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ORIGINAL

IN THE UTAH COURT OF APPEALS

AARON L. HELBACH, Appellant/Petitioner, vs. STATE OF UTAH, Appellee/Respondent.	Case No. 20080951-CA

BRIEF OF APPELLEE

APPEAL FROM DENIAL OF PETITION FOR POST-CONVICTION RELIEF, IN THE SECOND JUDICIAL DISTRICT, WEBER COUNTY, THE HONORABLE ROGER S. DUTSON PRESIDING.

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IN THE UTAH COURT OF APPEALS

AARON L. HELBACH, Appellant/Petitioner, vs. STATE OF UTAH, Appellee/Respondent.	Case No. 20080951-CA

BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

Petitioner appeals from the denial of his petition for post-conviction relief challenging his conviction for aggravated robbery. This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (West 2004).

STATEMENT OF THE ISSUES

1. Did the post-conviction court correctly conclude that Helbach failed to demonstrate that his guilty plea was not knowing and voluntary?

2. Did the post-conviction court correctly conclude that Helbach failed to demonstrate that the trial court should have *sua sponte* ordered a competency examination before accepting the guilty plea?

3. Did the post-conviction court correctly conclude that Helbach failed to establish that his trial attorney was ineffective for not requesting a competency examination?

4. Did the post-conviction court correctly conclude that Helbach failed to establish that his trial attorney was ineffective for not challenging the admissibility of Helbach's confession?

Standard of Review. A petitioner seeking post-conviction relief has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. This Court reviews the post-conviction court's legal conclusions for correctness and its factual findings for clear error. *Matthews v. Galetka*, 958 P.2d 949, 950 (Utah App. 1998) (citations omitted).

5. Did the post-conviction court err in not *sua sponte* ordering an evidentiary hearing on Helbach's claims?

Standard of Review. Unpreserved claims are evaluated for plain error. *See State v. Richardson*, 2009 UT App 40, ¶¶ 7-8, 204 P.3d 872 (claim that trial court should have ordered evidentiary hearing reviewed for plain error where defendant failed to request a hearing).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes are attached as Addendum A:

Utah Code Annotated § 76-6-302 (West 2004);
Utah Code Annotated § 77-15-5 (West Supp. 2009).

STATEMENT OF THE CASE

On March 21, 2003, Helbach was charged in Second District Court, Weber County, with three counts of aggravated robbery in three separate informations. R. 383-84 ("Findings of Fact, Conclusions of Law and Order Dismissing Petition for Post-Conviction Relief," dated September 26, 2009, Addendum B). In case no. 031901411, it was alleged that Helbach, claiming to have a gun, robbed an Arby's restaurant on February 14, 2003. R. 384. In case no. 031901412, it was alleged that Helbach, claiming to have a knife, robbed a Sinclair station on March 11, 2003. *Id.* Helbach was also charged in the Second Judicial District Court in Davis County with two armed robberies of convenience stores that occurred on February 13, 2003. *See* docket for case no. 031700453. *Id.*

Helbach ultimately pleaded guilty to a total of three counts of aggravated robbery. On April 7, 2003, Helbach pleaded guilty to one count of aggravated robbery in the Davis County case and the other count of aggravated robbery in that case was dismissed pursuant to a plea bargain. On August 18, 2003, Helbach pleaded guilty to two counts of aggravated robbery in the Weber County cases. *See*

Statement of Defendant in Support of Guilty Plea and Certificate of Counsel ("Plea Statement"), R. 44-49, Addendum C. In exchange for Helbach's guilty pleas to in the Weber County cases (case nos. 031901411 and 031901412), the State agreed to dismiss the third count (case no. 031901413) and to recommend that any prison term be imposed concurrently with any term imposed in the Davis County case.[1]

In the Plea Statement in the Weber County cases, which are the subject of this appeal, Helbach acknowledges the elements of the crimes to which he pleaded guilty: "I unlawfully and intentionally took or attempted to take personal property from another by the threatened use of a gun." R. 45. He also stated:

> I stipulate and agree 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 plea and prove the elements of the crime(s) to which I am pleading guilty: On 2-14-2003 and 3-11-2003 I attempted to take property from (1) Arby's and (2) D. Magoon by use of a gun (1) and a knife (2).

Id.

He acknowledged that his guilty plea waives all of the constitutional rights to which he would otherwise be entitled, including the presumption of innocence, the privilege against self-incrimination and the rights to a jury trial, to confront and

---

[1]The charges and guilty pleas are summarized in a Department of Corrections Field Operations memorandum, dated August 27, 2003, R. 59-60, and in the Pre-Sentence Investigative Report ("PSIR"), dated May 14, 20004, R. 61-70.

cross-examine witnesses and to appeal. R. 46. The Plea Statement advised Helbach that he could receive a prison sentence of five years to life. R. 38.

Helbach stated:

> I am entering this plea of my own free will and choice. No force, threats, or unlawful influence of any kind have been made to get me to plead guilty. 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 an 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.

R. 41-42.

Helbach affirmed that he was mentally stable and able to comprehend the plea agreement:

> 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.

R. 42.

Finally, Helbach acknowledged that he understood that if he wished to withdraw his plea, he could do so only by motion filed before sentencing and only upon a showing of good cause. *Id.*

During the August 18, 2003, change-of-plea hearing in the Weber County cases, the contents of the Plea Statement were properly incorporated into the record through a colloquy with the trial court:

THE COURT: All right. Is there a written plea agreement?

MR. CAINE [defendant's counsel]: There is.

THE COURT: And you understand what's in there, Mr. Helbach?

THE DEFENDANT: Yeah, I do.

THE COURT: What's you level of education?

THE DEFENDANT: Post high school tech school.

THE COURT: And you read and write and understand well?

THE DEFENDANT: Yes, sir.

THE COURT: *Are you on any medications, alcohol, drugs or do you have any mental health condition today that would make it so you don't fully understanding what's happening?*

THE DEFENDANT: *No, sir.*

THE COURT: And are you satisfied with the legal representation you've received?

THE DEFENDANT: Yes, sir.

THE COURT: All right. If you wish, you may go ahead and sign that.

MR. CAINE: Actually, he signed it earlier, I can affirm. We'll just make a record, Your Honor. Aaron, you and reviewed this document and talked about this and it bears your signature and you just signed it in the lockup in there a minute ago; is that correct?

> **THE DEFENDANT**: Yes, sir.
>
> **THE COURT**: That is your signature? And do you waive or give up your preliminary hearing rights?
>
> **THE DEFENDANT**: Yes, sir.
>
> **THE COURT**: You understand you've had the right to have preliminary hearings?
>
> **THE DEFENDANT**: Yes, sir.
>
> **THE COURT**: Okay.

R. 301-03 (Transcript, change-of-plea hearing, dated August 18, 2003) (emphasis added), Addendum D.

On September 8, 2003, Helbach was sentenced to two terms of five years to life at the Utah State Prison. The court reluctantly followed the State's recommendation and agreed to impose concurrent sentences for the two crimes:

> **THE COURT**: Well, again, I struggle. You had four felonies as a juvenile, and then you have the Davis County felony, and this makes six felonies, and many of them [are] very, very serious felonies. I suppose I can just place my trust in the Board of Pardons and hope that they do what is right. And I suspect they're going to have an opportunity to observe you and your conduct while you're at the prison. So I'm going to go along with it. I have a great deal of reluctance because these are very serious charges.

R. 317 (Transcript, sentencing hearing, dated September 8, 2003), Addendum E.

Helbach filed no timely appeal.

On March 5, 2004, Helbach filed a pleading in the Weber County criminal cases captioned "Motion to be Re-Sentenced Nunc Pro Tunc" in which he claimed *inter alia* that his plea was improperly and involuntarily entered due to mental illness. In denying the motion, the trial court stated that:

> Rule 11 governing pleas has been substantially complied with by the Court and that Defendant was advised by this Court that if he had any mental illness that affected his ability to understand[,] he should not go ahead[,] and he stated that he understood that. Numerous other questions were posed to Defendant which he answered in a manner that indicated he fully understood what he was doing.

R. 321-22.

On August 9, 2004, Helbach filed a "Notice of Appeal." On November 2, 2004, this Court dismissed the appeal. *See State v. Helbach,* 2004 UT APP 388U (Memorandum Decision) ("*Helbach I*"), *cert. denied,* 109 P.3d 804 (2005), Addendum F.[2] The court noted that Helbach's motion to be resentenced was "in substance" a motion to withdraw his plea, which must be filed before sentencing. *Id.* at 7 (citing Utah Code Ann. § 77-13-6(2)(b) (motion to withdraw plea "shall be made by motion before sentence is announced")). The Court held that because Helbach's motion to withdraw his plea was filed months too late, the trial court had no jurisdiction to consider it and the court of appeals had no jurisdiction over the appeal. *Id.* at 7-8.

---

[2] For the Court's convenience, the State has numbered the paragraphs of the unpublished decisions attached as addenda F, G & I.

Helbach next attempted to challenge his convictions in the Weber County cases by filing a petition for extraordinary relief in this Court under rule 19, Utah Rules of Appellate Procedure, which also sought habeas corpus relief under appellate rule 20. R. 12-34. This Court denied that petition, explaining that rule 19 requires that "no plain, speedy or adequate remedy exists" and that Helbach had such a remedy available under rule 65C, Utah Rules of Civil Procedure. R. 193-94 (*Helbach v. Judge Roger Dutson, et al.*, 2004 UT App 480U (Memorandum Decision) ("*Helbach II*")), Addendum G. The appellate court also denied the petition under Utah R. App. P. 20 because Helbach had stated no reason why the petition should not be directed to the district court. *Id.* at 4. The court referred the petition to the Second Judicial District Court to the extent that it raised issues for review under the Utah Post-Conviction Remedies Act ("PCRA"), Utah Code Ann. §§ 78B-9-101 – 405 (West Supp. 2009), and rule 65C, Utah Rules of Civil Procedure. *Id.* at 4-5.

In evaluating Helbach's claims under the PCRA, Second Judicial District Court initially denied the requested relief and dismissed the petition in its entirety. R. 197-204. However, the Court later reconsidered and agreed to allow some of Helbach's claims to go forward. R. 208-223 (Ruling and Order, dated May 16, 2006 ("May 16 Order")), Addendum H.

On January 30, 2006, Helbach filed documents in the United States District Court for the District of Utah purporting to state claims under 28 USCA § 2254.

There, Helbach challenged the validity of his guilty pleas entered in the Weber County cases. The federal court dismissed that petition on July 7, 2008.

Meanwhile, the Second Judicial Court, Davis County, dismissed claims virtually identical to those raised in the instant matter. *See Helbach v. State*, 2007 UT App 191U (Memorandum Decision), ("*Helbach III*"), Addendum I. In that case, Helbach claimed that his plea was not knowing and voluntary, the trial court erred in not *sua sponte* ordering a competency examination and ineffective assistance of counsel. *See id.* Helbach appealed that dismissal and this Court affirmed. *Helbach III*, 2007 UT App 191U at ¶ 7.

On October 6, 2008, the Second Judicial District Court, Weber County, dismissed Helbach's post-conviction petition (the instant matter) challenging his guilty plea in the Weber County cases. R. 383-95 ,Addendum B.

Helbach timely appealed. R. 398.

SUMMARY OF ARGUMENT

Point I.A. Helbach has failed to demonstrate his plea was not knowingly and voluntarily entered. During post-conviction and now on appeal, Helbach has argued that the trial court did not comply with rule 11, Utah Rules of Criminal Procedure, in accepting the plea. However, a post-conviction petitioner is not entitled to relief based on the trial court's violation of rule 11 unless he can show that the violation rendered his plea unknowing and involuntary. Helbach demonstrated no rule 11 error, let alone any error that rendered the plea unknowing and involuntary.

Point I.B. Helbach has not demonstrated that he was entitled to a *sua sponte* competency hearing. To show that he was entitled to a competency hearing, a petitioner must show that there was a substantial question of possible doubt as to his competency at the time he entered his plea. Although Helbach presented evidence showing that he may have suffered from some mental disorders at or near the time he entered his plea, he presented no evidence showing that he was incompetent or that there was a substantial question of possible doubt as to his competency. The post-conviction court therefore properly denied relief based on these claims.

Point II.A. Helbach failed to meet his burden to demonstrate that his trial counsel was ineffective. Helbach claims he was incompetent and that his attorney

should have requested a competency evaluation, should not have recommended acceptance of the guilty plea or should have moved to withdraw the plea when he learned of Helbach's mental health issues. However, mental illness does not automatically render a defendant incompetent and Helbach failed to demonstrate that he was incompetent. Because Helbach's apparent mental health issues did not render him incompetent, his attorney had no reason to question the plea bargain.

Point II.B. Helbach claims his attorney was ineffective because he should have moved to suppress his confession to police. This claim fails because Helbach's knowing and voluntary guilty plea waived any pre-plea constitutional violations.

Point III. Helbach is not entitled to an evidentiary hearing, first, because he never requested one and, second, because he did not establish disputed material facts that would have required a hearing.

Point IV. Any remaining claims are inadequately briefed.

ARGUMENT

I.

HELBACH HAS NOT PROVED HIS PLEA WAS UNKOWING OR INVOLUNTARY.

A. The Trial Court Properly Ensured Helbach's Plea was Knowing and Voluntary.

Helbach claims his guilty plea was not a "voluntary, intelligent and knowing admission of guilt with an understanding of the law in relation to the facts." Aplt.

Br. at 9. In support, Helbach alleges the trial court failed to comply with rule 11, Utah Rules of Criminal Procedure. In post-conviction proceedings, however, Rule 11 violations alone are insufficient to invalidate a guilty plea.

On appeal, Helbach claims his plea was not knowing and voluntary because *inter alia* the trial court did not advise him that:

> • A sentence of "five years to life" means he could be in prison for at least five years and perhaps for life, in violation of rule 11(e)(5), Aplt. Br. at 11;
>
> • He had until 30 days after his sentence to move to withdraw his guilty plea, in violation of rule 11(e)(7), *id.* at 10, 12;
>
> • He had the right to appeal, in violation of rule 11(e)(8), *e.g.*, *id.*, at 22;
>
> •The State had the burden of proving each element of the crime beyond a reasonable doubt, in violation of rule 11(e)(4)(A), *id.*
>
> • Helbach also claimed that the court did not explain the constitutional rights he was waiving by pleading guilty (rule 11(e)(3)), the elements of aggravated robbery or the factual basis for the plea (rule 11(e)(4)(A) & (B)). *E.g.*, *id.*, at 9-11.

The post-conviction court ruled that Helbach's claims failed to the extent that he alleged only technical violations of Rule 11, which did not demonstrate that his plea was *in fact* involuntary. R. 386. This ruling is correct. *Bluemel v. State*, 2007 UT 90, ¶ 18, 173 P.3d 842; *accord Salazar v. Warden, Utah State Prison*, 852 P.2d 988 (Utah 1993). "'[O]n collateral attack of a conviction, the petitioner must show a *constitutional* violation to obtain relief.'" *Id.* (citing *Salazar*, 852 P.2d at 991, n.6)

(emphasis added by *Bluemel* court). A plea is in fact knowing and voluntary if there is a factual basis for the plea and the petitioner understands and waives his privilege against self-incrimination, the right to a jury trial and the right to confront witnesses. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

The post-conviction court also ruled that even when Helbach's claims are analyzed under the correct post-conviction review standards, they still do not demonstrate that his plea was unknowing or involuntary. R. 387-88. This ruling is also correct because Helbach's claims are flatly contradicted by the record. In the Plea Statement, Helbach affirms that:

> I am entering this plea of my own free will and choice. No force, threats, or unlawful influence of any kind have been made to get me to plead guilty. 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 an 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.

R. 290-91.

Helbach also affirmed during the change-of-plea hearing that he understood and accepted the plea agreement and that he did so knowingly and voluntarily:

> **THE COURT**: And you understand what's in there [the Plea Statement], Mr. Helbach?

THE DEFENDANT: Yeah, I do.

THE COURT: What's you level of education?

THE DEFENDANT: Post high school tech school.

THE COURT: And you read and write and understand well?

THE DEFENDANT: Yes, sir.

THE COURT: Are you on any medications, alcohol, drugs or do you have any mental health condition today that would make it so you don't fully understanding what's happening?

THE DEFENDANT: No, sir.

R. 302.

Helbach's claims that he was not advised of the elements of aggravated robbery or of how his conduct met those elements are also contradicted by the record. In Utah, "[a] person commits robbery if . . . [he] unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person . . ." Utah Code Ann. § 76-6-301(1)(a) (West 2004). The robbery is aggravated "if in the course of committing robbery, he . . . uses or threatens to use a dangerous weapon," Utah Code Ann. § 76-6-302(1)(a) (West 2004), which is "any item capable of causing death or serious bodily injury; . . ." Utah Code Ann. § 76-1-601(5)(a) (West 2004).

In the Plea Statement, Helbach fully acknowledged the elements of the aggravated robbery and the factual basis for the plea: "I unlawfully and

intentionally took or attempted to take personal property from another by the threatened use of a gun." R. 39. He also stated:

> I stipulate and agree . . . 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 . . . pleas and prove the elements of the crime(s) to which I am pleading guilty: On 2-14-2003 and 3-11-2003 I attempted to take property from (1) Arby's and (2) D. Magoon by use of a gun (1) and a knife (2).

