

1999

Wayne S. Tippet v. Fred Vanderveur : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,)	ADDENDUM TO BRIEF
)	OF APPELLANT
Appellant,)	
	)	Case # 990178-CA
v.)	
)	
FRED VANDERVEUR,)	
)	
Appellee.)	

PR

ADDENDUM TO BRIEF OF APPELLANT

AN APPEAL FROM THE EIGHTH DISTRICT COURT
DENYING THE APPELLANT'S PETITION FOR POST
CONVICTION RELIEF AND DETERMINATION OF
INEFFECTIVE ASSISTANCE OF COUNSEL

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2

ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

FILED

JUN 25 1999

Julia D'Alessandro

IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,)	ADDENDUM TO BRIEF
)	OF APPELLANT
Appellant,)	
)	Case # 990178-CA
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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,)	ADDENDUM TO BRIEF
)	OF APPELLANT
Appellant,)	
	)	Case # 990178-CA
v.)	
)	
FRED VANDERVEUR,)	
)	
Appellee.)	

ADDENDUM EXHIBIT A

IN THE EIGHTH JUDICIAL DISTRICT COURT
UINTAH COUNTY, STATE OF UTAH

WAYNE S TIPPETT,

Petitioner,

vs.

FRED VANDERVEUR,

Respondent.

RULING

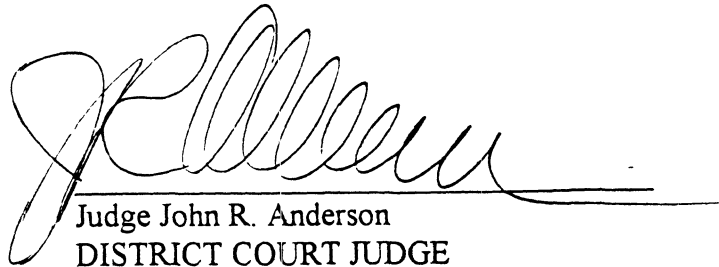
Case No 970800314 RN

Judge John R. Anderson

The Court has carefully read the memoranda regarding Tippet's Petition for Post-Conviction Relief.

The petition is denied for the reasons set forth in the Respondent's memorandum.

DATED this 8th day of February, 1999


Judge John R. Anderson
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I do hereby certify that on this 9 day of February, 1999, I hand-delivered or mailed, postage prepaid, the foregoing Ruling to the following Angela F Micklos, Assistant Attorney General, P O Box 140854, Salt Lake City, Utah 84114-0854, Joann Stringham, Uintah County Attorney, 152 East 100 North, Vernal, Utah 84078, and to Julie McPherson, Attorney for the Petitioner, 321 South 600 East, Salt Lake City, Utah 84102

Finlance Hall

Deputy Court Clerk

IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPFILL,	)	ADDENDUM TO BRIEF
	)	OF APPELLANT
Appellant)	
	)	Case # 990178-C A
v.)	
)	
FRED VANDERBUR)	
)	
Appellee.)	

ADDENDUM EXHIBIT B

1 done. If I am going to make a trip to Gunnison, I am
2 effectively going to wipe out one full day of work
3 regardless. Four hours there, four hours back. Visit
4 ranging anywhere from - I usually plan on an hour to
5 an hour and-a-half is the normal visit. I don't
6 remember particularly how long these were. But it was
7 easy to say, okay. If I am going to wipe out the
8 whole day at work, I am going to go to Gunnison, then
9 I can keep on going, spend the night and talk to
10 relatives. My in-laws live in Fillmore, which is
11 another 80, 90 miles past Gunnison.

12 Q And do you believe you could have raised any
13 other issue more effectively, or a little more
14 effectively helped him on petition for rehearing if
15 you had gone out and visited him with a copy of the
16 appellate decision in hand versus instructing his
17 secretary to mail it to him?

18 A I'm not sure that it would have made any
19 difference on my effectiveness on petition for
20 rehearing. Again, as I said, I sent him a copy of the
21 opinion. Told him that we could be doing certificate.
22 That it was not clear to me based on law whether my
23 representation went that far, to please advise me what
24 he wanted to do.

25 Q Were you ever advised prior to the appellate

IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,

Appellant

v.

FRED CAMPBELL

Appellee.

) ADDENDUM TO BRIEF

) OF APPELLANT

) Case # 990178 CA

)

)

)

)

)

ADDENDUM EXHIBIT C

1 office. Probably six or seven times. And then I
2 talked to him about three times, three or four times
3 on the phone.

4 Q When he would call during the six or seven
5 times when you were not available to talk to him, were
6 his calls accepted by your secretary?

7 A Probably not.

8 Q Did you ever send Mr. Tippet letters
9 explaining to him why you felt some of his issues were
10 frivolous or not timely or not right for review based
11 on current case law?

12 A I never told him any of his issues were
13 frivolous.

14 Q Did you ever tell him any --

15 A I did not explain in the letters to him those
16 things because I had explained them to him in the
17 visits that where I considered they were proper in the
18 context of what we were dealing with at that time.

19 Q And when did you send Mr. Tippet a copy of
20 your brief ~~filed~~ in Utah Supreme Court?

21 A I did not personally do it. I directed my
22 secretary to do it within the week, within a week or
23 so after it was filed.

24 Q Did you ever tell Mr. Tippet that you would
25 send him a copy of the draft of the brief for his

IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,	)	ADDENDUM TO BRIEF
	)	OF APPELLANT
Appellant,)	
	)	Case # 990178-CA
v.)	
)	
FRED VANDERVEUR,)	
)	
Appellee.)	

ADDENDUM EXHIBIT D

IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff/Appellee,

vs.

WAYNE S, TIPPETT,

Defendant/Appellant.

*
*
* BRIEF OF APPELLANT
*
*
*
*
* Case No. 94-0369
*
*
* Priority No. 2
*
*
*

BRIEF OF APPELLANT

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
UINTAH COUNTY
HONORABLE JOHN R. ANDERSON, PRESIDING

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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff/Appellee,

vs.

WAYNE S. TIPPETT,

Defendant/Appellant.

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*

BRIEF OF APPELLANT

Case No. 94-0369

Priority No. 2

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal pursuant to Utah Code Section 78-2-3 (i).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Did the trial court abuse its discretion in denying Appellant's Motion to Withdraw Guilty Plea?

The court should review this case using an "abuse of discretion" standard, State vs. Mildenhall, 747 P.2d 422, (Utah 1987).

DETERMINATIVE STATUTORY PROVISIONS

This case is governed in part by Rule 11(e), Utah Rules of Criminal Procedure, which was at the time of the plea codified as Title 77, Chapter, 35, Section 11(e), Utah Code Annotated.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal of the Eighth District Court's denial of a Motion to Withdraw Guilty Plea submitted by the defendant/appellant on the 9th of June, 1994. The motion was denied by two separate rulings; one dated June 29, 1994 and a supplementary ruling dated July 12, 1994.

B. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

The Defendant/Appellant was charged in the Eighth District Court for Uintah County, State of Utah on the 18th of February, 1986 with two counts of Aggravated Kidnapping in violation of Section 76-5-302 Utah Code Annotated. Each count also provided a Firearms Enhancement Provision pursuant to Section 76-3-23 Utah Code. On February 26, 1986 the Defendant/Appellant plead guilty to Count One of the Information. Count Two of the Information was dismissed. The record does not reveal that any affidavit was used to assist the court in an explanation of Defendant/appellant's Rule 11(e) rights at the time of plea. After a colloquy with the Honorable Richard Davidson, the court accepted the guilty plea. The matter came before the court for sentencing on the 26th day of March, 1986, the Honorable Boyd Bunnell presiding. The defendant/appellant was sentenced to a minimum mandatory sentence at the Utah State Prison of 15 years to life with a firearm enhancement requiring an additional 5 to 10 years to be served consecutively with the 15 years to life sentence. On May 20, 1987 at the request of the Chairman of the Board of Pardons, the court

reviewed the Defendant/appellant's sentence. The court, the Honorable Dennis Draney presiding, re-affirmed the sentence originally imposed. On June 9, 1994, Defendant filed a Motion to Withdraw Guilty Plea before the Eighth District Court. All the prior judges having retired, resigned, or being deceased, the case was re-assigned to the Honorable John Anderson. Judge Anderson issued a summary ruling with no response from the State of Utah on June 29, 1994 denying all aspects of Defendant's Motion to Withdraw Guilty plea excepting for a response by the State the issue of an inadequate explanation of the firearms enhancement. After considering the State's response, on July 12, 1994 Judge Anderson issued a ruling denying the Defendant's Motion to Withdraw Guilty Plea in its entirety stating that the court had substantially complied with the requirements of Rule 11(e).

SUMMARY OF ARGUMENT

The trial court's denial of the Motion to Withdraw Guilty Plea is in error. The court made no findings that the appellant waived his right to self incrimination. The court made no findings that the appellant understood the nature and elements of the crime and that his plea admitted each and every element. The court incorrectly advised the defendant as to the maximum sentence which could be imposed.

ARGUMENT

THE COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA BECAUSE IT FAILED TO COMPLY WITH RULE 11(e) OF THE RULES OF CRIMINAL PROCEDURE.

Rule 11(e) of the Utah Rules of Criminal Procedure in effect

at the time appellant made his guilty plea as codified in 77-35-11(e) provided as follows:

The court . . . shall not accept a (plea of guilty) until the court has made the findings:

(1) That if the defendant is not represented by counsel he has knowingly waived his right to counsel and does not desire counsel;

(2) That the plea is voluntarily made:

(3) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights:

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

(5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences; and

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

The record of the entry of pleas is very limited. From the record, it appears that no plea affidavit was used, therefore the court can only determine the trial court's compliance with rule 11 (e) based on the oral representations made in open court.

That record is bereft of any discussion with the appellant on several critical points included in the rule. There is no discussion whatsoever with the appellant concerning his right against compulsory self incrimination as required by subsection (3)

of the rule. There is no discussion of the nature and elements of the offense of aggravated kidnapping with a firearms enhancement as required by Subsection 4 of the rule. There is no discussion or record that the guilty pleas was an admission to each of the elements of the alleged crime as required by subsection 4 (Record, pp 4-7).

The record also reveals that the trial judge affirmative misrepresented to the appellant the maximum sentence possible as a result of the plea. Subsection 5 of the rule required a finding that the defendant understands both the minimum and maximum possible sentence. At line 12, page 7 of the record, the trial judge informed the appellant that a one to five year enhancement was possible in addition to the five years to life he originally explained. No correction of that error was made. The appellant was sentenced to a five to ten year firearm enhancement in direct contradiction to what had been explained.

The standard of review as previously stated is that of an abuse of discretion by the court. The companion cases of Warner v. Morris, 709 P. 2d 309 (Utah, 1985) and Brooks v. Morris 709 P. 2d 310, (Utah, 1985), established the standard by which a trial court accepts guilty pleas. The Supreme Court stated that a failure of to advise a defendant of his right concerning self-incrimination was not alone sufficient to invalidated a guilty plea provided that the record as a whole showed that the rule 11 requirements were substantially complied with. Subsequently the Supreme Court in State v. Gibbons, 740 P. 2d 1309 (Utah, 1987)

replaced the "substantial compliance" rule with a "strict compliance" standard. It has been ruled that the Gibbons rule was not retroactive, however the concepts set forth in Gibbons are useful. In Gibbons the court stated that the trial court may not rely on defense counsel or affidavits to satisfy the specific requirements of Rule 11(e). In his case, where there is no affidavit, the court has a situation much more akin to Gibbons factually than might typically be the case.

The case most similar to this which has reached the appellate courts is that of State v. Vasilacopulas, 756 P. 2d 92 (Utah App. 1988). The Utah Court of Appeals, using the Warner-Brooks test found that an absence of discussion concerning the possibility of consecutive sentences, and a failure to find that the defendant understood that possibility showed a failure to substantially comply with Rule 11(e). That alone was sufficient to mandate a reversal of the trial court's denial of the defendant's motion to withdraw guilty plea. The court did not consider a failure to comply with Rule 11(e)(4), citing the failure to comply with the sentencing portions of the rule as being sufficient. It can be presumed that if there had been a problem with an explanation of the elements of the offense as there was in this case, the Vasilacopulos Court could have only made its decision stronger. It is also interesting to note that one of the concurring judges in Vasilacopulos was Richard Davidson, the trial judge who took the plea in this case.

In this case, we have three major failures to even discuss

rights required by the rule. While the Warner and Brooks cases state that a failure to explain the right of self incrimination was not fatal in light of the record, the record there was more complete than here. Here as well, we have not only a failure to inform appellant of the maximum sentence, but a misrepresentation by the court as to the maximum sentence. When coupled with the failure to discuss the elements of the offense, the combination is fatal to the trial court's ruling that the requirements had been substantially complied with. Finally, even though there was some discussion of some of the Rule 11 requirements at the time the plea was entered, no findings were made except that the plea was knowingly made. (Record, p 8).

CONCLUSION

The record in this case shows affirmative mistakes by the court in the taking of appellant's plea. It does not show strict compliance, substantial compliance, or anything approaching the required standard. Appellant hereby prays that the court reverse the trial court's denial of his motion to withdraw guilty plea and remand the case for further proceedings.

Dated this 20th day of January, 1995.

Alan M. Williams
Alan M. Williams
Attorney for Appellant

IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,	)	ADDENDUM TO BRIEF
	)	OF APPELLANT
Appellant,)	
	)	Case # 990178-CA
v.)	
)	
FRED VANDERVEUR,)	
)	
Appellee.)	

ADDENDUM EXHIBIT E

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Appellee, : Case No. 940369
v. :
WAYNE S. TIPPETT, : Priority No. 2
Defendant/Appellant. :

BRIEF OF APPELLEE

- - - - -

APPEAL FROM A JUDGMENT AND SENTENCE ENTERED
UPON A PLEA OF GUILTY TO THE CHARGE OF
AGGRAVATED KIDNAPPING, A FIRST DEGREE FELONY,
IN VIOLATION OF UTAH CODE ANN. § 76-5-302
(SUPP. 1986), IN THE EIGHTH JUDICIAL DISTRICT
COURT IN AND FOR UTAH COUNTY, STATE OF
UTAH, THE HONORABLE JOHN R. ANDERSON,
PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 940369
v.	:	
WAYNE S. TIPPETT,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a judgment and sentence entered upon a plea of guilty to the charge of aggravated kidnapping, a first degree felony, in violation of Utah Code Ann. § 76-5-302 (Supp. 1986).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1994).

STATEMENT OF ISSUES PRESENTED ON APPEAL
AND STANDARDS OF APPELLATE REVIEW

The sole issue presented on appeal is whether the trial court correctly held that defendant's guilty plea was taken in substantial compliance with rule 11, Utah Rules of Criminal Procedure, and, hence, properly denied his motion to withdraw his plea. The ultimate decision to deny a motion to withdraw a guilty plea is reviewed on appeal for an abuse of discretion. State v. Gardner, 844 P.2d 293, 295 (Utah 1992). The underlying findings of fact are reviewed for clear error, State v. Stilling, 856 P.2d 666, 670 (Utah App. 1993), while the determination of substantial compliance is a question of law reviewed for

correctness. See Willett v. Barnes, 842 P.2d 860, 861 (Utah 1992); State v. Hoff, 814 P.2d 1119, 1124-25 (Utah 1991).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any relevant text of constitutional, statutory, or rule provisions pertinent to the resolution of the issue presented on appeal is contained in or appended to this brief.

STATEMENT OF THE CASE

Defendant was charged on February 18, 1986, with two counts of aggravated robbery, both first degree felonies, in violation of Utah Code Ann. § 76-5-302 (Supp. 1986) (R. 2-3). Addendum A. Each charge included a firearm enhancement pursuant to Utah Code Ann. § 76-3-203 (Supp. 1986) (id.). Defendant waived his preliminary hearing on February 25, 1986, and was bound over to district court (R. 16-17). At the arraignment on February 26, defendant entered a plea of guilty to count one pursuant to plea discussions with the State, and the second count was dismissed (R. 18; Arraignment Transcript [hereinafter "Tr."] 34-36, 41). The court conducted a colloquy with defendant and accepted the plea (Tr. 36-41). Following preparation of a presentence report, the court sentenced defendant to the Utah State Prison to serve a minimum mandatory term of fifteen years to life, with a consecutive term of five-to-ten years for the firearm enhancement (R. 19-21; Sentencing Transcript [hereinafter "Sent. Tr."] 51-53).¹ Addendum B.

¹ On May 20, 1987--fourteen months after defendant was sentenced--the trial court held a hearing to review defendant's sentence after receiving a formal request from the Board of Pardons

On June 30, 1994, more than eight years after being sentenced, defendant filed a pro se motion to withdraw his guilty plea (R. 72-114). In response, the trial court sought a written response from the State regarding the question of the sentencing court's imposition of a different firearm enhancement penalty than was explained to defendant when he entered his plea (R. 115-16). The court denied the remainder of defendant's motion (id.). On July 12, 1994, the court entered a supplemental ruling denying defendant's motion as it related to the sentence enhancement (R. 121-22).² Defendant appeals from these two rulings.

STATEMENT OF FACTS

Defendant was arrested and charged with two counts of aggravated kidnapping, with a firearms enhancement for each count, based on his actions of February 17, 1986 (R. 2-3). On Highway 40 outside Vernal, Utah, defendant used a revolver and threats of death to force two teenagers to drive him to Rangely, Colorado (R. 4-7). Defendant released the boys when they arrived in Rangely and was arrested shortly thereafter by the Rangely City Police (R. 7).

(R. 31). The Board was concerned that the sentence was not in line with those sentences received by similar offenders for similar crimes, and that defendant "may be able to demonstrate release readiness at some time sooner than fifteen years from his commitment" (R. 22-24, 26-28). The trial court reviewed unspecified information provided at the hearing and affirmed the sentence originally imposed upon defendant (R. 31). This review is not challenged on appeal.

² Defendant filed additional motions in the trial court and in this Court, none of which bear on the issue raised in this appeal (R. 123-26, 127-29, 130-31, 134-37, 140-42, 143, 154-56, 157-59, 160-61, 162-67).

Defendant appeared with counsel before the circuit court on February 25, 1986, and, after being advised of his rights by the court, stated that he understood his rights and waived the preliminary hearing (R. 16-17). The court bound him over to the district court for trial (id.). He appeared for arraignment before the district court the next morning and pled guilty to one count of aggravated kidnapping with the use of a firearm (R. 18; Tr. 34-35, 41). In return, the State agreed to seek dismissal of the second count of aggravated kidnapping and to recommend to the court that "in the event [defendant] is transferred to another penitentiary that he be given credit for time served in that other penitentiary against his Utah sentence" (Tr. 35-36).³

The judge then questioned defendant concerning the plea (a copy of the colloquy is attached as Addendum C). He first established defendant's name, distinguishing it from numerous aliases, then ascertained that defendant was not suffering from the effects of alcohol or drugs (Tr. 36-37). Defendant admitted taking methadone while in Salt Lake, but said he was neither taking it nor under its influence as of the hearing (Tr. 37). The court then established that defendant understood why he was before the court, that a plea was to be entered, that defendant

³ At the time the plea was entered, the record only indicates that charges "may be pending" in the federal courts, in Salt Lake County, or in South Carolina (R. 18; Tr. 35). Only upon preparation of the presentence report for sentencing was the extent of defendant's criminal history revealed. See Point IB, footnote 4 and accompanying text, infra.

was prepared to proceed, and that defendant had received a copy of the information and waived its reading (id.). The judge explained the first count to defendant and asked whether defendant was ready to enter a plea and, if so, what it would be (Tr. 37-38). Defendant responded that he was aware of the charge and was prepared to plead guilty (Tr. 38).

