

1999

Utah v. Tarnawieki : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

STATE OF UTAH

Plaintiff-Appellee
v.

Case No. 990225-CA

MARHA TARNAWIECKI

Priority No. 2

Defendant-Appellant

OPENING BRIEF OF APPELLANT
MARHA TARNAWIECKI

On Appeal from the denial of an motion to extend the time to file and
motion to withdraw a guilty plea in the Third Judicial District Court,
in and for Salt Lake County, State of Utah; Honorable Sheila K. McCleve,
District Court Judge, presiding.

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STATEMENT OF CASE-RELEVANT FACTS-JURISDICTION

Defendant is an alien.(RT, Page 178, page 7, line 20) English is a second language for defendant. On May 18, 1998, there was an incident with defendant's estranged husband, Mark J. Grosser, that lead to an information that was filed on May 20, 1998, charging defendant with two misdemeanors. Count one was an alleged violation of a domestic protective order prohibiting defendant, Marha Tarnawiecki, from attempting, committing, or threatening to commit abuse or domestic violence, as enumerated in the statement of probable cause. Count two was alleged assault.(TC, Pages 1-3)

On July 17, 1998, defendant pled guilty to count one of the information and her plea affidavit was entered that date.(TC, Pages 14-15) Also, on July 17, 1998, there was a guilty plea colloquy between the trial court and defendant.(Reporter's transcript of July 17, 1998) The plea affidavit omitted the constitutional and Rule 11 requirements of right to speedy public trial before an impartial jury, minimum sentence and penalty, and there were no foundational facts establishing the prima facie case of attempting, committing, or threatening to commit abuse or domestic violence.(TC, Pages 14-15) The plea colloquy failed to mention the right to a speedy public trial before an impartial jury, the minimum sentence and inadequately inquired as to the facts underlying count one. Specifically, the trial court only parroted

that the defendant intentionally violated a protective order, a legal conclusion without any underlying facts.(RT, July 17, 1998, page 2, lines 17-25)

Defendant alleges that her criminal defense lawyer was ineffective and erroneously urged her to plead guilty because of his lack of preparation, investigation and follow up. On September 17, 1998, defendant filed a motion to extend the time to file and to withdraw her guilty plea.(TC, Pages 27-39,) An evidentiary hearing was had on December 29,1998.(RT, Page 178, et. seq.)

On February 8, 1999, the trial court denied the motion to extend and withdraw her plea.(RT, Pages 179, et. seq.) On February 18, 1999, the trial court signed Findings of Fact and Conclusions of Law, specifically finding that it had no jurisdiction to hear the motion to extend and withdraw because of the 30 day limitation. Furthermore, that no further decision as to the merits of the motion was necessary.(TC, Pages 163-4)

On March 10, 1999, defendant filed her Notice of Appeal, challenging the denial of the motion to extend the time to file and the motion to withdraw her plea.(TC, Pages 156-8) Based on defendant's guilty plea to violation of a protective order, defendant has served forty-five days in the county jail and INS has filed a deportation hearing that is still pending and scheduled for hearing early in January, 2000.(TC, Page 89, et.seq.)

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction to hear this matter under the provisions of § 78-2a-3(2)(e), Utah Code Annotated, as an appeal by right from a court of record in a criminal case based on the denial of a motion to extend time to file a motion to withdraw a guilty plea.

I

WHERE CRIMINAL DEFENDANT IS NOT ADVISED OF HER RIGHT TO A SPEEDY PUBLIC TRIAL BEFORE AN IMPARTIAL JURY, HER GUILTY PLEA MUST BE SET ASIDE

The Utah Rules of Criminal Procedure, Rule 11, regarding guilty pleas, specifically, Rule 11(e)(3), in pertinent part, provides “The court ... may not accept the plea **until** the court has found ... (3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, **the right to a speedy public trial before an impartial jury**, the right to confront and cross examine in open court the prosecution witnesses, the right to compel attendance of defense witnesses, and that **by entering the plea, these rights are waived;**” Utah R. Crim. P., Rule 11(e)(3). (Emphasis added).

STRICT COMPLIANCE WITH RULE 11 IS REQUIRED

In **State v. Gibbons**, 740 P.2d 1309, 1313-14, (Utah 1987), the Utah Supreme Court held that trial judges are responsible for strict compliance with Rule 11(e). “Rule 11(e) squarely places on trial courts the burden of ensuing that **constitutional and Rule 11(e) requirements are complied with** when a guilty plea is entered. The basis for that duty is found in *Boykin v Alabama*, 395 U.S. 238, 243-44, 89 S.Ct. 1709, 1712-13, 23 L.Ed.2d 274 (1969), where the United States Supreme Court stated: ‘What is at stake for

an accused facing [punishment] demands the utmost solicitude of which the courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.” (Emphasis added).

Utah courts have also held that “[it] is critical ... that strict compliance be demonstrated on the record at the time the guilty ... plea is entered.” **State v. Smith**, 812 P.2d 470, 477 (Utah App. Ct. 1991) cert. denied, 836 P.2d 1383 (1992). Although a rigid colloquy or rote recitation of the elements of Rule 11 is not required, see **State v. Abeyta**, 852 P.2d 993, 996 (Utah 1993); **State v. Maquire**, 830 P.2d 216, 218 (Utah 1991); a record of compliance with Rule 11(e) must nonetheless be established by multiple means, either a plea affidavit or a plea colloquy between the trial court and the defendant, or both, at which the trial court must ensure that the defendant’s guilty plea is knowingly and voluntarily entered. **“It is imperative that ‘no requirement of the rule’ [11] be omitted by the trial court.”** **State v. Visser**, 973 P.2d. 998, at 1002 (Utah App. 1999). (Emphasis added)

Visser, *supra*, is the latest case regarding the omission to advice of the right to a speedy public trial. In **Visser**, the court held that the trial court abused its discretion as a matter of law in not advising defendant, before accepting his guilty plea in mid-trial, of his constitutional right to a speedy

public trial before an impartial jury. Despite the fact that the trial itself presupposed that the defendant had actually been given a speedy public trial before an impartial jury, the court reversed the trial court's order denying defendant's motion to withdraw his guilty plea, and remanded to the trial court with instructions to allow defendant to withdraw his guilty plea. In *Visser*, supra, at 1002, the court opined: **"Our review of the record in this case reveals that when the trial court accepted defendant's plea, it: (1) failed to inform defendant of his constitutional right to trial by an impartial jury; (2) failed to inform defendant of his constitutional right to a speedy trial; and (3) failed to ensure defendant understood that, by entering his plea, he was waiving these rights."** (Emphasis added)

Since neither the plea affidavit nor the plea colloquy contain any reference to a speedy public trial before an impartial jury, the **defendant could not waive a right that she did not know about**. A waiver is the intentional or voluntary relinquishment of a **known right**. *Atlas Life Ins. v. Schrimsher*, 179 Okl. 643, 66 P.2d 944, 948. (1937). Since the defendant was never advised of her constitutional and Rule 11 right to a speedy public trial before an impartial jury, she could not waive that right. Rule 11 requires that the court may not accept the plea of guilty **until** there has been an

advisement of the defendant's constitutional and Rule 11 rights, therefore the court never had the power and jurisdiction to accept the guilty plea ab initio.