Id.

In addition, the trial court reviewed the elements in more detail during the plea colloquy:

> **THE COURT**: . . . [U]nder the most recent case from the Court of Appeals, we have to be very detailed on the elements. And I'll go over those again which may be somewhat duplicating what's in this written agreement but I want you to clearly understand what you're pleading to, what the elements are, and so I'm going to go over them in some detail. I'll ask, first on the case of February the 14th on case 1411, and that's the Arby's case, what would the elements have been had you gone to trial on that?
>
> **MS. BEATON** [prosecutor]: Do you want to state them?
>
> **MR. CAINE**: . . . This is a case, this is a situation where the defendant went in there, he indicated he had a weapon and attempting to get property, money in this case, and that's what happened.
>
> **THE COURT**: Did he obtain property or just attempt to gain property at Arby's?
>
> **MR. CAINE**: Yeah. He obtained the property.

THE COURT: Arby's[,] he got some money or property from them threatening them with a weapon?

MR. CAINE: Money, yes.

THE COURT: All right. And on the 11th of March, D. Magoon, what are the—that says it was a knife.

MR. CAINE: . . . This is the—at a Sinclair gas station actually. The individual was the person named there and there was a[n] indication that he had a knife and there was money from there also.

THE COURT: And you got money then?

THE DEFENDANT: Yes, sir.

THE COURT: All right. So those then would be the elements[: T]hat you did by use of force or fear[—]a knife, and then in the other case, a gun[—] steal money from persons[, which] you had no legal right to have. And you understand those are the elements?

THE DEFENDANT: Yes, sir.

R. 304-05.

Helbach also claims he was not advised that, if he went to trial, the State had the burden of proving every element of the crime. However, the Plea Statement explicitly states: "At a trial, the State would have the burden of proving each element of the charge beyond a reasonable doubt." R. 40.

Helbach next complains that he was not advised of his right to appeal. Because Helbach pleaded guilty, he explicitly waived his right to appeal. *Id.; see also State v. Sery*, 758 P.2d 935, 938 (Utah App.1988) ("[A] voluntary guilty plea is a

waiver of the right to appeal all nonjurisdictional issues, including alleged pre-plea constitutional violations").[3] If Helbach wished to appeal, he would first have had to timely move to withdraw his plea. *See Grimmett v. State*, 2007 UT 11,¶ 25, 152 P.3d 306 ("Absent a timely-filed motion to withdraw a guilty plea, this court does not have jurisdiction over a direct appeal to review the validity of the plea"). And he was advised that if he wished to withdraw his plea, he must file a written motion before sentencing. R. 42; *see also* Utah Code Ann. § 77-13-6(2)(a) (Utah 2004). Helbach did not do so. Thus, he effectively had no appellate rights once he entered his guilty plea.

In his appellate brief, Helbach claims that he should have been told that he had 30 days after sentencing to move to withdraw his plea. Aplt. Br. at 15. He claims that under *State v. Ostler*, 2000 UT App 23, 996 P.2d 1065, "which was the governing law at the time of my proceedings, I should have been afforded 30 days after the time of sentencing to withdraw my plea." *Id.* (emphasis added by Helbach). Helbach is incorrect. Utah Code Ann. 77-13-6(1)(b), which became effective May 5, 2003, states that a motion to withdraw a guilty plea "shall be made by motion before sentence is announced." Thus, this provision was the governing law when Helbach

[3] Petitioner could have timely challenged his *sentence* on appeal, but he did not do so. *Manning v. State*, 2005 UT 61, ¶ 37, 122 P.3d 628.

entered his guilty plea on August 18, 2003. Helbach was properly advised that he must move to withdraw his plea before sentencing. He did not do so.[4]

Finally, Helbach claims "the court did not explain that the minimum I would serve was 5 years maximum of life . . ." Aplt. Br. at 25. On the first page of the Plea Statement—the same statement Helbach has repeatedly affirmed having read and understood—Helbach acknowledged that "I am pleading guilty to the following crimes: . . . 2 (cts) Ag. Robbery," which may be punished by "MIN/MAX AND/OR MINIMUM MANDATORY" sentences of "5-life USP and [$]20,000 fine on each." R. 38. Although expressed in abbreviated form, the language "5-life USP" clearly means that Helbach was pleading guilty to crimes that would result in a sentence at the Utah State Prison for a minimum of five years and up to life. Helbach understood this when he entered his guilty plea and it is absurd to suggest otherwise.

In sum, the post-conviction court correctly ruled that Helbachs' plea was knowingly and voluntarily entered. The Plea Statement and the trial court's colloquy with the defendant during the change-of-plea hearing clearly demonstrate that Helbach's plea was entered knowingly and voluntarily. Helbach has presented nothing to suggest otherwise.

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[4] Nor did Helbach move to withdraw his plea within 30 days of sentencing.

B. Helbach's Claim that the Trial Court Should Have Ordered a Competency Hearing Fails Because Nothing in the Record Raises a "Substantial Question Of Possible Doubt" Concerning His Competence.

Helbach claims that the post-conviction court "committed error in denying relief on [his] claim that he was incompetent to plead guilty [and] that he was entitled to a competency hearing." Appellant's Br. at 5. This claim is without merit.

"A mentally incompetent defendant can provide no defense, and proceedings against such a defendant do not comport with due process." *State v. Young*, 780 P.2d 1233, 1236 (Utah 1989) (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960)); *see also Jacobs v. State*, 2001 UT 17, ¶ 12, 20 P.3d 382. The same standard applies to a determination of competency to stand trial and competency to plead guilty. *Jacobs*, 2001 UT 17, ¶ 15 n.3.

"In determining whether a defendant is competent to [stand trial or] plead guilty, the trial court must consider whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *State v. Holland*, 921 P.2d 430, 433 (Utah 1996) (internal quotation marks and citations omitted); *see also Jacobs*, 2001 UT 17, ¶ 12; Utah Code Ann. § 77-15-2. "In determining whether the trial court erred by not holding a

competency hearing, a reviewing court considers the facts that were before the trial court when the plea was entered." *Helbach II*, 2004 UT App 480U, ¶ 1.

Competency to stand trial or to enter a guilty plea is, however, "a much narrower concept than moral or social wellness, and thus the fact that a defendant is twisted and disturbed does not necessarily mean he is unfit for trial" or unfit to enter a guilty plea. *Jacobs*, 2001 UT 17, ¶ 16. "A defendant may be fit for trial even though his mind is otherwise unsound." *Id.* This applies even though a person may be diagnosed as "suffer[ing] from personality disorders, depression, psychotic episodes, and suicidal behaviors" or "from chronic paranoid schizophrenia" and "diminished ability to control his behavior," and even where he may be diagnosed as "actively psychotic." *Id.* at ¶¶ 5, 7. "The fact that a person is mentally ill, displays bizarre, volatile, and irrational behavior, or has a history of mental illness, does not mean that he or she is incompetent to stand trial." *Id.* at ¶ 16.

In Utah, an order for a competency hearing "is mandatory only on the filing of a petition" to determine competency. *State v. Bailey*, 712 P.2d 281, 285 (Utah 1985) (citing Utah Code Ann. § 77-15-5). Thus, a trial court "has no statutory duty to order a hearing in the absence of a petition." *Id.* As a matter of constitutionally-guaranteed due process, however, "[a] trial court must hold a competency hearing when there is a substantial question of possible doubt as to a defendant's competency at the time of the guilty plea." *Jacobs*, 2001 UT 17, ¶ 13 (internal

quotation marks and citation omitted). In other words, the court must hold a competency hearing when there is a substantial question of possible doubt as to whether a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *Holland*, 921 P.2d at 433 (internal quotation marks and citations omitted). Because a post-conviction petition is civil in nature, "Helbach had the burden to prove by a preponderance of the evidence that a substantial question of possible doubt as to his competency existed at the time he pleaded guilty." *Helbach II*, 2004 UT App 480U, ¶ 2.

Accordingly, the issue for the post-conviction court was whether Helbach met his burden to prove by a preponderance of the evidence either that he was incompetent to enter his plea or that "a substantial question of possible doubt" as to his competency existed at the time he pled guilty. *See* Utah Code Annotated § 77-35a-105 (West Supp. 2009) ("The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief").

In support of his claim that he was incompetent or that a competency hearing was required, Helbach attached copies of a military evaluation of his mental health, prepared on September 17, 2001, and a diagnostic evaluation, prepared June 18, 2003, for use in connection with his sentencing. *See* R. 68-70 (Entrance Physical

Standards Board (EPSBD) Proceedings," dated September 17, 2001 (hereinafter "Military Evaluation")); R. 1 (Psychological Evaluation, dated June 18, 2003 ("Psychological Evaluation).

In reviewing identical claims Helbach raised in his post-conviction challenge to his conviction in the Davis County case, this Court found Helbach had established neither his incompetence nor any reason to question the knowing and voluntary nature of his guilty plea. *See generally Helbach III*, 2007 UT App 191U. In that case, Helbach claimed he was incompetent when he entered his plea and that his incompetence was established by his 2001 Military Evaluation and his 2003 Psychological Evaluation, prepared for use in sentencing. *Id.* at ¶ 3. The post-conviction court in the Davis County case rejected these claims and this Court affirmed, holding that Helbach had not met his burden to prove by a preponderance of the evidence that a substantial question of possible doubt as to his competency existed at the time he pleaded guilty. *Helbach III*, 2007 UT App 191 U, ¶ 2. This Court stated that Helbach

> responded appropriately to the court's questions, affirmed his understanding of the written plea agreement, and acknowledged that he was knowingly and voluntarily pleading guilty. . . . The post-conviction court correctly determined that the facts before the district court at the time of the change of plea did not give rise to a substantial question of possible doubt about [Helbach's] competency.

Id.[5]

Similarly, here, the post-conviction court ruled there was no evidence before the trial court that would have raised a substantial question of possible doubt about Helbach's competence to plead guilty. R. 390. The record shows that Helbach fully participated in the change-of-plea hearing by responding coherently to the court's questions, repeatedly affirming that he understood the contents of the Plea Statement and acknowledging that he was knowingly and voluntarily pleading guilty and waiving his constitutional rights:

> **THE COURT**: All right. Is there a written plea agreement?
>
> **MR. CAINE** [defendant's counsel]: There is.
>
> **THE COURT**: And you understand what's in there, Mr. Helbach?
>
> **THE DEFENDANT**: Yeah, I do.
>
> **THE COURT**: What's you level of education?
>
> **THE DEFENDANT**: Post high school tech school.
>
> **THE COURT**: And you read and write and understand well?
>
> **THE DEFENDANT**: Yes, sir.

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[5] Although the Utah Supreme Court has held that *res judicata* does not in itself bar relitigation of previously adjudicated issues or claims raised on post-conviction petition, the court has stated that "a prior adjudication of the same ground for relief is sufficient to bar relitigation on that ground, absent unusual circumstances." *Hurst v. Cook*, 777 P.2d 1029, 1037 (Utah 1989).

THE COURT: *Are you on any medications, alcohol, drugs or do you have any mental health condition today that would make it so you don't fully understanding what's happening?*

THE DEFENDANT: *No, sir.*

THE COURT: And are you satisfied with the legal representation you've received?

THE DEFENDANT: Yes, sir.

THE COURT: All right. If you wish, you may go ahead and sign that.

MR. CAINE: Actually, he signed it earlier, I can affirm. We'll just make a record, Your Honor. Aaron, you and reviewed this document and talked about this and it bears your signature and you just signed it in the lockup in there a minute ago; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: That is your signature? And do you waive or give up your preliminary hearing rights?

THE DEFENDANT: Yes, sir.

THE COURT: You understand you've had the right to have preliminary hearings?

THE DEFENDANT: Yes, sir.

THE COURT: Okay.

R. 301-03 (emphasis added) *see also* R. 293-98 (Plea Statement). The trial court also had an opportunity to observe Helbach's demeanor during the hearing and apparently saw nothing amiss.[6]

In sum, there was nothing before the trial court to indicate Helbach was not competent during the change-of-plea hearing and none of the psychological evaluations suggests otherwise. Thus, Helbach's unsupported, self-serving claims that he was mentally incompetent should be rejected.

II.

THE POST-CONVICTION COURT PROPERLY DETERMINED THAT HELBACH HAD NOT MET HIS BURDEN TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Helbach has not met his burden to demonstrate ineffective assistance of counsel. The burden to prove such a claim is extremely high. To prevail, Helbach must meet the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the courts in Utah. *See, e.g., Alvarez v. Galetka*, 933 P.2d 987, 989 (Utah 1997). Helbach must establish that:

1. His attorney's performance was deficient, and

---

[6]Additionally, in the Certificate of Defense Attorney attached to the plea statement, trial counsel certified, "I know defendant has read the statement or that I have read it to defendant; I have discussed it with defendant and believe that defendant fully understands the meaning of its contents and is mentally and physically competent." *See, e.g.*, R. 297.

2. The deficient performance prejudiced his defense.

Strickland, 466 U.S. at 687. Petition's claims fail under both prongs.

To satisfy the first prong of the *Strickland* test, Helbach must demonstrate that counsel's "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This requires a showing that Helbach's attorney made errors so egregious that he or she was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Id.; accord Parsons v. Barnes*, 871 P.2d 516, 522 (Utah), *cert. denied*, 115 S. Ct. 431(1994); *State v. Templin*, 805 P.2d 182, 186 (Utah 1990). To establish that such serious errors occurred, a defendant must identify counsel's specific acts or omissions that "fall outside the wide range of professionally competent assistance." *State v. Classon*, 935 P.2d 524, 532 (Utah App. 1997) (citations omitted and internal quotation marks omitted). "'Proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.'" *State v. Penman*, 964 P.2d 1157, 1162 (Utah App. 1998) (citing *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993)).

To establish deficient performance, a petitioner must "rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy." *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92. To prevail on a claim of ineffective assistance, petitioner must demonstrate "'that counsel's actions were not conscious trial strategy,'" and "that there was a 'lack of any conceivable tactical basis' for

counsel's actions." *State v. Winward*, 941 P.2d 627, 635 (Utah App. 1997) (quoting *State v. Ellifritz*, 835 P.2d 170, 174 (Utah. App.1992)).

Furthermore, it is not enough for petitioner to show that counsel's performance *could have* been better. The Sixth Amendment entitles petitioner "only to effective assistance of counsel, not to a right to the best or most complete representation available." *State v. Tyler*, 850 P.2d 1250, 1259 (Utah 1993); *see also Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999) (the court may find counsel's performance constitutionally deficient only if petitioner establishes that counsel's performance was "completely unreasonable, not merely wrong.").

The post-conviction court properly determined that Helbach's knowing and voluntary guilty plea waived all ineffective assistance claims concerning pre-plea representation. R. 216; *see also State v. Parsons*, 781 P.2d 1275, 1278 (Utah 1989) (defendant who pleads guilty "is deemed to have admitted all of the essential elements of the crime charged and thereby waives all nonjurisdictional defects, *including alleged pre-plea constitutional violations*") (emphasis added); *State v. Hardy*, 2002 UT App 244, ¶¶ 8, 13, 54 P.3d 645 (declining to address pre-plea claims that protective order statutes were overbroad and vague because defendant entered knowing and voluntary guilty plea). Thus, the only unwaived claims concern his counsel's representation during the plea negotiation process. These claims would be (1) that his counsel should have been aware of Helbach's alleged incompetence

and should not have allowed him to plead guilty, *see, e.g.*, Aplt. Br. at 4-5, and (2) his counsel should not have considered his confession in recommending that he plead guilty. *E.g.*, *id.* at 19.

These claims fail. First, Helbach's claim that his trial attorney was ineffective because he did not move to suppress the confession was waived by the knowing and voluntary guilty plea. Second, the claim that his attorney was ineffective because he should have realized Helbach was incompetent is not supported by the record.

A. Helbach Waived His Claim That His Trial Counsel was Ineffective for Not Challenging the Admissibility of His Confession.

Helbach's knowing and voluntary guilty plea waived his claim that his attorney was ineffective for not attempting to suppress the confession. Accordingly, the post-conviction court properly dismissed this claim.

A post-conviction petitioner cannot raise claims concerning pre-plea constitutional violations, including claims of ineffective assistance of counsel, because such claims are waived by a knowing and voluntary guilty plea. "The ineffectiveness of counsel that contributes to a flawed guilty plea, however, can spare a defendant the consequences of her plea only if the defendant makes out the same case required of every defendant who seeks to withdraw a plea: that the plea

was not knowing and voluntary." *State v. Rhinhart*, 2007 UT 61, ¶ 13, 167 P.3d 1046. A defendant who pleads guilty "is deemed to have admitted all of the essential elements of the crime charged and thereby waives all nonjurisdictional defects, *including alleged pre-plea constitutional violations*." *State v. Parsons*, 781 P.2d 1275, 1278 (Utah 1989) (emphasis added); *see also State v. Hardy*, 2002 UT App 244, ¶¶ 8, 13, 54 P.3d 645 (declining to address pre-plea claims that protective order statutes were overbroad and vague because defendant entered knowing and voluntary guilty plea). Furthermore, a voluntary guilty plea constitutes an admission of the elements of the offense. *See McCarthy v. United States*, 394 U.S. 459, 466 (1969); *accord Salazar v. Warden*, 852 P.2d 988, 991 (Utah 1993); *State v. Gibbons*, 740 P.2d 1309, 1313 (Utah 1987).