The court then asked defendant if he understood that he was giving up his right to a jury trial, to have his appointed counsel represent him at trial, to have the State prove each element of the offense beyond a reasonable doubt, and to be convicted by a unanimous jury (Tr. 38-39). Defendant acknowledged his understanding of each of these rights (id.).

The judge also explained defendant's right to confront and cross-examine witnesses at trial, to present his own witnesses and his defense, and to appeal any conviction he might receive, and asked whether defendant understood that his guilty plea would waive these rights (Tr. 39). Defendant acknowledged his understanding of each of these points (id.).

The court verified that defendant's plea had not been obtained through promises or threats, and that the plea was entered of defendant's "own free will and choice" (Tr. 39-40). The judge explained the sentence for the first degree felony, emphasizing the fact that the court had full discretion in determining the sentence and was not bound by any representations anyone else might make (Tr. 40-41). The court also explained that the firearm enhancement carried a penalty "of not less than

one or up to five years" on top of the sentence for the felony (Tr. 40). Finally, defendant acknowledged that he was entering the plea because he was "in fact guilty of the crime of aggravated kidnapping" (Tr. 41). Defendant then entered a guilty plea, which the court found was knowingly and voluntarily made (R. 18; Tr. 41).

SUMMARY OF THE ARGUMENT

In advising defendant that his guilty plea subjected him to a sentence enhancement of one-to-five years, the sentencing court acted in conformance with the information available to it at the time it took the guilty plea. Imposition at sentencing of a five-to-ten year enhancement was mandated by statute once the presentence report revealed defendant's prior convictions involving the use of firearms. Where only defendant knew of the previous convictions at the time the plea was entered and he failed to voice concern over the enhancement either at sentencing or a year later when his sentence was reviewed and affirmed, this Court should decline to grant withdrawal of the guilty plea eight years after its entry.

Defendant's failure to provide sufficient specificity for his claim that the trial court failed to inform him of the nature and elements of aggravated kidnapping should defeat his claim. Regardless of the ambiguity in defendant's argument, the record as a whole demonstrates that defendant was adequately appraised of the nature and elements of the offense through his

multiple exposures to the information and his colloquy with the court.

This Court should not reach defendant's assertion of insufficient findings because he provides neither legal authority nor analysis. Even on its merits, the claim does not warrant withdrawal of the pre-Gibbons plea because specific findings on all the requirements under rule 11, Utah Rules of Criminal Procedure, are not required where the lower court substantially complied with rule 11, and the court's finding that the plea was both knowing and voluntary is supported by the record.

Defendant's claims that the trial court failed to inform him of his right against compulsory self-incrimination and that the guilty plea constituted an admission to each element of the offense are not properly before this Court as they are raised for the first time on appeal and defendant argues neither plain error nor exceptional circumstances. Accordingly, this Court should decline to address these issues.

ARGUMENT

POINT I

THE DENIAL OF DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA WAS APPROPRIATE WHERE THE PRE-GIBBONS PLEA WAS TAKEN IN SUBSTANTIAL COMPLIANCE WITH RULE 11, UTAH RULES OF CRIMINAL PROCEDURE

A. Introduction

Defendant argues that the trial court erred in denying his motion to withdraw his guilty plea because the judge who took the plea did not comply with rule 11, Utah Rules of Criminal Procedure. Br. of App. at 3-7. He contends that the plea was not voluntarily and knowingly entered because the judge misrepresented the maximum sentence available for the firearms enhancement, did not explain the nature and elements of the offense under rule 11(e)(4), did not make sufficient findings under rule 11(e), did not mention defendant's right against compulsory self-incrimination under rule 11(e)(3), and did not explain that the plea constituted an admission to each element of the charged offense under rule 11(e)(4). Id. at 4-5.

The colloquy in this case and the absence of a written plea affidavit fall short of present-day standards for entry of a guilty plea. However, this plea was entered prior to this Court's decision in State v. Gibbons, 740 P.2d 1309, 1312-14 (Utah 1987), which held that strict compliance with constitutional and procedural requirements during the plea colloquy was required before a plea could be entered. Gibbons constituted a clear break with previous law and was not given retroactive effect. State v. Hoff, 814 P.2d 1119, 1123-24 (Utah

1991). Instead, pleas taken prior to Gibbons are upheld so long as the record as a whole demonstrates "substantial compliance" with rule 11 requirements. Willetts v. Barnes, 842 P.2d 860, 868 (Utah 1992); Hoff, 814 P.2d 1119, 1123-24 (Utah 1991). This plea was taken in accordance with the standards in place prior to Gibbons, and the entire record must be reviewed with that in mind.

The district court denied defendant's motion to withdraw his plea below, stating that the sentencing judge had "complied with Rule 11 so as to apprise Defendant of his Constitutional rights and of the consequences of entering his guilty plea" (R. 115). Addendum D. In a supplemental ruling on the firearm enhancement issue, the district court held that "the general requirements of Rule 11 were met by the arraignment Judge in this case" and that "the Firearm Enhancement sentence that was imposed was in compliance with both the Information filed in the case and with the information given to the Defendant at the arraignment hearing, given the fact that it was only in the Defendant's mind and knowledge that there were multiple prior firearm convictions" (R. 121). Addendum D.

B. The Trial Court Advised Defendant Of The Appropriate Sentence Given The Available Information; Mandatory Imposition Of A Greater Enhancement At Sentencing Based On New Information Previously Known Only By Defendant Does Not Warrant Withdrawal Of The Guilty Plea

Defendant entered his guilty plea nine days following commission of the offense, and one day following his waiver of a preliminary hearing and his plea discussion with the State (R. 2-

3, 16-18; Tr. 34, 36). No information concerning his criminal history was provided to the court at the time he entered his plea (R. 119). During the plea colloquy, the court explained the possible sentence for the first degree felony to which defendant intended to plead guilty (Tr. 40). Addendum C. It then explained that the offense "also carries with it a firearm enhancement penalty of not less than one or up to five years on top of that" (id.). This explanation of the enhancement penalty conforms with the language of Utah Code Ann. § 76-3-203 (Supp. 1986), which provides that when a person is convicted of a first degree felony involving a firearm, the court may impose an additional consecutive sentence of at least one year and may impose a consecutive indeterminate sentence not exceeding five years.⁴

⁴ Section 76-3-203 provides:

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

(1) In the case of a felony of the first degree, for a term at not less than five years, unless otherwise specifically provided by law, and which may be for life but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

. . .

(4) Any person who has been sentenced to a term of imprisonment for a felony in which a firearm was used or involved in the accomplishment of the felony and is

The court ordered preparation of a presentence report which revealed that defendant previously had been convicted of at least five robberies involving the use of firearms (Sent. Tr. 48-49).⁵ Under these circumstances, the enhancement statute mandated imposition of a consecutive sentence of five-to-ten years "because the defendant has previously been convicted of a felony where a firearm was used in the crime" (R. 19). Utah Code Ann. § 76-3-203(4) (Supp. 1986) (reproduced in footnote 4 at pages 10-11).

Defendant argues that the trial court's failure to inform him of the possible heightened enhancement violated rule 11. Br. of App. at 5-7. While the record is clear that the possibility of a five-to-ten year enhancement was not discussed at the plea hearing, that fact does not warrant withdrawal of the guilty plea in this case.

Defendant argues only that the trial court did not inform him at the plea hearing that the increased enhancement was possible, not that he was surprised by its imposition at

convicted of another felony when a firearm was used or involved in the accomplishment of the felony shall, in addition to any other sentence imposed, be sentenced for an indeterminate term to be not less than five nor more than ten years to run consecutively and not concurrently.

(Emphasis added.)

⁵ The presentence report, which defense counsel acknowledged below was "fairly accurate" and consistent with what defendant had told him, showed "a very aggravated criminal history," including convictions for five armed robberies in which firearms were used, escape from a penitentiary with the use of a firearm, and at least four armed robbery counts pending in other jurisdictions, all involving the use of firearms (Sent. Tr. 48-49).

sentencing. Br. of App. at 5. However, neither the court nor the prosecutor had reason to believe at the time of the plea hearing that section 76-3-203(4) had any application to this case; only defendant was privy to the information at that point. Based on the information available to it, the court disclosed the sentencing information it reasonably believed to be relevant to the proceedings. A review of the subsequent sentencing proceedings gives rise to the reasonable inference that at sentencing, everyone understood that the mandatory enhancement under section 76-3-203(4) would be imposed because of the information revealed in the presentence report (Tr. 48-51). Defendant gave no indication that the increased enhancement was unexpected; his counsel conceded the accuracy of the report and revealed that he and defendant had discussed the information prior to preparation of the report (Sent. Tr. 47), and defendant knew that the aggravated kidnapping charge was subject to the firearm enhancement statute. Defendant remained silent when the increased enhancement was announced, and he continued his silence even though his sentence was reviewed a year later at the request of the Board of Pardons.⁶ Although defendant asserted below his counsel's ineffectiveness for failing to object to the enhancement change at sentencing (R. 80-81), he does not renew that claim on appeal.

Where it is clear that the lower court acted in conformance with the information available to it at the time it

⁶ See note 1, supra.

took the guilty plea, and that defendant voiced no concern over the increased enhancement, despite being in a position to do so, this Court should decline to grant withdrawal of the guilty plea eight years after its entry.

C. The Record As A Whole Demonstrates That Defendant Understood Both The Nature And The Elements Of Aggravated Kidnapping

Defendant argues that the trial court failed to fully apprise him of the nature and elements of aggravated kidnapping.⁷ Br. of App. at 5, 7. However, he fails to set forth any particular deficiency in the court's explanation of the charge. His failure to develop his position or to provide

⁷Aggravated kidnapping is defined as follows:

(1) A person commits aggravated kidnapping if the person intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seizes, confines, detains, or transports the victim with intent:

(a) To hold for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

(b) To facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

(c) To inflict bodily injury on or to terrorize the victim or another; or

(d) To interfere with the performance of any governmental or political function; or

(e) To commit a sexual offense as described in Part 4 of this chapter.

Utah Code Ann. § 76-5-302 (Supp. 1986). The information reflected the statutory language of subsection (1)(a)-(c) for each count (R. 2-3). Addendum E.

sufficient specificity in his assertion of error should defeat his claim. State v. Wareham, 772 P.2d 960, 966 (Utah 1989) (refusing to reach an issue which was inadequately briefed); State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984); State v. Price, 827 P.2d 247, 248-50 (Utah App. 1992).

Regardless of the ambiguity in defendant's argument, the record as a whole demonstrates that defendant was adequately appraised of the nature and elements of the offense before entering his plea. He had appeared in court five days prior to entering his plea and listened to the court read the information (R. 13, 18). The information reflected the language of the aggravated kidnapping statute, including the requisite elements of the crime (R. 2-3). Addendum E. Although the information did not include a detailed account of the underlying facts of the crime, it apprised defendant that the offense involved two victims whom he allegedly kidnapped at the same time in Uintah County (id.).⁸

Defendant appeared in court again the day before entering his plea (R. 16-18). The minute entry of the hearing reflects that "[t]he Court explained rights to defendant. Defendant stated he understood his rights[,] the court granted the waiver and bound defendant over to the district court (R. 16). The next day defendant entered his guilty plea (R. 18). During the colloquy, after the court established that defendant

⁸ Defendant raises no challenge on appeal to the adequacy of the factual basis for the plea.

had received a copy of the information, the court paraphrased the statutory language from the information: "You understand, Mr. Tippet, that you are charged with the crime of aggravated kidnapping in violation of [section] 76-5-302. That's a first degree felony, which alleges that you at the time and place [indicated] did take control of people and cause them to be transported against their will. You held them under your control against their will, and that in fact you did utilize a firearm in the commission of that offense." (Tr. 37-38). Addendum C. This recitation includes the critical elements of the offense and, when combined with the information, sufficiently defined the offense so that defendant was apprised of the nature of the offense to which he was pleading guilty and the critical elements involved. Cf. United States v. Newman, 912 F.2d 1119, 1124 (9th Cir. 1990) (critical elements, not every element, of pleaded-to crime should be explained).

In his motion below, defendant argued that the trial court omitted any reference to the intent requirement of the offense (R. 77-78).⁹ To the extent his ambiguous argument on appeal includes this point, the argument is without merit.

⁹ Defendant also asserted below that the nature and elements of the crime which must be explained by the court include the fact that the firearm enhancement statute provides for an increased enhancement should he have prior felony convictions involving firearms (R. 78). To the extent his ambiguous argument on appeal includes this assertion, the claim is without merit. This Court has held that such enhancement statutes are not part of the offense. State v. Speer, 750 P.2d 186, 192 (Utah 1988). Hence, they need not be included within an explanation of the nature and elements of the crime. See also Point IB, supra.

Defendant was appraised of the requisite intent through his multiple exposures to the information, which echoed the statutory explanation of intent (R. 13, 18; Tr. 37). Further, while the court did not specifically identify or define the intent element, intent could reasonably be inferred from the language used by the court at the plea hearing. The court's explanation that defendant had taken control of people, transported them and held them against their will by use of a firearm reasonably reflects the requisite intent for the offense. Defendant makes no claim that he was unaware of the intent requirement or that he could not have reasonably determined the requisite intent element from the information available to him. The nature and elements of this particular offense are clear and readily understandable and were adequately imparted to defendant prior to entry of his plea without the need for the exacting particularity he seeks to impose on the lower court.

D. The Lack Of Detailed Findings Is Not Critical Where The Court Specifically Found, And The Record Establishes, That Defendant Entered His Plea With Full Knowledge And Understanding Of Its Consequences And The Rights He Was Waiving

Defendant's brief concludes with a one-line assertion that "even though there was some discussion of some of the Rule 11 requirements at the time the plea was entered, no findings were made except that the plea was knowingly made." Br. of App. at 7. This assertion, without legal authority or analysis, is insufficient to warrant review by this Court. Wareham, 772 P.2d at 966; Amicone, 689 P.2d at 1344.

Even if it is reached, the claim is without merit. Although the trial court needs to establish the rule 11 information, it need not enter specific findings so long as the record reflects that the requisite inquiries were made and that the plea was made knowingly and voluntarily. See State v. Miller, 718 P.2d 403, 405 (Utah 1986) (per curiam) (the absence of a finding under rule 11 is not critical so long as the record affirmatively establishes that the plea was entered with full knowledge and understanding of its consequences and of the rights being waived); see also State v. Trujillo-Martinez, 814 P.2d 596, 600-01 (Utah App. 1991) (addressing post-Gibbons plea, absence of express findings did not warrant withdrawal of plea where the record established that all rule 11 requirements were addressed and supported the court's conclusion that the plea was freely and voluntarily made), cert. denied, 843 P.2d 516 (Utah 1992).

In this case, the trial court completed the colloquy and affirmatively found that it was "satisfied that the defendant has a knowledge of his rights and that this plea is a voluntary act" (R. 18; Tr. 41). Although the pre-Gibbons exchange did not strictly follow the litany of rule 11, it substantially complied with the rule, and the record as a whole supports the court's ultimate determination of both knowledge and voluntariness. See Hoff, 814 P.2d at 1123-24 (requiring only substantial compliance); Trujillo-Martinez, 814 P.2d at 600.

Defendant was apprised of the charges and knew by virtue of the information that he faced two counts of aggravated

kidnapping--each involving the use of a firearm--for having kidnapped two victims. At the plea hearing, he confirmed his understanding of the charges, claimed he was fully aware of the reason for the hearing, denied being under the influence of alcohol or drugs, and asserted his readiness to enter the plea despite his knowledge that doing so would waive his constitutional rights (Tr. 36-38). Addendum C. He also admitted that he was "in fact guilty of the crime of aggravated kidnapping" (Tr. 41). Addendum C.

Defendant demonstrated no confusion or uncertainty regarding his rights or the offense he was admitting, but presented himself as being informed and knowledgeable. During the colloquy, he answered the court directly without any hesitation or evidence of confusion, giving definite, unequivocal answers and seeking no clarification or explanation concerning the plea or his rights. In contrast, he did not hesitate to voice his uncertainties over his sentencing immediately following entry of his plea; he freely explained his confusion to the court, then volunteered to follow his counsel's recommendation (Tr. 42). Addendum C.

The only requirement not discussed prior to entry of the plea was the application of the increased enhancement based on prior felony convictions involving the use of firearms. As established above, the fact that this part of the enhancement statute had any application in this case was unknown to anyone but defendant prior to preparation of the presentence report.

Defendant was neither surprised by the enhancement penalty ultimately imposed nor concerned that his plea had been entered without full knowledge of the sentence he faced, as evidenced by his failure to avail himself of the opportunity to address the point prior to entry of the final judgment or upon review of his sentence one year later.

That defendant acted voluntarily is also apparent from the record. He admitted that no one had induced his plea through threats or promises (Tr. 39-40), that no one had made any representations concerning sentencing (Tr. 41), that he was fully aware that the court had sole responsibility over sentencing regardless of the parties' recommendations (Tr. 41), and that he was ready to enter his plea, doing so of his "own free will and choice" (Tr. 40-41). Nothing suggests that defendant was or had reason to be duplicitious or insincere in his responses to the court.

Because the record reflects substantial compliance with rule 11 and supports the court's finding that defendant entered the plea knowingly and voluntarily, the lack of any express findings on rule 11 factors does not warrant withdrawal of the plea. See Trujillo-Martinez, 814 P.2d at 600-01.

E. The Claims Involving The Right Against Compulsory Self-Incrimination And Admission Of Each Element Of The Offense Were Not Raised Below And Are Not Properly Before This Court

Although defendant's pro se motion to withdraw his guilty plea below addressed a number of issues, it did not include any claim that the trial court failed to discover whether

defendant knew of his right against compulsory self-incrimination or that the court failed to explain that his plea would admit each element of the offense (R. 72-88). Addendum F. Accordingly, these two issues are not properly before this Court. State v. Brown, 853 P.2d 851, 853-54 (Utah 1992); Gibbons, 740 P.2d at 1311.

Aside from raising the issues for the first time on appeal, defendant fails to argue either plain error or exceptional circumstances to justify appellate review of the issues. Because he fails to include either argument in his opening brief, this Court should refuse to consider them.¹⁰ See

¹⁰ Moreover, neither exceptional circumstances nor plain error exists in this case to warrant review of the unpreserved issues. The record reflects no exceptional circumstances warranting an exception to this Court's general rule. Further, the law in existence at the time the plea was entered made it clear that the court taking a guilty plea did not have to specifically follow the litany set forth in rule 11(e) so long as the court found the plea to be knowing and voluntary and the record, as a whole, established that the plea was entered "with full knowledge and understanding of its consequences and of the rights he was waiving[.]" See Warner v. Morris, 709 P.2d 309, 310 (Utah 1985); Brooks v. Morris, 70 P.2d 310, 311 (Utah 1985) (per curiam). As established in Point ID, supra, this standard was met here. Any oversight by the lower court in addressing defendant's right against self-incrimination or his admission of the elements of the offense would not constitute plain error where the court was not required to strictly comply with rule 11(e) and was, as established by the entire record, otherwise justified in finding that the plea was, nevertheless, both voluntary and knowing. See Point ID, supra.