The trial court's mistake meets the abuse of discretion and plain error tests of appellate review as enumerated in **Visser**, *supra*, and **State v. Dunn**, 850 P.2d 1201, at 1208-9 (Utah 1993). Since the defendant extensively briefed Rule 11 and it was frequently referred to during the evidentiary hearing, the trial court should have been on notice of its applicability to the fact pattern. Therefore, by reading Rule 11(e)(3) it should have been obvious that the court had a duty to inform the defendant of the right to a speedy public trial by an impartial jury, before accepting the defendant's plea. Without notice of the right to a speedy public trial by an impartial jury, the lack of such information was critically important in evaluating whether or not to go to trial, and affected the case's outcome.

II

IF CRIMINAL DEFENDANT IS NOT PROPERLY ADVISED OF THE MINIMUM SENTENCE, HER GUILTY PLEA MUST BE SET ASIDE

The trial clerk's record of the plea affidavit (TC, pages 14-15), on page two, merely lists in columnar form the headings Offense, Jail, Fine and Plus Maximum 85% Surcharge. However there is no reference in the plea affidavit to the fact that the minimum sentence may be 0 days in jail **and** \$0.00. There

is no conjunction **“and”** in the plea affidavit. Also, there is no mention that the punishment of jail time is in the county jail and not state prison. The reporter’s transcript of July 17, 1998, (page 2, lines 9-16) contains the only colloquy discussion of the potential sentence and that discussion is limited to the maximum penalty. There is no reference to the minimum sentence that could be imposed.

Rule 11(e)(5), in pertinent part, provides: **“The court ... 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 offence to which a plea is entered, including the possibility of the imposition of consecutive sentences.” Utah R. of Crim. P., Rule 11(e)(5). (Emphasis added.) Therefore, because of the failure to advise the defendant of the minimum fine **and** jail time, the defendant’s constitutional and Rule 11 rights have been violated and the defendant must be allowed to withdraw her guilty plea as a matter of law. The omission of the word **and** in the plea affidavit and the lack of any mention of the minimum penalty in the colloquy between the trial court and the defendant is fatally defective.

In **State v. Smith**, 777 P.2d 464, at 466 (Utah 1989) the Utah Supreme Court held that where neither the plea affidavit nor the trial court clearly

explained the possibility of a minimum mandatory sentence to the defendant, there were grounds to vacate the guilty plea, since it was not knowingly and voluntarily made. In **State v. Pharris**, 798 P.2d 722 (Utah App. 1990), the court vacated the defendant's conviction and remanded to the trial court to allow the defendant to withdraw his plea because the trial court failed to review the possible punishment with the defendant as required by Rule 11(e)(5).

III

THERE WAS NO FACTUAL BASIS FOR THE PLEA IN THE PLEA AFFIDAVIT, THE COLLOQUY, OR BOTH AND THE DEFENDANT DID NOT UNDERSTAND THE NATURE AND ELEMENTS OF VIOLATION OF A PROTECTIVE ORDER

A trial court must make an inquiry on the record concerning the defendant's understanding of the nature and elements of the offense as required by Rule 11. Utah Rules of Criminal Procedure, Rule 11(e)(4)(A)(B), in pertinent part, provides that a court may not accept a guilty plea until: "(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements; (B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was

actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish substantial risk of conviction;”

The Utah Supreme Court has held that a defendant’s guilty plea was involuntarily made, and the judgment of conviction was entered without due process of law in violation of Utah Constitution, Article I, Section 7, because the judge failed to make any findings on the record that defendant understood nature and elements of offense to which he pled guilty and record showed that defendant did not understand nature and elements of offense. **State v.**

Breckenridge, 688 P.2d 440, (Utah 1984). A trial court must make an inquiry on the record concerning the defendant’s understanding of the nature and elements of the offense as required by Rule 11.(currently, Rule 11(e)(4)(A)(B)). **State v. Pharris**, 798 P.2d 772, at 777, (Utah App. 1990).

Failure to inform a defendant of the nature and elements of the offense is fatal to a guilty plea conviction. **State v. Gibbons**, 740 P.2d 1309, 1314, (Utah 1987); **State v. Valencia**, 776 P.2d 1332, 1335, (Utah App. 1989); Parroting the statutory elements of the crime charged against a defendant is merely a legal conclusion and does not establish a factual basis for the plea. **Willett v.**

Barnes, 842 P.2d 860, at 862, (Utah 1992); Furthermore, a defendant’s understanding of the elements of the charges and the relationship of the law to

the facts may not be presumed from a silent or incomplete record. **State v. Smith**, 776 P.2d 929 (Utah App. 1989); **State v. Vasilacopulos**, 756 P.2d 92, 95 (Utah App. 1988); **State v. Mills**, 898 P.2d 819, 824 (Utah App. 1995).

Applying the aforementioned law to the facts of this case, the plea affidavit (TC, Page 15), on page two, merely recites that “on or about May 18, 1989 in Salt Lake County, St. of Ut. the [defendant] directly, or indirectly communication [communicated] w/ the Petitioner, and mutual combat resulted.” However, the probable cause statement of the information enumerates “The statement of Salt Lake Police Detective Jensen that a valid Protective Order issued on April 24, 1998, prohibits the defendant, Marha Tarnawiecki from attempting, committing, or threatening to commit abuse or domestic violence against Mark Grosser.” (TC, Page 3).

The plea affidavit only admits that defendant communicated with the Petitioner and mutual combat resulted. Since “mutual combat resulted” is a mere conclusion and in itself is not a violation of the underlying protective order, the fact that mutual combat resulted is legally irrelevant. The plea affidavit has no statement alleging who initiated the combat and merely recites that the defendant communicated with the Petitioner. Communicating

with the Petitioner does not legally amount to abuse or domestic violence, as alleged in the statement of probable cause. How the defendant communicated and what she said are not alleged in the plea affidavit. Mere words without more do not constitute assault or abuse. There must be a menacing act evincing the intent to cause contact or placing the victim in reasonable apprehension of an imminent contact. *Whartons, 2 Criminal Law ,15th. Ed, 428, Section 184*. The salient point is that the plea affidavit itself does not contain any element of the offense of violation of a protective order involving abuse or domestic violence. It merely recites irrelevant conclusionary statements without any preliminary facts demonstrating abuse or domestic violence. There are no operative or ultimate facts contained in the plea affidavit, therefore the plea colloquy between the trial court and the defendant needs to be examined.

The reporter's transcript of the trial court's acceptance of the guilty plea on July 17, 1998, reveals that the only reference to the elements of the prima facie case of violation of a protective order is the following: "If you plead guilty to that class A misdemeanor, you are admitting that at 668 East Third Avenue in Salt Lake, on or about May 18th, you were the respondent subject to a Protective Order that had been issued under the authority of the Utah Code and that you intentionally violated that order after having been

properly served with it. So there was an Order out that you didn't follow.

