was convicted of include Aggravated Assault, U.C.A. §76-5-103<sup>2</sup> which explicitly lists the requirement of a dangerous weapon as an essential element to the crime. Next, the crime of Possession of a Dangerous Weapon by a Restricted Person, U.C.A. §76-10-503<sup>3</sup>, requires that the individual be of a restricted class and have in possession a dangerous weapon. Both of these crimes hinge upon whether there was a possession of a weapon. Further enhancing the Defendant's sentence through a dangerous weapon penalty enhancement is exactly what the *Haron* court defined as double enhancement.

In a case out of the Tenth Circuit, *U.S. v. Farrow*, 277 F.3d 1260 (C.A.10 (Okla.),2002), (in which the defendant robbed a grocery store with his hand in

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<sup>2</sup> 76-5-103. Aggravated assault.

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon....

<sup>3</sup> 76-10-503.Restrictions on possession, purchase, transfer, and ownership of dangerous weapons by certain persons.

(a) A Category I restricted person is a person who:

(i) has been convicted of any violent felony....

his pocket acting like a gun) the court held that “[A]n enhancement based on possession of a dangerous weapon under 2B3.1(b)(2) does not result in double counting because possession of a dangerous weapon is not an element of the offense of unarmed robbery under the statute. *Id.* See *United States v. Rucker*, 178 F.3d 1369, 1373 (10th Cir.1999) (no improper double counting of separate enhancement provisions when they “do not necessarily overlap, are not indistinct, and do not serve identical purposes”).

The Tenth Circuit has made it clear that an enhancement for a weapon is permissible, as long as the weapon is not an element of the offense or overlaps. In the present case, the weapon enhancement directly overlaps and is an element in the aggravated assault and possession of a weapon by a restricted person.

The double jeopardy provisions in both the United States and Utah constitutions generally prohibit the State from making repeated attempts to convict an individual for the same offense after jeopardy has attached....” *State v. Harris*, 2004 UT 103, ¶ 22, 104 P.3d 1250. “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983) (addressing Fifth Amendment double jeopardy claims).

In *Hunter*, the United States Supreme Court determined that dangerous weapon enhancement statutes do not violate the Fifth Amendment’s prohibition on double jeopardy if the legislature specifically authorized cumulative punishment for a crime committed with a dangerous weapon. *See Id.* (stating “where two statutory provisions proscribe the ‘same offense,’ they are construed not to authorize cumulative punishments *in the absence of a clear indication of contrary legislative intent* “ (quoting *Whalen v. United States*, 445 U.S. 684, 692, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980))).

In the case at bar, the enhancement statute and legislative intent are at issue. U.C.A. §76-3-203.8 states (in relevant part):

(2) If the trier of fact finds beyond a reasonable doubt that a dangerous weapon was used in the commission or furtherance of a felony, the court:

(b) may increase by five years the maximum sentence applicable by law in the case of a felony of the second or third degree.

(4) If the trier of fact finds beyond a reasonable doubt that a person has been sentenced to a term of imprisonment for a felony in which a dangerous weapon was used in the commission of or furtherance of the felony and that person is subsequently convicted of another felony in which a dangerous weapon was used in the commission of or furtherance of the felony, the court shall, in addition to any other sentence imposed including those in Subsection (2), impose an indeterminate prison term to be not less than five nor more than ten years to run consecutively and not concurrently.

Utah courts have determined that parts of this statute are clear and that the legislative intent was intended to enhance sentencing in which a dangerous weapon was used. The *State v. Alfatlawi* case is an example.

In *State v. Alfatlawi*, 153 P.3d 804, 816 -818 (Utah App.,2006), the Defendant, who was charged with multiple counts of aggravated robbery and one count of aggravated burglary, claimed he was punished twice for a single act – the use of a dangerous weapon in the commission of his crimes when the court used a dangerous weapon enhancement, and further violated his right against double jeopardy.

This Court disagreed and determined that the dangerous weapon enhancement statute does not violate Defendant’s right against double jeopardy. This Court stated that *Hunter* requires us to consider whether the legislature intended for the dangerous weapon enhancement to impose cumulative punishments. *See id.* We determine that the legislature did so intend. “ ‘[W]here the statutory language is plain and unambiguous, we do not look beyond the language’s plain meaning to divine legislative intent.’ ” *State v. Kenison*, 2000 UT App 322, ¶ 10, 14 P.3d 129 (quoting *State v. Tryba*, 2000 UT App 230, ¶ 13, 8 P.3d 274). Therefore, “[o]nly when we find ambiguity in the statute’s plain language need we seek guidance from the legislative history and relevant policy



considerations.” *Id.* (quoting *Nelson v. Salt Lake County*, 905 P.2d 872, 875 (Utah 1995)).