Finally, although the court did not expressly say that the defendant's plea effectively admitted each of the elements of the offense, defendant freely admitted before entering his plea that he was "in fact guilty of the crime of aggravated kidnapping" (Tr. 41). Hence, express reference to the fact that the plea constituted a separate admission to the offense would not affect the knowing or voluntary nature of the plea. Accordingly, the Court should not reach defendant's unpreserved claims.


State v. Jennings, 875 P.2d 566, 570 (Utah App. 1994) (refusing to reach an issue raised for the first time on appeal absent an assertion by defendant of either exceptional circumstances or plain error); State v. Bello, 871 P.2d 584, 587-88 n.3 (Utah App.), cert. denied, 883 P.2d 1359 (Utah 1994); State v. Sepulveda, 842 P.2d 913, 917-18 & n.5 (Utah App. 1992); cf. Brown, 853 P.2d at 854 n.1 (refusing to reach a state constitutional issue not presented in appellant's opening brief); State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988), aff'd, 776 P.2d 631 (Utah 1989), vacated on other grounds sub nom. Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991) ("we will not engage in a state constitutional analysis unless an argument for different analyses under the state and federal constitutions is briefed.").

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's conviction and sentence.

RESPECTFULLY SUBMITTED this 13th day of March, 1995.

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IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,)	ADDENDUM TO BRIEF
)	OF APPELLANT
Appellant,)	
	)	Case # 990178-CA
v.)	
)	
FRED VANDERVEUR,)	
)	
Appellee.)	

ADDENDUM EXHIBIT F

(2) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of that court, or act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

B. *Judges pro tempore.* A judge pro tempore shall comply with Canons 1, 2A, 3B, 3E, and 3F. A judge pro tempore appointed pursuant to § 78-6-1.5 shall not practice law in the same small claims division in which the judge serves.

C. *Court commissioners.* A court commissioner is subject to this Code to the same extent as a full-time judge.

D. *Active senior judges.* An active senior judge is not required to comply with Canon 4F.

E. *Senior judges.* A senior judge is not required to comply with the provisions of this Code.

CHAPTER 13. RULES OF PROFESSIONAL CONDUCT

Preamble A Lawyer's Responsibilities.

Scope.

Terminology.

Client-Lawyer Relationship

Rule

- 1.1. Competence.
- 1.2. Scope of representation.
- 1.3. Diligence.
- 1.4. Communication.
- 1.5. Fees.
- 1.6. Confidentiality of information.
- 1.7. Conflict of interest: general rule.
- 1.8. Conflict of interest: prohibited transactions.
- 1.9. Conflict of interest: Former client.
- 1.10. Imputed disqualification: general rule.
- 1.11. Successive government and private employment.
- 1.12. Former judge or arbitrator.
- 1.13. Organization as a client.
- 1.14. Client under a disability
- 1.15. Safekeeping property.
- 1.16. Declining or terminating representation.

Counselor

- 2.1. Advisor.
- 2.2. Intermediary
- 2.3. Evaluation for use by third persons.

Advocate

- 3.1. Meritorious claims and contentions.
- 3.2. Expediting litigation.
- 3.3. Candor toward the tribunal.
- 3.4. Fairness to opposing party and counsel.
- 3.5. Impartiality and decorum of the tribunal.
- 3.6. Trial publicity.
- 3.7. Lawyer as witness.
- 3.8. Special responsibilities of a prosecutor
- 3.9. Advocate in nonadjudicative proceedings

Transactions With Persons Other Than Clients

- 4.1. Truthfulness in statements to others.
- 4.2. Communication with person represented by counsel.
- 4.3. Dealing with unrepresented person.
- 4.4. Respect for rights of third persons.

Law Firms And Associations

- 5.1. Responsibilities of a partner or supervisory lawyer.
- 5.2. Responsibilities of a subordinate lawyer.
- 5.3. Responsibilities regarding nonlawyer assistants.

Rule

5.4. Professional independence of a lawyer.

5.5. Unauthorized practice of law.

5.6. Restrictions on right to practice.

Public Service

- 6.1. Pro bono publico service.
- 6.2. Accepting appointments.
- 6.3. Membership in legal services organization.
- 6.4. Law reform activities affecting client interests.

Information About Legal Services

- 7.1. Communications concerning a lawyer's services
- 7.2. Advertising
- 7.3. Direct contact with prospective clients.
- 7.4. Communication of fields of practice.
- 7.5. Firm names and letterheads.

Maintaining The Integrity Of The Profession

- 8.1. Bar admission and disciplinary matters.
- 8.2. Judicial officials.
- 8.3. Reporting professional misconduct.
- 8.4. Misconduct.
- 8.5. Jurisdiction.

Preamble: A Lawyer's Responsibilities.

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

In all professional functions, a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons

SUPREME COURT RULES OF PROFESSIONAL PRACTICE

who are not poor, cannot afford adequate legal assistance and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the Bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideal of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the Bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope.

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are

imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested that the lawyer render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation and the severity of a sanction depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations. Disciplinary action shall be governed by the Procedures of Discipline of the Utah State

Bar, and the burden of proof shall be on the State Bar to sustain any allegation of violation by clear and convincing evidence.

Violation of a Rule should not give rise to a cause of action, nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment or for sanctioning a lawyer under the administration of a disciplinary authority does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rule should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application of either the client-lawyer or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the client-lawyer privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The client-lawyer privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with the recognized exceptions to the client-lawyer and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. Research notes were prepared to compare counterparts in the Code of Professional Responsibility (approved by the Utah Supreme Court February 19, 1971) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the Rules and are not intended to affect the application or interpretation of the Rules and Comments.

Terminology.

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial," when used in reference to degree or extent, denotes a material matter of clear and weighty importance.

CLIENT-LAWYER RELATIONSHIP

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Rule 1.2. Scope of representation.

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, a lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4. Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation.

Rule 1.5. Fees.

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors

to be considered as guides in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) The fee customarily charged in the locality for similar legal services;
 - (4) The amount involved and the results obtained;
 - (5) The time limitations imposed by the client or by the circumstances;
 - (6) The nature and length of the professional relationship with the client;
 - (7) The experience, reputation and ability of the lawyer or lawyers performing the services; and
 - (8) Whether the fee is fixed or contingent.
- (b) When the lawyer has not regularly represented the client, and it is reasonably foreseeable that total attorneys fees to the client will exceed \$750.00, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.
- (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
- (d) A lawyer shall not enter into an arrangement for, charge or collect:
- (1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
 - (2) A contingent fee for representing a defendant in a criminal case.
- (e) A division of fee between lawyers who are not in the same firm may be made only if:
- (1) The division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
 - (2) The client is advised of and does not object to the participation of all lawyers involved; and
 - (3) The total fee is reasonable.

Rule 1.6. Confidentiality of information.

- (a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after disclosure.
- (b) A lawyer may reveal such information to the extent the lawyer believes necessary:
 - (1) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;
 - (2) To rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

- (3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or
- (4) To comply with the Rules of Professional Conduct or other law.

(c) Representation of a client includes counseling a lawyer(s) about the need for or availability of treatment for substance abuse or psychological or emotional problems by members of the Utah State Bar serving on the Lawyers Helping Lawyers Committee.

Rule 1.7. Conflict of interest: general rule.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) Each client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation to each client of the implications of the common representation and the advantages and risks involved.

(c) A lawyer shall not simultaneously represent the interests of adverse parties in separate matters, unless:

- (1) The lawyer reasonably believes the representation of each will not be adversely affected; and
- (2) Each client consents after consultation.

Rule 1.8. Conflict of interest: prohibited transactions.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; and
- (2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) The client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or an account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except:

- (1) A lawyer may advance court costs and expenses of litigation the repayment of which may be contingent on the outcome of the matter; and
- (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) The client consents after consultation;
- (2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) Information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) Acquire a lien granted by law to secure the lawyer's fee or expenses; and
- (2) Contract with a client for a reasonable contingent fee in a civil case.

Rule 1.9. Conflict of interest: Former client.

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially factually related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Rule 1.10. Imputed disqualification: general rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially factually related matter in which that lawyer, or a firm with which the lawyer has associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

- (1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) Any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7

Rule 1.11. Successive government and private employment.

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person, unless the appropriate government client consents after consultation with the lawyer. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, unless the appropriate government client consents after consultation with the lawyer.

(d) As used in this Rule, the term "matter" includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

Rule 1.12. Former judge or arbitrator.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Rule 1.13. Organization as a client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If, in a matter related to the representation of an organization, a lawyer knows that an officer, employee or other person associated with the organization is engaged in, intends to engage in, or refuses to take action in violation of a legal obligation of the organization, or a violation of law that may reasonably be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization, except as required by law or other rules of professional conduct. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer has "good cause" to resign or withdraw, as appropriate, under Rule 1.16(b)(6).

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, share-

holders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by a person or entity, other than the individual who is to be represented, properly authorized by the organization.

(f) A lawyer elected, appointed, retained, or employed to represent a governmental entity shall be considered for the purpose of this rule as representing an organization. The government lawyer's client is the governmental entity except as the representation or duties are otherwise required by law. The responsibilities of the lawyer in paragraphs (b) and (c) may be modified by the duties required by law for the government lawyer.

Rule 1.14. Client under a disability.

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Rule 1.15. Safekeeping property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. The account may only be maintained in a financial institution which agrees to report to the Office of Disciplinary Counsel in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

Rule 1.16. Declining or terminating representation.

(a) A lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) The representation will result in violation of the Rules of Professional Conduct or other law;

(2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) The lawyer is discharged.

(b) A lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client or if:

(1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) The client has used the lawyer's services to perpetrate a crime or fraud;

(3) A client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) Other good cause for withdrawal exists.

(c) This Rule is not violated by a lawyer who continues representation when ordered to do so by a tribunal, notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law, but must provide, upon request, the client's file to the client. The lawyer may reproduce and retain copies of the client file at the lawyer's expense.

COUNSELOR

Rule 2.1. Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 2.2. Intermediary.

(a) A lawyer may act as intermediary between clients if:

(1) The lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect of the attorney-client privileges, and obtains each client's consent to the common representation; and

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the client's best interest, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients; and

(4) All requirements of Rules 1.7 and 1.8 are met.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the

lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Rule 2.3. Evaluation for use by third persons.

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) The lawyer reasonably believes that the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) The client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

ADVOCATE

Rule 3.1. Meritorious claims and contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.2. Expediting litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3. Candor toward the tribunal.

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4. Fairness to opposing party and counsel

A lawyer shall not:

(a) Unlawfully obstruct another party's access to evidence, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5. Impartiality and decorum of the tribunal.

A lawyer shall not:

(a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law; or

(b) Communicate ex parte with a juror or prospective juror before the discharge of the jury except as permitted by law; or

(c) In an adversary proceeding, communicate, or cause another to communicate, as to the merits of the cause with a judge or other official before whom a matter is pending, except:

(1) In the course of official proceedings in the cause;

(2) In writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if such party is not represented by a lawyer;

(3) Orally upon adequate notice to opposing counsel or to the adverse party if such party is not represented by a lawyer; or

(4) As otherwise authorized by law; or

(d) Engage in conduct intended to disrupt a tribunal.

Rule 3.6. Trial publicity.

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a) a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Rule 3.7. Lawyer as witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in the trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

(a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

Rule 3.9. Advocate in nonadjudicative proceedings.

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1. Truthfulness in statements to others.

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2. Communication with person represented by counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. This rule does not apply to communications with government parties unless litigation about the subject of the representation is pending or imminent. Communications with elected officials are permissible when litigation is pending or imminent after disclosure of the representation to the official.

Rule 4.3. Dealing with unrepresented person.

(a) During the course of a lawyer's representation of a client, the lawyer shall not give advice to an unrepresented person other than the advice to obtain counsel.

(b) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Rule 4.4. Respect for rights of third persons.

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

LAW FIRMS AND ASSOCIATIONS**Rule 5.1. Responsibilities of a partner or supervisory lawyer.**

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.2. Responsibilities of a subordinate lawyer.

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of a question of professional duty.

Rule 5.3. Responsibilities regarding nonlawyer assistants.

With respect to a nonlawyer employed or retained by or associated with a lawyer

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.4. Professional independence of a lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration.

(2) A nonlawyer is a corporate director or officer thereof; or

(3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer may practice in a non-profit corporation which is established to serve the public interest provided that the nonlawyer directors and officers of such corporation do not interfere with the independent professional judgment of the lawyer.

Rule 5.5. Unauthorized practice of law.

A lawyer shall not:

(a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) Assist any person in the performance of activity that constitutes the unauthorized practice of law.

Rule 5.6. Restrictions on right to practice.

A lawyer shall not participate in offering or making:

(a) A partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) An agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

PUBLIC SERVICE

Rule 6.1. Pro bono publico service.

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Rule 6.2. Accepting appointments.

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) Representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- (b) Representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) The client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship of the lawyer's ability to represent the client.

Rule 6.3. Membership in legal services organization.

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) If participation in the decision would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
- (b) Where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer, or on the representation of a client of the lawyer or the lawyer's firm.

Rule 6.4. Law reform activities affecting client interests.

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1. Communications concerning a lawyer's services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Rule 7.2. Advertising.

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this Rule shall include the name of at least one lawyer responsible for its content.

Rule 7.3. Direct contact with prospective clients.

(a) A lawyer may not solicit, in-person, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "in-person" includes in-person and telephonic communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

(b) A lawyer may not solicit, by mail or other written communication directed to a specific recipient concerning a specific cause of action, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship under the following circumstances:

- (1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;
- (2) The person has made known to the lawyer a desire not to receive communications from the lawyer; or
- (3) The communication involves coercion, duress, or harassment.

Rule 7.4. Communication of fields of practice.

A lawyer may communicate the fact that the lawyer will accept employment in specified areas of practice. A lawyer whose practice is limited to specified areas of practice may communicate that fact. A lawyer shall not hold himself out publicly as a specialist and shall not indicate any certification or designation as a specialist, except as follows:

- (a) A lawyer admitted to practice before the United States Patent and Trademark office may use the designation "patent attorney" or a substantially similar designation; and
- (b) In accordance with any plan regulating lawyer specialization approved and promulgated by the Utah Supreme Court.

Rule 7.5. Firm names and letterheads.

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

MAINTAINING THE INTEGRITY OF THE PROFESSION**Rule 8.1. Bar admission and disciplinary matters.**

An applicant for admission to the Bar, or a lawyer in connection with a Bar admission application or in connection with a disciplinary matter, shall not:

- (a) Knowingly make a false statement of material fact; or
- (b) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.2. Judicial officials.

(a) A lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer, or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Rule 8.3. Reporting professional misconduct.

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of the applicable Rules of Judicial Conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) This rule does not require disclosure of information provided to or discovered by members of the Utah State Bar during the course of their work on the Lawyers Helping Lawyers Committee, a committee which has as its purpose the counseling of other bar members about substance abuse or psychological or emotional problems.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of justice;

(e) State or imply an ability to influence improperly a government agency or official;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; or

(g) Engage in sexual relations with a client that exploit the lawyer-client relationship. For purposes of this subdivision:

(1) "Sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse; and

(2) Except for a spousal relationship or a sexual relationship that existed at the commencement of the lawyer-client relationship, sexual relations between a lawyer and a client shall be presumed to be exploitative. This presumption is rebuttable.

Rule 8.5. Jurisdiction.

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

CHAPTER 14. RULES OF LAWYER DISCIPLINE AND DISABILITY**Summary.****Rule**

1. Purpose, authority, scope and structure of lawyer disciplinary and disability proceedings.
2. Definitions.
3. Ethics and discipline committee.
4. Disciplinary counsel.
5. Expenses.
6. Jurisdiction.
7. Roster of lawyers.
8. Periodic assessment of lawyers.
9. Grounds for discipline.
10. Prosecution and appeals.
11. Proceedings subsequent to finding of probable cause.
12. Sanctions
13. Immunity
14. Service.
15. Access to disciplinary information.
16. Dissemination of disciplinary information.
17. Additional rules of procedure.
18. Interim suspension for threat of harm.
19. Lawyers convicted of a crime.
20. Discipline by consent.
21. Resignation with discipline pending.
22. Reciprocal discipline.
23. Proceedings in which lawyer is declared to be incompetent or alleged to be incapacitated.
24. Reinstatement following a suspension of six months or less.
25. Reinstatement following a suspension of more than six months; readmission.

IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,	)	ADDENDUM TO BRIEF
	)	OF APPELLANT
Appellant,)	
	)	Case # 990178-CA
v.)	
)	
FRED VANDERVEUR,)	
)	
Appellee.)	

ADDENDUM EXHIBIT G

STATE of Utah, Plaintiff and Appellee,
v.
Von Lester TAYLOR, Defendant and Appellant.

No. 910496.

Supreme Court of Utah.

Oct. 24, 1997

Defendant pled guilty to capital murder and was sentenced to death, by the District Court, Coalville Department. Frank G. Noel, J. Defendant appealed. The Supreme Court, Durham, J., held that: (1) trial counsel did not provide ineffective assistance by misinforming defendant about likelihood of preventing evidence regarding dropped charges from entering into penalty phase of homicide prosecution; (2) defense counsel did not have conflict of interest based on philosophy of role of defense counsel, (3) defense counsel conducted adequate mitigation investigation; (4) defense counsel did not have conflict of interest based on minimal compensation; and (5) defense counsel's closing argument was adequate.

Affirmed.

Stewart, Associate C J., filed a dissenting opinion.

[1] CRIMINAL LAW ⚖️1158(1)

110k1158(1)

Supreme Court defers to trial court's findings of fact after hearing on ineffective assistance of counsel claim. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 23B.

[2] CRIMINAL LAW ⚖️641.13(1)

110k641.13(1)

Supreme Court reviews ineffective assistance of counsel claims under two-part analysis: defendant must demonstrate that counsel's performance fell below objective standard of reasonableness; and defendant must show that absent counsel's errors, he had reasonable chance to prevail, and thus errors undermine confidence in outcome. U.S.C.A. Const.Amend. 6.

[3] CRIMINAL LAW ⚖️641.13(1)

110k641.13(1)

When reviewing counsel's performance, on ineffective assistance of counsel claim, court must indulge strong presumption counsel's conduct falls within wide range of reasonable professional assistance. U.S.C.A. Const.Amend. 6.

[4] CRIMINAL LAW ⚖️641.13(5)

110k641.13(5)

Trial counsel did not provide ineffective assistance by misinforming defendant about likelihood of preventing evidence regarding dropped charges from entering into penalty phase of homicide prosecution, evidence supported finding that counsel correctly informed defendant about scope of penalty phase, at plea hearing defendant heard prosecution say it intended to introduce evidence of dismissed charges and defense counsel objected, and defendant twice told court during plea proceedings that he was satisfied with counsel's performance. U.S.C.A. Const.Amend. 6.