You understand that? Yes" (Transcript of July 17, 1998, page 2, lines 17-25, in manila folder in appellate court file; July 17, 1998 transcript not indexed in appellate file).

The trial court's conclusion that defendant intentionally violated the protective order is legally insufficient. That defendant intentionally violated a protective order is a mere conclusion of law without any underlying necessary foundational facts. What defendant did to intentionally violate the order is not stated by the trial judge. Parroting the statutory elements of the crime, as the trial judge did here, is merely stating a legal conclusion. **Willett v. Barnes**, 842 P.2d 860, at 862 (Utah 1992). A defendant's understanding of the elements of the charges and the relationship of the law to the facts may not be presumed from a silent or incomplete record. **State v. Smith**, 776 P.2d 929 (Utah App. 1989). Clearly, since there are no foundational facts establishing intent, the trial judge's inquiry is insufficient. There are no ultimate facts stated, therefore the facts are not related to the law, as required. The trial court fails to meet the minimum standards as set out in Rule 11 and the case law. In fact, it does not come close to the standards set out.

IV

INEFFECTIVE REPRESENTATION DEPRIVED DEFENDANT OF CONSTITUTIONAL RIGHT TO COUNSEL UNDER U.S. AND STATE OF UTAH CONSTITUTIONS

Ineffective counsel was raised in the trial court but was not decided, since the trial court ruled that it had no jurisdiction to hear that issue because of **State v. Price**, 837 P.2d 578, at 583 (Utah App. 1992) (TC, Page 161, Conclusions of Law, paragraphs 1 and 2) Therefore, a reviewing court is free to make an independent determination whether U.S. Constitution sixth amendment right to counsel, incorporated and made binding on the states via the fourteenth due process clause, and Article I, Section 12 of the State of Utah Constitution have been satisfied. **State v. Templin**, 805 P.2d 182, at 186[2] (Utah 1990). The trial record is more than adequate to permit an independent appellate evaluation of the performance of counsel. **State v. Humphries**, 818 P.2d 1027, 1029 (Utah 1991).

To demonstrate constitutionally ineffective representation, a defendant must establish that (1) her counsel's performance was so deficient as to fall below an objective standard of reasonableness, and (2) but for her counsel's deficient performance, there is a reasonable probability that the outcome would have been different. **Strickland v. Washington**, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the

outcome.” **State v. Templin**, 805 P.2d 182, at 187 (quoting **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068).

The test for reasonableness of the totality of counsel’s representation is not a hard and fast rule, but rather “the proper measure of attorney performance remains simply reasonableness under the prevailing norms ... The purpose is simply to insure that criminal defendants receive a fair trial.” **Strickland**, *supra*, at 688-9. The determination of whether deficient performance affected the outcome must be made by considering “the totality of the evidence [and] taking into account such factors as whether errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record.” **Templin**, *supra*, at 187, citing **Strickland**, at 696.

It is the totality of nonfeasance and misfeasance and that the errors are of such critical importance, which is so striking in the instant case. Also, the amount of error demonstrates a pattern of deficient investigation and preparation. In fact, the lack of diligence is woven throughout the fabric of counsel’s representation. In Utah, under the cumulative error doctrine, the court will reverse if the “... cumulative effect of several [otherwise harmless] errors undermines our confidence ... that a fair trial was had.” **State v. Dunn**, 850 P.2d 1201, 1229 (Utah 1993) Quoting **Whitehead v. American Motors**

Sales Corp., 801 P.2d 920, 928 (Utah 1990). Also, see **State v. Perez**, 924 P.2d 1, 2 at footnote 3 (Utah 1996).

**ATTORNEY FAILED TO DISCOVER, CONSIDER,
INVESTIGATE, PREPARE AND RESEARCH OBVIOUS
EXCULPATORY EVIDENCE, VIABLE DEFENSES AND DEFECTS
IN PROSECUTION'S CASE**

In the trial court brief, Defendant's Closing Synopsis Brief And Closing Argument, (TC, Pages 124-7, inclusive) defendant enumerated eighteen errors of counsel. Additionally, numerous other critically important egregious errors will be discussed herein and but for counsel's deficient performance the outcome would have been different. That is, the defendant would not have entered a guilty plea, but would have elected to go to trial.

Two glaring examples of deficient performance literally jump out from the very inception of the criminal case. Count 1 of the Domestic Violation Information states, (TC, Page 1) in pertinent part, that the defendant-respondent, Marha Tarnawiecki, is subject to a protective order or ex parte protective order issued under Title 30, Chapter 6 and did intentionally violate that order after having been properly served with it. From page two of the information's probable cause statement (TC, Page 2), it is clear that defendant is alleged to have violated a protective order of attempting,

committing, or threatening to commit abuse or domestic violence against Mark Grosser, dated April 24, 1998. In fact, there is no protective order dated April 24, 1998; however, there is a protective order dated April 24, 1996. In other words, the attorney failed to recognize and object to count one of the information, which had the wrong date. Although a motion to amend or interlineate would probably been granted, the omission reflects a pattern of lack of diligence, preparation and carelessness.

More importantly, the Utah Code Ann. 1953, as amended, Title 30-6-6(5) in pertinent part, states: “Each protective order and ex parte protective order ... to refrain from abusing the plaintiff [Mark Grosser] **SHALL**

CONSPICUOUSLY BEAR THE FOLLOWING LANGUAGE:

“VIOLATION OF THIS ORDER IS A CRIMINAL OFFENCE
CONSTITUTING A CLASS A MISDEMEANOR, CARRYING
PENALTIES OF FINE AND IMPRISONMENT. Since the actual notice
warning in the protective order states: “RESPONDENT’S VIOLATION OF
THIS ORDER WILL CONSTITUTE A CRIMINAL OFFENSE. NEITHER
PARTY MAY IGNORE OR ALTER THE TERMS OF THIS ORDER”, the
omission of “carrying penalties of fine and imprisonment” and that the
violation is “a class A misdemeanor” are fatally defective; ergo, there can be

no abuse. Based on the legislature's intent, it seems clear that without the magic words of notice and warning, there can be no violation of Title 30-6. Not noticing and raising the issue is unreasonable, since the attorney stated that he read the protective order. (RT, Page 178, page 23, lines 16-23, inclusive) However, the did not bother to check the notice and warning language in the protective order against the actual wording of Title 30-6-6(5) nor did he notice that the date was April 24, 1996, not 1998.

The pattern of lack of preparation and investigation is further highlighted by the following: the attorney knew that intent, self-defense, and who was the aggressor was in issue; defendant told him she had called the police to assist and she had to call them twice; Kathy Shepherd had told her what to do(TC, Pages 130-133) ; there were eye witnesses to the incident that occurred at the mother's house; defendant had been taken to the hospital from the scene; the defendant was an alien who might face deportation, and defendant believed that Mr. Grosser was about to immediately remove the parties minor child from the State of Utah, yet he failed to reasonably investigate and follow up on each of these factors. (RT, Page 178, dated December 29, 1998) The evidentiary purpose and value of each of these errors is to show the totality and pattern of lack of preparation, undermining the confidence in the outcome and its lack of fairness to the defendant.