The plain language of §76-3-203.8 states that “[i]f the trier of fact finds beyond a reasonable doubt that a dangerous weapon was used in the commission or furtherance of a felony, the court ... shall increase by one year the minimum term of the sentence applicable by law.” Utah Code Ann. §76-3-203.8(2). This Court further went on to say “We believe this language unambiguously states that the legislature intended to make it mandatory for trial courts to increase prison terms where the jury determined beyond a reasonable doubt that the defendant used a dangerous weapon while committing a felony. As a result, the dangerous weapon enhancement statute complies with the requirements of *Hunter* and does not violate the Fifth Amendment.” *State v. Alfatlawi*, 153 P.3d 804.

This court held and recognized that the plain language of U.C.A. §76-3-203.8(2) is clear and that an enhancement is constitutional when looking at subsection (2); however, looking at subsection (4), it is ambiguous as to whether an enhancement is intended by the legislature when the possession of a weapon is an essential element of the offense.

In the case at bar, Defendant was convicted and sentenced for crimes in which a necessary element was the possession of a dangerous weapon. The

statute states that the enhancement can be applied even if the use of a dangerous weapon was used in the furtherance of the commission of a felony. However, nowhere in the statute does it permit an enhancement for a weapon possession when the possession is the sole element of the underlying crime.

The application of the weapons enhancement statute to a weapons offense is clearly redundant. The statutory scheme set forth by the Utah Legislature has established a weapons enhancement statute that specifically defines additional penalty when a weapon is used in the commission or furtherance of a felony. The Utah Legislature has also made it a felony to possess a weapon if you are a restricted person. The application of the enhancement statute to that particular offense simply makes no sense. The operative language of UCA §76-3-203.8(4) states, “If the trier of fact finds beyond a reasonable doubt that a person ..... is subsequently convicted of another felony in which a dangerous weapon was used in the commission of or furtherance of the felony,” that the additional weapons enhancement statute applies. The troubling language is the redundancy of the use of a dangerous weapon in the commission of a dangerous weapon felony. This would be akin to increasing the statutory penalty for the use of the check in a forged check offense, the use of a car in the commission of an auto theft, or the use of a prescription pad in the commission of a forged prescription offense. The redundancy of the language simply does not make any sense.

It cannot be assumed that the legislature intended for this particular weapons enhancement to be utilized in a weapons possession case because this would subsume the language of the possession of a weapon by a restricted person statute, and render it surplusage, in violation of the precept of statutory construction that courts give effect to each statutory term and presume that the legislature enacted them all advisedly, e.g., *Burns v. Boyden*, 2006 UT 14, ¶ 19, 133 P.3d 370. It is this redundancy that was recognized by the court in *People v. Haron*, 422 N.E.2d 627 (Ill. 1981), where the court refused to apply a weapon enhancement to a weapon charge.

Defendant is serving his sentence for aggravated assault and possession of a dangerous weapon by a restricted person, further enhancing that sentence by applying the dangerous weapons enhancement is doubly charging Defendant and is a violation of his Fifth Amendment right to be free from double jeopardy.

## **POINT II**

**THE DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE CRUEL AND UNUSUAL PROVISION OF ARTICLE I, SECTION 9 OF THE UTAH CONSTITUTION WERE VIOLATED BY THE DOUBLE ENHANCEMENT AND THIS VIOLATION CONSTITUTED PLAIN ERROR.**

The United States Supreme Court, in the case of *Solem v. Helm*, 463 U.S. 277 (1983) recognized that the Eighth Amendment prohibition against cruel and

unusual punishment limits the length of sentence as well as prohibiting a barbaric sentence. In *Solem v. Helm*, the Court held:

In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. (*Id.* at 290)

The Court reversed a life sentence without the possibility of parole for an individual that had been convicted of a seventh non-violent felony. It is instructive to note that the Court in *Solem v. Helm* declared unconstitutional that sentence in light of the fact that the defendant was convicted of “uttering a ‘no account’ check for \$100.” (*Id.* at 281)

Recently, the U.S. Supreme Court tempered, to some extent, the proportionality analysis in the case of *Ewing v. California*, 538 U.S. 11 (2003). In that case the Court allowed a 25-year sentence to stand against a defendant with an extensive criminal record under the new California “three strikes you’re out” legislation. Ewing was sentenced to 25 years prison for the theft of \$1,200 of golf equipment. The Court, however, in still recognizing the proportionality doctrine noted that the defendant had a “long serious criminal record”, “including robbery and three residential burglaries.” (*Id.* at 30).