[5] CRIMINAL LAW ⚖️1158(1)

110k1158(1)

Trial court's findings of fact are "clearly erroneous" when they are against clear weight of evidence.
See publication Words and Phrases for other judicial constructions and definitions.

[6] CRIMINAL LAW ⇨ 641.13(2.1)
110k641.13(2.1)

Defense counsel's philosophy about role of defense counsel did not conflict with his duty to represent defendant in capital murder proceedings; trial court found that defense counsel did not actually believe that role of defense attorney is to help client admit to wrongdoing but merely asserted that position in closing argument. counsel tried to dissuade defendant from pleading guilty, and defendant testified he pled guilty for personal reasons. U S C.A. Const Amend. 6.

[6] CRIMINAL LAW ⇨ 641.13(5)
110k641.13(5)

Defense counsel's philosophy about role of defense counsel did not conflict with his duty to represent defendant in capital murder proceedings; trial court found that defense counsel did not actually believe that role of defense attorney is to help client admit to wrongdoing but merely asserted that position in closing argument. counsel tried to dissuade defendant from pleading guilty, and defendant testified he pled guilty for personal reasons. U.S.C.A. Const.Amend. 6.

[7] CRIMINAL LAW ⇨ 641.5(.5)
110k641.5(.5)

Right to counsel encompasses right to counsel free from conflicts of interest. U.S.C.A. Const.Amend. 6

[8] CRIMINAL LAW ⇨ 641.5(.5)
110k641.5(.5)

Defendants claiming ineffective assistance of counsel resulting from conflict of interest must show that actual conflict of interest adversely affected his lawyer's performance U.S.C.A. Const.Amend. 6

[9] CRIMINAL LAW ⇨ 641.5(.5)

To establish actual conflict of interest resulting in ineffective assistance of counsel, defendant must demonstrate as threshold matter that defense attorney was required to make choice advancing his own interests to detriment of his client's interests. U.S.C.A. Const.Amend. 6.

[10] CRIMINAL LAW ⇨ 641.5(.5)
110k641.5(.5)

Once defendant demonstrates actual conflict, there is no need to show prejudice, on ineffective assistance of counsel claim based upon alleged conflict of interest. U.S.C.A. Const.Amend. 6.

[11] CRIMINAL LAW ⇨ 641.13(7)
110k641.13(7)

Defense counsel's mitigation investigation was adequate, albeit limited, in capital murder prosecution. there was no indication that anything useful was overlooked. U.S.C.A. Const.Amend. 6

[12] CRIMINAL LAW ⇨ 641.13(7)
110k641.13(7)

Where defendant has pled guilty to a capital crime, defense counsel has the sole duty of trying to prevent the imposition of the death penalty.

[13] CRIMINAL LAW ⇨ 641.13(7)
110k641.13(7)

Defense attorneys must adequately investigate all potentially mitigating factors in order to provide effective assistance at sentencing phase where defendant has pled guilty to capital crime. but further investigation is not required. where attorney can reasonably rule out mitigating factor. U.S.C A. Const.Amend 6.

[14] CRIMINAL LAW ⇨ 641.13(7)

110k641.13(7)

Defense counsel must investigate potential mitigation by mental disease or extreme mental disturbance, in sentencing phase of capital prosecution, where defendant claims to have suffered from mental illness at time of crime or to have suffered serious mental illness previously U.S.C.A. Const.Amend. 6.

[15] CRIMINAL LAW ⇨ 641.13(7)

110k641.13(7)

Attorney does not have obligation to introduce mitigating evidence in sentencing phase of capital prosecution, if she believes after thorough investigation that it will harm the case or if other strategic reasons for its omission exist. U.S.C.A. Const.Amend. 6

[16] CRIMINAL LAW ⇨ 641.13(7)

110k641.13(7)

Failure to investigate mitigating factors in sentencing phase of criminal prosecution can constitute ineffective assistance of counsel only where such factors actually exist and may be productively used in penalty phase. U.S.C.A. Const.Amend. 6.

[17] CRIMINAL LAW ⇨ 641.5(.5)

110k641.5(.5)

Defense counsel did not have conflict of interest, in capital murder prosecution, based upon fact that he received only minimal compensation; defendant failed to present evidence that his defense suffered, and counsel had substantial income from other sources. U.S.C.A. Const.Amend. 6.

[18] CRIMINAL LAW ⇨ 641.13(2.1)

110k641.13(2.1)

Capital murder defendant did not receive ineffective assistance of counsel based on defense counsel's closing argument; although minimal, argument was reasonable. U.S.C.A. Const.Amend. 6.

[19] CRIMINAL LAW ⇨ 641.13(1)

110k641.13(1)

For purposes of ineffective assistance of counsel claim, attorney's performance need only be reasonable, and range of reasonableness is broad. U.S.C.A. Const.Amend. 6

*683 Jan Graham, Atty. Gen., J. Frederic Voros, Jr., Asst. Atty. Gen., Robert W Adkins, Coalville, Terry L. Christiansen, Park City, for plaintiff and appellee.

J. Bruce Savage, Park City, for defendant and appellant.

DURHAM, Justice:

We hear this appeal from a capital conviction pursuant to section 78-2-2(3)(i) of the Utah Code. Defendant Von Lester Taylor pled guilty to two counts of capital murder in 1991. After a sentencing hearing, the jury returned two verdicts imposing the death sentence. Taylor appealed the sentence and subsequently fired his attorney, Elliot Levine. Taylor maintained his appeal with new counsel, asserting claims of inadequate representation at trial. In 1994, when the matter came before this court the first time, we remanded it to the trial court to hold a rule 23B hearing on the ineffective assistance of counsel claims and collateral claims. We now have the results of that hearing and treat all issues raised in the appeal.

The facts of the underlying crimes are as follows: In December 1990, Taylor left a halfway house where he was housed while on parole after imprisonment for aggravated burglary. Subsequently, Taylor and Edward Steven Delh broke into the Tiede family cabin near Beaver Springs, Utah, while the Tiedes were in Salt Lake City. Once in the cabin, Taylor called a friend and told him that he intended "to shoot some people." Shortly *684 thereafter, Mrs. Tiede

arrived at the cabin with her mother and her daughter. Taylor and Deli confronted them with guns, and Taylor shot Mrs Tiede and her mother. When Mrs Tiede's daughter started to pray, Taylor told her it would do no good because he worshipped the devil. Later that afternoon, Mr Tiede and another of the Tiedes' children arrived at the cabin. Defendant held Mr Tiede at gun point, stole \$105 from him, and shot him in the face with bird shot at least once and possibly twice. After trying to set fire to Mr Tiede, the house, and the garage, Taylor and Deli fled by snowmobile and then by car, taking the two Tiede daughters with them. The police apprehended Taylor and Deli later that day. Mr Tiede survived the attack.

The police charged Taylor with two counts of criminal homicide in the first degree, one count of attempted criminal homicide in the first degree, aggravated arson, two counts of aggravated kidnapping, aggravated robbery, theft, failure to respond to an officer's signal to stop, and aggravated assault. When Taylor agreed to plead guilty to the two counts of criminal homicide, the State dropped the other charges.

This appeal raises only the issues addressed at the rule 23B hearing, namely, whether Taylor's initial attorney, Levine, provided ineffective assistance of counsel and in doing so prejudiced the outcome. Taylor asserts multiple grounds for finding ineffective assistance of counsel: (1) Levine misinformed him about the effect of a guilty plea, which led him to plead guilty when he would not otherwise have done so, (2) Levine's philosophy about the role of the defense attorney conflicted with his duty to represent Taylor and caused Taylor to plead guilty involuntarily, and (3) the minimal compensation Levine received for Taylor's representation created a conflict of interest depriving Taylor of effective assistance of counsel. Taylor also suggests that the various errors by Levine resulted in cumulative error at the penalty phase, rendering the sentence arbitrary and capricious.

Following the rule 23B hearing, the trial court found that the prosecution had presented overwhelming evidence of Taylor's participation in the crimes alleged: one person witnessed the murders, multiple people saw the attempted murder and the aggravated kidnappings, and a police officer apprehended Taylor as Taylor fled the crime scene with hostages. The trial court also found, contrary to Taylor's testimony, that Levine did not tell Taylor that the penalty phase would exclude evidence of the crimes for which charges had been dropped. During plea discussions, with Taylor present, the court explicitly stated that it would have to rule on the admissibility of the evidence relevant to the dropped charges at the penalty phase. Levine had prepared to take the case to trial and advised Taylor to do so; he did not pressure Taylor to plead guilty. Taylor pled voluntarily because he did not want to put his family and the victims through a trial and he did not want to testify against Deli.

With regard to Levine's "philosophy," the trial court found that in his closing argument Levine did assert a position which conflicted with his role as a defense attorney. In that argument, Levine described his role as helping defendants admit their guilt and take the appropriate punishment. Nonetheless, the court believed Levine's testimony at the rule 23B hearing that his real beliefs differ from those he described at trial and that he made the statements at trial to garner the jury's trust and encourage its leniency. Furthermore, Taylor failed to provide any evidence that Levine actually encouraged him to plead guilty. The court also found that Levine's statement did not prejudice Taylor because it fell within the broad range of reasonable professional judgment about jury strategy.

Concerning the conflict resulting from inadequate compensation, the court found that Levine served as Taylor's lawyer under a contract with Summit County to provide criminal defense services. For two years of services, Levine received \$24,000. As the legal defender for the county, Levine defended clients in various courts and pursued habeas claims. Levine also maintained a private practice that, during the months he represented Taylor, provided eighty to ninety percent of his gross income. Levine spent approximately sixty-nine percent of his time between January and May 1991 on the Taylor *685 case. He spent fifty percent of that time in consultation with Taylor and with Taylor's parents. The trial court found that money did not matter to Levine and that his income did not affect his decisions in this case.

One of Taylor's claims is that Levine chose not to pursue a psychological exam of Taylor because Levine thought further exams would prove fruitless and the exams already performed to determine sanity and competency would be disclosed to the jury, hurting Taylor's case. The reports from the previous exams included information regarding

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Taylor's interests in Satanism and witchcraft, as well as previous drug abuse. One of the psychological evaluations did say that Taylor showed signs of antisocial personality disorder with schizoid personality features, but Levine determined that the negative information about Taylor's character and behavior would offset any potential benefit from suggesting the existence of a personality disorder. The court found that Levine's decision to omit mental health testimony fell within the broad range of reasonable professional judgment. Levine did not obtain Taylor's school records but did ask Taylor about his school days. Levine also failed to obtain Taylor's health records, his juvenile court records, and his family's psychological records. He did not interview Taylor's friends or family members other than his mother and father. Taylor, on the other hand, has failed to provide any evidence that if Levine had performed any of the suggested investigations, the outcome of the trial would have differed. He does not even suggest what such investigation would have revealed and how the revelations would have improved his position with the jury. The court found that Levine's performance did not fall below the reasonableness threshold.

[1][2][3] We defer to a trial court's findings of fact after a rule 23B hearing. *State v. Huggins*, 920 P 2d 1195, 1198 (Utah Ct App 1996). From these facts, we must decide whether Taylor received ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution. [FN1] See *id.* This court reviews Sixth Amendment ineffective assistance questions under a two-part analysis: (1) The defendant must demonstrate that counsel's performance "fell below an objective standard of reasonableness", and (2) he must show that absent counsel's errors, he had a reasonable chance to prevail, and thus the errors undermine confidence in the outcome. *State v. Templin*, 805 P 2d 182, 186-87 (Utah 1990) (quoting *Strickland v. Washington*, 466 U S 668, 688, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). When reviewing counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 186 (quoting *Strickland* at 689, 104 S Ct at 2065).

[FN1] Taylor did not advance a claim under the Utah Constitution.

I MISINFORMATION ABOUT SCOPE OF PENALTY PHASE

[4] Taylor claims that Levine specifically told him that the sentencing hearing would exclude all evidence about the dropped charges of attempted homicide, aggravated arson, aggravated kidnapping, aggravated robbery, theft, etc. Taylor argues that the trial court's factual finding that Levine did not misinform Taylor about the likelihood of preventing this evidence from entering into the penalty phase was clearly erroneous.

[5] We consider a trial court's findings of fact clearly erroneous when they "are against the clear weight of the evidence." *State v. Walker*, 743 P 2d 191, 193 (Utah 1987). Evidence presented at the rule 23B hearing supports the finding that Levine correctly informed Taylor about the scope of the penalty phase. Levine testified that he told Taylor that the penalty phase would resemble very closely a guilt phase but that Levine could possibly prevent the State from introducing certain inflammatory photographs as evidence. The transcript of the plea proceedings supports Levine's version and undermines Taylor's testimony to the contrary. At the plea hearing, Taylor heard the prosecution say that it intended to introduce evidence of the dismissed charges. Levine registered his intent to object to such evidence. When asked by the court if he was satisfied with Levine's performance, Taylor responded "686 affirmatively on two occasions during the plea proceedings. Although the judge could have found Taylor credible at the rule 23B hearing, he did not, and enough evidence supports the judge's finding to prevent us from holding it clearly erroneous. Hence, Levine did not misinform Taylor or provide ineffective assistance of counsel in this manner.

II CONFLICT IN DEFENSE ROLE

[6][7][8][9][10] Taylor claims that Levine's philosophy about the role of a defense attorney conflicted with his duty to represent Taylor, resulting in an involuntary guilty plea and prejudicing the outcome of the penalty phase. The right to counsel encompasses "the right to counsel free from conflicts of interest." *State v. Webb*, 790 P 2d 65, 72 (Utah Ct App 1990) (quoting *Strickland*, 466 U S at 688, 104 S Ct at 2064), denial of habeas aff'd sub nom. *by Webb v. Van Der Veur*, 853 P 2d 898 (Utah Ct App 1993) and by *Webb v. Van Der Veur*, 67 F 3d 312 (10th Cir 1995).

Defendants claiming ineffective assistance of counsel resulting from a conflict of interest must show that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980). "In order to establish an actual conflict, [the defendant] must demonstrate 'as a threshold matter . . . that the defense attorney was required to make a choice advancing his own interests to the detriment of his client's interests.'" *United States v Acevedo*, 891 F.2d 607, 610 (7th Cir. 1989) (ellipsis in original) (quoting *United States v Horton*, 845 F.2d 1414, 1419 (7th Cir. 1988)). Once a defendant demonstrates an actual conflict, there is no need to show prejudice. *Cuyler* at 349-50, 100 S.Ct. at 1718-19.

The trial court found that Levine did not actually believe a defense attorney should help his client admit to his wrongdoing, but merely asserted that position in an effort to acquire credibility with the jury. Levine's testimony at the rule 23B hearing provided adequate evidence to support that finding. Furthermore, nothing in the record indicates that Levine behaved in any way that was in conflict with Taylor's interests. Levine never told Taylor to plead guilty and in fact tried to discourage him from doing so. Moreover, Taylor himself testified that he pled guilty for personal reasons, not because of his attorney's advice. Thus, the alleged conflict does not undermine our confidence in the voluntariness of the guilty plea. Likewise, Levine's theory that the views expressed in his jury argument constituted a reasonable strategy under the circumstances is plausible. Levine wanted the jury to see him as a defense lawyer committed to truth and justice, with a client who was honest and repentant and thus not deserving of the death penalty.

[11] The only area where a significant question arises concerning Levine's motives in representing Taylor has to do with his failure to pursue mitigation evidence. At the sentencing phase of a capital crime in Utah, the fact finder must weigh the mitigating factors against the aggravating factors, imposing the death penalty only if the aggravating circumstances outweigh the mitigating beyond a reasonable doubt and the death penalty is appropriate beyond a reasonable doubt. Utah Code Ann. § 76-3-207, *State v. Wood*, 648 P.2d 71 (Utah 1981). Possible mitigating circumstances include an accused's minimal history of prior criminal activity, extreme mental or emotional disturbance, extreme duress, mental disease, intoxication, drug influence, youth, minimal participation in the offense, or any other factor that might mitigate the penalty. Utah Code Ann. § 76-3-207(3).

[12][13][14][15] Where a defendant has pled guilty to a capital crime, as here, his attorney has the sole duty of trying to prevent the imposition of the death penalty. Thus defense attorneys, to provide effective assistance of counsel at the sentencing phase, must adequately investigate all potentially mitigating factors. See *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066 (stating that "counsel has a duty to make reasonable investigations"). Nevertheless, where the attorney can reasonably rule out a mitigating factor, further investigation is not required. See *id.* For example, one theoretically available mitigating circumstance would be the "substantial domination" of the defendant by another *687 person. Utah Code Ann. § 76-3-207(3)(c). In this case, Taylor makes no such claim, and the evidence does not suggest it in any way. Therefore, no investigation of this factor was warranted. However, where the defendant claims to have suffered from mental illness at the time of the crime or to have suffered serious mental illness previously, the attorney must investigate potential mitigation by mental disease or extreme mental disturbance. Nonetheless, the attorney does not have an obligation to introduce such evidence if she believes after a thorough investigation that it will harm the case or if other strategic reasons for its omission exist. *Strickland* at 690, 104 S.Ct. at 2066.

Taylor argues that Levine failed to conduct an adequate investigation of his psychological history and condition. However, Levine knew about Taylor's childhood psychological problems resulting from a facial scar, a learning disorder, and substance abuse in his family. Moreover, Levine had access to both of the psychological reports from the examinations that had been performed to determine sanity and competence. The trial court found that Levine made the reasonable decision that introducing evidence regarding mental health would hurt Taylor rather than help because of the negative information it would disclose to the jury, specifically Taylor's prior drug abuse and involvement with Satanism and witchcraft, including the drinking of animal blood. Levine quite plausibly decided that Satanic worship and blood drinking did not comport with the "boy next door" image he hoped to portray. The trial court's finding that this decision was reasonable was not clearly erroneous.

[16] Moreover, Taylor fails to identify any mitigating information that might have been uncovered by additional

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investigation or another psychological exam. In other cases where failure to conduct a psychological exam has been held to constitute ineffective assistance of counsel, the defendants had a history of serious mental illness and could show how an investigation would have furthered their defenses. See, e.g., *Bouchillon v. Collins*, 907 F.2d 589, 596-97 (5th Cir.1990) (subsequent history on other grounds omitted) (discussing various cases of ineffective assistance when attorney knew defendant had previously been hospitalized for mental illness). A defendant must show not only that counsel failed to seek mitigating evidence, but also that some actually existed to be found. *Blake v. Kemp*, 758 F.2d 523, 534 (11th Cir.1985) ("[Defendant] has adequately demonstrated a reasonable probability that he would have received a lesser sentence but for [attorney's] complete failure to search out mitigating character evidence. As the district court found, 'Petitioner has demonstrated that no favorable evidence was sought and that some was in fact available.' " (quoting *Blake v. Zant*, 513 F.Supp. 772 (S.D.Ga.1981))). Taylor has not suggested a helpful strategy that would have been supported by evidence not known to Levine. Failure to investigate mitigating factors can constitute ineffective assistance of counsel only where such factors actually exist and may be productively used in the penalty phase.