With regard to intent, numerous critical errors and omissions occurred. Violation of a protective order requires an intentional act and assault also requires intent to cause or create a substantial risk of bodily injury to another. See Utah Code, Ann. 1953, as amended, 30-6-6 and 76-5-102(1)(c), respectively.

The following factors would tend to show that defendant did not have the requisite intent: 1) she initially called the police and asked them to meet her at the scene (dispatch tape and evidentiary hearing testimony-RT, Page 178, page 6, lines 5-10, inclusive, and pages 15-17, lines 16-24, 1-24 and 1-3, respectively), 2) there was a police dispatch tape to corroborate her version, 3) there was an existing order prohibiting the parties from removing the minor child from the State of Utah, 4) defendant believed that Mark Grosser was about to immediately remove the child from the jurisdiction of the court, 5) defendant waited at the house for the police to arrive, and 6) when they did not arrive promptly she called them again,(TC, Page 24) 7) Kathy Shepherd, the paralegal of her then domestic lawyer, had told defendant the day of the incident, if it were her child she would immediately take the child into her protective custody, [See Kathy Shepherd affidavit(TC, Pages 130-33) attached to trial brief and used to show the state of mind of defendant at or about the time of the incident] 8) Mr. Grosser had struck her first and 9) she

kicked him back as a reflexive self-defensive act and 10) there were records and persons who could verify her side of the conflicting contentions.

All of aforementioned factors had evidentiary value in that they tend to show that defendant did not have the requisite intent. However, counsel failed to investigate and follow up said salient evidence, demonstrating his overall pattern of faulty preparation. The evidence ameliorates and tends to show that the requisite mens rea requirement of both counts of the information could be rebutted and the prosecution cannot prove its case beyond a reasonable doubt. For example, the police dispatch tape was a foundational piece of evidence that would have tended to show that defendant did not have the intent to violate the protective order, since she placed calls, one before she arrived at the scene and one after she was at the scene, seeking police intervention to prevent Mark Grosser from immediately removing the minor child from the State of Utah contrary to an existing court order of no removal. Yet, counsel admits that he failed to obtain and listen to the tape before he recommended that defendant plead guilty and the guilty plea was entered. He finally went to the police department, a day before sentencing or on the day of sentencing, and after hearing the tape, (which corroborated defendant's version) he did not consider nor file a motion to withdraw the plea, which was well within the 30 day limitation period. (RT, Page 178, pages 6, lines 5-

10, and page 15, lines 3-5, 10-11, 16-24; page 16, lines 1-24; page 17, lines 1-24; page 18, lines 1-17) Although a criminal specialist, he did not consider the 30-day limitation rule, placing his client in an untenable position that was tantamount to a permanent waiver, except for exploring the deficiencies via ineffective counsel.

The pattern of inadequate preparation and lack of diligence is ubiquitous since the attorney failed to: interview the eyewitness; personally speak to the mother, who was at the scene; obtain an affidavit or statement from Kathy Shepherd, which would have tended to rebut the intent prerequisite element of intent; (RT, Page 178, page 33, lines 6-19, Kathy Shepherd; page 37, lines 5-7 and 15, eyewitnesses;)

The insufficiencies of counsel are continued in not preparing the self-defense issue and who initiated the contact. Initially, the defendant told counsel that she had called the police, Mr. Grosser was the aggressor and initiated the contact between the parties, and she had kicked him back as a reflexive act of self-defense. (RT, Page 178, page 6, lines 2-10; page 23, lines 10-15) Counsel admits that there were many witnesses who he could have interviewed and used to establish the fact that Mark Grosser struck first, but he failed to interview any of them, although many of them would have been extremely important. (RT, Page 178, page 48, lines 19-24)

The attorney's failure to interview any of the witnesses placed him in a position that he could not properly evaluate the impact of URE, Rule 404, and, via his own admission, there were many witnesses available to interview for that purpose.

The lack of investigation of obvious salient exculpatory and corroborative evidence, placed the attorney in the position of being unable to properly evaluate the strength or weakness of the prosecution's case, and properly advise his client whether or not to plead guilty, which is vital in evaluating the totality of the performance of counsel. Counsel's ineptitude and lack of investigation placed himself, and his client, in the untenable position that there could not be a proper evaluation of the State's offer on July 2, 1998 (Pre-trial date) and July 17, 1998. (Entry plea date)

**UNREASONABLE TRIAL STRATEGY OF DEFICIENT
COUNSEL CAUSED UNREASONABLE EMPHASIS ON
BOGUS THREAT OF FELONY ENHANCEMENT**

It seems clear that Mr. Archuleta testified that the threat of enhancement to a felony pursuant to Utah Criminal Code 76-5-109.1 was given to him one time only (RT, Page 178, page 40, line 8) and that it was Deputy Kevin Murphy who told him of that threat; and it was at the pre-trial

conference on July 2, 1998. (RT, Page 178, page 40, lines 18-24) It is uncontroverted that the attorney felt the threat backed him in the corner and had an unsettling affect on the defendant. (RT, Page 178, page 19, lines 5-6, 8-9)

Therefore, the issue is whether that trial strategy was unreasonable, taking into account the totality of the evidence and circumstances at the time the decision was made? In the words of **Strickland**, *supra*, at 690,691, “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. **In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.**” (emphasis added)

Since the threat came on July 2, 1998, but the plea was not entered until July 17, 1998, there were over two weeks for counsel to read and evaluate 76-5-109.1. Certainly, he had an affirmative duty to read the section to determine if the prosecution’s threat was bogus or real. Utah Criminal Code 76-5-109.1(2)(3), in pertinent part, states:

“(2) A person is guilty of child abuse if he: (a) commits or attempts to commit criminal homicide, as defined in section 76-5-201, against a cohabitant in the presence of a child; or (b) intentionally causes serious bodily injury to a cohabitant or uses a dangerous weapon, as defined in Section 76-1-601, or other means or force likely to produce death or serious bodily injury against a cohabitant, in the presence of a child; or (c) under circumstances not amounting to a violation of Subsection (2)(a) or (b), commits an act of domestic violence in the presence of a child after having committed: (i) a violation of Subsection (2)(a) or (b) on one or more prior occasions; or (ii) an act of domestic violence in the presence of a child, not amounting to a violation of Subsection (2)(a) or (b), on one or more prior occasions. (3) (a) A person who violates Subsection (2)(a) or (b) is guilty of a third degree felony. (b) A person who violates Subsection (2)(c) is guilty of a class A misdemeanor.”