As demonstrated in section I.A., above, Helbach's plea was knowingly and voluntarily entered. Accordingly, he cannot claim that his attorney was ineffective for not attempting to suppress the confession.

B. Helbach Has Not Demonstrated that His Trial Counsel Was Ineffective For Not Requesting a Competency Hearing.

Helbach has claimed that his counsel was ineffective because he did not move for a competency hearing, Aplt. Br. at 4, even though he allegedly knew Helbach

attempted suicide at the Davis County Jail and that he displayed symptoms of mental illness while in the military. *Id.* at 5. This claim is without merit.

As discussed in section I.B., above, even assuming Helbach suffers from some form of mental illness, that alone does not establish he was incompetent to stand trial or enter a knowing and voluntary guilty plea. As the Court of Appeals observed in defendant's previous and virtually identical case: "'The fact that a person is mentally ill, displays bizarre, volatile, and irrational behavior, or has a history of mental illness, does not mean that he or she is incompetent to stand trial.'" *Helbach III*, 2007 UT App 191U, ¶ 1 (quoting *Jacobs v. State*, 2001 UT 17, ¶ 16, 20 P.3d 382); *see also Kohler v. Kelly*, 890 F. Supp. 207, 213 (W.D.N.Y. 1994) (suicide attempt insufficient to alert counsel to competency issue where nothing else in the record could substantiate a finding of mental incompetence), *aff'd*, 58 F.3d 58 (2nd Cir. 1995), *cert. denied*, 516 U.S. 995 (1999); *cf. Drope v. Missouri*, 420 U.S. 162, 168, 178-80 (1975) (suicide attempt coupled with history of irrational behavior required an inquiry into Drope's competence).

Because Helbach has offered no evidence to establish his incompetence, the post-conviction court corrected ruled that his attorney had no reason to think he was incompetent, especially when the record demonstrates that Helbach was attentive and responsive at the plea hearing. R. 391. During the plea colloquy, Helbach also affirmed he was mentally competent and not under the influence of

drugs or suffering from mental illness. *Id.* Accordingly, Helbach has not demonstrated his attorney was ineffective in proceeding with the guilty plea.

III.

HELBACH WAS NOT ENTITLED TO AN EVIDENTIARY HEARING.

Helbach claims the post-conviction court erred in not ordering an evidentiary hearing because there were factual disputes that needed to be resolved. Aplt. Br. at 28. This claims is without merit.

First, Helbach never requested an evidentiary hearing. In his petition, he simply asked that the court "set aside or vacate the plea and conviction and allow the defendant to proceed to trial." R. 33. In his "Answer" to the State's motion to dismiss, Helbach "reques[ed] that the court order briefing on any issue that the court warrents [sic] more treatment . . . "R. 246. Because Helbach never requested an evidentiary hearing, he must show on appeal that it was plain error for the post-conviction court not to have done so *sua sponte*. *See State v. Richardson*, 2009 UT App 40, ¶¶ 7-8, 204 P.3d 872 (because defendant failed to request evidentiary hearing during sentencing, claim on appeal reviewed for plain error); *see also, id.*, at ¶ 8 (to establish plain error, defendant must show "that an error must have occurred, must have been harmful, and should have been obvious to the trial court"). Helbach had not argued plain error or any other exception to the preservation rule, so this Court

should not reach it. *State v. Pledger*, 896 P.2d 1226, 1229, n.5 (Utah 1995). This claim fails for that reason.

Second, even if Helbach had requested an evidentiary hearing, he cannot show that the post-conviction would have granted his request. "An evidentiary hearing is necessary only when a material fact is in dispute." *State v. Clegg*, 2002 UT App 279, ¶ 9, 54 P.3d 653. In his petition, Helbach did not meet his burden to proffer or identify evidence demonstrating a material factual dispute. Nor has he done so in his brief on appeal. Helbach claims an evidentiary hearing was necessary because the case is "fact sensitive" due to his "mechanical[] answers" to questions during the plea colloquy, which he claims did not establish the plea was made knowingly. Aplt. Br. at 30. Additionally, he claims an evidentiary hearing is needed to sort through "the issues involved in the ineffective counsel claim" and to develop "proof of appellant's alibis." *Id.* Because Helbach offers no evidence to support these allegations, they cannot create a factual dispute requiring an evidentiary hearing. Accordingly, the post-conviction court had no basis for scheduling an evidentiary hearing, even if Helbach had requested one.

IV.

ANY REMAINING APPELLATE CLAIMS ARE INADEQUATELY BRIEFED AND MUST BE REJECTED.

Any remaining claims in Helbach's brief must be dismissed because they are inadequately briefed. "It is well established that a reviewing court will not address arguments that are not adequately briefed." *State v. Thomas*, 961 P.2d 299, 304 (Utah 1998). Under rule 24, Utah Rules of Appellate Procedure, an appellate brief "must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters." Utah R. App. P. 24(k). "An issue is inadequately briefed when 'the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.'" *Smith v. Smith*, 1999 UT App 370, ¶ 8, 995 P.2d 14 (quoting *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998)).

While a reviewing court may grant an appellant "some leeway due to his status as a pro se litigant, th[e] court will not assume his 'burden of argument and research.'" *Treff v. Hinckley*, 2001 UT 50, ¶ 11, 26 P.3d 212 (quoting *State v. Thomas*, 961 P.2d 299, 204 (Utah 1998)) (in turn quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)) (additional internal quotation marks omitted). "As a general rule, a party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar [.]" *Nelson v. Jacobsen*, 669 P.2d 1207,

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm the post-conviction court's decision denying post-conviction relief.

Respectfully submitted September 24, 2009.

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UTAH ATTORNEY GENERAL

BRETT J. DELPORTO
Assistant Attorney General
Counsel for Appellee

1213 (Utah 1983). Although pro se litigants "'should be accorded every consideration that may reasonably be indulged. . . .'" *Id.* (quoting *Heathman v. Hatch*, 13 Utah 2d 266, 372 P.2d 990, 991 (1962)), they still must follow the appellate rules. *Lundahl v. Quinn*, 2003 UT 11, ¶ 4, 67 P.3d 1000.

Helbach's brief consists largely of renumbered pages from his post-conviction petition. Pages 4-8 of his brief consists of excerpted pages from the petition alleing instances of what appellant regards as ineffective assistance of counsel with no analysis or any attempt to apply controlling authority. Similarly, pages 9-14, also excerpted from the petition, reiterate an irrelevant discussion of the trial court's alleged failure to comply with rule 11, Utah Rules of Criminal Procedure, in accepting appellant's guilty plea.

As a result, most of Helbach's claims are cryptic and somewhat haphazard. The State has attempted to cover the claims addressed by the post-conviction court as well as any others that appear remotely colorable. Any additional claims should be rejected for inadequate briefing.

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2009, I served two copies of the foregoing Brief of Appellant upon the petitioner/appellant by causing them to be delivered by first class mail to:

Aaron L. Helbach
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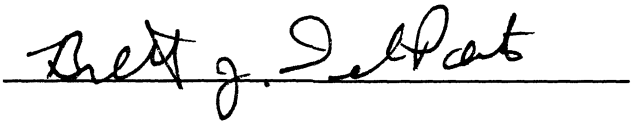

Addenda

Addendum A

West's Utah Code Annotated
Title 77. Utah Code of Criminal Procedure

Chapter 15. Inquiry Into Sanity of Defendant

§ 77-15-5. Order for hearing--Stay of other proceedings--Examinations of defendant--Scope of examination and report

(1) When a petition is filed pursuant to Section 77-15-3 raising the issue of the defendant's competency to stand trial or when the court raises the issue of the defendant's competency pursuant to Section 77-15-4, the court in which proceedings are pending shall stay all proceedings. If the proceedings are in a court other than the district court in which the petition is filed, the district court shall notify that court of the filing of the petition. The district court in which the petition is filed shall pass upon the sufficiency of the allegations of incompetency. If a petition is opposed by either party, the court shall, prior to granting or denying the petition, hold a limited hearing solely for the purpose of determining the sufficiency of the petition. If the court finds that the allegations of incompetency raise a bona fide doubt as to the defendant's competency to stand trial, it shall enter an order for a hearing on the mental condition of the person who is the subject of the petition.

(2)(a) After the granting of a petition and prior to a full competency hearing, the court may order the Department of Human Services to examine the person and to report to the court concerning the defendant's mental condition.

(b) The defendant shall be examined by at least two mental health experts not involved in the current treatment of the defendant.

(c) If the issue is sufficiently raised in the petition or if it becomes apparent that the defendant may be incompetent due to mental retardation, at least one expert experienced in mental retardation assessment shall evaluate the defendant. Upon appointment of the experts, the petitioner or other party as directed by the court shall provide information and materials to the examiners relevant to a determination of the defendant's competency and shall provide copies of the charging document, arrest or incident reports pertaining to the charged offense, known criminal history information, and known prior mental health evaluations and treatments.

(d) The prosecuting and defense attorneys shall cooperate in providing the relevant information and materials to the examiners, and the court may make the necessary orders to provide the information listed in Subsection (2)(c) to the examiners. The court may provide in its order for a competency examination of a defendant that custodians of mental health records pertaining to the defendant shall provide those records to the

examiners without the need for consent of the defendant or further order of the court.

(3) During the examination under Subsection (2), unless the court or the executive director of the department directs otherwise, the defendant shall be retained in the same custody or status he was in at the time the examination was ordered.

(4) The experts shall in the conduct of their examination and in their report to the court consider and address, in addition to any other factors determined to be relevant by the experts:

(a) the defendant's present capacity to:

(i) comprehend and appreciate the charges or allegations against him;

(ii) disclose to counsel pertinent facts, events, and states of mind;

(iii) comprehend and appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against him;

(iv) engage in reasoned choice of legal strategies and options;

(v) understand the adversary nature of the proceedings against him;

(vi) manifest appropriate courtroom behavior; and

(vii) testify relevantly, if applicable;

(b) the impact of the mental disorder, or mental retardation, if any, on the nature and quality of the defendant's relationship with counsel;

(c) if psychoactive medication is currently being administered:

(i) whether the medication is necessary to maintain the defendant's competency; and

(ii) the effect of the medication, if any, on the defendant's demeanor and affect and ability to participate in the proceedings.

(5) If the expert's opinion is that the defendant is incompetent to proceed, the expert shall indicate in the report:

(a) which of the above factors contributes to the defendant's incompetency;

(b) the nature of the defendant's mental disorder or mental retardation and its relationship to the factors contributing to the defendant's incompetency;

(c) the treatment or treatments appropriate and available; and

(d) the defendant's capacity to give informed consent to treatment to restore competency.

(6) The experts examining the defendant shall provide an initial report to the court and the prosecuting and defense attorneys within 30 days of the receipt of the court's order. The report shall inform the court of the examiner's opinion concerning the competency of the defendant to stand trial. or. in the alternative, the examiner may inform the court in writing that additional time is needed to complete the report. If the examiner informs the court that additional time is needed, the examiner shall have up to an additional 30 days to provide the report to the court and counsel. The examiner must provide the report within 60 days from the receipt of the court's order unless, for good cause shown, the court authorizes an additional period of time to complete the examination and provide the report.

(7) Any written report submitted by the experts shall:

(a) identify the specific matters referred for evaluation;

(b) describe the procedures. techniques, and tests used in the examination and the purpose or purposes for each;

(c) state the expert's clinical observations, findings, and opinions on each issue referred for examination by the court. and indicate specifically those issues, if any, on which the expert could not give an opinion; and

(d) identify the sources of information used by the expert and present the basis for the expert's clinical findings and opinions.

(8)(a) Any statement made by the defendant in the course of any competency examination, whether the examination is with or without the consent of the defendant, any testimony by the expert based upon such statement, and any other fruits of the statement may not be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced evidence. The evidence may be admitted, however, where relevant to a determination of the defendant's competency.

(b) Prior to examining the defendant. examiners should specifically advise the defendant of the limits of confidentiality as provided under Subsection (8)(a).

(9) When the report is received the court shall set a date for a mental hearing which shall be held in not less than five and not more than 15 days, unless the court enlarges the time for good cause. Any person or organization directed by the department to conduct the examination may be subpoenaed to testify at the hearing. If the experts are in conflict as to the competency of the defendant. all experts should be called to testify at the hearing if reasonably available. The court may call any examiner to testify at the hearing who is not

called by the parties If the court calls an examiner, counsel for the parties may cross-examine the expert.

(10) A person shall be presumed competent unless the court, by a preponderance of the evidence, finds the person incompetent to proceed. The burden of proof is upon the proponent of incompetency at the hearing. An adjudication of incompetency to proceed shall not operate as an adjudication of incompetency to give informed consent for medical treatment or for any other purpose, unless specifically set forth in the court order.

(11)(a) If the court finds the defendant incompetent to stand trial, its order shall contain findings addressing each of the factors in Subsections (4)(a) and (b) of this section. The order issued pursuant to Subsection 77-15-6(1) which the court sends to the facility where the defendant is committed or to the person who is responsible for assessing his progress toward competency shall be provided contemporaneously with the transportation and commitment order of the defendant, unless exigent circumstances require earlier commitment in which case the court shall forward the order within five working days of the order of transportation and commitment of the defendant.

(b) The order finding the defendant incompetent to stand trial shall be accompanied by:

(i) copies of the reports of the experts filed with the court pursuant to the order of examination if not provided previously;

(ii) copies of any of the psychiatric, psychological, or social work reports submitted to the court relative to the mental condition of the defendant; and

(iii) any other documents made available to the court by either the defense or the prosecution, pertaining to the defendant's current or past mental condition.

(12) If the court finds it necessary to order the defendant transported prior to the completion of findings and compilation of documents required under Subsection (11), the transportation and commitment order delivering the defendant to the Utah State Hospital, or other mental health facility as directed by the executive director of the Department of Human Services or his designee, shall indicate that the defendant's commitment is based upon a finding of incompetency, and the mental health facility's copy of the order shall be accompanied by the reports of any experts filed with the court pursuant to the order of examination. The executive director of the Department of Human Services or his designee may refuse to accept a defendant as a patient unless he is accompanied by a transportation and commitment order which is accompanied by the reports.

(13) Upon a finding of incompetency to stand trial by the court, the prosecuting and defense attorneys shall provide information and materials relevant to the defendant's competency to the facility where the defendant is committed or to the person responsible for assessing his progress towards competency. In addition to any other materials, the prosecuting attorney shall provide

(a) copies of the charging document and supporting affidavits or other documents used in the determination of probable cause;

(b) arrest or incident reports prepared by a law enforcement agency pertaining to the charged offense; and

(c) information concerning the defendant's known criminal history.

(14) The court may make any reasonable order to insure compliance with this section.

(15) Failure to comply with this section shall not result in the dismissal of criminal charges.

CREDIT(S)

Laws 1980, c. 15, § 2; Laws 1988, c. 1, § 399; Laws 1990, c. 127, § 1; Laws 1991, c. 166, § 4; Laws 1993, c. 142, § 2; Laws 1994, c. 162, § 4; Laws 2002, 5th Sp.Sess., c. 8, § 132, eff. Sept. 8, 2002; Laws 2003, c. 82, § 1, eff. May 5, 2003; Laws 2008, c. 212, § 1, eff. May 5, 2008.

Current through 2009 General Session and 2009 First Special Session

Addendum B

SECOND DISTRICT COURT
2008 OCT -6 AM 10: 49
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FINDINGS OF FACT AND CONCLUSIONS OF LAW AND
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060900429 STATE OF UTAH
pages: 15

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

AARON HELBACH, Petitioner, vs. STATE OF UTAH, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING PETITION FOR POST-CONVICTION RELIEF** Case No. 060900429 Judge Roger S. Dutson

By Memorandum dated May 21, 2008, this Court granted the State's Motion to Dismiss Petition for Post-Conviction Relief. Now being fully advised, the Court enters the following findings of fact, conclusions of law, and order dismissing the petition for post-conviction relief.

FINDINGS OF FACT

1. On March 21, 2003, petitioner was charged in Second District Court, Weber County, with three counts of aggravated robbery in three separate informations.

See case nos. 031901411, 031901412 and 031901413 ("the Weber County cases"). In case no. 031901411, it was alleged that petitioner, claiming to have a gun, robbed an Arby's restaurant on February 14, 2003. In case no. 031901412, it was alleged that petitioner, claiming to have a knife, robbed a Sinclair station on March 11, 2003. Petitioner was also charged in the Second Judicial District Court in Davis County with two armed robberies of convenience stores that occurred on February 13, 2003. *See* case no. 031700453 ("the Davis County case").

2. Petitioner ultimately pleaded guilty to a total of three counts of aggravated robbery. On April 7, 2003, petitioner pleaded guilty to one count of aggravated robbery in the Davis County case and the other count of aggravated robbery in that case was dismissed pursuant to a plea bargain. On August 18, 2003, petitioner pleaded guilty to two counts of aggravated robbery in the Weber County cases

3. In exchange for petitioner's guilty plea to two counts of aggravated robbery in the Weber County cases (case nos. 031901411 and 031901412), the State agreed to dismiss the third count (case no. 031901413) and to recommend that any prison term be imposed concurrently with any term imposed in the Davis County case.