One of the problematic aspects of this case is the evolving nature of standards for adequate defense of a capital prosecution. The State appears to suggest in its brief that an extensive mitigation workup or investigation may not always be necessary (apparently such investigations were not universally undertaken in Utah at the time this case was tried). We are troubled by that proposition if it is intended to suggest that a less-than-adequate investigation will suffice. We hold here that Levine's mitigation investigation, although very limited, appears to have been adequate; there are no indications that he overlooked anything useful in Taylor's background. We emphasize that the failure to perform an adequate mitigation workup represents ineffective assistance of counsel. To demonstrate that counsel made an unreasonable judgment in not pursuing an investigation further, a defendant must identify potentially mitigating circumstances that the investigation would have uncovered. See, e.g., *Taylor v. Warden*, 905 P.2d 277, 286 n. 6 (Utah 1995) (holding that where defendant did not introduce psychological report containing potentially mitigating evidence at effectiveness hearing, court cannot make judgments about its contents). Defense attorneys need not present all evidence *688 uncovered by a mitigation workup, but they absolutely must perform one.

III. CONFLICT OF INTEREST RESULTING FROM MINIMAL COMPENSATION

[17] Taylor also suggests that Levine's minimal compensation created a per se conflict of interest preventing him from giving Taylor adequate assistance of counsel. Taylor argues that flat fee compensation encourages lawyers to spend as little time on a case as possible and to promote plea bargains. We acknowledge that the problem of inadequate resources for defending capital cases creates significant potential for harm. [FN2] But Taylor has failed to allege, let alone identify, anything in this particular case to support the theory that his defense suffered. [FN3] At no time did Levine say, "We can't afford to have you psychologically tested," or anything of the kind. Moreover, Levine personally had substantial income from other sources during the period he represented Taylor and knew he could obtain extra compensation from the county if needed. Taylor did not introduce any evidence regarding other demands on Levine's time or point to inadequacies in the time spent on this case. Without this information, we must accept the lower court's assessment that Levine's income and resources did not affect his strategy and efforts in this case. Hence, under the conflict of interest standard discussed in part II above, Taylor has failed to demonstrate an actual conflict of interest.

FN2. See Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 *Buff. L.Rev.* 329 (Fall 1995). Poor compensation for capital defense attorneys appears to attract poor attorneys as evidenced by the rate of disciplinary action and disbarment for these attorneys in various states. *Id.* at 398. Also, many capital defense attorneys lack general experience and have not received the training needed to defend a client in "one of the most specialized fields of practice in American law." *Id.* at 398-99. Furthermore, because of the minimal pay, attorneys often fail to spend the time needed to prepare for a case. *Id.* at 402-03. Instead, in order to survive economically, they must take on other cases that also demand time. *Id.* This lack of preparation becomes particularly apparent in sentencing proceedings where attorneys fail to present mitigating evidence that does exist. *Id.* at 403-04; see also Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 *Rutgers L.Rev.* 281, 283 (1991) (examining whether statutorily set fees for capital defense attorneys remunerate lawyers so poorly that losing is more profitable than doing "everything possible to prevent a guilty verdict and death sentence").

FN3. We make no judgment about the efficacy of this argument in other cases with more evidence or in a system-wide challenge.

IV. CUMULATIVE ERROR

[18] Taylor claims that Levine violated Taylor's Sixth, Eighth, and Fourteenth Amendment rights by failing to fulfill his role as an advocate for Taylor. Despite citing the Eighth and Fourteenth Amendments, Taylor argues only the Sixth Amendment claim. He has, quite simply, failed to identify deficiencies in Levine's performance that had any apparent effect on the outcome of his penalty trial. We note that Taylor pled guilty to horrendous crimes and has never been able to suggest mitigating circumstances or undisclosed evidence which might have favorably influenced the jury. Fairness requires the observation that Levine did not have a lot to work with in his defense effort.

Levine's closing argument is a major target for Taylor's criticism. As Taylor suggests, Levine's closing argument was not a model of persuasive rhetoric. Levine began by telling a Native American story about how death came into the world but then failed to connect the story to his argument. Levine never asked the jury directly to spare his client's life, although he did say that "the killing has to stop somewhere." He told the jurors that balancing mitigating and aggravating factors meaningfully was extremely difficult if not impossible but that they had to do it anyway. He emphasized that Taylor himself thought his own crimes were "gross" and "vile." He repeatedly reminded the jury that Taylor, like criminals generally, did not think like "you and I." He mentioned, but did not elaborate on, the only mitigating factors he had, i.e., Taylor's relative youth and clean record. Overall, Levine did not give a virtuoso performance.

[19] Nevertheless, we are not in a position to review every closing statement in a *689 capital case to determine whether it was persuasive enough. As stated previously, an attorney's performance need only be "reasonable," *Templin*, 805 P.2d at 186-87, and the range of reasonableness is broad, *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. In the following cases, courts have held that defense attorneys' closing arguments did not meet the standard of effective assistance of counsel. In *United States v. Hammonds*, 425 F.2d 597, 604 (D.C.Cir.1970), the court found that "the totality of the omissions and errors, and particularly the futile closing argument, clearly reflect a pro forma defense and a lack of adequate representation in the preparation and trial of the case." The attorney's argument in *Hammonds* consisted primarily of telling the jury he did not intend to make a summation of the case and asking the jurors to do what the court told them to and that would constitute justice. *Id.* at 602. He failed to mention the presumption of innocence, the elements of the offense, the reasonable doubt standard, and the linchpin of the case--the defendant's lack of intent. *Id.* at 603. In *Wade v. Calderon*, 29 F.3d 1312, 1324 (9th Cir.1994), the court held that defense counsel's closing argument, which included telling the jury that the defendant would benefit from a death sentence because it would put him out of his misery, erased any doubt as to counsel's ineffectiveness. The court held that such an argument caused a "breakdown in the adversarial process that our system counts on to produce just results." *Id.* (quoting *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2068).

In both cases, elements of the representation other than closing argument demonstrated ineffectiveness. *Hammonds* at 603 (listing other factors including failure to appear at arraignment, to conduct voir dire, to make opening statement, etc.); *Wade* at 1325 (discussing failure to remind jury about child abuse, use of inflammatory testimony by defendant, reuse of twice-rejected multiple personality theory). Nonetheless, both courts found the deficiencies of the closing arguments to be so serious as to make the representation, beyond question, ineffective and prejudicial. *Hammonds* at 604; *Wade* at 1324.

In this case, Levine explained to the jury its duty and reiterated the mitigating factors--youth and prior clean record. He told the jurors that life in prison is "a tortuous existence," perhaps to suggest it would be a suitable punishment. Compared to *Hammonds* and *Wade*, these factors and the lack of other significant failings in his representation suggest that Levine provided effective, albeit not exemplary, assistance of counsel.

An accurate assessment of the impact of closing argument on the jury in a penalty hearing is extremely difficult. At that point, the jury knows all the facts, has heard all the witnesses, and has received the applicable instructions. Some jurors

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may already have made up their minds. Oral argument builds on this base of information and attempts to operate on the hearts and minds of the jurors. Persuasion depends greatly on the quality of the interpersonal dynamic between counsel and the jury. There are nuances to oral communication that cannot be reflected on the printed page. Levine, having become acquainted with the jurors, may have decided that aggressive advocacy would have alienated or offended them. He may have been convinced that a low-key, minimalist approach would elicit their sympathy. We acknowledge that Levine's argument is so minimal as to represent the lower threshold of reasonableness and that if he had had any more to work with in the evidence or his client, we might have reached another result. Given the nature of the crime and substantial evidence against Taylor, however, even the finest closing argument is not likely to have saved him from the death penalty. The few mitigating circumstances operating in this case fall well below the level needed to offset the vicious character of his crimes. In our judgment, the understatement of Levine's closing argument did not lead to the death penalty for his client.

CONCLUSION

As noted, Levine's representation of Taylor does not illustrate ideal defense attorney behavior. Taylor, however, was not the ideal defendant. Taylor voluntarily pled guilty to committing heinous crimes without provocation, and the State had irrefutable, detailed *690 evidence of those crimes. The chances that Taylor would have fared any better had the best criminal defense attorney in the country made the perfect argument are slim. For this reason, Taylor cannot show prejudice related to Levine's performance. Similarly, with regard to his conflict of interest claims, Taylor failed to show an actual conflict. The judgment of the trial court is affirmed.

ZIMMERMAN, C.J., and HOWE and RUSSON, JJ., concur in Justice DURHAM's opinion.

STEWART, Associate Chief Justice, dissenting.

There is no question that this case involves exceptionally wanton and heinous murders, and there is no question that defendant was the perpetrator. Nevertheless, whether the death penalty should be imposed was a question to be decided solely by the jury, but only after all the requisite legal procedures and requirements had been complied with. Defense counsel's failure to meet those requirements resulted in defendant's being denied the effective assistance of counsel as required by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *State v. Temple*, 805 P.2d 182 (Utah 1990).

The majority opinion states that "[d]efense attorneys absolutely must perform" a "mitigation workup." That was not done in this case. The majority opinion characterizes defense counsel's mitigation investigation as "very limited" but "adequate." *Id.* I cannot agree that it was adequate. Defense counsel did not conduct an in-depth investigation of defendant's psychological history and condition. It is simply not sufficient that the attorney knew about some of defendant's childhood psychological problems, his learning disorder, and substance abuse in his family. All those factors and possibly others that may have seriously affected defendant's character were simply not explored in any meaningful way for the purpose of providing some evidence that would weigh in favor of a life sentence. It may be that nothing would have come from an adequate mitigation workup that would have persuaded a jury to reach a different conclusion as to the appropriate penalty, but it is not possible to know what might have been discovered had defense counsel done his job.

Furthermore, defense counsel clearly should have been disqualified from representing defendant and any other capital defendant because of his failure to adhere to fundamental professional standards of competence and conduct. See *State v. Holland*, 876 P.2d 357 (Utah 1994) (discussing and disapproving defense counsel's personal approach and strategy in conducting defense of criminal cases), see also *id.* at 361 (opinion of Stewart, Assoc. C.J., & Durham, J.). Indeed, defense counsel's closing argument to the jury, to the extent it even addresses issues somewhat pertinent to the case, is more a self-justification of defense counsel than a plea that the jury impose a life sentence rather than death.

In my view, the death penalty should be vacated and the case remanded for another penalty hearing to take place after

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an appropriate mitigation workup has been conducted by competent counsel.

END OF DOCUMENT

IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,	)	ADDENDUM TO BRIEF
	)	OF APPELLANT
Appellant,)	
	)	Case # 990178-CA
v.)	
)	
FRED VANDERVEUR,)	
)	
Appellee.)	

ADDENDUM EXHIBIT H

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee vs. WAYNE S. TIPPETT, Defendant/Appellant.	BRIEF OF APPELLANT CASE NO. 95-0280 Priority No. 2
BRIEF OF APPELLANT	

AN APPEAL FROM THE EIGHTH JUDICIAL
DISTRICT COURT'S DENIAL OF A MOTION TO
WITHDRAW GUILTY PLEA UPON WHICH THERE WAS
A CONVICTION OF AGGRAVATED KIDNAPPING, A
FIRST DEGREE FELONY

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee

vs.

WAYNE S. TIPPETT,
Defendant/Appellant.

BRIEF OF APPELLANT

CASE NO. 95-0280

Priority No. 2

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal pursuant to Utah Code Section 78-2-3 (i).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Did the trial court abuse its discretion in denying Appellant's Motion to Withdraw Guilty Plea?

The Court should review this case using an "abuse of discretion" standard, State vs. Mildenhall, 787 P. 2d 744, (Utah, 1987).

DETERMINATIVE STATUTORY PROVISIONS

This case is governed in part by Rule 11(e), Utah Rules of Criminal Procedure, which was at the time of the plea codified as Title 77, Chapter 35, Section 11(e), Utah Code Annotated.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal of the Eighth District Court's denial of a Motion to Withdraw Guilty Plea submitted by the defendant/appellant on the 9th day of June, 1994. The motion was denied by two separate rulings; one dated June 29, 1994 and a supplementary ruling dated July 12, 1994.

B. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

The Defendant/Appellant was charged in the Eighth District Court for Uintah County, State of Utah on the 18th of February, 1986 with two counts of Aggravated Kidnapping in violation of Section 76-5-302 Utah Code Annotated. Each count also provided a Firearms Enhancement Provision pursuant to Section 76-3-203 Utah Code. On February 26, 1986 the Defendant/Appellant plead guilty to Count One of the Information. Count Two of the information was dismissed. The record does not reveal that any affidavit was used to assist the court in an explanation of Defendant/Appellant's Rule 11(e) rights at the time of plea. After a colloquy with the Honorable Richard Davidson, the court accepted the guilty plea. The matter came before the court for sentencing on the 26th day of March, 1986, the Honorable Boyd Bunnell presiding. The Defendant/Appellant was sentenced to a minimum mandatory sentence at the Utah State Prison of 15 years to life with a firearm enhancement requiring an additional 5 to 10 years to be served consecutively

with the 15 years to life sentence. On May 20, 1987 at the request of the Chairman of the Board of Pardons, the court reviewed the Defendant/Appellant's sentence. The court, the Honorable Dennis Draney presiding, re-affirmed the sentence originally imposed. On June 9, 1994, Defendant filed a Motion to Withdraw Guilty Plea before the Eighth District Court. The plea was defective in that the elements of the offense were not explained to Defendant/Appellant. It was further defective in that the trial court did not give the Defendant/Appellant the proper maximum punishment, nor explain the nature of the Utah indeterminate sentencing. Counsel for the Defendant/Appellant's performance was inadequate in that he did not explain any of the required Pre-requisites to a valid plea. The information was defective in that it did not adequately identify any victim of the alleged crime. Counsel's performance was also deficient in that he also did pursue any information to cure the defective information. All the prior judges having retired, resigned, or being deceased, the case was re-assigned to the Honorable John R. Anderson. Judge Anderson issued a summary ruling to the motion to dismiss, the State having given no response to the motion. That ruling, dated June 29, 1994 denied all aspects of Defendant's Motion to Withdraw Guilty Plea excepting for a response by the State the issue of an inadequate explanation of the firearms enhancement. After considering the State's response, on July 12, 1994 and giving the Defendant no opportunity to

consider the State's response, Judge Anderson issued a ruling denying the Defendant's Motion to Withdraw Guilty Plea in its entirety stating that the court had substantially complied with the requirements of Rule 11(e).

SUMMARY OF ARGUMENT

The trial court's denial of the Motion to Withdraw Guilty Plea is in error. The court made no findings that the appellant waived his right to self incrimination. The court made no findings that the appellant understood the nature and elements of the crime and that his plea admitted each and every element. The court incorrectly advised the defendant as to the maximum sentence which could be imposed. The information was deficient in that it did not advise the Defendant/Appellant of the identity of the victims. Defendant/Appellant was deprived of key elements of effective of counsel in that no discovery was requested, discussed with Defendant/Appellant, nor were there any attempts to explain the sentencing, or cure the defective information.

ARGUMENT

POINT I

THE COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA BECAUSE IT FAILED TO COMPLY WITH RULE 11(e) OF THE RULES OF CRIMINAL PROCEDURE.

Rule 11(e) of the Utah Rules of Criminal Procedure in effect at the time appellant made his guilty plea as codified in 77-35-11(e) provided as follows:

The court . . . shall not accept a (plea of guilty) until the

court has made the findings:

- (1) That if the defendant is not represented by counsel he has knowingly waived his right to counsel and does not desire counsel;
- (2) That the plea is voluntarily made;
- (3) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;
- (4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements;
- (5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences; and
- (6) Whether the tendered plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached.

The record of the entry of pleas is very limited. From the record, it appears that no plea affidavit was used, therefore the court can only determine the trial court's compliance with rule 11(e) based on the oral representations made in open court.

That record is bereft of any discussion with the appellant on several critical points included in the rule. There is no discussion whatsoever with the appellant concerning his right against compulsory self incrimination as required by subsection (3) of the rule. There is no discussion of the nature and elements of the offense of aggravated kidnapping with a firearms enhancement as required by Subsection 4 of the rule. There is no discussion

or record that the guilty plea was an admission to each of the elements of the alleged crime as required by subsection 4 (Record, pp 4-7).

The record also reveals that the trial judge affirmative misrepresented to the appellant the maximum sentence possible as a result of the plea. Subsection 5 of the rule required a finding that the defendant understands both the minimum and maximum possible sentence. At line 12, page 7 of the record, the trial judge informed the appellant that a one to five year enhancement was possible in addition to the five years to life he originally explained. No correction of that error was made. The appellant was sentenced to a five to ten year firearm enhancement in direct contradiction to what had been explained.

The standard of review as previously stated is that of an "abuse of discretion" by the court. The companion cases of Warner vs. Morris, 709 P. 2d 309 (Utah, 1985) and Brooks vs. Morris, 709 P. 2d 310, (Utah, 1985), established the standard by which a trial court accepts guilty pleas. The Supreme Court stated that a failure of to advise a defendant of his rights concerning self-incrimination was not alone sufficient to invalidate a guilty plea provided that the record as a whole showed that the rule 11 requirements were substantially complied with. Subsequently the Supreme Court in State vs. Gibbons, 740 P. 2d 1309 (Utah, 1987) replaced the "substantial compliance" rule with a "strict compliance" standard. It has been ruled that the Gibbons rule was not retroactive, however the concepts set forth in Gibbons are

useful. In Gibbons the court stated that the trial court may not rely on defense counsel or affidavits to satisfy the specific requirements of Rule 11(e). In his case, where there is no affidavit, the court has a situation much more akin to Gibbons factually than might typically be the case.

The case most similar to this which was reached the appellate courts is that of State vs. Vasilacopulas, 756 P. 2d 92 (Utah App., 1988). The Utah Court of Appeals, using the Warner-Brooks test found that an absence of discussion concerning the possibility of consecutive sentences, and a failure to find that the defendant understood that possibility showed a failure to substantially comply with Rule 11(e). That alone was sufficient to mandate a reversal of the trial court's denial of the defendant's motion to Withdraw Guilty Plea. The court did not consider a failure to comply with Rule 11(e) (4), citing the failure to comply with the sentencing proportions of the rule as being sufficient. It can be presumed that if there had been a problem with an explanation of the elements of the offense as there was in this case, the Vasilacopulas Court should have only made its decision stronger. It is also interesting to note that one of the concurring judges in Vasilacopulos was Richard Davidson, the trial judge who took the plea in this case.

In this case, we have three major failures to even discuss rights required by the rule. While the Warner and Brooks cases state that a failure to explain the right of self incrimination was not fatal in light of the record, the record there was more

complete that here. Here as well, we have not only a failure to inform appellant of the maximum sentence, but a misrepresentation by the court as to the maximum sentence. When coupled with the failure to discuss the elements of the offense, the combination is fatal to the trial court's ruling that the requirements had been substantially complied with. Finally, even though there was some discussion of some of the Rule 11 requirements at the time the plea was entered, no findings were made except that the plea was knowingly made. (Record p 8).