The Utah Supreme Court has traditionally held that it may review a constitutional provision independent of the treatment by the United States Court

of a similar federal constitutional provision. In the case of *State v. Larocco*, 794 P.2d 460, 465 (Utah 1990)<sup>4</sup> the Utah Supreme Court stated;

In *State v. Watts*, 750 P.2d 1219 (Utah 1988), this court explained that because of the similarity between Article I, Section 14 of the Utah Constitution and the Fourth Amendment of the United States Constitution, we have not in the past drawn any distinctions between the protections respectively afforded by them. *Id.* at 1221. We then noted, however, that “we have by no means ruled out the possibility of doing so in some future case” since “choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state’s citizens from the vagaries of inconsistent interpretations given to the Fourth Amendment by the federal courts.” (*Id.* at n. 8. emphasis added)

This separate application has been utilized in Article I Section 9 of the Utah Constitution. In the case of *State v. Gardner*, 947 P.2d 631 (Utah 1997) the Court was presented with a case wherein the defendant requested a constitutional ruling on this section. The Court issued a lengthy opinion thoroughly analyzing, comparing, and to some extent distinguishing Article I Section 9 of the Utah Constitution from the Eighth Amendment of the United States Constitution. Article I Section 9 of the Utah Constitution provides:

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishment be inflicted.

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<sup>4</sup> Called into question on other grounds in the case of *State v. Anderson* 910 P2d 1290 (Utah 1996). This question has now been resolved consistently with *Larocco* in the U.S. Supreme Court decision of *Arizona v. Gant* 129 S.Ct. 1710 129 S.Ct. 1710, 2009 WL 1045962.

Persons arrested or in prison shall not be treated with unnecessary rigor.

*State v. Gardner* dealt with a treatment of the former §76-5-103.5(2)(b) of the Utah Code which provided that an aggravated assault by a prisoner serving a first-degree felony was guilty of a capital offense. The Court declared that statute unconstitutional on its face. Justice Durham, writing the plurality decision held that Article I Section 9 requires “that the legislative power to prescribe punishment for criminals must be circumscribed by the principle of proportionality.” *State v. Gardner id at 633*. Justice Durham’s position regarding a plain language of that constitutional provision was that it suggested, “that a punishment, to avoid being unconstitutionally cruel, may not be excessive or grossly disproportionate to the crime it is designed to punish.” *State v. Gardner id at 633*.

The Court in *Gardner* made an extensive analysis of the United States Supreme Court interpretation of the Eighth Amendment, as well as various States’ interpretations of their individual constitutions with language similar to those contained in the Constitution of the State of Utah. After a careful consideration of the opinion of the various courts in these other jurisdictions, the Court held:

I would likewise hold that a disproportionately harsh punishment may be unconstitutionally cruel or unusual under Article I Section 9

of the Utah Constitution, but would base this holding on the widespread acceptance of proportionality analysis in interpreting cruel and unusual punishments clauses in other states' constitutions and the expressed intention of Utah's constitutional delegates that the citizens of Utah should share the same inherent inalienable rights as the citizens of other states. (*id at 638*)

The Utah Supreme Court recognized the Court's general desire to find legislatively enacted statutes to be constitutional. However, the Supreme Court also recognized its constitutionally mandated position to regulate those legislative enactments within the bounds of the Constitution. The Court in *Gardner*, in examining the proportionality and particularly the legislative intent to punish certain categories of criminals in a harsher manner, held:

The State's reference to the violent conditions existing in prison populations cannot justify a dramatic sentence enhancement that also applies in non-prison situations. Furthermore, concerns about the danger presented to society do nothing to explain why an assault by a prisoner serving a sentence for a first-degree felony should lead to a capital conviction when the identical assault would be classified as merely a second degree felony, punishable by a sentence of one to 15 years, if committed by a prisoner serving a sentence for a crime other than a first-degree felony. (*Id at 641*)