4. During the August 18, 2003, change-of-plea hearing in the Weber County cases, the contents of the Plea Statement were incorporated into the record through a colloquy among the Court, the petitioner and defense counsel.

5. On September 8, 2003, petitioner was sentenced to two terms of five years to life at the Utah State Prison.

6. Petitioner filed no timely appeal.

7. On March 5, 2004, petitioner filed a pleading in the Weber County criminal cases captioned "Motion to be Re-Sentenced Nunc Pro Tunc" in which he claimed *inter alia* that his plea was improperly and involuntarily entered due to mental illness. This Court denied the motion by order dated July 11, 2004.

8. On August 9, 2004, petitioner filed a "Notice of Appeal."

9. On November 2, 2004, the Utah Court of Appeals dismissed the appeal. The appeals court noted that petitioner's motion to be resentenced was "in substance" a motion to withdraw his plea, which must be filed before sentencing. Because petitioner's motion to withdraw his plea was filed months too late, the trial court had no jurisdiction to consider it and the court of appeals had no jurisdiction over the appeal.

10 Petitioner next attempted to challenge his convictions in the Weber County cases by filing a petition for extraordinary relief under rule 19, Utah Rules of Appellate Procedure, which also sought habeas corpus relief under appellate rule 20.

11. The Utah Court of Appeals denied that petition, explaining that rule 19 requires that "no plain, speedy or adequate remedy exists," but that petitioner had such a remedy available under rule 65C, Utah Rules of Civil Procedure. The court referred the petition to the Second Judicial District Court to the extent that it raised issues for review under the Utah Post-Conviction Remedies Act, Utah Code Ann. § 78-35a-101 –110 (West 2004), and rule 65C, Utah Rules of Civil Procedure.

12. In evaluating petitioner's claims under the PCRA, this Court initially denied the requested relief and dismissed the petition in its entirety. However, the Court later reconsidered, agreed to allow some of petitioner's claims to go forward and ordered the State to file a response.

13. Meanwhile, the Second Judicial Court, Davis County, dismissed virtually identical claims petitioner made in the post-conviction challenge to his guilty plea in the Davis County case. Petitioner appealed that dismissal and, on June 1, 2007, the Utah Court of Appeals affirmed the denial of post-conviction relief. *Helbach v. State*, 2007 UT App 191 U, ¶ 2 (Memorandum Decision).

14. The State filed a Response to the petition challenging petitioner's convictions in the Weber County cases, requesting that it be dismissed.

15. On May 21, 2008, this Court granted the State's motion to dismiss.

CONCLUSIONS OF LAW

1. In the post-conviction petition, petitioner claim his plea was invalid due to violations of rule 11, Utah Rules of Criminal Procedure, as well as other alleged violations of rules governing the entry of guilty pleas.

2. Petitioner's claims fail to the extent that he alleges only technical violations of rule 11 governing the entry of guilty pleas because he has failed in his burden to demonstrate that his plea was *in fact* involuntary. *Bluemel v. State*, 2007 UT 90, ¶ 18, 173 P.3d 842; *accord Salazar v. Warden, Utah State Prison*, 852 P.2d 988 (Utah 1993).

3. Under the correct post-conviction review standards, petitioner cannot demonstrate that his plea was unknowing or involuntary because such claims are contradicted by petitioner's Plea Statement, in which he affirms that he was entering his guilty plea freely and without duress, as well as petitioner's testimony during his change-of-plea hearing, during which petitioner affirmed that he understood and accepted the terms of the plea agreement and that he was doing so knowingly and voluntarily.

4. Petitioner's also claims that he was not advised of the elements of aggravated robbery or of how his conduct met those elements. These claims are also contradicted by the record. In the Plea Statement, petitioner also fully acknowledged the elements of the aggravated robbery and the factual basis for the plea: "I unlawfully and intentionally took or attempted to take personal property from another by the threatened use of a gun."

5. The Plea Statement also states:

> I stipulate and agree . . . 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 . . . pleas and prove the elements of the crime(s) to which I am pleading guilty: On 2-14-2003 and 3-11-2003 I attempted to take property from (1) Arby's and (2) D. Magoon by use of a gun (1) and a knife (2).

6. In addition, the trial court also reviewed the elements in more detail during the plea colloquy to ensure petitioner understood.

7. Petitioner also claims he was not advised that, if he went to trial, the State had the burden of proving every element of the crime. However, the Plea Statement

explicitly states: "At a trial, the State would have the burden of proving each element of the charge beyond a reasonable doubt."

8. Petitioner next complains that he was not advised of his right to appeal. Because petitioner pleaded guilty, he explicitly waived his right to appeal. If petitioner wished to appeal, he would first have to timely move to withdraw his plea. The Plea Statement advised petitioner that if he wished to withdraw his plea, he must file a written motion before sentencing. Petitioner did not do so. Thus, he effectively had no appellate rights once he entered his guilty plea.

9. Petitioner claims "the court never explained that I must be imprisoned for 5 years before being eligible for parole" and that he could be imprisoned for life. This claim is without merit. On the first page of the Plea Statement—the same statement petitioner has repeatedly affirmed having read and understood—petitioner acknowledges that "I am pleading guilty to the following crimes: . . . 2 (cts) Ag. Robbery," which may be punished by "MIN/MAX AND/OR MINIMUM MANDATORY" sentences of "5-life USP and [$]20.000 fine on each." Although expressed in abbreviated form, the language "5-life USP" clearly means that petitioner was pleading guilty to crimes that would result in a sentence at the Utah State Prison for a minimum of five years and up to life.

10. Petitioner claims that his plea was unknowing and involuntary because he was mentally incompetent at the time it was entered. He also claims the Court and his defense attorney erred in not discovering his incompetence and requesting a competency examination.

11. Under Utah law, "[n]o person who is incompetent to proceed shall be tried for a public offense." Utah Code Ann. § 77-15-1 (West 2004). Incompetence to proceed is defined as a defendant's "inability to have a rational and factual understanding of the proceedings against him or of the punishment specified for the offense charged; or. . . his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding." Utah Code Ann. § 77-15-2 (West 2004).

12. The Utah Supreme Court has held that "[a] trial court must hold a competency hearing when there is 'a substantial question of possible doubt as to a defendant's competency at the time of the guilty plea.'" *Jacobs v. State,* 2001 UT 17, ¶ 13, 20 P.3d 382 (citation omitted). In determining whether the trial court should have ordered a competency hearing, "only those facts that were before the [trial] court when the plea was entered" should be considered. *State v. Arguelles*, 2003 UT 1, ¶ 50, 63 P.3d 731.

13. In support of his alleged incompetence, petitioner offers reports from doctors, psychologists and criminal justice evaluators, which he claims show that he was incompetent to plead guilty. These reports, however illuminating they may be for purposes of illustrating petitioner's mental health issues, provide no reason to doubt his competence to plead guilty. The Utah Court of Appeals, which also evaluated the reports because defendant used them to support identical claims raised in his post-conviction challenge to his guilty plea in the Davis County case, concluded that the reports "assessed

mental health, not competency," and were, therefore, irrelevant to petitioner's competence. *Helbach v. State*. 2007 UT App 191 U, ¶ 2 (Memorandum Decision).

14. Similarly, in this case, there was nothing before the trial court to raise a substantial question of possible doubt about petitioner's competence to plead guilty. Petitioner fully participated in the change-of-plea hearing by responding coherently to the court's questions, repeatedly affirming that he understood the contents of the Plea Statement, and that he was knowingly and voluntarily pleading guilty and waiving his constitutional rights. The trial court also had an opportunity to observe petitioner's demeanor during the hearing and detected no sign of incompetence or mental illness.

15. Petitioner next claims ineffective assistance of counsel. To prevail, petitioner must establish that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

16. This Court previously determined petitioner's knowing and voluntary guilty plea waived all ineffective assistance claims concerning pre-plea representation. The only unwaived claims concern his counsel's representation during the plea negotiation process.

17. Petitioner claimed that his counsel was ineffective because he failed to move for a competency hearing even though he allegedly knew petitioner attempted suicide at the Davis County Jail and that he displayed symptoms of mental illness while in the military.

18. However, because petitioner has offered no evidence to establish his incompetence, there is no reason to believe his attorney had any reason to think he was incompetent, especially when the record demonstrates that petitioner was attentive and responsive at the plea hearing. He also affirmed he was mentally competent and not under the influence of drugs or mental illness. Accordingly, petitioner has not demonstrated his attorney was ineffective in proceeding with the guilty plea.

19. Nor has petitioner offered any evidence to substantiate his claim that his attorney erroneously advised him to plead guilty, despite supposed evidence that petitioner's confession was coerced. To succeed on this claim, petitioner must first demonstrate that there was enough evidence to support a claim that the confession was coerced and that a motion to suppress would have been meritorious. *See United States v. Cieslowski*, 410 F.3d 353, 360 (7th Cir.2005) ("When the claim of ineffective assistance is based on counsel's failure to present a motion to suppress, we have required that a defendant prove the motion was meritorious."), *cert. denied*, 546 U.S. 1097 (2006).

20. The Utah Supreme Court has identified a non-exhaustive list of objective and subjective factors that should be employed to determine whether, under the totality of the circumstances, a confession was improperly coerced. *State v Rettenberger*, 1999 UT 80, 984 P.2d 1009. "Objective" factors are potentially coercive interrogation techniques such as misrepresentations, the "false friend" technique and improper threats of punishment or promises of leniency. *Id.* at ¶¶ 20-32. "Subjective" factors include

characteristics of the defendant, such as age, maturity, intelligence and possible mental impairments that make a suspect susceptible to manipulation. *Id.* at ¶ 37.

21. Petitioner has offered no evidence whatsoever to support the existence of *any* factors, subjective or objective, as identified in *Rettenberger*. Rather, petitioner merely asserts that he was "manipulated" and that "the prosecution and defense played on my mental illnesses." He also claims that his counsel "failed to properly investigate the plea bargain," "failed to investigate and prepare a defense," "failed to make an independent investigation into the Weber County confessions . . ." and "failed . . . to suppress incompetent confession." But he provides no evidence or even specific examples to back up his claims. In short, petitioner offers nothing but his own self-serving and highly generalized allegations of coercion. Because petitioner has failed to offer any evidence or even any specific examples of improper police conduct, it is impossible for him to demonstrate that his attorney had any reason to question the admissibility of the confession.

22. Petitioner claims that the Presentence Investigation Report (PSIR) that was prepared for sentencing in his case was inaccurate. Further, he claims he did not receive the report until nine months after sentencing. These claims are meritless.

23. A court may order a pre-sentence report from the department of corrections if more information about the defendant is necessary for sentencing purposes. Utah Code Ann. § 77-18-1(5) (West 2004). When a report is requested, the department is required to provide the report to the *defendant's attorney* three working days before sentencing.

Utah Code Ann. § 77-18-1(6)(a). Any inaccuracies in the report should be resolved before sentencing if possible. *Id.* If inaccuracies cannot be resolved before sentencing, they should be brought to the attention of the sentencing judge, who may grant an additional ten working days to resolve the alleged inaccuracies. *Id.* If a party fails to challenge the report's accuracy at the time of sentencing, "that matter shall be considered to be waived." Utah Code Ann. § 77-18-1(6)(b).

24. The cover page of the PSIR lists its due date as May 14, 2003 and lists the sentencing date as May 19. 2003. Presumably, the report was available on its due date, which was well before the actual sentencing on September 8, 2003. At the time of sentencing, the report had been provided to the trial court—it was referred to repeatedly during the hearing—and presumably also to defense counsel. Although not explicitly stated, it is clear from the context that petitioner was also familiar with the contents of the PSIR. Because petitioner failed to point out any alleged inaccuracies at sentencing, any claims concerning the inaccuracies is waived. Utah Code Ann. § 77-18-1(6)(b).

25. Additionally, even if petitioner's claims were not waived, the report does not appear to be inaccurate. The only specific inaccuracy petitioner mentions concerns his claim he was in Youth Corrections "custody" from 1996 to 2001.

26. However, it is not clear how this comment is related to any alleged inaccuracy. The PSIR indicates that petitioner was placed in a Youth Corrections community program on July 7, 1996 for rape or sexual abuse of a child under 14 and that this status was continued on January 29, 1997 for assault. On September 22, 1997, he

was placed in a secure facility for lewdness and that status was continued on October 2, 1997, for sodomy on a victim under the age of 14. He was paroled on February 8, 2000 and Youth Corrections jurisdiction was terminated on May 29. 2001. Thus, petitioner was in fact under the *jurisdiction* of Youth Corrections from 1996 to 2001. If by "custody" petitioner means that he was incarcerated in a Youth Corrections facility from 1996 to 2001, then there may be a discrepancy. Still, it is unclear whether the report is inaccurate or whether the apparent discrepancy is simply due to a difference in terminology.

27. More fundamentally, even assuming that petitioner has identified inaccuracies in the report, he has failed to demonstrate how any inaccuracy prejudiced him in any way. Petitioner has not claimed that he did not commit any of felonies listed in the PSIR; rather, he only seems to take issue with his custody status from 1996 to 2001. Because this alleged inaccuracy had no apparent impact on the court's decision—and defendant has not suggested how it could have affected the court's decision—petitioner cannot show any prejudice. Accordingly, this claim is without merit.

ORDER

Based on the motions, memoranda and other pleadings filed by both parties, and based on the arguments of counsel and petitioner, and because there is good cause for doing so,

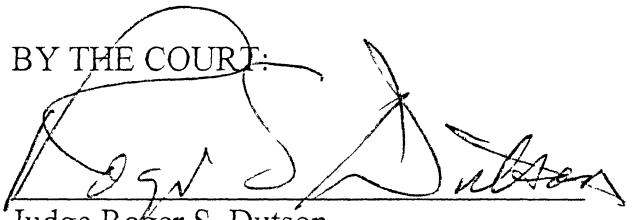
IT IS HEREBY ORDERED:

The State's motion to dismiss the petition for post-conviction relief is GRANTED. The petition's claims are DENIED and DISMISSED WITH PREJUDICE and the Court DENIES post-conviction relief on all claims.

Under the Post-Conviction Remedies Act, "[a]ny party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction." Utah Code Ann. § 78-35a-110 (West 2004).

DATED this 26 day of ~~June~~ September, 2008.

BY THE COURT:



Judge Roger S. Dutson
Second Judicial District Court Judge

Mailed to Aaron Helbach on June 5, 2008
Submitted to the Court on June 13, 2008, by
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APPROVED AS TO FORM:

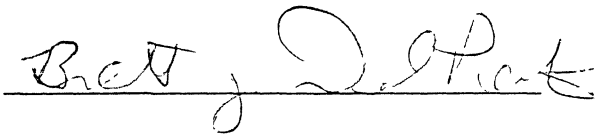
_____

Aaron L. Helbach #34774
CUCF
PO Box 550
Gunnison, Utah 84634

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2008, I served a copy of the foregoing by causing the same to be mailed, via first class mail, postage prepaid, to the following:

Aaron L. Helbach #34774
CUCF
PO Box 550
Gunnison, Utah 84634



Addendum C

THE PUBLIC DEFENDER ASSOCIATION, INC.,
OF WEBER COUNTY, STATE OF UTAH
2562 Washington Boulevard
Ogden, Utah 84401
Telephone (801)392-8247
Fax (801)334-7275

2003 AUG 19 A 8:42
SECOND DISTRICT COURT

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH Plaintiff, vs. Aaron Helbach Defendant.	STATEMENT OF DEFENDANT IN SUPPORT OF GUILTY PLEA AND CERTIFICATE OF COUNSEL Case No. 031901412 FS Judge Dutson AUG 19 2003

I, Aaron Helbach, hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights;

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.	2(CTS) Ag. Robbery	1st F.	5-life USP and 60 ow fine on each.
B.			
C.			
D.			

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 crime(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) are:

That I unlawfully and intentionally took or attempted to take personal property from another by the threatened use of a gun

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 no 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 crime(s) to which I am pleading guilty (or no contest):

On 2-14-2003 and 3-11-2003 I (1) attempted to take property from A.B.'s and D.L.'s (2) by use of a gun (1) and a knife (2)

WAIVER OF CONSTITUTIONAL RIGHTS

I am entering these pleas voluntarily. I understand that I have the following rights under the constitutions of Utah and 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 later, if the Judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I (have not) (have) waived my right to counsel. If I have waived my right to counsel, I have done so knowingly, intelligently, and voluntarily for the following reasons:

If I have waived my right to counsel, 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).

If I have **not** waived my right to counsel, my attorney is John T. Carne 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) by 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 the 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* on 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, I am waiving and giving up all the statutory and constitutional rights 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 sentence may be imposed one after the other (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 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:

(1) STATE DISMISSES 1 CT Ag Robbery 1st° felony
(2) STATE Recommends Concurrent sentence with each other and DARS Court

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 prosecution 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 or 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 21 years of age. I have attended school through the 12 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 judgement when I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgement.

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 will be allowed to withdraw my plea only if I show good cause. I will not be allowed to withdraw my plea after sentencing for any reason.

DATED this 18 day of August, 2003

DEFENDANT

CERTIFICATE OF DEFENSE ATTORNEY

I certify that I am the attorney for Aaron Weldacti, 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 understands 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 stated; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.

ATTORNEY FOR DEFENDANT
BAR NO. D536

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.