POINT II

THE PLEA WAS IMPROPERLY TAKEN BECAUSE THE INFORMATION DID NOT ADEQUATELY INFORM THE DEFENDANT/APPELLANT OF THE NATURE OF THE CHARGES.

The information to which the Defendant/Appellant alleges as follows:

Count : AGGRAVATED KIDNAPPING, in violation Section 76-5-302, Utah Code Annotated, 1953, as amended, on or about February 17, 1986, in Uintah County, Utah, a First Degree Felony;

The said defendant at the time and place aforesaid did intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seized, confined, detained, or transported the victim with intent:

a. To hold for ransom or reward, or as shield of hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

b. To facilitate the commission, attempted commission, or flight after commission or attempted commission of felony; or

c. To inflict bodily injury on or to terrorize the victim or another. . . .

There is no mention at any time in the information any name or other identification of any victim. This lack deprived the Defendant/Appellant of the opportunity of knowing what the charges effectively were against him and further complicated the inadequacy of the entry of guilty plea.

The Utah Supreme Court in State v. Wilcox, 808 P 2d. 1028, (Utah 1991), stated that a defendant is entitled to adequate notice of the proceedings being brought against him. That notice requires the prosecution to state the charge with sufficient specificity to protect the defendant from multiple prosecutions for the same crime and to give notice sufficient for the one charged to prepare a defense. See State v. Strand, 720 P 2d. 425 (Utah 1986), and State v. Bundy, 684 P 2d. 58 (Utah 1984). The Court further stated that "because of the almost infinite variety of circumstance where the question may arise, there are few ironclad rules for determining the adequacy of notice beyond the requirements that the elements of the offense be alleged." The court then stated that there should be a weighing of the completeness of the notice and its adequacy against the background of the information immediately available to the prosecution.

In this case, there were multiple victims alleged. It appears that the identity of those victims was available to the prosecutor at the time the information was filed. In order to prevent multiple prosecutions for the same offense, the name of the victim of each offense must be stated. This is mere common sense. While The Wilcox also states that the notice requirements may be waived

and that the filing of a bill of particulars is normally one of the proper remedies to an inadequate information, that statement only illustrates another issue which will be addressed later in this matter, that is, the ineffective assistance of counsel.

The lack of identity of the victims illustrates again the inadequacy of the inquiry at the time of the taking of his plea. It has already been stated that the record is bereft of any discussion of the elements of the offense charged. Because no bill of particulars was filed, the Defendant/Appellant did not have a more specific information than the original one which was filed. There is no indication that any request for discovery was ever filed nor that any discovery was given to the defendant. All of these things which might have had some curative effect upon the lack of the notice in the information did not occur. The failure to explain the elements of the crime, and to get a factual basis for the plea become even worse.

POINT 3

THE INADEQUATE ASSISTANCE OF DEFENSE COUNSEL FURTHER IMPAIRED THE DEFENDANT/APPELLANT'S ABILITY TO UNDERSTAND THE PROCEEDINGS WHEN THE GUILTY PLEA WAS TAKEN.

The performance of defense counsel in adequately representing his client is always a difficult issue in that much of any representation is not on the record. The attorney client privilege makes it difficult for an attorney to respond to ineffective assistance accusations, nevertheless there is guidance on what constitutes ineffective assistance of counsel. In State v. Moritzsky, 771 P 2d. 689 (Utah App. 1989), Defense attorney Lance

Wilkerson, the then Uintah County Public Defender, was found to have ineffectively assisted his client by failing to explore or request any instruction concerning the defense of habitation. Citing State v. Verde, 770 P 2d. 116 (Utah 1989) the appellate court stated the following test: "Defendant's Sixth Amendment challenge to his conviction will be successful only if he can prove that (1) his counsel rendered and objectively deficient performance, demonstrated by specific acts or omissions; and (2) counsel's error prejudiced the defendant, i.e. a reasonable probability' exist that but for counsel's omissions, the verdict would have been more favorable to defendant.

While the court must not second guess tactical decisions made by counsel, the tactical analysis has little relevance in this case.

In this case, Uintah County Public Defender Lance Wilkerson failed to request discovery. He failed to request a bill of particulars to clarify or cure an information that was devoid of notice of the identity of the alleged victim. He failed to explain the elements of the charge to his client. He failed to assist the court in establishing any factual basis for the entry of this plea. He failed to explain the nature of the firearm enhancement which was charged and sentenced to his client. He failed to appeal the errors in this plea immediately upon sentencing.

The specific acts or omissions required have been shown precisely by the inadequacy of the record in this case. The second prong is harder to address because this is guilty plea case. To adequately assess whether a trial verdict would have been more

favorable to defendant/appellant than his plea is difficult. I must be noted however that since the defendant/appellant receive the maximum sentence allowed by law for one count of aggravate kidnapping, and the statutory preference was for concurren sentences at the time, it is hard to say that no better resul could have been obtained for the Defendant.

CONCLUSION

The record in this case shows affirmative mistakes by th court and counsel in the taking of appellant's plea. It does nc show strict compliance, substantial compliance, or anythin approaching the required standard. The process was furthe complicated by defense counsel's ineffective performance in th process of the plea. Since the information was defective in notic to the defendant, the problem grew even worse. Appellant heret prays that the court reverse the trial court's denial of his Motio to Withdraw Guilty Plea and remand the case for furthe proceedings.

DATED this 1st day of April, 1996.

Alan M. Williams
Alan M. Williams
Attorney for Appellant

IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,	)	ADDENDUM TO BRIEF
	)	OF APPELLANT
Appellant,)	
	)	Case # 990178-CA
v.)	
)	
FRED VANDERVEUR,)	
)	
Appellee.)	

ADDENDUM EXHIBIT I

ORIGINAL

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

STATE OF UTAH,

PLAINTIFF,

VS.

WAYNE STEVEN TIPPETT AKA
TOM PETERSON, TERRELL
DANN KELLY, STEVE WAYNE
TIPPETT, DANIEL MITCHELL
KELLEY,

DEFENDANT.

REPORTER'S TRANSCRIPT OF
ARRAIGNMENT

CASE NO. 86-CR-14U

BE IT REMEMBERED, THAT ON THE 26TH DAY OF
JANUARY, 1986, COMMENCING AT THE HOUR OF 10:00 A.M., THE
ABOVE-ENTITLED MATTER CAME ON FOR HEARING IN THE DISTRICT
COURTROOM OF THE UINTAH COUNTY COURTHOUSE, VERNAL, UTAH;
SAID CAUSE BEING HEARD BY THE HONORABLE RICHARD C. DAVIDSON,
JUDGE IN THE SEVENTH JUDICIAL DISTRICT, STATE OF UTAH.

A P P E A R A N C E S

FOR THE PLAINTIFF:

MARK W. NASH, ESQ.
UINTAH COUNTY ATTORNEY
152 EAST 100 NORTH
VERNAL, UTAH 84078

FOR THE DEFENDANT:

LANCE T. WILKERSON, ESQ.
ATTORNEY AT LAW
319 WEST 100 SOUTH, SUITE A
VERNAL, UTAH 84078

FILED
DISTRICT COURT
UINTAH COUNTY, UTAH

JUL 22 1988

DOROTHY LUCK, CLERK
BY BRH DEPUTY

P R O C E E D I N G S

THE COURT: BE ON THE RECORD IN CASE NUMBER
86-CR-14, STATE OF UTAH V. WAYNE STEVEN TIPPETT, TERREL
DANN KELLY, STEVE WAYNE TIPPETT, DANIEL MITCHELL KELLEY.
COME FORWARD, PLEASE.

THE RECORD WILL INDICATE THE DEFENDANT IS PRESENT,
TOGETHER WITH COUNSEL, MR. WILKERSON. THIS IS THE TIME FOR
ARRAIGNMENT, THE PRELIMINARY HEARING HAVING BEEN WAIVED
DOWNSTAIRS IN CIRCUIT COURT, AND THE MATTER HAVING BEEN
BOUND OVER TO THIS COURT. ARE YOU READY TO PROCEED?

MR. WILKERSON: IN THIS MATTER THERE'S BEEN A PLEA
ARRANGEMENT ARRIVED AT IN THIS CASE. THE DEFENDANT INTENDS
TO ENTER A PLEA TO COUNT I, AND THAT COUNT II WILL BE
DISMISSED. IT SHOULD BE FURTHER NOTICED THAT THE COUNTY
ATTORNEY HAS AGREED TO RECOMMEND THAT IN THE EVENT THE
DEFENDANT IS TRANSPORTED TO ANOTHER FACILITY OUTSIDE OF THIS
STATE, NAMELY THE STATE OF SOUTH CAROLINA IS PROBABLY THE
MOST LIKELY, THAT HE WOULD RECOMMEND THAT THE DEFENDANT
RECEIVE TIME FOR--CREDIT FOR TIME SERVED THERE AGAINST HIS
SENTENCE HERE IN THIS STATE, AND THAT FURTHER THAT THERE HAS
BEEN NO REPRESENTATIONS AS TO WHAT WILL HAPPEN TO ANY OTHER
CHARGES THAT MAY BE PENDING IN ANY OTHER JURISDICTION, SUCH
AS SALT LAKE COUNTY OR THE FEDERAL AUTHORITIES OR WITH THOSE
IN SOUTH CAROLINA.

1 THE COURT: IS THAT THE UNDERSTANDING, MR. NASH?

2 MR. NASH: THAT IS CORRECT, YOUR HONOR. WELL, I
3 WOULD LIKE TO PUT ON THE RECORD THAT I DO NOT HAVE AUTHORITY
4 AND DO NOT AT THIS TIME ATTEMPT TO SPEAK FOR ANY OTHER
5 JURISDICTION, EITHER SALT LAKE COUNTY, THE FEDERAL AUTHORITIES
6 OR SOUTH CAROLINA. I HAVE MADE THE DEFENDANT AWARE OF THAT
7 IN CIRCUIT COURT YESTERDAY. I WOULD, HOWEVER, RECOMMEND,
8 ASSUMING HE IS SENTENCED TO TIME IN THE PENITENTIARY, I
9 WILL RECOMMEND TO THE COURT THAT IN THE EVENT HE IS
10 TRANSFERRED TO ANOTHER PENITENTIARY THAT HE BE GIVEN CREDIT
11 FOR TIME SERVED IN THAT OTHER PENITENTIARY AGAINST HIS UTAH
12 SENTENCE. THAT'S THE ONLY RECOMMENDATION THAT I AM PREPARED
13 OR WILL MAKE AS TO SENTENCING. ANYTHING ELSE I HAVE MADE NO
14 AGREEMENTS TO ASK FOR LENIENCY ON THE SENTENCING ON COUNT I
15 IN ANY RESPECT.

16 THE COURT: THIS BEING THE TIME FOR ARRAIGNMENT,
17 LET US PROCEED.

18

19 EXAMINATION

20 BY THE COURT:

21 Q FIRST OF ALL IS WAYNE TIPPETT YOUR TRUE AND CORRECT
22 NAME?

23 A WAYNE STEVEN TIPPETT.

24 Q YOU ARE KNOWN BY THESE OTHER ALIASES LISTED HERE
25 ON THE INFORMATION?

A YES, SIR.

Q WAYNE STEVEN TIPPETT IS YOUR TRUE AND CORRECT NAME?

A YES, SIR.

Q IS IT S-T-E-V-E-N?

A YES.

Q FOR THE RECORD, MR. TIPPETT, ARE YOU SUFFERING FROM THE EFFECTS OF ANY ALCOHOL OR DRUGS AT THIS TIME?

A NOT TODAY. I WAS ON METHUEN IN SALT LAKE, BUT I AM NO LONGER.

Q ALL RIGHT. YOU UNDERSTAND WHAT THIS PROCEEDING IS?

A YES, SIR.

Q YOU UNDERSTAND YOU ARE BEING CALLED UPON TO MAKE A PLEA OF GUILTY OR NOT GUILTY?

A YES, SIR.

Q ARE YOU PREPARED TO GO FORTH WITH THIS MATTER?

A YES.

THE COURT: HAVE YOU BEEN FURNISHED WITH A COPY OF THE INFORMATION?

MR. WILKERSON: YES WE HAVE, YOUR HONOR.

THE COURT: DO YOU WAIVE THE READING OF THAT?

MR. WILKERSON: YES.

Q (BY THE COURT) YOU UNDERSTAND, MR. TIPPETT, THAT YOU ARE CHARGED WITH THE CRIME OF AGGRAVATED KIDNAPPING IN VIOLATION OF 76-5-302. THAT'S A FIRST DEGREE FELONY, WHICH

ALLEGES THAT YOU AT THE TIME AND PLACE DID TAKE CONTROL OF PEOPLE AND CAUSE THEM TO BE TRANSPORTED AGAINST THEIR WILL. YOU HELD THEM UNDER YOUR CONTROL AGAINST THEIR WILL, AND THAT IN FACT YOU DID UTILIZE A FIREARM IN THE COMMISSION OF THAT OFFENSE. YOU ARE AWARE OF THAT CHARGE?

A YES, SIR.

Q ARE YOU PREPARED AT THIS TIME TO ENTER A PLEA TO THAT CHARGE?

A YES, SIR.

Q WHAT PLEA DO YOU INTEND TO ENTER?

A GUILTY.

Q PRIOR TO ACCEPTING A GUILTY PLEA, MR. TIPPETT, I'M SURE THAT YOU ARE AWARE THAT YOU HAVE CERTAIN CONSTITUTIONAL RIGHTS WHICH ARE VERY VALUABLE AND YOU HAVE TO WAIVE THOSE RIGHTS BEFORE I CAN ACCEPT A GUILTY PLEA. THE FIRST AND MOST OF THOSE RIGHTS IS YOUR RIGHT TO ASSISTANCE OF COUNSEL. THAT'S THE REASON MR. WILKERSON IS PRESENT TODAY. HE OR ANOTHER ATTORNEY WOULD REPRESENT YOU TODAY AND AT THE TRIAL OF THIS MATTER, AND EVEN ON THE APPEAL LEVEL IF IT WENT THAT FAR. DO YOU UNDERSTAND YOU HAVE THAT RIGHT?

A YES, SIR.

Q YOU UNDERSTAND NOBODY CAN TAKE THAT RIGHT FROM YOU, THAT YOU ARE ENTITLED TO THAT AND IT'S A RIGHT GIVEN BY THE STATE? DO YOU UNDERSTAND THAT?

A YES, SIR.

1 Q DO YOU UNDERSTAND THAT YOU ALSO HAVE A RIGHT TO A
2 TRIAL IN THIS MATTER, A TRIAL BY JURY?

3 A YES, SIR.

4 Q WHEREIN THE STATE WOULD HAVE TO GO FORWARD AND
5 PROVE EACH AND EVERY ELEMENT OF THIS OFFENSE BEYOND A
6 REASONABLE DOUBT TO THE SATISFACTION OF ALL EIGHT JURORS,
7 AND ALL EIGHT JURORS WOULD HAVE TO AGREE ON YOUR GUILT BEFORE
8 YOU COULD BE FOUND GUILTY. DO YOU UNDERSTAND THAT?

9 A YES, SIR.

10 Q DO YOU UNDERSTAND THAT YOU HAVE AT THE TIME OF
11 TRIAL THE RIGHT TO CROSS-EXAMINE THE WITNESSES BROUGHT AGAINST
12 YOU? THAT IS, YOUR COUNSEL. FURTHERMORE, YOU HAVE THE RIGHT
13 TO COMPULSORY PROCESS TO BRING ANY WITNESSES TO TELL YOUR
14 SIDE OF THE STORY, TO PUT ON YOUR CASE. DO YOU UNDERSTAND
15 THAT?

16 A YES.

17 Q DO YOU UNDERSTAND THAT IF YOU GO THROUGH THIS
18 TRIAL AND IF YOU WERE CONVICTED BY THE JURY THAT YOU EVEN
19 HAVE A RIGHT TO APPEAL THIS MATTER TO THE UTAH STATE SUPREME
20 COURT, AND YOU ARE GIVING THAT RIGHT UP AS WELL AS THESE
21 OTHER VALUABLE RIGHTS IF YOU PLEAD GUILTY?

22 A YES.

23 Q MR. TIPPETT, OTHER THAN THE DISMISSAL OF COUNT I
24 AND THE PRESENTATIONS MADE BY THE COUNTY ATTORNEY HERE TODAY
25 IN OPEN COURT, HAS ANYBODY PROMISED YOU ANYTHING TO GET YOU

1 TO MAKE THIS PLEA?

2 A NO, SIR.

3 Q ANYBODY THREATENED YOU IN ANY WAY?

4 A NO, SIR.

5 Q ARE YOU MAKING THIS PLEA OF YOUR OWN FREE WILL AND
6 CHOICE?

7 A YES, SIR.

8 Q YOU UNDERSTAND THAT BEING A FIRST DEGREE FELONY
9 CARRIES WITH IT A SENTENCE OF FIVE YEARS TO LIFE IN THE
10 UTAH STATE PRISON?

11 A YES, SIR.

12 Q IT ALSO CARRIES WITH IT A FIREARM ENHANCEMENT
13 PENALTY OF NOT LESS THAN ONE OR UP TO FIVE YEARS ON TOP OF
14 THAT. DO YOU UNDERSTAND THAT?

15 A YES, SIR.

16 MR. NASH: YOUR HONOR, I WOULD POINT OUT, AND THE
17 COURT SHOULD INFORM THE DEFENDANT, I BELIEVE THAT THE
18 AGGRAVATED KIDNAPPING CARRIES A MINIMUM MANDATORY SENTENCE
19 AS WELL, WHICH IS FIVE, TEN, FIFTEEN, DEPENDING ON THE
20 SENTENCING.

21 Q (BY THE COURT) YOU UNDERSTAND AN AGGRAVATED
22 KIDNAPPING IS A MINIMUM MANDATORY OF FIVE, TEN, FIFTEEN
23 YEARS AT THE DISCRETION OF THE COURT?

24 A YES, SIR.

25 Q YOU UNDERSTAND THAT?

1 A YES, SIR.

2 Q HAS ANYBODY MADE ANY REPRESENTATIONS TO YOU ABOUT
3 WHAT THIS COURT MAY OR MAY NOT DO IN THE WAY OF SENTENCING?

4 A NO.

5 Q YOU UNDERSTAND NOBODY CAN MAKE ANY REPRESENTATIONS
6 THAT ARE YOU IN ANY WAY BINDING ON THIS COURT IN SENTENCING,
7 THIS IS MY JOB AND NOBODY ELSE'S?

8 A YES, SIR.

9 Q ARE YOU MAKING THIS PLEA BECAUSE YOU ARE IN FACT
10 GUILTY OF THE CRIME OF AGGRAVATED KIDNAPPING?

11 A YES, SIR.

12 Q MR. TIPPETT, HAVING IN MIND THE RIGHTS THAT I HAVE
13 EXPLAINED TO YOU, AND THE POSSIBLE PENALTIES YOU ARE LOOKING
14 AT, TO COUNT I, THE CRIME BEING AGGRAVATED KIDNAPPING, WHAT
15 IS YOUR PLEA?