Although the Court recognized the constitutionality of a one-degree enhancement, the Court could not constitutionally validate a three-degree enhancement. The Court in *State v. Gardner* stated, "by enhancing the punishment for aggravated assault from a third-degree felony to a capital felony, the capital punishment provisions of §76-5-103.5(2)(b) is considerably harsher

than the enhancements provided for unquestionably more aggravating circumstances contained in other statutes of our criminal code.” (*Id at 644*). The Utah Supreme Court cited the U.S. Supreme Court decisions of *Furman v. Georgia*, 408 U. S. 238 (1972) which required aggravating factors for capital homicide, as well as *Coker v. Georgia*, 433 US 584 (1977) which ruled that capital punishment for rape was unconstitutional. The Court in *State v. Gardner* ruled;

Finally, a majority of this court concludes that the death penalty for aggravated assault by a prisoner is “excessive” in that it is “grossly out of proportion to the severity of the crime” (*id at 652*, citing *Coker v. Georgia*, 433 US 584 (1977))

In a memorandum, and unpublished decision in the case of *State v. Rivera*, 2003 Utah App 169 Case No. 20020397–CA this Court was asked to look at the constitutionality of the double enhancement, but declined to do so on the basis that the defendant had not properly preserved that issue in the trial court. In the case of *State v. South*, 932 P.2d 622, 627 (Utah Ct. App. 1977), the Court recognized that the enhancement was an element of the offense and must be determined by the trier of fact at trial. And in the case of *State v. Stromberg*, 783 P.2d 54 (Utah Ct. App. 1989) the Court upheld the constitutionality of a one degree enhancement for the drug-free zone. The Court in holding that the one-degree enhancement was constitutional stated:



As discussed previously, an enhanced penalty will not be held unconstitutional if the legislative classification is not arbitrarily drawn and rests upon a rational distinction. *See State v. Clark*, 632 P.2d 841, 843-44 (Utah 1981); *see also Moore*, 782 P.2d at 502 (legislature may enhance criminal penalties for specific conduct in its discretion). Indeed, “[i]t is not unconstitutional for a state to impose a more severe penalty for a particular type of crime than the penalty which is imposed with respect to the general category of crimes to which the special crime is related or of which it is a subcategory.” (*State v. Stromberg* at 60)

However it must be remembered that the *Gardner* case was decided after *Stromberg*, and declared a three-degree enhancement unconstitutional. The difference is the proportionality issue discussed in the *Gardner* decision.

In the present case, as discussed above, we have a situation where the Defendant is being doubly enhanced under law, but in reality is receiving a triple punishment for the possession of a weapon. First, he is being punished on a third-degree felony for the possession of a weapon by the restricted person. The first enhancement (second punishment) is the increase of the sentence from a 0 to 5 year sentence up to a 1 to 10 year prison sentence. Finally, the second enhancement (third punishment) for the use of the weapon resulted in a separate consecutive 5 to 10 year prison sentence, with a total sentence of 6 to 20 years in prison.

It is this second enhancement which the Defendant believes violates the constitutional provisions discussed above as applied by the *Gardner* decision. The proportionality violation of sentence in this particular case, as applied

particularly to the possession of a weapon by a restricted person, (as well as the aggravated assault) is a resulting 6 to 20 year prison sentence in a crime for which the legislature pronounced a 0 to 5 year prison sentence. The difficulty of this enhanced sentence is that the legislature knew when they passed the original possession of a weapon by a restricted person, that a dangerous weapon, by definition, had to be present in order for a defendant to be convicted of the charge. Knowing this fact, the legislature enacted a statute which prescribed a 0 to 5 year prison sentence. It is the misapplication and unconstitutionality of the enhancement statutes that raise this sentence by over 400%.

“To establish plain error, a defendant must show: (1) an error did in fact occur, (2) the error should have been obvious to the trial court, and (3) the error is harmful. *State v. Bradley*, 2002 UT App 348 (See also *State v. Ellifritz*, 835 P.2d 170, 174 (Utah Ct. App. 1992) In the case of *State v. Olsen*, 869 P.2d 1004, 1010 (Utah App. 1994) this Court held “Under [the plain error] standard, we will not reverse unless we determine that an error existed, and that the error was both obvious and harmful”. The Court further ruled “An error is harmful if the likelihood of a different result is ‘sufficiently high to undermine confidence in the verdict.’” (*Id* at 1010)

The first prong of the plain error test is showing that an error occurred. As discussed above, the Defendant has been sentenced to two terms of 6 to 20 years

on two third-degree felony charges. This is a violation of the Defendant's constitutional rights. The second prong of the plain error test is that the error must have been obvious to the trial court. In the present case there was extensive discussion by trial counsel about the unfairness and excessive nature of the sentence being imposed. (R. 194/105) Although trial counsel raised the merger/double jeopardy argument, trial counsel failed to raise the cruel and unusual punishment argument. The fact that this matter was even raised to the trial court should have elicited some consideration by the sentencing court of the constitutional implications under the Eighth Amendment and Article 1 Section 9.