Brinda D. Bratton

PROSECUTING ATTORNEY
BAR NO. 6832

ORDER

Based on the facts set forth in the foregoing Statement and the certification of the defendant and counsel, and base 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 _____ day of _____, 200____.

_____
DISTRICT COURT JUDGE

Addendum D

1 IN THE DISTRICT COURT OF WEBER COUNTY

2 STATE OF UTAH

3 *****

4 STATE OF UTAH,)
5 PLAINTIFF,)
6 VS.) VIDEO TRANSCRIPT
7 AARON LONNEL HELBACH,) CASE NO 031901411
8 DEFENDANT.)

9 *****

10

11 SENTENCING HEARING

12 SEPTEMBER 8, 2003

13 HONORABLE ROGER S. DUTSON

14

15

16 *****

17 APPEARANCES:

18 FOR THE STATE: RICHARD A. PARMLEY

19 FOR THE DEFENDANT: JOHN T. CAINE

20 *****

21

22

23 REPORTED/TRANSCRIBED BY DEAN OLSEN, CSR
2525 GRANT AVENUE
24 OGDEN, UTAH 84401
(801) 395-1056

25

COPY

1 OGDEN, UTAH SEPTEMBER 8, 2003

2 **MR. CAINE:** THE NEXT MATTER I HAVE IS AARON HELBACH.
3 THAT'S NUMBER 3 AND 4 ON THE CALENDAR.

4 **THE CLERK:** FOR THE RECORD, STATE OF UTAH AARON LONNEL
5 HELBACH, CASE NUMBER 031901411 AND 031901412, TIME SET FOR
6 SENTENCING.

7 **MR. CAINE:** JUDGE, THIS IS MR. HELBACH. YOU'LL RECALL
8 THAT BACK ON THE 18TH OF AUGUST, WE ENTERED INTO AN
9 AGREEMENT. AGAIN, THE STATE RECOMMENDED CONCURRENT SENTENCES
10 ON THAT, AND WE WERE JUST GONNA BE SENTENCED THAT DAY. BUT
11 THE -- THERE WAS SOME UNCLEARNESS ABOUT TWO THINGS. ONE WAS
12 WHETHER THE VICTIMS WANTED TO SPEAK AND ALSO THE RESTITUTION
13 ISSUE. IT'S MY UNDERSTANDING THERE ARE NO VICTIMS HERE TO
14 SPEAK, BUT WE DO HAVE A RESOLUTION OF THE RESTITUTION ISSUE.
15 I'VE RECEIVED A LETTER FROM THE DEPARTMENT OF CORRECTIONS
16 WHICH -- ADDRESSED TO YOU, WHICH I'M ASSUMING YOU GOT,
17 DELINEATING WHAT THE RESTITUTION FIGURE IS AND THE CASES THAT
18 ARE APPLICABLE IN THIS COUNTY. AND WE ACCEPT THOSE FIGURES.

19 **THE COURT:** ARE ANY OF THE VICTIMS IN THIS CASE PRESENT
20 OR WISH TO BE HEARD?

21 ALL RIGHT. JUST ONE PRELIMINARY MATTER: WHAT IS YOUR
22 POSITION CONCERNING THE REQUEST FOR $7 AN HOUR FOR THE ONE
23 VICTIM --

24 **MR. CAINE:** FOR THE WEEK?

25 **THE COURT:** -- FOR BEING OFF WORK FOR A WEEK?

1 **MR. CAINE:** WE BELIEVE THAT'S FAIR AND WOULD ACCEPT
2 THAT. WE'VE -- WE'RE ASSUMING -- WE'RE NOT CERTAIN IF SHE
3 WORKED A 40-HOUR WEEK, BUT ASSUMING SHE DID, THAT WOULD BE
4 $280, AND WE HAVE NO OBJECTION TO THAT BEING ENTERED.
5 **THE COURT:** AND I'M GOING TO HAVE TO ASK TO REFRESH ME
6 OF THE DETAILS OF THIS CASE BECAUSE AS I'VE READ THE
7 PRESENTENCE THAT WAS PREPARED, THERE WAS JUST ONE STATEMENT
8 STATING THAT THERE WERE -- THERE WAS A GUN USED IN THESE
9 CASES, AND IN THE DAVIS COUNTY CASE, IT WAS A KNIFE. BUT I
10 FRANKLY DON'T RECALL EXACTLY WHAT THE STATE SAID LAST TIME WE
11 WERE IN COURT AS TO WHAT WAS THE WEAPON USED --
12 **MR. PARMLEY:** YOUR HONOR, IN CASE --
13 **THE COURT:** -- IN THESE TWO CHARGES.
14 **MR. PARMLEY:** IN CASE 1412, THE VICTIM WAS A DEBBIE
15 MAGUNE AT SINCLAIR. THERE WERE ACTUALLY TWO ROBBERIES AT THE
16 SINCLAIR. BOTH TIMES DEBBIE MAGUNE WAS THE ONE WHO WAS THERE
17 AND THE VICTIM OF THE ROBBERIES. ONE TIME HE USED OR
18 THREATENED A KNIFE AND THE OTHER TIME HE USED OR THREATED A
19 GUN, AS I RECALL. THEN IN CASE 1411, THE DEFENDANT WENT TO
20 THE ARBY'S, AND IN THAT CASE (UNINTELLIGIBLE) THAT MYSELF
21 (UNINTELLIGIBLE) BRANDISHED A HANDGUN AND DEMANDED MONEY.
22 **THE COURT:** OKAY. ALL RIGHT. NOW, MR. CAINE, DO YOU
23 WISH TO SPEAK TO SENTENCING? AGAIN, YOU'VE GOT TO KNOW I'M
24 CONSIDERING IT CONSECUTIVE OR CONCURRENT HERE, CONCERNED
25 ABOUT IT, EVEN THOUGH THE RECOMMENDATION IS THAT THEY RUN

1 CONCURRENT.

2 **MR. CAINE:** I THINK I'VE -- AGAIN, MY UNDERSTANDING THAT

3 THE REASON THIS WAS CONTINUED OVER WAS NOT FOR YOU TO

4 CONSIDER THAT. IT WAS BECAUSE THERE WAS SOME CONCERN THAT

5 THE VICTIM DIDN'T GET A CHANCE TO SPEAK BECAUSE WE WERE DOING

6 IT THAT DAY. THAT'S HAPPENED, WE'VE RESOLVED THE

7 RESTITUTION --

8 **THE COURT:** WELL, I'LL TELL YOU NOW, IT'S MY CONCERN.

9 **MR. CAINE:** I THINK -- I THINK THEY SHOULD RUN

10 CONCURRENT. THAT'S THE AGREEMENT WE MADE. I THINK UNDER THE

11 CIRCUMSTANCES OF ALL OF THIS THAT PARTICULARLY WITH THE DAVIS

12 COUNTY CASE AND EVERYTHING, THAT EVEN CONCURRENT SENTENCES

13 WILL OBVIOUSLY RESULT IN A SIGNIFICANT AMOUNT OF TIME ON

14 THESE KINDS OF CASES. BUT THAT'S APPROPPIATE.

15 **THE COURT:** MR. HELBACH, DO YOU WISH TO SPEAK?

16 **MR. HELBACH:** YES, YOUR HONOR. I'VE HAD PLENTY OF TIME

17 TO THINK ABOUT WHAT I'VE DONE AND, QUITE FRANKLY, IT REALLY

18 IS UP TO YOU WHETHER THESE CHAPGES APE CONCURRENT OR

19 CONSECUTIVE. I KNEW WHAT I WAS DOING WAS WRONG AND I DID IT

20 ANYWAY. AND THEPE'S NOTHING I CAN DO PEALLY TO TAKE THAT

21 BACK NOW. BEYOND THAT, I DON'T REALLY KNOW WHAT ELSE TO SAY.

22 **THE COURT:** WELL, IN YOUR STATEMENT, MP. HELBACH, YOU

23 SEEM TO KIND OF SHIFT THE BUPDEN AND RESPONSIBILITY ABOUT

24 WHETHER OR NOT YOU CAN BELIEVE ANYONE AND WHETHER OR NOT

25 SOCIETY IS PERHAPS THE CAUSE OF ALL THIS AND -- AND REAL

1 STRANGE RATIONALE THAT I READ INTO IT PERHAPS, BUT AT LEAST
2 CAUSED ME SOME CONCERN. IN OTHER WORDS, WHICH SIDE OF THE
3 FENCE DO YOU WANT TO BE ON. ARE COPS HERE TO PROTECT AND
4 SERVE THE PROTECTED OR THE HUNTED. I QUESTION EVERYTHING.
5 AND I WAS WONDERING WHY YOU MADE THAT STATEMENT.
6 **MR. HELBACH:** QUITE FRANKLY, WHEN I WAS 11 YEARS OLD, MY
7 FATHER WAS KILLED BY A POLICE OFFICER AND THAT -- THAT
8 CHANGED MY VIEWS TOWARDS COPS FOR A LONG TIME. AND WHAT I
9 MEANT IN THAT STATEMENT WAS BEING LOCKED UP AND SEEING --
10 REALIZING WHERE I COULD HAVE CHANGED THINGS DURING THE TIMES
11 WHEN I WAS COMMITTING MY CRIMES, I COULD HAVE GONE TO THE
12 POLICE AND ASKED FOR HELP. I COULD HAVE GONE TO SOMEBODY AND
13 GOTTEN HELP WITH MY SITUATION BECAUSE I WAS IN SOME TROUBLE.
14 AND I DIDN'T BECAUSE OF WHAT HAPPENED WHEN I WAS 11 YEARS
15 OLD. BUT WHAT I MEANT WITH THAT STATEMENT WAS, BEING LOCKED
16 UP AND THE EXPERIENCES I'VE GONE THROUGH FOR THE LAST FIVE OR
17 SIX MONTHS, I'VE LEARNED TO QUESTION AND I'M STARTING TO COME
18 AROUND AND REALIZE THAT THINGS AREN'T REALLY THE WAY THAT I
19 BELIEVED THEY WERE.
20 **THE COURT:** DIDN'T YOU TALK ABOUT THAT SORT OF PROBLEM
21 WHEN YOU WERE IN O. AND A. FOR 91 DAYS AS A JUVENILE?
22 **MR. HELBACH:** I WAS NEVER IN O. AND A. FOR --
23 **THE COURT:** WEREN'T YOU IN O. AND A.?
24 **MR. HELBACH:** NO, THERE'S -- THERE'S A -- I WENT OVER
25 AND --

1 **THE COURT:** OH, THAT -- EXCUSE ME, THAT'S RIGHT, THAT
2 WASN'T YOU. YOU DID NOT GO INTO O. AND A., DID YOU? THAT'S
3 RIGHT.
4 **MR. CAINE:** THAT'S CORRECT. THINK YOU WERE THINKING OF
5 A PREVIOUS CASE.
6 **THE COURT:** MR. BRYANT, ACTUALLY.
7 **MR. CAINE:** CORRECT.
8 **THE COURT:** STATE WISH TO BE HEARD?
9 **MR. PARMLEY:** NO, YOUR HONOR.
10 **THE COURT:** AND IS IT THE STATE'S RECOMMENDATION THAT
11 THE SENTENCES RUN CONCURRENT WITH EACH OTHER AND WITH THE
12 DAVIS COUNTY --
13 **MR. PARMLEY:** YOUR HONOR, THAT WAS PART OF THE PLEA
14 NEGOTIATION IN THIS CASE.
15 **THE COURT:** THAT IS YOUR RECOMMENDATION --
16 **MR. PARMLEY:** -- YES, YOUR HONOR.
17 **THE COURT:** -- IN THIS CASE. WELL, AGAIN, I STRUGGLE.
18 YOU HAD FOUR FELONIES AS A JUVENILE, AND THEN YOU HAVE THE
19 DAVIS COUNTY FELONY, AND THIS MAKES SIX FELONIES, AND MANY OF
20 THEM VERY, VERY SERIOUS FELONIES. I SUPPOSE I CAN JUST PLACE
21 MY TRUST IN THE BOARD OF PARDONS AND HOPE THAT THEY DO WHAT
22 IS RIGHT. AND I SUSPECT THEY'RE GOING TO HAVE AN OPPORTUNITY
23 TO OBSERVE YOU AND YOUR CONDUCT WHILE YOU'RE AT THE PRISON.
24 SO I'M GOING TO GO ALONG WITH IT. I HAVE A GREAT DEAL OF
25 RELUCTANCE BECAUSE THESE ARE VERY SERIOUS CHARGES.

1 IT'S THE SENTENCE OF THIS COURT THAT YOU SERVE TWO TERMS
2 OF FIVE YEARS TO LIFE AT THE UTAH STATE PRISON, ONE ON EACH
3 OF THE FIRST DEGREE FELONIES. HOWEVER, I WILL ORDER THAT
4 THEY RUN CONCURRENT WITH EACH OTHER AND WITH THE DAVIS COUNTY
5 FELONY.
6 **MR. CAINE:** THANK YOU, YOUR HONOR.
7 **THE COURT:** AND I'M GOING TO ORDER THAT YOU PAY
8 RESTITUTION OF $801 ON THE ARBY'S CASE AND $299 PLUS TWO
9 HUNDRED AND --
10 **MR. CAINE:** EIGHTY.
11 **MR. PARMLEY:** -- EIGHTY DOLLARS IN RESTITUTION. THAT
12 280 IS TO MRS. MAGUNE. IN THE EVENT ANY OF THESE VICTIMS DO
13 ENGAGE IN COUNSELING, ALSO GOING TO ORDER THAT YOU PAY THEIR
14 COUNSELING COSTS BECAUSE YOU CAN WELL IMAGINE THAT THEY MAY
15 BE TERRORIZED EVEN TO LEAVE THEIR APARTMENTS NOW, SO -- OR
16 THEIR HOMES BECAUSE OF YOUR MISCONDUCT. BUT THAT WILL BE
17 RESERVED FOR THE BOARD OF PARDONS TO DETERMINE IN THE EVENT
18 SOMETHING LIKE THAT HAPPENS.
19 I'M NOT GOING TO GIVE YOU NEW TIME -- CREDITS FOR TIME
20 SERVED OR GOOD TIME OBVIOUSLY IN THIS CASE. THAT'S ALL.
21 **MR. CAINE:** THANK YOU, YOUR HONOR.
22 **MR. HELBACH:** THANK YOU.
23 *****
24
25

1

2 CERTIFICATE

3 STATE OF UTAH)
) SS
4 COUNTY OF WEBER)

5 THIS IS TO CERTIFY THAT THE FOREGOING SEVEN PAGES OF
6 TRANSCRIPT CONSTITUTE A TRUE AND ACCURATE RECORD OF THE
7 PROCEEDINGS TO THE BEST OF MY KNOWLEDGE AND ABILITY AS A
8 CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF UTAH.
9 DATED AT OGDEN, UTAH THIS 17TH DAY OF JANUARY, 2007.
10
11 Dean Olsen
12 DEAN OLSEN, CSR
13
14
15
16
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22
23
24
25

Addendum E

1
2 IN THE SECOND JUDICIAL DISTRICT COURT
3 IN AND FOR WEBER COUNTY, STATE OF UTAH
4 *****
5
STATE OF UTAH,)
6)
PLAINTIFF,)
7)
VS.) REPORTER'S TRANSCRIPT
8)
AARON LONNEL HELBACH,) PLEA
9)
DEFENDANT.) CASE NOS. 031901411, 031901412
10) 031901413
11 *****
12 HONORABLE ROGER S. DUTSON
13 AUGUST 18, 2003
14
15
16 APPEARANCES
17 FOR THE PLAINTIFF: MS. BRENDA J. BEATON
18 FOR THE DEFENDANT: MR. JOHN T. CAINE
19
20
21
22
23 COPY
24
25

1 PROCEEDINGS

2 **THE CLERK:** For the record, this is State of Utah
3 versus Aaron Lonnel Helbach, case numbers 031901411,
4 031901412, and 031901413. Time set for disposition.
5 **MR. CAINE:** This is Aaron Helbach, Your Honor. As
6 you recall, this case had been continued over a bit because
7 he had pled guilty to a first degree felony aggravated
8 robbery in Davis County and had actually gone down on a
9 diagnostic while these cases were pending. We've now
10 received the diagnostic. He was sentenced by Judge Allphin
11 to the five to life sentence.
12 Based upon that, I've talked with Mr. Parmley and we've
13 reached a negotiation; that is, that he will plead guilty to
14 two of the -- I think these are in separate files, actually,
15 two first degree felony aggravated robberies. It's the
16 case -- the first one is the -- just so that you have them --
17 is the case on the 14th of February 2003 where the victim is
18 Arby's. And the second one is on 3/11/2003, the victim is
19 listed as initial D. Magoon, capital, M-A-G-O-O-N.
20 In return for that, the third case will be dismissed.
21 And the State -- we're going to ask to be sentenced today and
22 the State will recommend concurrent sentences as between the
23 two charges and with the Davis County case, and that's the
24 negotiation.
25 **THE COURT:** All right. Is there a written plea

agreement?

MR. CAINE: There is.

THE COURT: And you understand what's in there, Mr. Helbach?

THE DEFENDANT: Yeah, I do.

THE COURT: What's your level of education?

THE DEFENDANT: Post high school tech school.

THE COURT: And you read and write and understand well?