16 A GUILTY.

17 THE COURT: THE COURT WILL ACCEPT THE GUILTY PLEA,
18 FINDING THAT IT IS KNOWINGLY MADE.

19 WHAT IS YOUR DESIRE AS TO SENTENCING?

20 MR. WILKERSON: WELL, YOUR HONOR, IN THIS MATTER
21 DUE TO THE DEFENDANT'S PRIOR RECORD HE WOULD LIKE TO BE
22 SENTENCED TODAY IF THAT WOULD BE POSSIBLE. OF COURSE, IT'S
23 UP TO THE COURT TO DECIDE WHETHER IT HAS ENOUGH INFORMATION
24 AVAILABLE.

25 THE COURT: MR. NASH?

1 MR. NASH: YOUR HONOR, THE STATE DOES NOT FEEL
2 IT'S PREPARED AT THIS TIME TO PROCEED WITH SENTENCING,
3 BECAUSE OF THE BRIEF TIME WE HAVE HAD TO WORK ON THIS. WE
4 HAVEN'T RECEIVED ALL THE INFORMATION WE NEED OUT OF SOUTH
5 CAROLINA AND OTHER JURISDICTIONS, AND WE WILL REQUEST THE
6 MATTER BE REFERRED TO ADULT PROBATION AND PAROLE FOR A
7 PRE-SENTENCE REPORT.

8 THE COURT: YOU HAVE A RIGHT, MR. TIPPETT, TO BE
9 SENTENCED NOT SOONER THAN TWO DAYS FROM TODAY AND NOT LATER
10 THAN THIRTY DAYS. WHAT IS YOUR DESIRE IN THIS MATTER?

11 MR. WILKERSON: WELL, HE IS SOMEWHAT ANXIOUS TO GET
12 THE SENTENCING OVER WITH.

13 THE WITNESS: I WANT TO GET SENTENCED TO GET BACK
14 TO SOUTH CAROLINA AND START GETTING ON THE TIME.

15 BUT AS FAR AS CHECKING INTO MY BACKGROUND, I HAVE
16 A PRETTY GOOD WORK RECORD AND EVERYTHING IN SALT LAKE UP
17 UNTIL THE LAST YEAR OR SO. SO I DON'T KNOW IF IT WOULD BE
18 BETTER FOR ME TO GO AHEAD AND DO A CHECK, JUST GO ON AND
19 SENTENCE. THAT'S MY PROBLEM. SO I DON'T REALLY KNOW. I'LL
20 TAKE HIS RECOMMENDATION.

21 THE COURT: YOU UNDERSTAND BY SENTENCING YOU TODAY,
22 HAVING NO OTHER INFORMATION, THE ONLY ALTERNATIVE I HAVE IS
23 INCARCERATION?

24 THE WITNESS: I REALIZE THAT.

25 THE COURT: I THINK IT BETTER IN YOUR BEST

1 INTEREST TO HAVE THIS MATTER REFERRED AND HAVE A REPORT
2 PREPARED. I DON'T KNOW HOW LONG THAT WOULD TAKE.

3 MR. WILKERSON: I WOULD THINK THEY COULD DO IT
4 WITHIN THE THIRTY-DAY PERIOD.

5 THE COURT: I WOULD THINK SO EASILY WITHIN THIRTY
6 DAYS, AND IF THEY COULD GET IT DONE SOONER WE COULD TAKE
7 CARE OF THIS MATTER SOONER.

8 MR. WILKERSON: OKAY. I THINK THAT WOULD ALSO
9 GIVE THE COURT--GET SOME BACKGROUND ON WHAT HAPPENED.
10 THERE WAS NO INJURY OR ANYTHING DONE TO THE VICTIMS. THEY
11 WERE NOT HELD FOR A VERY LONG PERIOD OF TIME. IT MAY BE WELL
12 IF THE COURT WAS AWARE OF THE FACTUAL SITUATION, TOO. THAT
13 WOULD NOT BE POSSIBLE IF HE WERE SENTENCED TODAY.

14 THE COURT: LET'S REFER THIS MATTER TO THE
15 DEPARTMENT OF ADULT PROBATION AND PAROLE FOR THE PREPARATION
16 OF A PRE-SENTENCE REPORT. IS THAT AGREEABLE WITH YOU, MR.
17 TIPPETT?

18 THE WITNESS: YES, SIR.

19 THE COURT: THAT WILL BE THE ORDER OF THE COURT.
20 AS SOON AS THAT HAS BEEN PREPARED AND CIRCULATED LET'S BRING
21 IT BACK UP HERE. WE'LL FIX SENTENCING TENTATIVELY FOR TWO
22 LAW AND MOTION DAYS FROM NOW.

23 THE CLERK: MARCH 26TH.

24 THE COURT: MARCH 26TH. IF IT'S DONE SOONER THAT
25 WILL TAKE CARE OF IT SOONER THAN THAT. THANK YOU.

1 MR. NASH: YOUR HONOR, AS TO COUNT II, THE STATE
2 WOULD AT THIS TIME MOVE FOR THE DISMISSAL OF COUNT II.

3 THE COURT: YOU HAVE NO OBJECTION TO THAT?

4 MR. WILKERSON: NO OBJECTION.

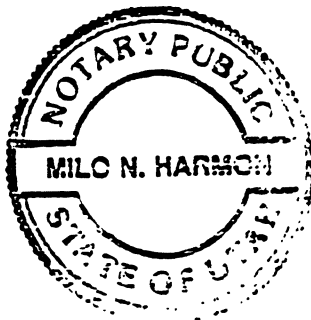
5 THE COURT: COUNT II IS DISMISSED.

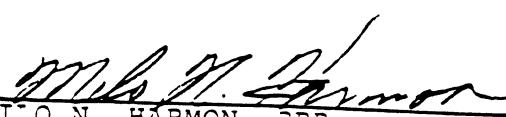
6 (WHEREUPON THIS ARRAIGNMENT WAS CONCLUDED.)
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4 REPORTER'S CERTIFICATE
5

6 I, MILO N. HARMON, RPR, OFFICIAL COURT
7 REPORTER IN THE EIGHTH JUDICIAL DISTRICT, STATE OF UTAH, DO
8 HEREBY CERTIFY THAT THE ABOVE AND FOREGOING PROCEEDINGS WERE
9 BY ME STENOGRAPHICALLY REPORTED AT THE TIMES AND PLACES
10 HEREIN SET FORTH; THAT THE SAME WAS SUBSEQUENTLY BY ME
11 CAUSED TO BE REDUCED TO TYPEWRITTEN FORM CONSISTING OF PAGES
12 1 THROUGH 11 BOTH INCLUSIVE; AND THAT THE SAME CONSTITUTES
13 A TRUE AND CORRECT TRANSCRIPTION OF TESTIMONY GIVEN, EVIDENCE
14 ADDUCED, AND PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE.

15 TO WHICH CERTIFICATION I HEREBY SET MY HAND
16 THIS 26th DAY OF JULY, 1988, AT VERNAL, UTAH.
17




MILO N. HARMON, RPR
REGISTERED PROFESSIONAL REPORTER
(UTAH CSR NO. 51)

IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,	)	ADDENDUM TO BRIEF
	)	OF APPELLANT
Appellant,)	
	)	Case # 990178-CA
v.)	
)	
FRED VANDERVEUR,)	
)	
Appellee.)	

ADDENDUM EXHIBIT J

RANDY A. HUDSON #1565
DEPUTY UINTAH COUNTY ATTORNEY
Attorney for Plaintiff
152 East 100 North
Vernal, Utah 84078
Phone: 801/781-0770

FILED
DISTRICT COURT
UINTAH COUNTY, UTAH

FEB 26 1986

DOROTHY LUCK, CLERK

BY _____ DEPUTY

FILED
CIRCUIT COURT
UINTAH COUNTY, UTAH

FEB 18 1986

CHERYL L. WELLS, CLERK
BY _____ DEPUTY

IN THE CIRCUIT COURT OF UINTAH COUNTY, STATE OF UTAH

STATE OF UTAH, :
 :
 Plaintiff, :
 :
 vs. ^{Steven} :
 WAYNE TIPPETT, AKA :
 DANIEL TERREL KELLEY :
 AKA: TOM PETERSON, TERREL DANNY :
 KELLY, STEVE WAYNE TIPPETT, :
 DANIEL MITCHELL KELLEY :
 DOB: 8/28/52, 9/28/52, :
 :
 Defendant. :

CASE NO. 86CR 14
86CR 197

The undersigned RICK HAWKINS, under oath states on information and belief that the defendant committed the crimes of:

COUNT I: AGGRAVATED KIDNAPPING, in violation of Section 76-5-302, Utah Code Annotated, 1953, as amended, on or about February 17, 1986, in Uintah County, Utah, a First Degree Felony;

The said Defendant at the time and place aforesaid did intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seized, confined, detained, or transported the victim with intent:

a. To hold for ransom or reward, or as a shield of hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

b. To facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

c. To inflict bodily injury on or to terrorize the victim or another.

FIREARM ENHANCEMENT, in violation of Section 76-3-203, Utah Code Annotated, 1953, as amended, on or about February 17, 1986, in Uintah County, Utah;

The said Defendant at the time and place aforesaid did use a firearm or a facsimile of a firearm or the representation of a firearm in the commission or furtherance of the Felony offense alleged in Count I.

Dismissed

COUNT II: AGGRAVATED KIDNAPPING, in violation of Section 76-5-302, Utah Code Annotated, 1953, as amended, on or about February 17, 1986, in Uintah County, Utah, a First Degree Felony;

The said Defendant at the time and place aforesaid did intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seized, confined, detained, or transported the victim with intent:

a. To hold for ransom or reward, or as a shield of hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

b. To facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

c. To inflict bodily injury on or to terrorize the victim or another.

FIREARM ENHANCEMENT, in violation of Section 76-3-203, Utah Code Annotated, 1953, as amended, on or about February 17, 1986, in Uintah County, Utah;

The said Defendant at the time and place aforesaid use a firearm or a facsimile of a firearm or the representation of a firearm in the commission or furtherance of the Felony offense alleged in Count II

This information is based on evidence obtained from the following witnesses:

Authorized for presentment
and filing:

Randy A. Hudson
COUNTY ATTORNEY

Det. R. L. Spaulding
COMPLAINANT

SUBSCRIBED AND SWORN to before
me this 18th day of Feb.,
1986.

Whitney D. Hammond
JUDGE

IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,	)	ADDENDUM TO BRIEF
	)	OF APPELLANT
Appellant,)	
	)	Case # 990178-CA
v.)	
)	
FRED VANDERVEUR,)	
)	
Appellee.)	

ADDENDUM EXHIBIT K

STATE of Utah, Plaintiff and Appellee,
v.
Robert G. JOHNSON, Defendant and Appellant.

No. 900598-CA.

Court of Appeals of Utah.

Dec. 19, 1991.

Defendant was convicted in the Second District Court, Weber County, Ronald O Hyde, J., of six felony counts of securities fraud, six felony counts of sale of unregistered securities, and one felony count of employing unregistered securities agent, and he appealed. The Court of Appeals, Greenwood, J., held that: (1) defendant was denied effective assistance of counsel due to counsel's conflict of interest, and (2) defendant's purported waiver of conflict-free counsel was not valid and did not preclude his claim of ineffective assistance.

Reversed and remanded for new trial.

[1] CRIMINAL LAW ⚖️ 1134(3)

110k1134(3)

While ordinarily claim of ineffective assistance of counsel must be addressed by collateral attack through habeas corpus proceedings, claim may be raised on direct appeal in limited circumstances, such as when there is new counsel on appeal and there is adequate trial record. U.S.C.A. Const.Amend. 6.

[2] CRIMINAL LAW ⚖️ 641.5(.5)

110k641.5(.5)

Formerly 110k641 5

Right under Sixth Amendment to have assistance of counsel for one's defense in criminal prosecution guarantees all criminal defendants right to effective assistance of counsel, and includes right to counsel free from conflicts of interest. U.S.C.A. Const.Amend. 6.

[2] CRIMINAL LAW ⚖️ 641.13(1)

110k641.13(1)

Right under Sixth Amendment to have assistance of counsel for one's defense in criminal prosecution guarantees all criminal defendants right to effective assistance of counsel, and includes right to counsel free from conflicts of interest. U.S.C.A. Const.Amend. 6.

[3] CRIMINAL LAW ⚖️ 641.13(1)

110k641.13(1)

Purpose of right of effective assistance of counsel is to ensure that criminal defendants receive fair trials, but while defendant should be afforded fair opportunity to hire attorney of his choice, that right is not absolute. U.S.C.A. Const.Amend. 6.

[4] CRIMINAL LAW ⚖️ 641.5(7)

110k641.5(7)

Standard for analyzing Sixth Amendment claim grounded on conflict of interest differs from that used for other ineffective assistance of counsel claims: defendant who did not object to conflict at trial has burden on appeal of demonstrating with specificity that actual conflict of interest existed which adversely affected his lawyer's performance, and if such showing is made, prejudice will be presumed. U.S.C.A. Const.Amend. 6.

[5] CRIMINAL LAW ⚖️ 641.5(.5)

110k641.5(.5)

Formerly 110k641.5

Defendant being prosecuted for violations of state securities law was denied effective assistance of counsel as result of conflict of interest of his trial counsel, who was implicated as conspirator in testimony of State's chief prosecution witness and in prosecutor's closing argument: effect of conflict was evidenced in counsel's questioning of chief prosecution witness, his failure to call defendant as witness, and his failure to object to comments of prosecutor during closing argument. Rules of Prof.Conduct, Rules 1.7(b), 8.4(d); U.S.C.A. Const.Amend. 6.

[6] CRIMINAL LAW ⇨ 641.13(1)

110k641.13(1)

Counsel's conduct may be examined in light of prevailing professional and ethical standards to determine whether defendant received effective representation. U.S.C.A. Const.Amend. 6.

[7] CRIMINAL LAW ⇨ 641.10(1)

110k641.10(1)

Test for determining on appeal whether attorney should have been disqualified from case because of appearance of impropriety is two-pronged: first, court must find that there is at least reasonable possibility that some specifically identifiable impropriety occurred because of representation, though proof of actual wrongdoing is not necessary, and second, court must balance likelihood of public suspicion or obloquy against social interest in allowing defendant to continue being represented by lawyer of his choice. Rules of Prof.Conduct, Rules 1.7(b), 8.4(d).

[8] CRIMINAL LAW ⇨ 641.5(7)

110k641.5(7)

Defendant's purported waiver during pretrial proceeding of any potential conflict of interest arising from his representation by trial counsel did not preclude defendant's claim of ineffective assistance based upon counsel's implication as coconspirator during trial, because waiver was based on representations contrary to what actually happened at trial and incomplete knowledge of possible consequences. U.C.A.1953, 61-1-1, 61-1-3, 61-1-7, 61-1-21; U.S.C.A. Const.Amend. 6.

[9] CRIMINAL LAW ⇨ 641.5(7)

110k641.5(7)

Defendant can generally waive his right to conflict-free counsel, but to be valid, decision must be knowing and intelligent, and made only after adequate warning by trial court of potential hazards posed by conflict of interest and of accused's right to other counsel; validity of waiver depends upon whether defendant knew enough about possible consequences to make informed choice. U.S.C.A. Const.Amend. 6.

[10] CRIMINAL LAW ⇨ 641.5(7)

110k641.5(7)

Trial courts have discretion to grant waiver of right to conflict-free counsel and are not expected to foresee all possible events which may take place during trial. U.S.C.A. Const.Amend. 6.

[11] CRIMINAL LAW ⇨ 641.5(7)

110k641.5(7)

Trial courts can refuse to accept defendant's waiver of conflict-free counsel where there is either actual or potential conflict of interest between defendant and counsel. U.S.C.A. Const.Amend. 6.

*486 Michael F. Olmstead (argued), Ogden, for defendant and appellant.

R. Paul Van Dam, State Atty. Gen. and Kenneth A. Bronston, Asst. Atty. Gen., Salt Lake City, for plaintiff and appellee.

Before GARFF, GREENWOOD and RUSSON, JJ.

OPINION

GREENWOOD, Judge:

Defendant Robert G. Johnson appeals his conviction of six felony counts of securities fraud in violation of Utah Code Ann. §§ 61-1-1(2) and 61-1-21 (1989), six felony counts of sale of unregistered securities in violation of Utah Code Ann. §§ 61-1-7 and 61-1-21 (1989), and one felony count of employing an unregistered securities agent in violation of Utah Code Ann. §§ 61-1-3(2) and 61-1-21 (1989). He appeals on the basis that he was denied effective assistance of counsel at trial. We reverse and remand. [FN1]

FN1. Defendant also raises other issues on appeal which we do not reach because of our resolution of his ineffective assistance of counsel claim.

BACKGROUND

As a result of a criminal investigation by the Utah Attorney General's Office, defendant was arrested and charged by information with thirteen felony counts of securities violations. He retained attorney Joseph Bottum to represent him. Pursuant to its investigation, the State had reason to believe that Bottum had substantial knowledge of and had participated in one of the transactions which formed the basis of the charges against defendant. The State anticipated presenting evidence in that regard at trial, including possibly calling Bottum as a witness. The State filed a pretrial motion informing the court of the possible conflict of interest between defendant and Bottum. In its motion, the State requested that the court order Bottum and defendant to state on the record the nature and extent of the conflict and to explain to defendant the potential effect on his defense if Bottum were called to testify at trial. The State moved the court to either allow defendant to waive the conflict or to disqualify Bottum from further representing defendant.

The State attached to its motion an affidavit of Ed Morin, an investigator with the Utah Division of Securities, who had investigated the transactions that resulted in defendant's charges. The affidavit contained the following statements. Morin had obtained evidence that Bottum knew about and participated in the planning of the investment program in question. Bottum received cash from defendant to purchase stock or an interest in a company that was to be merged with another company and sold. The transaction would provide profits to the participants, including Bottum, defendant, the investors, and others. When Bottum was unable to complete the transaction, he returned over \$50,000 in cash, which defendant had collected, to defendant for further use in the scheme. Morin also stated that the State alleged that *487 the completed transaction constituted the sale of unregistered securities and that fraudulent and false statements were made in connection with the sale of the investment. In its accompanying memorandum, the State said it planned to present this evidence at trial.

The court held a hearing on the State's motion. At the hearing, Bottum represented to the court that he had no knowledge of or involvement in the transactions. He stated that he "had nothing to do with [the sale of securities]," and that he knew of no reason why he would be called to testify. The State discussed the information it had showing that Bottum was involved. The State indicated Bottum would not be called as a witness by the prosecution, but that other witnesses would testify about Bottum's involvement. Bottum, however, repeatedly contended that he "was at a loss to understand what they're talking about." He stated that if the State were correct, there would be "a tremendous problem for [his] client," but if such evidence were presented at trial, defendant could rebut all of it and exonerate Bottum through his testimony. After being informed that evidence might be introduced at trial implicating Bottum, and that Bottum would not be able to take the stand to refute it, defendant told the court he still wished to have Bottum represent him.