Since only Subsection (2)(a) or (b) are felonies and (c) is a misdemeanor, only Subsection (2)(a) or (b) need to be analyzed. Subsection (2)(a) is inapplicable since it involves criminal homicide, therefore Subsection (2)(b) is the only possible relevant applicable section. Since serious bodily injury is required in Subsection (2)(b) and only a reflexive kick to the buttocks was involved in the instant fact pattern, Subsection (2)(b) is

inapplicable to the defendant's scenario. Also, Mr. Grosser and the defendant were not cohabitants at the time of the alleged incident and at any other relevant time. In short, there is no factual basis for a felony pursuant to 76-5-109.1 and all counsel had to do was to read the section to discover that fact. He clearly did not bother to read the section or if he did, he unreasonably and deficiently did not properly evaluate the applicability of the relevant section. Therefore, he made an unreasonable deficient trial strategy decision and pursuant to **Strickland**, supra at 691, he made an unreasonable decision based on his unreasonable lack of preparation. Additionally, the cumulative effect of his lack of preparation of the aforementioned areas of intent and self-defense left the attorney, and his client, in the position where they did not have the foundational data to properly evaluate whether or not the prosecution's offer was acceptable or not. The unreasonable defective performance deprived his client of the opportunity of a fair adversarial day in court. Clearly, there was prejudice suffered by the defendant because there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different, and the defendant would not have entered a guilty plea. **Strickland**, supra at 703. Therefore, there was no reasonable trial strategy decision and prejudice resulted.

The attorney had a duty to consider the case from three aspects:

1) The most favorable criminal disposition, 2) the most favorable custody disposition and 3) the most favorable immigration disposition. He failed to properly investigate and prepare any of these three aspects of the case. He had only a brief discussion with the divorce lawyer Brad Parsons. He did not properly advise his client as to the impact of a protective order violation as it impacted the pending custody case. Lastly, the act of referring the case to immigration expert Ishola, and then not following up that aspect. The admission of no follow-up tends to show that the overall pattern was one of lack of diligence, preparation and investigation. The evidence of the immigration consequences is admissible for the limited purpose of showing another lack of preparation in a total scheme of unpreparedness. (RT, Page 178, pages 29-30, lines 12-24 and 1-15, respectively)

The attorney's enumeration in the plea affidavit, in the statement of specific comprising elements of each offense, is a further example of the attorney's deficient performance. He did not even know that the protective order violation was attempting, committing, or threatening to commit abuse or domestic violence, not directly or indirectly communicating with the Petitioner, Mark Grosser.

The evidentiary hearing transcript is filled with nearly ninety

pages of the inadequacy of counsel. There is an imbalance of what was done reasonably and what was done unreasonably. An accurate point of view question might ask- What, if anything, did counsel do that was reasonable? Seemingly, very little. The attorney's own assessment of his own performance was that "I think that ineffective assistance of Counsel, failure to advise the client of the time limits. I think all those are sufficient grounds for the purposes of setting the plea aside beyond the 30 day period, all of which I did not do."(RT, Page 178, page 56, lines 6-12)

It is uncontroverted that defendant testified that Mr. Archuleta told her that she would not be deported. He said the reasons were that she had a child born in America, she was married to an American citizen, and there was a child evaluation going on at the present time. He said that deportation would constitute a violation of her rights to due process.

Further, he said, at the time that she came to the entry of the plea on July 17, that a felony for sure would constitute deportation, but not a misdemeanor. And that a misdemeanor is nothing. If it were a felony the INS would go and find her, but not if it was a misdemeanor. And when she asked him why he knew that he said he just knew, as a criminal lawyer he knew that. (RT, Page 178, page 85, lines 16-24; page 86, lines 1-12) One purpose of the aforementioned testimony is to show that wrong advice was given to

the defendant, bringing her within the exception to **State v. McFadden**, 884 P.2d 1303, at 1305, footnote 3. The exception is that the giving of erroneous advice regarding deportation is not within the ambit of the collateral consequence doctrine.

In summary, the total number of errors establish that the cumulative errors doctrine is applicable, and the harmful errors resulted in substantial prejudice to the defendant. Ineffective counsel resulted in extreme prejudice as well, and neither doctrine is subject to the 30-day limitation rule.

V

UTAH CODE ANN. TITLE 77-13-6 VIOLATES DUE PROCESS AND EQUAL PROTECTION CLAUSES OF STATE OF UTAH AND U.S. CONSTITUTIONS ON ITS FACE AND AS APPLIED

UNCONSTITUTIONAL AS APPLIED

Utah Code Ann. Section 77-13-6 states: “**77-13-6. Withdrawal of plea.**

(1) A plea of not guilty may be withdrawn at any time prior to conviction. (2)

(a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of court. (b) **A request to withdraw a plea of guilty**

or no contest is made by motion and shall be made within 30 days after

the entry of the plea. (3) This section does not restrict the rights of an

imprisoned person under Rule 65B, Utah Rules of Civil Procedure.

(Emphasis added)

The 30-day time limitation must be read and construed in conjunction with Rule 11 of the Utah Rules of Criminal Procedure. **State v. Price**, 837 P.2d 578, at 582 (Utah App. 1992). Rule 11(e)(7) states that the court may not accept the plea until the court has found the defendant has been advised of the time limits for filing any motion to withdraw the plea. Rule 11(f) provides that failure to advise the defendant of the time limits for the filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting aside the plea aside, but may be a ground for extending the time to make a motion under Section 77-13-6. Section 77-13-6(2)(b) is a jurisdictional rule and after a proper advisement in the trial court, 30 days after the entry of the plea, the defendant's rights are forever extinguished, waived and barred. **Price**, *supra*, at 583-4.

The actual words used in the plea affidavit are different from the language enumerated in 77-13-6. Instead of using the word "shall", indicating the mandatory nature of the statute, the plea states the defendant has a right to withdraw her plea AS LONG AS the request is in writing and for good cause shown. (TC, Page 15, last paragraph on page) The clause beginning "as long as" is misplaced in the sentence and comes after the 30 day admonishment,

creating ambiguity, uncertainty and confusion. Furthermore, the warning notice fails to inform the defendant that after the 30 day period her rights are forever extinguished.

The issues raised are whether failure to advise the defendant of the consequence that after 30 days her rights are forever extinguished is fatally defective, and whether the words “as long as” created ambiguity, confusion and uncertainty, resulting in improper advisement of the rights of defendant?

The word “shall”, as used in 77-13-6, is mandatory not discretionary language. If a written motion to withdraw for good cause is not filed within 30 days from the entry of the guilty plea, the defendant’s right to bring the motion is forever extinguished. **Price**, supra. Although the word “shall” usually is construed to be mandatory, there are cases that hold that such wording may be permissive in certain instances. In analyzing the contention whether shall is mandatory language, it is pertinent to observe that the term “shall” is a flexible one. This is clearly revealed by reference to that comprehensive lexicon of the law, *Words and Phrases*. It contains numerous pages of case references to the word “shall,” a perusal of which indicates that it is sometimes used in the mandatory sense and sometimes merely as directory or permissive, leading to the conclusion that its meaning is to be determined from the context in which it is used and the purpose sought to be

accomplished. See **Hansen v. Utah State Retirement Bd.**, 652 P.2d 1332, at 1342. (Utah 1982)

In Utah, where there is an unequivocal legislative intent to have a failure to comply stand as a bar to further action, the statutory notice requirement is mandatory. **Stahl v. Utah Transit Authority**, 618 P.2d 480,482 (Utah 1980) **Crowder v. Salt Lake County**, 552 P.2d 646 (Utah 1976); **Gallegos v. Midvale City**, 492 P.2d 1335 (Utah 1972); **Peterson v. Salt Lake City**, 221 P.2d 591 (Utah 1950). It seems axiomatic that “shall” as used in 77-13-6 is mandatory language, therefore the trial court had an affirmative duty to bring home to the defendant that after 30 days her rights were forever extinguished. Instead, to the contrary, the trial court created ambiguity, uncertainty and confusion when it used the words “as long as”, presumptively in place of “shall”. The defendant respectfully submits that the aforementioned terms are not equivalent or synonymous. In fact, the terms are very dissimilar.