THE DEFENDANT: Yes, sir.

THE COURT: Are you on any medications, alcohol, drugs or do you have any mental health condition today that would make it so you don't fully understand what's happening?

THE DEFENDANT: No, sir.

THE COURT: And are you satisfied with the legal representation you've received?

THE DEFENDANT: Yes, sir.

THE COURT: All right. If you wish, you may go ahead and sign that.

MR. CAINE: Actually, he signed it earlier, I can affirm. We'll just a make a record, Your Honor.

Aaron, you and I reviewed this document and talked about this and it bears your signature and you just signed it in the lockup in there a minute ago; is that correct?

THE DEFENDANT: Yes, sir.

1 **THE COURT:** That is your signature? And do you
2 waive or give up your preliminary hearing rights?
3 **THE DEFENDANT:** Yes, sir.
4 **THE COURT:** You understand you've had the right to
5 have preliminary hearings?
6 **THE DEFENDANT:** Yes, sir.
7 **THE COURT:** Okay. So that we have everything
8 straight here.
9 **MS. BEATON:** We don't have restitution determined is
10 one thing. And I don't know whether or not the victims in
11 this case want to be heard given the nature of the fact that
12 it's an aggravated robbery.
13 **THE COURT:** Right.
14 **MS. BEATON:** They may very well want to be heard.
15 **THE COURT:** They very well might. Let's -- now
16 there were two involving --
17 **MR. CAINE:** Yeah. One on --
18 **THE COURT:** -- D. Magoon one on March the 5th and
19 one on March the 11th.
20 **MR. CAINE:** The one on March 11th is the one we're
21 going to plead to.
22 **THE COURT:** All right.
23 **MR. CAINE:** And then the Arby's case which is on the
24 14th of February.
25 **THE CLERK:** Can we specify case numbers so I get the

1

2 **THE COURT:** Yes, I will.

3 **MS. BEATON:** We'll be dismissing case ending in 1413

4 and the defendant will be pleading to case ending 1412 and

5 1411.

6 **THE CLERK:** Thank you.

7 **MR. CAINE:** That is correct.

8 **THE COURT:** All right. Now --

9 **MR. CAINE:** As far as -- I guess we probably ought

10 to -- since this hasn't been raised before, as far as the

11 restitution goes since I don't -- at least Mr. Parmley didn't

12 indicate there had been any claim, I suppose what you can do

13 is leave that for the Board of Pardons to determine.

14 **THE COURT:** We can address that.

15 **MR. CAINE:** Yeah.

16 **THE COURT:** But first then, so that we're clear on

17 the elements under the most recent case from the Court of

18 Appeals, we have to be very detailed on the elements. And

19 I'll go over those again which may be somewhat duplicating

20 what's in this written agreement but I want you to clearly

21 understand what you're pleading to, what the elements are,

22 and so I'm going to go over them with some more detail.

23 I'll ask first on the case of February the 14th on case

24 number 1411, and that's the Arby's case, what would the

25 elements have been had you gone to trial on that?

1 **MS. BEATON:** Do you want to state them?

2 **MR. CAINE:** This is -- they're all fairly similar.

3 This is a case, this is a situation where the defendant went

4 in there, he indicated that he had a weapon and attempting to

5 get property, money in this case, and that's what happened.

6 **THE COURT:** Did he obtain property or just attempt

7 to gain property at Arby's?

8 **MR. CAINE:** Yeah. He obtained the property.

9 **THE COURT:** Arby's he got some money or property

10 from them threatening them with a weapon?

11 **MR. CAINE:** Money, yes.

12 **THE COURT:** All right. And on the 11th of March, D.

13 Magoon, what are the -- that says it was a knife.

14 **MR. CAINE:** This is a -- this is a -- at least he

15 indicated that he had done that. This is the -- at a

16 Sinclair gas station actually. The individual was the person

17 named there and there was a indication that he had a knife

18 and there was money from there also.

19 **THE COURT:** And you got money then?

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

21 **THE COURT:** All right. So those then would be the

22 elements that you did by use of force or fear a knife, and

23 then in the other case, a gun, steal money from persons that

24 you had no legal right to have. And you understand those are

25 the elements?

1 **THE DEFENDANT:** Yes, sir.
2 **THE COURT:** All right. Then to the Arby's theft in
3 case number 1411, a robbery, how do you plead?
4 **THE DEFENDANT:** Guilty.
5 **THE COURT:** And to the Sinclair robbery involving a
6 victim by the name of D. Magoon, how do you plead?
7 **THE DEFENDANT:** Guilty.
8 **THE COURT:** Aggravated robbery. All right.
9 And the factual basis has been given to the Court which
10 included these elements, and therefore, the Court finds there
11 is a factual basis upon which to enter the pleas and they are
12 entered. You have up to the time of any sentencing in which
13 to attempt to withdraw your pleas in writing. And you wish
14 to have sentencing today apparently?
15 **MR. CAINE:** We do.
16 **THE COURT:** You need to understand, Mr. Helbach,
17 before we go ahead that I'm not bound by any recommendations
18 as to any penalties. In other words, I don't have to follow
19 the recommendations to run them concurrent and they could run
20 consecutive to any other penalties. Do you understand that?
21 **THE DEFENDANT:** I do understand that, Your Honor.
22 **THE COURT:** All right. You have the right to come
23 back after two days for sentencing and normally within 45
24 days if the Court's calendar permits to have sentencing. And
25 normally I would refer the matter to the Adult Probation

1 Department for some recommendation. Do you understand that?
2 **THE DEFENDANT:** Yes, sir.
3 **MS. BEATON:** Judge, the State's problem with doing
4 sentencing today is, one, restitution has not been
5 determined. Two, the victims in these cases have not been
6 notified of the plea negotiation that was entered into, and
7 obviously, not have had an opportunity to let the Court know
8 what their feelings are.
9 Although case number 1413 has been dismissed, that victim
10 is the victim on the first instance and the victim on the
11 second instance. And she submitted a victim impact statement
12 that indicates that she clearly has an opinion as to what
13 ought to happen in this case, and I just don't see how the
14 defendant is harmed in any fashion by waiting.
15 **THE COURT:** All right. I tend to agree, although I
16 do have a presentence report with the diagnostic evaluation
17 of some sorts. Actually, it's not a presentence, it's just a
18 diagnostic.
19 **MS. BEATON:** I don't think Mr. Parmley had
20 anticipated that sentencing would take place today.
21 **THE COURT:** I'm not -- I think it would be better
22 for me to know what the facts are and whether the State
23 remains silent or not isn't the issue. I'm going to refer it
24 because of the seriousness of the offenses for presentence.
25 **MR. CAINE:** Well, that -- okay. I'm going to now

1 I'm in a position -- number one, let me make the record.
2 Mr. Parmley did know it.
3 Number two, it makes no sense at all to have a
4 presentence report. You have a diagnostic report and that's
5 what we were working on. I don't care if we continue it to
6 let the victim come in, that's all right with me. It makes
7 no sense at all to have another diagnostic report. And this
8 is not a situation where the State -- the State -- he knows
9 he's going to prison, and the State is making an affirmative
10 recommendation for a concurrent sentence.
11 **THE COURT:** Right.
12 **MR. CAINE:** And I think that's where it ought to be.
13 I don't have any problem with giving a victim an opportunity
14 to speak, but the victim -- all the victim can ask for is a
15 prison sentence, and that's all we're doing.
16 **THE COURT:** What I'm going to do then is continue
17 this to allow the time for the victims to come in and ask
18 that the presence recommendations that have been made in
19 Davis County be provided.
20 **MR. CAINE:** That's fine. I don't have any problem
21 with that.
22 **MS. BEATON:** Well, maybe if they can determine a
23 restitution figure.
24 **MR. CAINE:** Yeah. If we've got a restitution --
25 **THE COURT:** If we could get a restitution figure,

1 that would be helpful.
2 **MR. CAINE:** That's fine.
3 **THE COURT:** How long do you need? Two weeks? We've
4 got a holiday on the 1st. Let's set it for the -- and I'm
5 really heavy on the 8th. Let's set it for the 15th. And
6 that's simply because my calendar is so bad. If that's good
7 for you, fine; if not, let's talk --
8 **MR. CAINE:** The only problem with that day is --
9 well, I'm sure one of my colleges can be here. I start a
10 jury trial here with --
11 **THE COURT:** Would you be available on the 8th,
12 Mr. Caine?
13 **MR. CAINE:** The 8th of September?
14 **THE COURT:** Uh-huh. It's getting to be quite heavy
15 but --
16 **MR. CAINE:** Let's see. Yes, I would.
17 **THE COURT:** All right. Let's set it for the 8th.
18 **MR. CAINE:** All right.
19 **THE COURT:** September the 8th then.
20 **MR. CAINE:** That will be fine.
21 **THE COURT:** All right. Thank you. All right.
22 (The matter concluded.)
23
24
25

1 REPORTER'S CERTIFICATE

2 STATE OF UTAH)
: SS.
3 COUNTY OF WEBER)

4

5 I, Tracy A. Covington, do certify that I am a Registered
6 Professional Reporter and Official Court Reporter in and for
7 the State of Utah; that I reported the proceedings of the
8 above-entitled matter at the aforesaid time and place. That
9 the foregoing proceedings were reported by me in stenotype
10 using computer-aided transcription.
11 That the same constitutes a true and correct
12 transcription of the said proceedings.
13 That I am not of kin or otherwise associated with any of
14 the parties herein or their counsel, and that I am not
15 interested in the events thereof.
16 WITNESS my hand at Ogden City, Utah, this 25th day of
17 January, 2007.
18
19
20 Tracy A. Covington, RPR
21
22
23
24
25

Addendum F

H
State v. Helbach
Utah App..2004.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Court of Appeals of Utah.
STATE of Utah, Plaintiff and Appellee,
v.
Aaron L. **HELBACH**, Defendant and Appellant.
No. 20040671-CA.

Oct. 28, 2004.

Second District, Ogden Department; The Honorable Roger S. Dutson.

Aaron L. **Helbach**, Gunnison, Appellant Pro Se.
Mark L. Shurtleff and Laura B. Dupaix, Salt Lake City, for Appellee.

Before Judges BENCH, DAVIS, and ORME.

MEMORANDUM DECISION (Not For Official Publication)
PER CURIAM:
[¶1]*1 AaronHelbach appeals the trial court's denial of his motion to be resentenced. This is before the court on the State's motion for summary disposition based on lack of jurisdiction.

[¶2] Helbach pleaded guilty to a charge of aggravated robbery in August 2003. Helbach completed a statement in support of his guilty plea, giving the factual basis for his plea and waiving specific rights, including his right to appeal. The document also specified that he could withdraw his plea only on good cause shown, and that he must file a motion to withdraw his plea before the announcement of sentence. Helbach was sentenced in September 2003.

[¶3] In March 2004, Helbach filed a motion for resentencing in the trial court in his criminal case. Helbach asserted that he was incompetent at the time of his plea, and thus the plea was invalid. The trial court denied the motion on its merits, finding there was no indication that Helbach was not fully capable of entering a knowing and voluntary plea, and that the mental evaluation from the State did not indicate any disorder that would impact his competency. The trial court also noted the motion was filed several months after sentencing, but did " not address [the] timeliness of the Motion."

[¶4] Helbach asserts that his motion was filed " under the philosophy" of *State v. Rees*, 2003 UT App 4, 63 P.3d 120,*cert. granted*,73 P.3d 946 (Utah 2003), which permitted a defendant to file a motion for resentencing in the sentencing court under particular circumstances. Helbach has apparently seized on *Rees* to avoid going through the procedures for post-conviction relief as set forth in the Utah Post-Conviction Remedies Act (Act), Utah Code sections 78-35a-101 to -304 (2002), and Utah Rule of Civil Procedure 65C. However, after *Rees*, this court has held that

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requests to be resentenced to permit a renewal of an opportunity to appeal fall squarely within rule 65C and the Act. *See State v. Manning,* 2004 UT App 87,¶ 21, 89 P.3d 196,*cert. granted,*2004 Utah LEXIS 172(Utah Aug. 11, 2004).

[¶5] Additionally, Helbach has not shown that he comes within the scope of *Rees* In *Rees,* this court held that extraordinary relief may be available in the sentencing court if a defendant has been denied the effective assistance of counsel on appeal. *See Rees,* 2003 UT App 4 at ¶ 6. Such relief, however, is available only in " limited circumstances, to modify or vacate a judgment where extra-record facts show that the defendant has been deprived of his constitutional right to a fair trial or meaningful appeal." *Id* at ¶ 13.Helbach waived his right to a trial and appeal by pleading guilty and does not come within the narrow scope of *Rees*

[¶6] Instead, Helbach's motion is governed by Utah Code section 77-13-6, providing for the methods of challenging a guilty plea. Section 77-13-6 provides that a guilty plea " may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made." Utah Code Ann. § 77-13-6(2)(a) (2003). A request to withdraw a plea " shall be made by motion before sentence is announced." *Id* § 77-13-6(2)(b). If a defendant does not timely request to withdraw his plea, any challenge to the plea must be made pursuant to rule 65C and the Act. *See id* § 77-13-6(2)(c).

[¶7] ***2** Helbach's motion requested resentencing, but attacked the validity of his plea, arguing he was incompetent. The trial court addressed the merits, finding that Helbach was not incompetent at his plea. The trial court also noted, but did not rule on, the late filing of the motion. In substance, Helbach's motion was a motion to withdraw his plea, and the trial court considered it as such. However, under section 77-13-6, the trial court had no jurisdiction to consider the motion because it was made months after sentence was announced. Section 77-13-6 limits a defendant's right to withdraw a guilty plea to the time before the announcement of sentence. *See id* § 77-13-6(2)(b). " Thereafter, the right is extinguished." *State v. Abeyta,* 852 P.2d 993, 995 (Utah 1993) (holding that failure to file a timely motion for withdrawal extinguishes the right). The timely filing of a notice to withdraw a plea is jurisdictional. *See State v. Reyes,* 2002 UT 13,¶¶ 3-4, 40 P .3d 630.

[¶8] The trial court lacked jurisdiction over Helbach's motion, and thus this court likewise lacks jurisdiction over this appeal. *See State v. Montoya,* 825 P.2d 676, 678-79 (Utah Ct.App.1991). Accordingly, this appeal is dismissed.

Utah App..2004.
State v. Helbach
Not Reported in P.3d, 2004 WL 2404373 (Utah App.), 2004 UT App 388

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Addendum G

Helbach v. Dutson
Utah App..2004.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.

Aaron L. **HELBACH**, Petitioner,

v.

Judge Roger DUTSON, Mark DeCaria, and State of Utah, Respondents.

No. 20040947-CA.

Dec. 16, 2004.

Original Proceeding in this Court.

Aaron L. **Helbach**, Gunnison, Petitioner Pro Se.

Brent M. Johnson, Salt Lake City, for Respondent Judge Dutson.

Mark L. Shurtleff and Christopher D. Ballard, Salt Lake City, for Respondent State of Utah.

Before Judges BILLINGS, BENCH, and GREENWOOD.

MEMORANDUM DECISION (Not For Official Publication)

PER CURIAM:

[¶1] ***1** Aaron Helbach filed a petition in the appellate courts seeking extraordinary relief under Utah Rule of Appellate Procedure 19 and seeking habeas corpus relief under Utah Rule of Appellate Procedure 20.

[¶2] Helbach's petition challenges the validity of his guilty plea to charges of aggravated robbery. Helbach pleaded guilty in August 2003 and was sentenced in September 2003. He did not file a timely motion to withdraw his plea. *See*Utah Code Ann. § 77-13-6(2)(b) (2003) (providing a motion to withdraw a guilty plea must be made before sentence is announced). As a result, his sole avenue to challenge his plea is under the Post-Conviction Remedies Act (Act), *see*Utah Code sections 78-35a-101 to -110, and rule 65C of the Utah Rules of Civil Procedure. *See*Utah Code Ann. § 77-13-6(2)(c).

[¶3] Under rule 19 of the Utah Rules of Appellate Procedure, a petition for extraordinary relief in an appellate court is available only where " no other plain, speedy, or adequate remedy exists." Utah R.App. P. 19(b)(4); *see also*Utah R. Civ. P. 65B. Helbach has a plain, speedy, and adequate remedy to challenge his plea under the procedures of the Act and rule 65C. Thus, to the extent Helbach's petition is a petition for extraordinary relief under rule 19, it is denied.

[¶4] Rule 20 provides that where a petition for habeas corpus relief is filed in an appellate court, the petition " will be referred to the appropriate district court." Utah R.App. P. 20(a). The referral is required " unless it is shown on the face of the petition to the satisfaction of the appellate court that the district court is unavailable or other exigent circumstances exist." *Id.* Helbach's petition does not address this requirement at all. He alleges no

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facts that would show the unavailability of the district court or other exigent circumstances warranting the retention of the petition in an appellate court. As a result, insofar as the petition is a petition for habeas corpus or post-conviction relief, the petition is not appropriately before this court.

[¶5] Accordingly, the petition for extraordinary relief is denied. Further, the petition is referred to the second district court for consideration regarding the claims for post-conviction relief.