The final prong of the plain error test is that the error was harmful. Under the circumstances that is a given. Defendant has been sentenced to a term of 6 to 20 years on both third-degree felony charges. In the event the trial court eliminated one or both of the enhancements that sentence would be either be 0 to 5 years in prison or a 1 to 10 year prison term, which are significantly less than the sentence imposed on the defendant.

### **POINT III**

**THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTIONS SEVEN AND TWELVE OF THE UTAH CONSTITUTION WHEN HIS ATTORNEY FAILED TO**

**OBJECT TO THE SENTENCE UNDER THE EIGHTH  
AMENDMENT AND ARTICLE 1 SECTION 9 OF THE  
UTAH CONSTITUTION.**

The United States Supreme Court has recognized that “the right to counsel is the right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 692 (1984). In *Strickland*, the Supreme Court established a two-part test to determine whether counsel’s assistance 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.” *Strickland v. Washington*, 466 U.S. at 687, 80 L.Ed.2d at 693.

In the case of *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Court was presented with a case where defense counsel, due to a failure to conduct proper discovery, did not timely file a motion to suppress evidence under the Fourth Amendment. The Court of Appeals reversed his conviction under an ineffective assistance of counsel claim. The Supreme Court affirmed that reversal. In that affirmation of reversal the Court stated:

Where defense counsel’s failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence

in order to demonstrate actual prejudice. (*Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986))

In making the determination that trial counsel's conduct failed to comport with constitutional requirements, the Court held:

In this case, however, we deal with a total failure to conduct pretrial discovery, and one as to which counsel offered only implausible explanations. Counsel's performance at trial, while generally creditable enough, suggests no better explanation for this apparent and pervasive failure to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." [citation omitted] Under these circumstances, although the failure of the District Court and the Court of Appeals to examine counsel's overall performance was inadvisable, we think this omission did not affect the soundness of the conclusion both courts reached — that counsel's performance fell below the level of reasonable professional assistance in the respects alleged. (*Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986))

In the case of *State v. Gallegos*, 967 P.2d 973 (Utah Ct. App. 1998), the Court found that the failure of trial counsel to object to a Fourth Amendment violation constituted error, as well as established reversible ineffective assistance of counsel. In that case, the Court applied the *Strickland* test to a situation where defense counsel had in a pretrial motion moved to suppress evidence on the basis of an illegal search. The trial court denied that motion based upon evidence at a preliminary hearing. During trial the officer altered his testimony establishing the lack of plain view, yet trial counsel did not re-raise the motion to suppress. The Court held that "where a defendant can show that there was no conceivable legitimate tactical basis for counsel's deficient actions,

the first prong of *Strickland* is satisfied.” (Id. at 976, quoting *State v. Snyder*, 860 P.2d 351, 359 (Utah Ct. App. 1993))

Defense counsel’s error in the present case was glaringly obvious to any observer. Her failure to object to and raise an Article 1 Section 9 and Eighth Amendment claim to the double enhancement which raised the Defendant’s sentence 400% clearly showed a deficiency. In *Kimmelman v. Morrison infra.* the court found reversible error in a case where trial counsel realized a Fourth Amendment issue, but brought it to the court’s attention in an untimely manner. That untimely motion alone constituted reversible error. In *State v. Gallegos infra.*, the court found error in trial counsel’s failure to renew a previously denied motion to suppress. In the present case, counsel, as in *Kimmelman*, raised one issue writ in regard to the enhancement (the merger/double jeopardy argument) but totally failed to recognize and raise the more compelling Eighth Amendment claim.

Furthermore, “Counsel’s performance at trial... suggests no better explanation for this apparent and pervasive failure.” (*Kimmelman*) To the contrary, there is absolutely no conceivable reason for defense counsel not to make an objection to the clearly excessive sentence the defendant received.