A perusal of *Words and Phrases* reveals that “as long as” is used far less frequently than “shall”, and that when used the equivalents are “while”, “during”, and “until”. The term “as long as” is generally a word of art. Used in a lease, they are words of limit and “while”, “until” and “during” has been held equivalents of the term “as long as”. **Vanatta v. Brewer**, 32 N.J. Eq.

268, 270. Contracts, leases, deeds and real property interests are contexts in which the term is most frequently used. In **Lindsay v. Wigal**, 250 N.E.2d 755, at 757 (1969), the court held that “as long as” were words of art creating a determinable fee with a possibility of reverter. If not intended as words of art, Webster’s Third New International Dictionary, Unabridged, defines “as” and states: “to the same degree or amount: to such extent: equally”. It is clear that as a word of art or in the common ordinary meaning of the words, “as long as” and “shall” are neither equivalents nor synonymous terms.

The question then narrows to whether the following sentence in the plea affidavit is adequate notice and advisement to the defendant of the 30-day rule and its consequences? **“I understand that I have a right to withdraw this plea within 30 days of today’s date as long as the request is in writing and for good cause shown.”** (TC, Page 15). The trial judge did not mention the 30-day rule in the colloquy of July 17, 1998, and Mr. Archuleta testified that he did not specifically remember advising the defendant about the 30-day rule. (RT, Page 178, page 42, lines 15-20). Therefore, the only admonishment to defendant was the aforementioned sentence in the plea affidavit. Defendant contends that the sentence is insufficient notice of the 30 day limitation since it creates ambiguity and confusion, and fails to advise the defendant that a direct consequence of

failure to comply with the 30 day rule results in a permanent bar and extinguishment of her right. The language of 77-13-6 and the verbiage used in the plea affidavit are substantially different from one another.

The plea affidavit conveyed an erroneous, confusing and different meaning than the legislative intended in creating the 30-day limitation of 77-13-6. Furthermore, the omission to advise defendant of the consequences that failure resulted in the extinguishment of that right forever, violated the due process and equal protection clauses of the State of Utah and U.S. Constitutions, as applied to this defendant. A proper advisement would have stated that “I understand that I have a right to withdraw this plea only if the request is in writing for good cause shown and filed within 30 days after the entry of this plea” or “I understand that I have a right to withdraw this plea only if the request is in writing for good cause shown and filed within 30 days after the entry of this plea or that right is forever extinguished.”

Since the penalty for not filing within the 30-day period is extremely drastic, the duty of the trial court to clearly admonish and explain the consequences is greater than if this were not a jurisdictional statute. It takes only a very short time to correctly state the rule and explain the consequences of failure. The consequence is direct and substantial where the defendant does not act, therefore the court has a duty to completely and properly advise the

defendant of said impact. For example, a court has the duty to advise the defendant of the penalty and sentence that could be imposed for violation of the particular law (in this case, violation of a domestic protective order) because they are direct consequences. A failure to exercise her rights within 30 days also has a direct consequence-her right is forever extinguished! There is no real difference between the sentence imposed and the direct consequence of extinguishment, since they are both inevitable. They directly flow from an act or omission to act.

The statement in the plea form is ambiguous, confusing and misleading. Since the clause “as long as the request is in writing and for good cause shown” comes after the “within 30 days of today’s date”, one can reasonably conclude that the written motion does not have to come within 30 days of the entry of the plea. It is the court that has misplaced the clause, since it is the court’s form, and any ambiguity, uncertainty and confusion created falls on the trial court. If an affidavit is used to aid Rule 11 compliance and creates any ambiguity or uncertainty, it must be addressed during the plea hearing. The trial court must conduct an inquiry to establish that the defendant understands the affidavit and voluntarily signed it. Any omissions or ambiguities in the affidavit must be clarified during the plea hearing, as must any uncertainties raised in the course of the colloquy. State

v. Abeyta, 852 P.2d 993,996 (Utah 1993); **State v. Maguire**, 830 P.2d 216 (Utah 1992); **State v. Smith**, 812 P.2d 470 (Utah Ct. App. 1991). Also, **Gibbons**, *supra*, and **State v. Hoff**, 814 P.2d 1119, 1123, (Utah 1991).

Defendant raised there arguments in the trial court and alleged that there was a violation of due process, equal protection and the plea was involuntary. The trial court made no ruling regarding the aforementioned contentions, since it concluded that it had no jurisdiction to hear and decide the matter because of the 77-13-6 violation as expressed in *Price*. Defendant reasserts the aforementioned contentions and respectfully requests that the Appellate Court decide said issues.

UNCONSTITUTIONAL ON ITS FACE

The Due Process Clauses, in the Fifth and Fourteenth Amendments, provide substantive protection when fundamental rights are involved. If fundamental rights are affected by the legislation or the class itself is suspect, the strict scrutiny test is used to test validity. The legislation will be held invalid unless it is necessary to achieve a compelling governmental interest. A more difficult test than the rational relationship standard, where economic or social legislation is involved.

The 30-day limitation involves the withdrawal of a fundamental right to access the court against a suspect class. Since only criminal defendants who

have entered guilty pleas are involved, the presumption is that it is invalid unless it is necessary to achieve a compelling state interest. Whether or not a fundamental right or privilege is being abridged is itself a substantive question. It seems self-evident that the extinguishment of a criminal defendant's access to the trial court is an abridgement of a fundamental right and privilege, since it is implicit in the concept of ordered liberty that a defendant be able to access the trial judge. **Palko v. Connecticut**, 302 U.S. 319 (1947). Where the rights and privileges of a criminal defendant are involved, the courts have recognized that fundamental fairness is in issue and the strictest scrutiny is the measure used. One's freedom is at stake and freedom is the essence of our society. The court is the vanguard of freedom in our tripartite system. Due process goes further than protecting the rights enumerated in the Bill of Rights and reaches various rights not expressly states in the Constitution. For example, that proof in a criminal case is "beyond a reasonable doubt". **In re Winship**, 397 U.S. 358 (1970)