Utah App..2004.
Helbach v. Dutson
Not Reported in P.3d, 2004 WL 2903877 (Utah App.), 2004 UT App 480

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Addendum H

IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
WEBER COUNTY, OGDEN DEPARTMENT

AARON HELBACH, Petitioner, vs. STATE OF UTAH, Respondent.	**RULING AND ORDER** Case No. ~~031901411 FS~~ 060900429 Honorable Roger S. Dutson MAY 18 2006

When the Petitioner filed a petition challenging the validity of his guilty plea, this Court summarily dismissed it after a review of the record showed that the Petitioner's claims were without merit. Subsequently, the Petitioner asked for reconsideration arguing that the law does not allow a review of the record or the merits of a petitioner's claims at this stage of the proceedings. Because the Court finds that the Petitioner's arguments are valid, the previous order dismissing the petition is vacated.

Upon receiving a petition for post conviction relief, a court must summarily dismiss claims when, based solely on the pleading's allegations, it appears that the facts alleged do not support a claim for relief as a matter of law, or that the claim has no arguable basis in fact. Utah R. Civ. P. 65C(g). The court will review only the information contained in this petition.

I. Elements of Aggravated Robbery

The Petitioner alleges that he was not told that the elements of aggravated robbery included: (1) a taking, (2) of personal property, (3) from a person or in his immediate presence,

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and (4) a positive identification by the victim. A defendant must be informed of the elements of the charge before a court may accept a guilty plea. State v. Merrill. 114 P.3d 585. 592 (Utah 2005). The aggravated robbery statute in effect at the time the Petitioner committed the crime states that. "[a] person commits aggravated robbery if in the course of committing robbery, he . . . uses or threatens to use a dangerous weapon as defined in Section 76-1-601. . . ." Utah Code Ann. § 76-6-301 (2003). The robbery statute states that, "[a] person commits robbery if . . . the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence. against his will. by means of force or fear. . . ." Utah Code Ann. § 76-6-302 (2003). Clearly, the statute includes the elements of (1) a taking. (2) of personal property. (3) from a person or in his immediate presence, so the Petitioner's claim that his plea was not voluntary because he was not advised of these elements, is not facially frivolous. That issue will be forwarded to the Utah State Attorney General's Office for review. However. a positive identification by a victim. is not an element of aggravated robbery, so this claim is summarily dismissed as facially frivolous.

II. How the Facts Constitute The Crime

The Petitioner alleges that he was not told how the facts of his case constitute the crime charged. "Because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." State v. Breckenridge. 688 P.2d 440, 444 (Utah 1984). The Petitioner has at least stated a possible cause of action. so that issue will be forwarded to the Attorney General's Office for review.

III. Bifurcated Procedure

The Petitioner asserts that his plea was not knowing, because no one explained that proving aggravated robbery was a bifurcated procedure requiring proof of robbery before aggravated robbery. He states that had he known that the Prosecutor had to prove that he took personal property from a person by means of force or fear, he would not have entered into a guilty plea, because these elements require some proof that he was at the scene. It is not clear which of the following three probable claims the Petitioner is making.

If the Petitioner means to state a claim that his plea was unknowing, because he did not know that a conviction for an aggravated crime is done in a bifurcated procedure, he has stated a facially frivolous claim. The Petitioner has not provided, and the Court has not found, any support for this proposition, and the Court concludes that this information is not required. The Court finds support for its conclusion in State v. Corwell, 114 P.3d 569 (Utah 2005). In Corwell, the defendant argued that the court's duty under Rule 11(e) of the Utah Rules of Civil Procedure (Rule 11(e)) to advise her that her right to appeal was limited, meant that the court must explain numerous appeal issues. The Supreme Court of Utah observed that nothing in the plain language of Rule 11(e) required such a detailed explanation. The Supreme Court also referenced, State v. Visser, 22 P.3d 1242 (Utah 2000), where it held that a trial court was not required to explain every aspect of the right to a speedy trial. Consequently, the Supreme Court held that a defendant was not entitled to an explanation of every aspect of the right to appeal. The Court concludes that requiring a trial court to explain the bifurcated procedure used in a conviction for an aggravated offense is tantamount to requiring a court to provide a detailed explanation of appellate issues. Therefore, the Court summarily dismisses this claim.

The second possible claim the Petitioner could be making is that he was not advised of

every element of the crime. This claim echos the Petitioner's first claim, but it alleges that none of the elements were explained. This claim will be forwarded to the Utah State Attorney General's Office.

The third possible claim the Petitioner could be making is that his plea was unknowing, because he was not advised that the State must prove every element of the crime. As stated before, a defendant must be advised of the consequences of his guilty plea. See, State v. Merrill, 114 P.3d 585, 592 (Utah 2005). Therefore, this claim will be forwarded to the Office of the Utah State Attorney General for review.

IV. Ability to Withdraw Guilty Plea and the Right to Appeal

The Petitioner has included two different paragraphs which contain contradictory statements regarding whether the Court made mistakes when advising him about his right to appeal and his right to withdraw his guilty plea. In his second paragraph he states that he was *never advised* of his right to withdraw his guilty plea or his right to appeal. However, in his first paragraph, he states that the plea agreement *incorrectly* advised him that he had thirty days from the entry of a plea to withdraw his plea. Further, the Petitioner argues that the law allows the withdrawal of a guilty plea upon a showing of good cause or exceptional circumstances, or by using a petition for post conviction relief. Finally, the Petitioner states that he would like to assert his right to withdraw his guilty plea pursuant to Rule 11(f).

The failure to inform a defendant of the right to appeal can constitute a denial of the right to appeal. See, Manning v. State, 122 P.3d 628, 636 (Utah 2005). Therefore, the Petitioner has stated a claim for relief, and the Court will forward this claim to the Attorney General's Office for review.

Before addressing the Petitioner's claims related to his ability to withdraw a guilty plea, the Court notes that withdrawal of a guilty plea is not a right. State v. Dean, 95 P.3d 276, 280 (Utah 2004). To the extent that the Petitioner means to assert a claim that his right to withdraw his guilty plea was violated, he has stated a facially frivolous claim which is summarily dismissed. The Court will address the Petitioner's arguments assuming that he means to assert a claim that he was not advised of his ability to seek withdrawal of his guilty plea.

If the Petitioner is claiming that he never was informed of his ability to withdraw his guilty plea, he has stated facially frivolous claim. To state a claim in a petition for post conviction relief, the basis for that relief must be one, such as a constitutional violation, listed in the Post-Conviction Remedies Act (PCRA). Pleading a violation of one of the prophylactic provisions of Rule 11(e) is insufficient. Salazar v. Utah State Prison, 852 P.2d 988 (Utah 1993). The only possible constitutional violation implicated by this issue is whether the failure to advise the defendant of the ability to withdraw a guilty plea renders the plea unknowing or involuntary. The Petitioner has not provided, and the Court's review of many cases, has not revealed any support for such an assertion. Two case which addresses this issue suggest to the contrary. In State v. Dean, 95 P.3d 276, 280 (Utah 2004), the Supreme Court of Utah stated that withdrawal of a guilty plea is not a right, it is a privilege which may be granted upon a showing of good cause In State v. Merrill, 114 P.3d 585 (Utah 2005), the Supreme Court of Utah stated that the right to *seek* withdrawal of a guilty plea is not subject to constitutional protections. Because withdrawal of a guilty plea is not a right, it is unlikely that the failure to advise a defendant that he can seek withdrawal of his guilty plea renders the plea unknowing. Further, Rule 11(f) states the failure to advise a defendant of the time limits in which he may make a motion to withdraw a

guilty plea, is not a basis to set the plea aside. Given the lack of support for the Petitioner's position, and the strongly suggestive language in the cases and Rule 11(f), the Court concludes that a defendant does not have the constitutional right to be advised of his ability to pursue the withdrawal of his guilty plea. Therefore, this claim is summarily dismissed.

If the Petitioner is claiming that his guilty plea should be vacated, because he was incorrectly told of the time limits for withdrawing his guilty plea under State v Ostler, 31 P.3d 528 (Utah 2001), his claim is facially frivolous. Ostler interpreted a statute which allowed a defendant to withdraw his guilty plea up to thirty days after its entry. Since Ostler, this time limit has been changed. This amendment was in effect when the Petitioner committed the crimes and entered his plea. Therefore, the Court summarily dismisses this claim.

Petitioner also claims that any statement which gives a time limit for withdrawing a guilty plea is an incorrect statement of the law. The Petitioner cites to State v Marvin, 964 P 2d 313, 318 (Utah 1998) to demonstrate that a defendant may withdraw a guilty plea upon a showing of good cause or exceptional circumstances. He also notes that withdrawal can be done by using a petition for post conviction relief. If this is a separate claim for relief, it repeats the Petitioner's claim that he was incorrectly advised of the time limits to withdraw his guilty plea. Therefore, it is summarily dismissed as facially frivolous.

The final issue in this claim, is whether the Petitioner may assert his "right" under Rule 11(f) to make a motion to set aside his guilty plea, because he was incorrectly informed about the time limits for making such a motion. However, the Petitioner has not submitted a motion to withdraw his guilty plea. Therefore, the Court dismisses this claim as frivolous.

V. Conditional Guilty Pleas and Incompetency

The Petitioner's next claim is also unclear. He firsts states that his plea was unknowing, because he was not advised of his right to enter into a conditional guilty plea. Then, he makes multiple allegations regarding his competency. First, he was evaluated for mental incompetency after a conviction in Davis County but before his guilty plea in Weber. Second, the evaluation stated that he did not suffer from any serious mental disorder at that time. Third, he was not competent to make a confession. Fourth, when his lawyer saw the report, he incorrectly advised him to plead guilty, because the Petitioner had confessed. The Petitioner claims this advise was unsound, because his attorney should have been looking at his competency at the time he confessed. Fifth, the Petitioner alleges that the Court made several procedural errors in assessing his competency, because (1) the Court did not order another evaluation by the Department of Human Services which the Petitioner claims is required by 77-15 et. seq.; and (2) the Court incorrectly stated that he was competent without ever holding a hearing or getting an evaluation by mental experts: and (3) the Court was incorrect in its assessment of competency, because his mental disorder was worse than in several other cases which the Petitioner cites; and finally, the petitioner alleges that he did not know what was going on in the courtroom, because he suffers from bipolar disorder.

The Petitioner could be making several possible claims: (1) the Petitioner was entitled to be advised of the right to enter a conditional guilty plea (he would have used that right to exclude his confession and contest his competency to stand trial); (2) his plea was unknowing, because he was not advised of his right to enter a conditional guilty plea; (3) he was incompetent at the time he confessed, so using his confession to obtain a guilty plea is illegal (this claim was made in this petition); (4) the Petitioner was incompetent at the time he entered a guilty plea, so his guilty plea

was unknowing; or (5) the Petitioner was too incompetent to enter any type of plea (this claim was made in this petition). Again, the Court will address each possibility in turn.

The first two of these possible claims are based on the incorrect assumption that a defendant has the right to be informed of the ability to enter a conditional guilty plea and/or he had the right to enter a conditional guilty plea. Based on the following analysis, the Court dismisses the first two possible claims as facially frivolous.

The Petitioner has not provided, and the Court cannot find, any support for the proposition that a defendant has the right to be informed of the ability to enter a conditional guilty plea, and the Court concludes that it is not required to inform a defendant of this option. The purpose of Rule 11(e), which lists the rights of which a defendant must be informed, is to ensure that a defendant's plea is voluntary and *knowing*. See, State v Gamblin, 1 P.3d 1108, 1111 (Utah 2000) (emphasis added). The ability of a defendant to enter a conditional guilty plea is not one of these rights listed in rule 11(e)–it is listed in Rule 11(i). Therefore, the Court concludes that it is not required to advise a defendant of the possibility of entering a conditional plea, before a defendant's plea can be characterized as voluntary.

Also, the Court concludes that the Petitioner does not have the right to enter such a plea. Rule 11(i), which lists the conditions under which a court may accept a conditional guilty plea, states that a defendant can only enter a conditional guilty plea if the prosecutor consents, and the court approves. The plain language of Rule 11(i) demonstrates that the ability to enter a conditional guilty plea is a privilege--not a right. This conclusion is supported by State v Gamblin, 1 P.3d 1108 (Utah 2000). In Gamblin, the Supreme Court of Utah concluded that withdrawal of a guilty plea was a privilege not a right, because the plain language of the statute

stated that withdrawal was conditioned on court approval. The rule allowing the entry of a conditional guilty plea, also conditions this ability on court approval. Therefore, the Court concludes that the ability to enter a conditional guilty plea is not a right.

The Petitioner's next possible claim is that he was incompetent when he gave his confession, so it should have been excluded. The Petitioner apparently presumes that exclusion of the confession would mean that it could not be used by his attorney to encourage him to plead guilty or by the prosecution as a basis for the guilty plea. "[B]y pleading guilty, the defendant . . .waives all nonjurisdictional defects, including alleged pre-plea constitutional violations." State v. Parsons, 781 P.2d 1275, 1278 (Utah 1989). Whether a confession can be used due to a defendant's incompetency is a pre-plea constitutional issue. Therefore, this claim is frivolous and summarily dismissed.

The Petitioner's claim, that his attorney should not have considered his confession when recommending the plea bargain, is one for ineffective assistance of counsel. To succeed in an ineffective assistance of counsel claim, a petitioner must at least allege that counsel's performance fell below professionally competent assistance, and but for counsel's deficient performance, there is a reasonable probability that the proceeding's results would have been different. Strickland v. Washington, 466 U.S. 668, 690-694 (1984). While the Petitioner failed to allege prejudice, the Petitioner's claim is sufficient for the review of the Attorney General.

Finally, the Petitioner claims that the prosecutor established a basis for his guilty plea by inappropriately using evidence obtained by engaging in unconstitutional behavior. The Petitioner did not provide, and the Court's review of many cases did not reveal, any support for his assertion. Therefore, the Court summarily dismisses this claim as frivolous.

The last of the Petitioner's possible claims allege that he was incompetent at the time he was entered his guilty plea. "It is well established that due process requires that a defendant be mentally competent to plead guilty and to stand trial." State v. Arguelles, 63 P.3d 731, 745 (Utah 2003). Because the Petitioner made allegations which facially support these last claims for relief, the Court will forward both of them to the Attorney General's Office for response.

As part of these claims the Court will forward the Petitioner's claims that the Court did not correctly follow the procedure to establish whether the Petitioner was competent–including the Petitioner's claims that the Court decided competency without a hearing or getting an evaluation completed by mental experts. However, the Court will not address the Petitioner's claim that he had the right to have his competency evaluated by the Department of Human Services (DHS) as stated in 77-15, et. seq., because (1) the Petitioner had undergone a recent DHS evaluation which was provided to this Court and (2) the Petitioner did not have this right. The only reference to DHS performing a competency evaluation in the statutes cited by the Petitioner is in 77-15-5(2)(a) which states; "[a]fter the granting of a petition and prior to a full competency hearing, the court ***may*** order the Department of Human Services to examine the person and to report to the court concerning the defendant's mental condition. Utah Code Ann. 77-15-5(2)(a) (emphasis added). Because an evaluation by DHS is discretionary, the Court is not required to provide an additional evaluation The Court dismisses this part of the Petitioner's claim as facially frivolous.

VI. Explanation of Possible Punishments for the Charged Crime

The Petitioner also claims that his plea was unknowing, because he did not receive an adequate explanation of the punishment which would be imposed. The Petitioner states that: (1)

the Court did not explain that he would have to be in prison for at least five years before he would be eligible for parole: (2) the Court did not explain that he could be imprisoned for life; (3) the Court did not explain that the matrix calculation in the pre-sentencing investigation report (PSI) was not binding; and (4) the Court did not explain that it relinquished jurisdiction to the Board of Pardons and Parole after sentencing. Due process requires that a court explain the consequences of a guilty plea. See, State v. Merrill, 114 P.3d 585, 592 (Utah 2005). A Court must explain the minium and maximum punishment for a crime when taking a guilty plea, so the Court will forward the first two claims to the Utah State Attorney General's office for response. However, the Court has no obligation to discuss the PSI matrix as that is only advisory to the Court, and the Court need not explain that it relinquishes jurisdiction to the Board of Pardons and Parole as that is done by statute. These later two claims are dismissed as facially frivolous.

VII. Rights Which Are Waived Upon Pleading Guilty

Next, the Petitioner states that the Court failed to ensure that he understood all of the rights he was waiving. However, the Petitioner does not state of which right the Court did not advise him. Because, this mere allegation is not enough to state a claim, the Court summarily dismisses this claim as frivolous on its face.

VIII. Strict Compliance With Rule 11(e)

Next, the Petitioner states that the Court failed to strictly comply with Rule 11(e) when taking his guilty plea. The Petitioner does not state whether this allegation is a claim or is a factual allegation to support his claim that his plea was not voluntary and knowing. The failure to strictly comply with Rule 11(e) is not a basis to vacate a plea pursuant to a petition for post-conviction relief. See, Salazar v. Warden, 852 P.2d 988, 992 (Utah 1993)(a petitioner must

show a violation of his constitutional rights which made his/her plea unknowing or involuntary). However, the Petitioner has alleged facts important enough to forward this claim to the Attorney General for review.