The second prong of the two-part test articulated in *Strickland* is “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." *Strickland v. Washington*, 466 U.S. at 687, 80 L.Ed. 2d at 693.

In *Strickland*, the Court held that "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." In *State v. Templin*, 805 P.2d 182 (Utah 1990), the Utah Supreme Court held that to meet the second part of the *Strickland* test a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 187(quoted *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). In making the determination that counsel was ineffective, the appellate court should "consider the totality of the evidence, taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record." *Id.*

Likewise, in the case of *State v. Gallegos*, 967 P.2d 973, 981 (Utah Ct. App. 1998), the court found prejudicial error in failing to object to the admission of a tin canister that contained drugs, which was found during an illegal search. In that case the court held: "Because the evidence found in the tin was essential

to the State's case on [drug possession] charges, admission of that evidence was obviously prejudicial to defendant."

In the present case, the error by defense counsel is absolutely quantifiable by the increase in sentence. If This Court determines that the double enhancement (triple sentence) violated the Utah and Federal Constitutional provisions for cruel and unusual punishment, the result is not in question.

When the totality of the circumstances is considered it is clear that the Defendant did not receive the type of assistance necessary to justify confidence in the outcome of the Defendant's representation.

### **CONCLUSION**

Based upon the foregoing reasons, the Defendant respectfully requests the dangerous weapons penalty enhancement either be declared unconstitutional and reversed and his sentence modified.

DATED this 22 day of May 2009

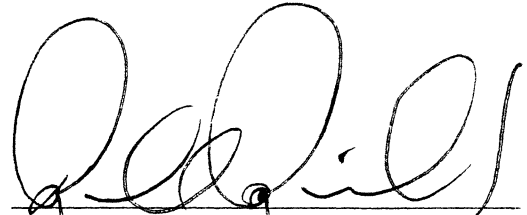


RANDALL W. RICHARDS



**CERTIFICATE OF MAILING**

I certify that I mailed two copies of the foregoing Brief of Appellant to Mark Shurtleff, Utah Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0180, postage prepaid this 22 day of May 2009.

  
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RANDALL W. RICHARDS  
Attorney at Law

## **ADDENDUM A**

**76-1-402. Separate offenses arising out of single criminal episode -- Included offenses.**

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

**76-5-103. Aggravated assault.**

(1) A person commits aggravated assault if he commits assault as defined in Section **76-5-102** and he:

(a) intentionally causes serious bodily injury to another; or

(b) under circumstances not amounting to a violation of Subsection (1)(a), uses a dangerous weapon as defined in Section **76-1-601** or other means or force likely to produce death or serious bodily injury.

(2) A violation of Subsection (1)(a) is a second degree felony.

(3) A violation of Subsection (1)(b) is a third degree felony.

**76-10-503. Restrictions on possession, purchase, transfer, and ownership of dangerous weapons by certain persons.**

(1) For purposes of this section:

(a) A Category I restricted person is a person who:

(i) has been convicted of any violent felony as defined in Section **76-3-203.5**;

(ii) is on probation or parole for any felony;

(iii) is on parole from a secure facility as defined in Section **62A-7-101**; or

(iv) within the last ten years has been adjudicated delinquent for an offense which if committed by an adult would have been a violent felony as defined in Section **76-3-203.5**.

(b) A Category II restricted person is a person who:

- (i) has been convicted of or is under indictment for any felony;
- (ii) within the last seven years has been adjudicated delinquent for an offense which if committed by an adult would have been a felony;
- (iii) is an unlawful user of a controlled substance as defined in Section **58-37-2**;
- (iv) is in possession of a dangerous weapon and is knowingly and intentionally in unlawful possession of a Schedule I or II controlled substance as defined in Section **58-37-2**;
- (v) has been found not guilty by reason of insanity for a felony offense;
- (vi) has been found mentally incompetent to stand trial for a felony offense;
- (vii) has been adjudicated as mentally defective as provided in the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993), or has been committed to a mental institution;
- (viii) is an alien who is illegally or unlawfully in the United States;
- (ix) has been dishonorably discharged from the armed forces; or
- (x) has renounced his citizenship after having been a citizen of the United States.

(2) A Category I restricted person who intentionally or knowingly agrees, consents, offers, or arranges to purchase, transfer, possess, use, or have under his custody or control, or who intentionally or knowingly purchases, transfers, possesses, uses, or has under his custody or control:

- (a) any firearm is guilty of a second degree felony; or
- (b) any dangerous weapon other than a firearm is guilty of a third degree felony.