Since the 30-day rule applies only in criminal cases and only to plea criminal defendants, the Fourteenth Amendment equal protection clause is also involved in analyzing the constitutionality of 77-13-6 and Rule 11. Since the fundamental right to access the trial court is being severely limited and shortened to a mere 30 days, said right is subject to "strict scrutiny". Also,

since only criminal defendant's who have pled guilty are singled out, it is a suspect class. The limitation violates equal protection unless found to be necessary to a compelling state interest and it cannot be accomplished by a less drastic alternative. **San Antonio Independent School District v. Rodriguez**, 411 U.S. 1 (1973); **State v. Bell**, 785 P.2d 390 (Utah 1989); **State v. James**, 819 P.2d 781 (Utah 1991); **J.J.N.P. Co. v State, ETC** 655P.2d 1133 . In other words, the same test applies under equal protection and due process-“strict scrutiny”. **Utah Public Employees Association v. State**, 610 P.2d 1272 (Utah 1980)

Under any test, 1) rational relationship, 2) substantially related to an important legislative interest or 3) strict scrutiny that necessary to promote compelling state interest, the 30 day rule is too drastic and too short of a period, and a less extreme period (90 to 180 days) would accomplish the purpose of the legislation. Although defendant urges that the strict scrutiny standard should apply in the present fact pattern, 77-13-6 does not pass the least demanding “any rational basis” test. There is an abuse of legislative discretion since there is no rational basis for a 30-day limitation. Withdrawing access to the court violates the “open door policy of Utah. **Condemarin v. University Hosp.**, 775 P.2d 348, 377(Utah 1989); **Berry ex rel. v. Beech Aircraft Corp.**, 717 P.2d 670 (Utah 1985).

The letter from Carvel R. Harward, Chief Criminal Deputy, to James Housley, notes that there was no time limit on a motion to withdraw and that after a reasonable time evidence is far more difficult to preserve. (TC, Pages 103, 104, 105). Then, he summarily concludes that 30 days is a reasonable period of time to allow for a withdrawal of plea, since defendant can always appeal or file for an extraordinary writ under Utah Code Ann. 78-35a-101 et. seq., The Post Convictions Remedies Act. He believes imprisoned defendants should resort to habeas corpus petitions rather than a motion to withdraw. The problem with the Post Conviction Remedies Act is that a defendant must first exhaust his right to appeal before he can qualify for relief, making the remedy impractical and unmanageable. The statute of limitations under the Post Convictions Remedies Act, yet it is designed to cover the same wrongs as the motion to withdraw, and is a one year statute, not thirty days.(78-35a-107)

The statute of limitations for habeas corpus is one year as well. See 78-35a-107. In **Frausto v. State**, 966 P.2d 848 (Utah 1998), the Supreme Court stated that the trial court erred in summarily dismissing petitioner's habeas corpus petition without first considering whether the interests of justice excused the petitioner's failure to file within the one-year statute of limitations. In other words, the court has the discretion to go beyond the one-

year limitation, but no discretion where a motion to withdraw or extend is involved, and the period is a mere 30 days. An appeal is far more complicated than a petition for habeas corpus or motion to withdraw and is directed to an appellate court, not the trial judge. It is not an adequate substitute for habeas corpus or a motion to withdraw. As the letter admits, the preference is to allow a trial judge an opportunity to review his own rulings before the matter is removed to a higher level. Most importantly, there is no reason given nor is there any rational basis for placing a short 30 day limit on a jurisdictional statute that imposes a substantial burden on criminal defendants, many of whom are incarcerated and have limited ability and resources to discover substantially all of the errors that may have been made at the trial level.

Since many of the defendants who are part of the class affected are incarcerated, the 30-day limit invidiously discriminates against them without any rational basis for such discrimination. The overwhelming majority of evidence and witnesses are available beyond 30 days and no reason is specifically given for choosing such a period. Comparing the time periods with the rest of the states, which average six months and in many cases longer, the 30-day period is patently unreasonable and the burden has shifted to the legislation to demonstrate that thirty days is the appropriate means and

classification period to achieve the legislative objective of placing a time limit to give finality to the decision and protect the prosecution from its stale evidence claim.

The letter dated February 17, 1989, to the attorney general, (asking that the constitutionality be examined) and the response letter of Assistant Attorney General Stanley H. Olsen, dated February 23, 1989, which states that “**our brief review** indicates no patent constitutional flaw or legal deficiency” illustrates the cursory analysis that was given to the constitutionality of the legislation. (TC, Pages 106, 107, 108, 109). In other words, former deputy Stanley H. Olsen, assumed the thirty day limitation was rational because it came from the Governor’s office and the legislature.

The shortness of time between the letters itself (February 17 and February 23 and February 17, 1989 is a Friday, therefore only three business days elapsed) demonstrates that only a cursory or no constitutional evaluation ever took place. Had an evaluation occurred and had there been a comparison to other states, it would be obvious that the thirty-day period is too short to be anything other than unreasonable, without any rational basis for the short period. If the state cannot account for its own witnesses and evidence beyond thirty days, our entire system of criminal justice must be reexamined. The fundamental rights of a defendant must not be sacrificed for the prosecutor’s

sophistry of alleged lost evidence. The prosecution's shortcomings are not a rational reason to severely abridge the defendant's ability to access the trial judge who pronounced judgment. Furthermore, it is prudent and logical to allow the trial court a chance to review its own decision before forcing the defendant to move to the next level of review. Six months to one year is a rational period. Since one can assume that errors will be made, it is reasonable to allow sufficient time to discover any errors and bring them to the attention of the trial judge. The trial court deserves the confidence that it can correct its own errors, if a sufficient chance is permitted. Thirty days is too short to be a genuine opportunity for the trial judge and the defendant to address the multitude of errors that may arise in the course of a guilty plea entry.

In researching the time period for vacating or withdrawing a guilty plea and similar procedures nationwide, Utah is the shortest period for such a procedure, highlighting the arbitrary determination that 30 days is reasonable. For example, some states only require that a postjudgment motion to change or withdraw a plea be seasonably made. Whether or not the motion is seasonable is determined by the trial judge. See **People v. Castaneda**, 37 Cal. App.4th 1612, 44 Cal. Rptr. 2d 666 (Cal. App.1 Dist. 1995) for an exposition of the better view. The majority of states allow a defendant at least

six months to withdraw his guilty plea. Under any view, Utah's 30-day limitation is without any rational basis and a comparison to other states demonstrates the Utah aberration and anomaly.

ENIGMATIC LANGUAGE OF STATE v. PRICE

Since the trial judge ruled that she had no jurisdiction to hear and decide the motion to extend and to withdraw because of **State v Price**, 837P.2d 578 (Utah App. 1992), it is appropriate to consider that case. (TC, Page 161). The baffling language of **Price**, supra at 583, states "This is the first time this court has considered the application of the thirty-day filing period in section 77-13-6(2)(b) when the record shows that a defendant was informed of the thirty-day deadline. If the timeliness issue had been properly addressed in the trial court, that court would have been without jurisdiction to hear defendant's motion and without a basis for extending the time for defendant to file his motion." **In other words, where the defendant is advised of the thirty-day rule, pursuant to 77-13-6(2)(b), the trial court has no jurisdiction to hear a motion to withdraw and extend the time to file the motion to withdraw pursuant to Price.** However, the legislature created Rule 11(6), now Rule 11(f), which states "(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside,

but may be the ground for extending the time to make a motion under Section 77-13-6.” (Emphasis added)