IX. Evidence Supporting the Charge of Aggravated Robbery

The Petitioner attacks the evidence in his case by making the following claims: (1) intent was not proven; (2) there was no evidence that he committed the crime; (3) his co-defendants had motive to implicate him; and (4) his confession was incompetent. "[B]y pleading guilty, the defendant is deemed to have admitted all of the essential elements of the crime charged . . . ." State v. Parsons, 781 P.2d 1275, 1278 (Utah 1989). The Petitioner waived his right to require the state to prove all of the elements of aggravated robbery when he entered a guilty plea. Therefore, the Court summarily dismisses this claim as facially frivolous.

X. Insufficient Factual Basis to Support the Petitioner's Guilty Plea

The Petitioner claims that the insufficient factual basis provided for his guilty plea violated his due process rights and the prosecutor's ethical duty. A violation of a prosecutor's ethical duty is an insufficient allegation to support a motion to vacate a guilty plea Therefore, this claim is summarily dismissed. However, failing to make a record of facts sufficient to support a guilty plea is a violation of a defendant's due process rights. Willett v. Barnes, 842 P.2d 860, 862 (Utah 1992). Therefore, the Petitioner's claim is facially sufficient, so it will be forwarded to the Utah State Attorney General's Office for evaluation.

XI. Inaccuracies Contained in the Pre-Sentencing Investigation Report

The Petitioner also contends that he was unable to contest inaccuracies in his Pre-sentencing Investigation Report (PSI), because he never received a copy. Due process requires

that a defendant be provided with information being relied on by the Court for sentencing. State v. Casarez, 656 P.2d 1005 (Utah1982). Therefore, the Petitioner has stated a facially sufficient claim for relief, and the Court will forward it to the Office of the Attorney General.

XII. Ineffective Assistance of Counsel

The Petitioner claims he received ineffective assistance of counsel, listing approximately 25 reasons why his attorney's performance was deficient. To succeed on a claim for ineffective assistance of counsel, a petitioner must allege that counsel's performance fell below professionally competent assistance, and but for counsel's deficient performance, there is a reasonable probability that the proceeding's results would have been different. Strickland v. Washington, 466 U.S. 668, 690-694 (1984). Although the Petitioner failed to allege how these deficiencies prejudiced him, it is an issue sufficient to refer to the Attorney General for response.

XIII. Sufficiency of the Evidence and Vagueness

The Petitioner alleges that the behavior of which he is accused does not satisfy the elements of the aggravated robbery statute. First, the statute requires an intentional taking. The Petitioner asserts that this element requires proof of his identity–something which did not happen in this case. Second, the Petitioner states that robbery is the unlawful and intentional taking of personal property from their person or in his immediate presence by means of force or fear. The Petitioner references Black's Law Dictionary to show that the definition of "personal" means "pertaining to and limited to a person." The Petitioner uses his version of the robbery statute and his definition of "personal" to argue that the statute requires that the property which is taken, must be taken from the person who owns it. Since the property taken, in the robberies of which the Petitioner was convicted was owned by the store (not by the employees from whom it was

taken), the Petitioner argues that he is not guilty. Finally, the Petitioner, in an implicit acknowledgment that his argument hinges on his definition of personal, states that if someone can provide a different definition of "personal," the statute is unconstitutionally vague.

The Petitioner's claim that his guilty plea should be vacated, because the State did not provide proof of his identity is facially frivolous. "[B]y pleading guilty, the defendant is deemed to have admitted all of the essential elements of the crime charged. . . ." State v. Parsons, 781 P.2d 1275, 1278 (Utah 1989). When the Petitioner pleaded guilty, he admitted all essential elements of the crime. Therefore, this claim is summarily dismissed.

The Petitioner's argument that the property taken must be owned by the person from whom it is taken is facially frivolous. The robbery statute in effect at the time of the Petitioner's conviction reads, "[a] person commits robbery if . . . the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear. . . ." Utah Code Ann. § 76-6-302 (2003). The statute clearly outlaws the taking of personal property (property owned by a person) from a person who has possession of it. Therefore, the Petitioner's claim is summarily dismissed. Because the Court was able to resolve the Petitioner's claim without providing a different definition of "personal property," the Court will not address the Petitioner's constitutional vagueness argument.

ORDER

The following claims of the Petitioner are dismissed as facially frivolous.

1- There was no positive identification of the Petitioner by a victim as the statute requires.
2- The Petitioner was not advised of the bifurcated procedure used in aggravated crimes.
3- The Petitioner was denied his right to withdraw his guilty plea.

4- The Petitioner was never informed of his ability to withdraw his guilty plea.
5- The Petitioner was incorrectly told of the time limits for withdrawing his guilty plea.
6- A guilty plea may be withdrawn upon a showing of good cause or plain error or by a petition for post conviction relief.
7- The Petitioner's should have been told of his right to enter a conditional guilty plea.
8- The Petitioner's plea was unknowing, because he was not advised of his right to enter a conditional guilty plea.
9- The Petitioner's confession should have been excluded, because he was incompetent.
10- The Prosecutor violated the Petitioner's rights when he/she used the Petitioner's confession. obtained in violation of the constitutional. as a factual basis for the guilty plea.
11- The Court should have ordered an evaluation by the Department of Human Services.
12-The Court did not explain that the matrix calculation in the pre-sentencing investigation report was not binding
13-The Court did not explain it relinquishes jurisdiction to the Board of Pardons and Parole after sentencing.
14- The Court did not inform the Petitioner of all of the rights which he was waiving.
15- The evidence is insufficient to prove every element of aggravated robbery including intent.
16- The prosecutor violated his/her ethical duty to insure that there was sufficient evidence to charge the Petitioner with aggravated robbery.
17- The Prosecutor did not establish an intentional taking or a positive identification of the Petitioner.
18- The aggravated robbery statute requires proof that the property, taken during the robbery, was owned by the person from whom it was taken.

The following claims by the Petitioner are not facially frivolous.

1- The Petitioner was not told that the elements of aggravated robbery include a taking, of personal property, from a person or in his immediate presence.
2- The Petitioner's plea was not informed of how the law related to the facts.
3-The Petitioner was not advised of every element of the crime.
4- The Petitioner was not advised that the State had the burden of proving every element of the crime.
5- The Petitioner was not informed of the right to appeal.
6- The Petitioner's attorney should not have considered his confession in deciding to recommend that the Petitioner plead guilty.
7- The Petitioner's guilty plea was unknowing, because was incompetent at the time he entered the guilty plea.
8- The Petitioner was so incompetent, he was not able to enter any type of plea.
9- The Court incorrectly determined competency.
10- The Court did not correctly follow the procedure to establish whether the Petitioner was competent when it did not hold a hearing or obtain evaluations from mental experts.

Addendum I

Helbach v. State
Utah App.,2007.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.

Aaron L. **HELBACH**, Petitioner and Appellant,

v.

STATE of Utah, Respondent and Appellee.

No. 20060750-CA.

June 1, 2007.

Second District, Farmington Department, 040700291; The Honorable Michael G. Allphin.

Aaron L. Helbach, Draper, Appellant Pro Se.
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake City, for Appellee.

Before Judges BENCH, McHUGH, and THORNE.

MEMORANDUM DECISION (Not For Official Publication).

PER CURIAM:

[¶1] ***1** Aaron L. Helbach appeals the denial of post-conviction relief from his conviction of aggravated robbery, a first degree felony. Helbach claims the post-conviction court erred by denying his claim that the district court should have sua sponte ordered a competency evaluation before accepting the plea. In the absence of a competency petition, " [a] trial court must hold a competency hearing when there is ' a substantial question of possible doubt as to a defendant's competency at the time of the guilty plea.' " *State v. Arguelles*, 2003 UT 1,¶ 49, 63 P.3d 731 (citation omitted). " In determining whether a defendant is competent to plead guilty, the trial court must consider whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *State v. Holland*, 921 P.2d 430, 433 (Utah 1996). Thus, " [t]he fact that a person is mentally ill, displays bizarre, volatile, and irrational behavior, or has a history of mental illness, does not mean that he or she is incompetent to stand trial." *Jacobs v State*, 2001 UT 17,¶ 16, 20 P.3d 382. In determining whether the trial court erred by not holding a competency hearing, a reviewing court considers the facts that were before the trial court when the plea was entered. *See id.* at ¶ 18.

[¶2] Helbach had the burden to prove by a preponderance of the evidence that a substantial question of possible doubt as to his competency existed at the time he pleaded guilty. He attached two exhibits to the post-conviction petition. The first was a military evaluation, prepared in 2001, and the second was a diagnostic evaluation, prepared on June 18, 2003, for use in sentencing in his criminal case. The military evaluation assessed Helbach's mental health, not his competency, and predated his guilty plea by two years. The diagnostic evaluation

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also assessed mental health, not competency, and was prepared two months after the guilty plea. Nothing appearing in the district court record or at the change-of-plea hearing would have created a substantial question of possible doubt about Helbach's competency. Helbach responded appropriately to the court's questions, affirmed his understanding of the written plea agreement, and acknowledged that he was knowingly and voluntarily pleading guilty. He advised his attorney of a possible additional charge, allowing counsel to obtain an agreement that the guilty plea could be withdrawn if the State filed the additional charge. The post-conviction court correctly determined that the facts before the district court at the time of the change of plea did not give rise to a substantial question of possible doubt about Helbach's competency.

[¶3] Helbach's claim that his guilty plea was taken in violation of rule 11 of the Utah Rules of Criminal Procedure is inadequately briefed and without merit. A rule 11 violation, standing alone, is not sufficient to support post-conviction relief, and a petitioner must demonstrate that his guilty plea was not knowing and voluntary. *See Salazar v. Warden,* 852 P.2d 988, 992 (Utah 1993). In advance of his guilty plea, Helbach executed a detailed statement, which stated the elements of the offense, the factual basis for the guilty plea, the possible sentences, the rights being waived, and the time limit for moving to withdraw a guilty plea. The district court conducted a plea colloquy and also confirmed that Helbach had read the statement and discussed it with counsel. The post-conviction court did not err in determining that Helbach's plea was knowing, intelligent, and voluntary and in denying relief based upon alleged rule 11 violations.

[¶4] ***2** Helbach next claims that the post-conviction court erred by denying relief based upon allegedly inappropriate police action resulting in a coerced confession and *Miranda* violations. A defendant who pleads guilty " is deemed to have admitted all of the essential elements of the crime charged and thereby waives all nonjurisdictional defects, including alleged pre-plea constitutional violations." *State v. Parsons,* 781 P.2d 1275, 1278 (Utah 1989); *see also State v. Hardy,* 2002 UT App 244,¶ 13, 54 P.3d 645. Having concluded that the post-conviction court did not err in determining that Helbach's guilty plea was knowing and voluntary, we do not consider these claims further.

[¶5] Helbach also claims that the post-conviction court erred in denying relief based upon alleged ineffectiveness of trial counsel. To prevail, Helbach must demonstrate both that trial counsel's performance was deficient, and that the deficient performance resulted in prejudice. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984). Helbach contends that his trial counsel was ineffective by failing to move to withdraw the guilty plea based upon the evidence of mental illness contained in the 2001 military evaluation or the 2003 diagnostic evaluation prepared between the time of the plea hearing and sentencing. Neither evaluation addressed his competency to enter a guilty plea. The State correctly notes that the diagnostic report found no thought disorder or serious mental illness. Helbach did not present sufficient proof to the post-conviction court that his trial counsel was deficient in failing to move to withdraw the guilty plea, and that court did not err in denying relief.

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[¶6] The remaining claims of ineffectiveness of trial counsel are both conclusory and inadequately briefed. Rule 24(a)(9) of the Utah Rules of Appellate Procedure" requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." *State v. Thomas,* 961 P.2d 299, 305 (Utah 1998). An issue is inadequately briefed " when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court." *Id.* We also reject Helbach's apparent challenge to rule 65C of the Utah Rules of Civil Procedure and his claim of " structural defect" as inadequately briefed. Accordingly, we do not consider these claims on the merits.

[¶7] We affirm the denial of post-conviction relief.

RUSSELL W. BENCH, Presiding Judge and CAROLYN B. McHUGH and WILLIAM A. THORNE JR., Judges, Concur.
Utah App.,2007.
Helbach v. State
Not Reported in P.3d, 2007 WL 1576395 (Utah App.), 2007 UT App 191

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Addendum J

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1. 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
Tenth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Ira Lee WILKINS, Defendant-Appellant.
No. 04-5189.

Dec. 13, 2005.

Background: After defendant was indicted for conspiracy and access device fraud, he moved to suppress any statements obtained during interrogation on the grounds that he was not properly given his Miranda warnings. After a hearing, The United States District Court for the Northern District of Oklahoma denied the motion, finding that Miranda warnings were given. Defendant then pled guilty, but appealed district court's denial of his motion to suppress.

Holding: The Court of Appeals, Ebel, J., held that defendant was precluded from raising arguments related to his statements made during interrogation because he had entered into unconditional guilty plea after he had made the statements.
Affirmed.

West Headnotes

Criminal Law 110 **1026.10(4)**

110 Criminal Law
110XXIV Review
110XXIV(D) Right of Review
110k1025 Right of Defendant to Review
110k1026.10 Waiver or Loss of Right
110k1026.10(2) Plea of Guilty or Nolo Contendere
110k1026.10(4) k. Issues Considered. Most Cited Cases
Defendant was precluded from raising various arguments challenging federal district court's denial of his motion to suppress his confessions, where defendant entered an unconditional plea of guilty, which precluded him from thereafter raising independent claims relating to the alleged deprivation of constitutional rights that occurred prior to entry of the guilty plea.
***142** Usan K. Morgan, Philip E. Pinnell, Asst. U.S. Attorney, Office of the United

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States Attorney, Tulsa, OK. for Plaintiff-Appellee.

Steven M. Hightower, Tulsa, OK, for Defendant-Appellant.

Before EBEL, McKAY and HENRY, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f) and 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This Order and Judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

DAVID M. EBEL, Circuit Judge.

****1** Defendant-Appellant Ira Lee Wilkins appeals the district court's denial of his motion to suppress his confessions that he claims were given involuntarily and in violation of his Fifth Amendment rights. Exercising jurisdiction under 28 U.S.C. § 1291, we AFFIRM.

BACKGROUND

In early 2004, the United States Postal Inspection Service launched an investigation into the tampering of a credit card account by a person later identified as Drukyel Gaines. Gaines changed the account information to indicate that the cardholder was a Lorenzo Gray of Tulsa, Oklahoma. Shortly after these changes were made, a person purporting to be Lorenzo Gray requested a duplicate card be issued and mailed to his address in Tulsa. This card was used to make over $13,000 worth of purchases; additional cash advances in excess of $5,800 were attempted but denied.

When first interviewed by Postal Inspector Scott West, Gaines claimed that Lorenzo Gray was her boyfriend. She further stated that Gray was the person in a surveillance photograph taken of a black man wearing large diamond earrings and an "OU Sooners" baseball-style cap and using the Lorenzo Gray credit card. West later went to Gaines' residence to obtain a positive identification of Gray based on the photograph. When he arrived, Wilkins answered the door. West thought that Wilkins looked like the man in the photograph and noticed that Wilkins was wearing earrings that appeared to be identical to the ones worn in the photograph. West told Wilkins that he thought the picture was of him; Wilkins maintained it was a picture of Lorenzo Gray.

On April 21, 2004, West (along with another postal inspector) went to Gaines' residence with a warrant for her arrest. After placing Gaines in custody, West discovered***143** Wilkins in the back bedroom. He also found an "OU Sooners" baseball cap that matched the hat in the surveillance photograph. The inspectors then took Wilkins back to the back bedroom, and questioned him about his involvement in the credit card scheme. The

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parties dispute whether Wilkins was orally read and whether he orally waived his Miranda rights; [FN1] both parties acknowledge Wilkins did not sign a written waiver. Wilkins eventually confessed, verbally and in writing, that he was the person in the surveillance photos and that he had used the credit card.

FN1. At the suppression hearing, West testified that Wilkins was read his Miranda rights, that Wilkins acknowledged that he understood his rights, and that Wilkins nevertheless stated he would talk to the inspectors. On the other hand, Wilkins testified that he was "absolutely not" read his Miranda rights.

Wilkins was indicted for conspiracy and access device fraud. He moved to suppress any statements obtained during the April 21 interrogation on the grounds that he was not properly given his Miranda warnings. After a hearing, the district court denied the motion, finding that Miranda warnings were in fact given. The district court also noted that Wilkins might have been insinuating that there was some coercion involved in obtaining his confession, but declined to rule on that issue. Wilkins then pleaded guilty to conspiracy and was sentenced to nine months in prison.

DISCUSSION

On appeal, Wilkins raises various arguments challenging the district court's denial of his motion to suppress his confessions. However, the record reflects that Wilkins entered an unconditional plea of guilty.[FN2] When a defendant voluntarily enters such a plea, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *United States v. Salazar*, 323 F.3d 852, 856 (10th Cir.2003) (quoting *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973)). Because Wilkins' confessions occurred prior to his plea, he may not now argue that those confessions were taken unconstitutionally. Therefore, we must AFFIRM the district court's judgment.

FN2. The Federal Rules of Criminal Procedure allow a defendant to enter a "conditional" guilty plea, "reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." Fed.R.Crim.P. 11(a)(2). No such written document appears in the record, nor does the district court's docket sheet indicate the entry of a written, conditional plea.

C.A.10 (Okla.).2005.
U.S. v. Wilkins
158 Fed.Appx. 141, 2005 WL 3388564 (C.A.10 (Okla.))

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