At trial, the State's chief prosecution witness was Blake Adams. Adams had originally been charged as a co-defendant with defendant but had pleaded guilty. Adams testified that defendant introduced him to Bottum and that the three of them formed a partnership. He testified that he and defendant met with Bottum in Bottum's law office where Bottum told them he knew of a company which could be purchased through stock acquisition and then merged with another

(Cite as: 823 P.2d 484, *487)

company. Bottum told them he had access to the company or an individual who controlled the company. Bottum offered to take care of the filings and have the stock traded properly. Defendant and Adams were to raise the money. Bottum, defendant and Adams would split the proceeds in thirds. Adams further testified that as part of the deal, they used funds from their partnership in the form of a check made out to Joseph Bottum Trust Account. Adams testified that the scheme "was a [defendant], Adams and Bottum thing." In his closing argument, the prosecutor recounted Adams's testimony about Bottum's involvement.

On appeal defendant argues that he was denied effective assistance of counsel in violation of the Sixth Amendment due to a conflict of interest between him and his attorney. He argues that his waiver during the pretrial hearing is invalid because a defendant, as a matter of law, cannot waive such a conflict.

INEFFECTIVE ASSISTANCE OF COUNSEL

[1] While ordinarily a claim of ineffective assistance of counsel must be addressed by collateral attack through habeas corpus proceedings, in limited circumstances, the claim may be raised on direct appeal. *State v. Humphries*, 818 P.2d 1027, 1029 (Utah 1991); *United States v. Swanson*, 943 F.2d 1070, 1072 (9th Cir.1991); *United States v. Tatum*, 943 F.2d 370, 380 (4th Cir.1991); *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 133-34 (3d Cir.1984). Those circumstances exist when there is new counsel on appeal and there is an adequate trial record. *Zepp*, 748 F.2d at 133-34. We find both present in this case, and therefore proceed to consider the merits of defendant's claims.

An ineffective assistance of counsel claim is usually a mixed question of law and fact. *State v. Templin*, 805 P.2d 182, 186 (Utah 1990) (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674 (1984)). Although there are no fact findings as to the ineffectiveness of counsel here, the record of what actually transpired allows us to determine on appeal, as a matter of law, whether defense counsel's performance constituted ineffective counsel. *Zepp*, 748 F.2d at 133-34.

[2] The Sixth Amendment to the United States Constitution states: "In all criminal *488 prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." This right guarantees all criminal defendants the right to effective assistance of counsel. *Templin*, 805 P.2d at 186, and "includes the right to counsel free from conflicts of interest." *State v. Webb*, 790 P.2d 65, 72 (Utah App.1990) (citing *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065).

[3] The purpose of the right to effective assistance of counsel is to ensure that criminal defendants receive fair trials. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. While a defendant "should be afforded a fair opportunity" to hire the attorney of his or her choice. *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932), that right is not absolute. *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988); *United States v. Collins*, 920 F.2d 619, 625 (10th Cir.1990) cert. denied, 500 U.S. 920, 111 S.Ct. 2022, 114 L.Ed.2d 108 (1991) (citing *United States v. Gipson*, 693 F.2d 109, 111 (10th Cir.1982) cert. denied, 459 U.S. 1216, 103 S.Ct. 1218, 75 L.Ed.2d 455 (1983)). The right to effective assistance of counsel seeks to "guarantee an effective advocate for each criminal defendant." *Wheat*, 108 S.Ct. at 1697, and is paramount to a defendant's right to be represented by an attorney of his or her choice. "Courts therefore must balance a defendant's constitutional right to retain counsel of his [or her] choice against the need to maintain the highest standards of professional responsibility, the public's confidence in the integrity of the judicial process and the orderly administration of justice." *Collins*, 920 F.2d at 626 (citations omitted).

The right to effective assistance of counsel is "so basic to a fair trial that [its] infraction can never be treated as harmless error." *Holloway v. Arkansas*, 435 U.S. 475, 489, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978) (quoting *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827- 28, 17 L.Ed.2d 705 (1967)); *State v. Velarde*, 806 P.2d 1190, 1192 (Utah App.1991).

Conflict of Interest

[4] "[A] sixth amendment claim grounded on conflict of interest is a special subtype of an ineffectiveness claim" and must be analyzed under the following standard, which is different than that used for other ineffective assistance of counsel claims. *Velarde*, 806 P 2d at 1192, *Webb*, 790 P 2d at 72. A defendant who did not object to the conflict at trial has the burden on appeal of demonstrating with specificity that "an actual conflict of interest existed which adversely affected his [or her] lawyer's performance." *Webb*, 790 P 2d at 73 (quoting *Cuyler v Sullivan*, 446 U S 335, 348, 100 S Ct 1708, 1718, 64 L Ed 2d 333 (1980)), *Zepp*, 748 F 2d at 135-36 (citing *Wood v Georgia*, 450 U S 261, 271, 101 S Ct 1097, 1103, 67 L Ed 2d 220 (1981)). If the defendant makes such a showing, prejudice need not be demonstrated to prevail on the claim. *Cuyler*, 446 U S at 349-50, 100 S Ct at 1718-19, *Webb*, 790 P 2d at 73. The court will presume the defendant was prejudiced by the lawyer's performance. *United States v Cronin*, 466 U S 648, 658, 104 S Ct 2039, 2046, 80 L Ed 2d 657 (1984), *Webb*, 790 P 2d at 73 (quoting *Strickland*, 466 U S at 692, 104 S Ct at 2067).

[5] Utah appellate decisions have addressed counsel's conflict of interest only in the context of representation of multiple clients and a potential conflict of interest among those clients. No Utah cases have presented facts where, as here, the alleged conflict of interest is between the lawyer and the client. We therefore look to other jurisdictions to determine if an actual conflict of interest exists here, and if so, whether it adversely affected counsel's performance. We find *Zepp*, 748 F 2d 125, and *United States v Hobson*, 672 F 2d 825 (11th Cir) (per curiam), cert denied, 459 U S 906, 103 S Ct 208, 74 L Ed 2d 166 (1982), particularly helpful.

In *Zepp*, defendant was arrested and charged with possession of cocaine and destruction of evidence following a warrantless sweep search of her home. After the search, she was taken to police headquarters. The results from the search were negative. Later, defense counsel and *489 defendant went to defendant's residence and closed the front door. Moments later police officers heard a toilet flush several times. Three days later, the officers obtained a search warrant for the septic tank connected to the house. Forty plastic bags were found during the search, twenty of which tested positive for cocaine residue.

Defense counsel was called as a prosecution witness for the government at a pretrial suppression hearing. He objected and thereafter entered into a stipulation with the government wherein he stated that he did not use any of the bathrooms while he was inside defendant's house. The stipulation was introduced into evidence at trial. On appeal, the court held that defendant's Sixth Amendment right to effective assistance of counsel was violated because her counsel faced potential criminal liability on the same charges for which she was being tried and because he acted as a prosecution witness. *Id.* at 136.

The court stated that "when defense counsel has independent personal information regarding the facts underlying his client's charges, and faces potential liability for those charges, he has an actual conflict of interest," which may likely impair his professional judgment. *Id.* In such a situation, a court cannot assume that a lawyer "vigorously pursued his client's best interest entirely free from the influence of his own concern to avoid his own incrimination." *Id.* The lawyer must either withdraw or be disqualified. *Id.*

Similarly, in *Hobson*, defendant appealed his conviction of drug trafficking on the ground that a conflict of interest between him and his attorney violated his Sixth Amendment right to effective assistance of counsel. The affidavits of two witnesses implicated defendant's attorney as a coconspirator in the transportation of marijuana from Panama to the United States. The court upheld the district court's disqualification of defense counsel because if the evidence indicating defense counsel's involvement in the crime were presented at trial, defense counsel's credibility and integrity would be impugned, which would likely be detrimental to defendant. *Hobson*, 672 F 2d at 828-29.

[6] *Zepp*, *Hobson* and other conflict of interest cases have also discussed ethical standards under the Rules of Professional Conduct. [FN2] While violation of the Rules does not "create any presumption that a legal duty has been breached" or provide a basis for civil liability, *Scope*, Utah R.Prof Conduct, courts have referred to the Rules to augment legal principles involving lawyer conduct. The application of ethical standards to particular facts is a question of law. See *Hobson*, 672 F 2d at 828. Counsel's conduct may be examined in light of prevailing professional and

ethical standards to determine whether defendant received effective representation. Zepp, 748 F.2d at 135.

FN2. The Utah Rules of Professional Conduct replaced the earlier Utah Canons of Professional Responsibility.

Rule 1.7(b) of the Utah Rules of Professional Conduct states:

A lawyer shall not represent a client if the representation of that client may be materially limited by ... the lawyer's own interest, unless: (1) The lawyer reasonably believes the representation will not be adversely affected, and (2) Each client consents after consultation

....

Also, in order to continue representation under Rule 1.7(b), the client's representation must not appear to be adversely affected by the lawyer's other interests. Code Comparison, Utah R.Prof.Conduct 1.7. The Comment notes to this rule explain that where the "probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." Comment, Utah R.Prof.Conduct 1.7.

Utah Rule of Professional Conduct 8.4(d) addresses the institutional interest in ensuring that just verdicts are rendered in criminal cases--an interest that may be jeopardized by the existence of conflicts of interest. Wheat, 108 S.Ct. at 1697. Courts *490 have an "interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Id. Rule 8.4(d) states: "It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice." When a lawyer engages in irresponsible or improper conduct, the public's confidence in the bar and in the legal process is eroded. Hobson, 672 F.2d at 828. This is especially true when a lawyer's integrity is impugned before a jury. Id. at 829.

[7] In Hobson, the court articulated a two-pronged test for determining on appeal whether an attorney should have been disqualified from a case because of an appearance of impropriety. Although the test was based upon Canon Nine of the former Canons of Professional Responsibility, we find the test appropriate under the current Utah Rules of Professional Conduct. First, the court must find that there is "at least a reasonable possibility that some specifically identifiable impropriety" occurred because of the representation. Id. (quoting Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir.1976)). There need not be proof of actual wrongdoing, however. Id. at 829. Second, the court must balance "the likelihood of public suspicion or obloquy" against the social interest in allowing the defendant to continue being represented by the lawyer of his or her choice. Hobson, 672 F.2d at 828 (quoting Woods, 537 F.2d at 813 n. 12). "[T]he interest in permitting a criminal defendant to retain counsel of his choice is strong and deserves great respect. The right to counsel of choice is not absolute, however, and must give way where its vindication would create a serious risk of undermining public confidence in the integrity of our legal system." Hobson, 672 F.2d at 828. An attorney should be disqualified if both prongs are satisfied. Id. [FN3]

FN3. It is also apparent that Bottum could have, and perhaps should have, been called as a witness. Utah Rule of Professional Conduct 3.7(a) states:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where. (1) The testimony relates to an uncontested issue; (2) The testimony relates to the nature and value of legal services rendered in the case; or (3) Disqualification of the lawyer would work substantial hardship on the client.

In applying the foregoing principles to this case, we note that Zepp and Hobson present facts similar to those herein. Bottum was implicated as a coconspirator in Adams's testimony and in the prosecutor's closing argument. He had an interest in exonerating himself which was not consistent with defending his client. Also, Bottum's integrity and credibility as defense counsel, as well as personally, were eroded by the accusations, making him less effective in representing defendant. These facts demonstrate an actual conflict of interest between Bottum and defendant. The conflict clearly affected Bottum's performance as defense counsel. The effect of the conflict was evident in his questioning of Adams, his failure to call defendant as a witness, and his failure to object to comments of the prosecutor during closing argument. Ethical considerations also lead to the conclusion that an actual conflict of interest existed between Bottum and defendant and that he ought not to have acted as counsel. He had a personal interest in vindicating himself which was not consonant with the interests of his client. Implications that Bottum was a participant in illegal

activities not only lessened his effectiveness as counsel for defendant, but also discredited the system under which defendant was tried. Because we find that there was an actual conflict of interest between Bottum and defendant and that the conflict affected Bottum's performance as counsel, we presume defendant was prejudiced thereby

Warver

[8] Defendant purportedly waived any potential conflict of interest during the pretrial proceeding. Defendant argues that his warver is invalid because, as a matter of law, he is unable to waive such a conflict.

[9] A defendant can generally waive his or her right to conflict-free counsel. *Holloway*, *491 435 U.S. at 483 n. 5, 98 S.Ct. at 1178 n. 5. To be valid, such a warver must be knowing and intelligent, and made "only after adequate warning by the [trial] court of the potential hazards posed by the conflict of interest and of the accused's right to other counsel" *United States v Rodriguez*, 929 F.2d 747, 750 (1st Cir.1991) (per curiam). The validity of a warver depends upon whether the defendant knew enough about the possible consequences to make an informed choice. *United States v Roth*, 860 F.2d 1382, 1387-88 (7th Cir.1988) cert. denied, 490 U.S. 1080, 109 S.Ct. 2099, 104 L.Ed.2d 661 (1989).

[10][11] Trial courts have the discretion to grant a warver and are not expected to foresee all the possible events which may take place during trial. See *Roth*, 860 F.2d at 1387-89. Trial courts can refuse to accept a defendant's warver where there is either an actual or a potential conflict of interest between defendant and counsel. *Wheat*, 108 S.Ct. at 1698-99. Trial courts have an "institutional interest in protecting the truth-seeking function of the proceedings over which [they are] presiding by considering whether [defendants have] effective assistance of counsel, regardless of any proffered warver[s]" *United States v Moscony*, 927 F.2d 742, 749 (3d Cir.) cert. denied, 501 U.S. 1211, 111 S.Ct. 2812, 115 L.Ed.2d 984 (1991).

We are sensitive to the possibility that a defendant may seek a warver and then try to use it to his or her advantage later. We do not condone such manipulation. In this case, however, Bottum's denial to the trial court during the pretrial hearing of any knowledge or involvement in the sale of securities was not borne out. Bottum said that he had not participated in the transactions and could refute any implications with defendant's testimony. At trial, however, prosecution witness Adams was adamant about Bottum's involvement. Bottum did not call defendant as a witness and therefore neither he nor any other witness was able to rebut this evidence. Defendant was advised during the pretrial hearing that Bottum would not be able to act both as counsel and as a witness, but was never told of the possible deleterious effects on the jury if his defense counsel were implicated in the same dealings constituting criminal activity as was he. Therefore, the warver does not preclude defendant's ineffective assistance claim because it was based on representations contrary to what actually happened at trial and incomplete knowledge of the possible consequences. When the conduct occurred during trial, defendant was not then fully informed of the possible consequences and did not then have an opportunity to make a voluntary and informed warver. [FN4] Therefore, the warver was not valid and does not preclude defendant's claim of ineffective assistance of counsel.

FN4 While we do not go so far, *Hobson* held a defendant may not waive a conflict of interest where "the ethical violation involves public perception of the lawyer and the legal system rather than some difficulty in the attorney's effective representation...." 672 F.2d at 829

CONCLUSION

Defendant was denied his Sixth Amendment right to counsel because of the ineffectiveness of his counsel resulting from an actual conflict of interest. His pretrial warver of any potential conflict did not extend to what occurred at trial when the actual conflict crystallized. We reverse and remand for a new trial.

GARFF and RUSSON, JJ, concur.

END OF DOCUMENT

IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,	)	ADDENDUM TO BRIEF
	)	OF APPELLANT
Appellant,)	
	)	Case # 990178-CA
v.)	
)	
FRED VANDERVEUR,)	
)	
Appellee.)	

ADDENDUM EXHIBIT L

FILED

OCT 03 1996

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

COURT OF APPEALS

State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	
v.	)	Case No. 950280-CA
)	
Wayne S. Tippet,)	
	)	F I L E D
Defendant and Appellant.	)	(October 3, 1996)

Eighth District, Vernal Department
The Honorable John R. Andersen

Attorneys: Alan M. Williams, Vernal, for Appellant
Kris Leonard, Salt Lake City, for Appellee

Before Judges Orme, Davis, and Greenwood.

ORME, Presiding Judge:

Defendant's main contention on appeal is that the trial court violated Utah R. Crim. P. 11(e) by failing to inform him, before he entered his guilty plea, of the maximum additional sentence that could be imposed upon him by reason of the firearm enhancement.¹

In State v. Gibbons, 740 P.2d 1309, 1312-14 (Utah 1987), our Supreme Court held that strict compliance with the constitutional and procedural requirements for the taking of a guilty plea was required before such a plea could be taken. However, pleas taken before Gibbons² are upheld so long as the record as a whole demonstrates "substantial compliance" with Rule 11 of the Utah

1. Although defendant raises additional arguments, they are without merit and we decline to address them further. See, e.g., State v. Carter, 776 P.2d 886, 889 (Utah 1989) ("[T]his Court need not analyze and address in writing each and every argument, issue, or claim raised and properly before us on appeal.").

2. Gibbons was a clear break with the Supreme Court's rulings in previous cases dealing with the validity of guilty pleas and, therefore, is not applied retroactively. State v. Hoff, 814 P.2d 1119, 1123 (Utah 1991).

Rules of Criminal Procedure and the Constitution. Willett v. Barnes, 842 P.2d 860, 861 (Utah 1992); State v. Hoff, 814 P.2d 1119, 1123-24 (Utah 1991). In this case, defendant's plea was taken prior to the Supreme Court's opinion in Gibbons and, therefore, must be evaluated under the substantial compliance test.

Utah R. Crim. P. 11(e) provides, in pertinent part, as follows:

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

. . . .

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

During the taking of the plea, the trial court informed defendant that a one to five year firearm enhancement was possible in addition to the sentence for the underlying aggravated kidnapping charge. Defendant then entered his plea of guilty. However, at defendant's sentencing, following the receipt of a presentence report indicating five prior convictions for armed robbery, the court enhanced defendant's minimum mandatory term of fifteen years to life with a consecutive term of five to ten years for his use of a firearm.³ Because the trial court failed to inform defendant of the maximum sentence that could have been imposed upon him by reason of the firearm enhancement, the trial court was not in substantial compliance with Utah R. Crim. P. 11 on this point.

Nonetheless, it is not necessary that defendant be allowed to withdraw his guilty plea since the problem is limited to the

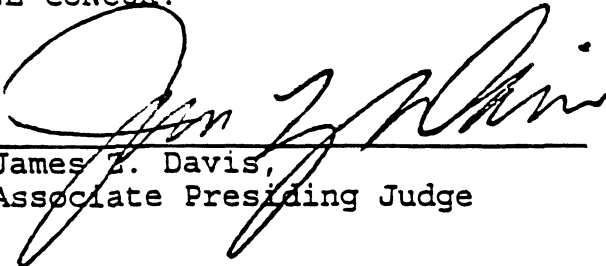
3. Of course, at the time the plea was taken, the trial court did not know of the additional convictions. Nonetheless, the point could have been adequately covered by explaining the enhancement scheme to defendant and emphasizing that the enhancement to be ultimately imposed would depend on the number and nature of his prior convictions, but could be as much as ten years. See Utah Code Ann. § 76-3-203(1) (Supp. 1996).

firearm enhancement. At the invitation of the State, we modify defendant's sentence by reducing the firearm enhancement to that which had been explained to him, namely, not less than one year nor more than five years. See State v. Dunn, 850 P.2d 1201, 1211 (Utah 1993) (holding that appellate courts have the authority to modify criminal judgments on appeal). The order appealed from is otherwise affirmed.



Gregory K. Orme,
Presiding Judge

WE CONCUR:



James T. Davis,
Associate Presiding Judge



Pamela T. Greenwood, Judge