(3) A Category II restricted person who purchases, transfers, possesses, uses, or has under his custody or control:

- (a) any firearm is guilty of a third degree felony; or
- (b) any dangerous weapon other than a firearm is guilty of a class A misdemeanor.

(4) A person may be subject to the restrictions of both categories at the same time.

(5) If a higher penalty than is prescribed in this section is provided in another section for one who purchases, transfers, possesses, uses, or has under this custody or control any dangerous weapon, the penalties of that section control.

(6) It is an affirmative defense to a charge based on the definition in Subsection (1)(b)(iv) that the person was:

(a) in possession of a controlled substance pursuant to a lawful order of a practitioner for use of a member of the person's household or for administration to an animal owned by the person or a member of the person's household; or

(b) otherwise authorized by law to possess the substance.

**76-3-203. Felony conviction -- Indeterminate term of imprisonment.**

A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:

(1) In the case of a felony of the first degree, unless the statute provides otherwise, for a term of not less than five years and which may be for life.

(2) In the case of a felony of the second degree, unless the statute provides otherwise, for a term of not less than one year nor more than 15 years.

(3) In the case of a felony of the third degree, unless the statute provides otherwise, for a term not to exceed five years.

**78A-4-103. Court of Appeals jurisdiction.**

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

## **ADDENDUM B**

## **UTAH CONSTITUTION**

### **Article I, Section 7. [Due process of law.]**

No person shall be deprived of life, liberty or property, without due process of law.

### **Article I, Section 9. [Excessive bail and fines -- Cruel punishments.]**

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

### **Article I, Section 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.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

## **ADDENDUM C**



## UNITED STATES CONSTITUTION

### **FOURTH AMENDMENT - Search and Seizure**

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.

### **FIFTH AMENDMENT - Rights of Persons**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger: nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **SIXTH AMENDMENT - Rights of Accused in Criminal Prosecutions**

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.

### **EIGHTH AMENDMENT - Further Guarantees in Criminal Cases**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## **FOURTEENTH AMENDMENT - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection**

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## **ADDENDUM D**

SECOND DISTRICT COURT - OGDEN  
WEBER COUNTY, STATE OF UTAH

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STATE OF UTAH,	:	MINUTES
Plaintiff,	:	APP SENTENCING
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 061902954 FS
	:	
MICHAEL DAN KERR,	:	Judge: PARLEY R BALDWIN
Defendant.	:	Date: August 28, 2008

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PRESENT

Clerk: debbieg

Prosecutor: MILES, BRANDEN B

Defendant

Defendant's Attorney(s): GUSTIN, SUSANNE

DEFENDANT INFORMATION

Date of birth: May 21, 1964

Video

Tape Number: 3D082808 Tape Count: 9:35-9:42

CHARGES

1. AGGRAVATED ASSAULT (amended) - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 06/17/08 Guilty
2. POSSESSION OF A DNGR WEAP BY RESTRICTED - 3rd Degree Felony  
Plea: Not Guilty - Disposition: 06/17/08 Guilty
3. DANGEROUS WEAPON PENALTY ENHANCEMENT - Not Applicable  
- Disposition: 06/17/08 Guilty

HEARING

This is time set for sentencing. Defendant is present in custody and is represented by Suanne Gustin, private counsel. Counsel address the court. Court proceeds with sentencing.

Sentence, Judgment, Commitment



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Date: Aug 28, 2008

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SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED ASSAULT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term from 1 to 10 years in the Utah State Prison.

Based on the defendant's conviction of POSSESSION OF A DNGR WEAP BY RESTRICTED a 3rd Degree Felony, the defendant is sentenced to 1 to 10 years in the Utah State Prison.

Based on the defendant's conviction of DANGEROUS WEAPON PENALTY ENHANCEMENT a Not Applicable, the defendant is sentenced to 5 to 10 years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the WEBER 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

The Court recommends a concurrent sentence as to count 1 and 2 with count 3 to run consecutively as the statute orders.

SENTENCE RECOMMENDATION NOTE


The Court recommends credit for time served while in the Weber County Jail.

Case No: 061902954

Date: Aug 28, 2008

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Dated this 2 day of Sept-2008.

  
PARLEY R BALDWIN  
District Court Judge