Despite such language the Price court summarily concludes, without clearly stating any reason for its conclusion, that the trial court is divested of jurisdiction to hear a motion to withdraw and without a basis for extending the time for a defendant to file his motion in all cases where a defendant is advised of the 30 day rule, forcing an appeal or petition for habeas corpus. In essence, the Price court has judicially eliminated what the legislature created- a ground for extending the time to make a motion under 77-13-6 in the trial court, which is the plain meaning of the last clause in Rule 11(f). Although the *Price* court states that Rule 11 must be read in conjunction with 77-13-6, it then cancels the defendant’s right to proceed under Rule 11(f) in the trial court. There is no discussion of statutory intent and interpretation, ignoring that entire litany of cases. Such judicial interpretation is without precedence and violates the separation of power doctrine. Simply stated, the *Price* case does not explain its rationale and is inconsistent with the clear plain meaning of the statute (77-13-6) and the rule (Rule 11(f)). It literally eliminates the defendant’s right to a review in the trial via a motion to withdraw or extend. Coupled with the short 30-day rule of limitation, such deprivation violates due

process, is invidiously discriminatory and distastefully repugnant to a concept of ordered liberty.

In **James v. Galetka**, 965 P.2d 567, at 572-3, (Utah App. 1998), *Price* is criticized since the court states that “We believe that *Conerly* and the cases from the other jurisdictions holding that statutes of limitation are not jurisdictional are the better reasoned cases.” *Price* needs to be explained, overruled and partially modified rather than merely criticized. Particularly, **“If the timeliness issue had been properly addressed the trial court, that court would have been without jurisdiction to hear defendant’s motion and without a basis for extending the time for defendant to file his motion.”**, needs to be deleted because it is erroneous, not the better view and violates due process, equal protection and the separation of power clauses of the U.S. and State of Utah Constitutions. Furthermore, no rationale is stated and the aforementioned sentence is judicial dicta and not a decisive utterance. Lastly, the litany of statutory interpretation is not mentioned and the entire relevant area is not even considered. Frankly, the case is very much a judicial embarrassment. It needs to be changed. It has led to a plethora of decisions, such as the one made by the trial judge in the instant case, and has caused an additional work load to fall on the appellate courts that was not intended when the 30-day limit of 77-13-6 was added.

CONSEQUENCE OF DEPORTATION

In **State v. McFadden**, 884 P.2d 1303, at 1305, (Utah App. 1994) the Utah Appellate Court held that whether or not a plea is voluntary is unaffected by collateral consequences such as possible deportation, while recognizing that erroneous advice regarding deportation and ineffective counsel are exceptions to the doctrine.

It is respectfully submitted that said case needs to be modified or overruled because the rationale underlying the doctrine is based on an unsupportable legal fiction, it is anachronistic and out of step with today's realities and the doctrine is confused and has been misapplied to attorneys, although originally intended to apply only to the courts.

Firstly, direct and collateral consequence doctrine was judicially created to deal with the issue of overcrowded court calendars and to limit the court's responsibility to a criminal defendant. The collateral consequence doctrine originally stated that trial judges did not have to inform defendants of all the possible effects of criminal convictions, but only the direct consequences. This doctrine was based on the rationale that because such a wide variety of potential consequences exist, one could not expect judges to warn defendants about every possible result of conviction. For example, the

judge has no duty to inform a defendant that conviction of a felony involves the temporary loss of the right to vote. However, the penalty and sentence are direct consequences of the guilty plea, therefore the judge has a duty to inform the defendant of these consequences. Most of the state law is based on the federal law in the area.

In **United States v. Santelises**, 476 F.2d 787, (2d Cir. 1973), the Second Circuit elaborated on the difference between direct and collateral consequences. The court stated that the distinction depends **upon the degree of certainty with which the sanctions affect defendants. *Id.*** at 789-90. In **Michel v. United States**, 507 F.2d 461, 466, (2d Cir. 1974) the Second Circuit added that if the punishment is meted out by another agency, such as INS, **judges** need not inform defendants of such possibilities, even if deportation amounts to an absolute certainty after conviction. However, regardless of what agency doles out the punishment, if the consequence is virtually a certainty, it is not collateral and to conclude that it is begs the question and is pure language sophistry. It is a direct consequence because it is a substantial certainty. A deportation OSC and hearing has been filed against the defendant and is pending, and she faces the consequence of deportation based on her plea to the violation of the domestic violence protective order. For this defendant, facing deportation is a real consequence.

Secondly, the immigration law has significantly changed since *McFadden*, supra, was decided in 1994. Under the former law, a judge could recommend to INS that an alien not be deported, although convicted of a criminal offense. The law has been changed and a trial judge no longer has that discretion. Another recent change permits INS to deport an alien for violation of a protective order. Therefore, failing to advise an alien defendant about deportation ignores the fact that the consequence of deportation is extremely severe and frequently more important than the criminal consequence. An alien can be deported and forced to leave the country for the de minimus act of violation of a domestic protective order. There are serious due process problems with the anachronistic view that deportation is a collateral consequence, and the court wants to acknowledge the realities that currently exist.

Lastly, when the collateral consequence doctrine originated it was only applied to the court, then, out of confusion and lack of precision, the doctrine was erroneously applied to attorneys as well. It is clear that there are significant differences between the duties owed by the court and by the attorney to the defendant. The differences were extensively covered in the briefs tendered to the trial court. (Please see TC, Pages 72-77) The attorney has a duty to advise his alien client of the possible deportation consequence

of the guilty plea, although the court may not have such a duty. The considerations and standards for the court and the attorney are substantially different and should reflect the essential differences of the different duties owed to the defendant.

The undersigned, as an Adjunct Professor of Immigration Law and immigration expert, testified in the evidentiary hearing that *McFadden*, *supra*, ought to be overruled or modified in the light of changes that occurred in the law since 1994. (RT, Page 178, page 61, lines 9-12). Also, as to the standard of care, the undersigned further testified that he is on retainer with the Salt Lake Public Defender's Office, and that the Defender's Office and attorneys throughout the state regularly call him and ask him to analyze the specific immigration consequences as they impact an alien criminal defendant. (RT, Page 178, page 65, lines 8-15). The testimony shows that the local and statewide legal community is concerned and considers the immigration consequences of a criminal plea, therefore the right to effective counsel via the Sixth Amendment is within the scope of the duty that the lawyer owes to the criminal defendant, particularly within Salt Lake County. In other words, the standard of care that an attorney owes to a criminal alien defendant includes advising defendant as to the immigration impact of her criminal case. Learned experts agree that the better view is that deportation consequences

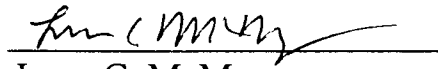
are within the scope of the duty that the attorney owes to the client. Some states have statutorily extended that duty to include the trial judges as well. Please see defendant's trial brief on this point.(TC, Page 72-4). Furthermore, the undersigned also testified that Judge Lynn Davis of the Fourth District asked him to draft a statement that he could use in the sentencing of aliens. (RT, Page 178, pages 71-72, lines 15-24 and 1-15, respectively). Therefore, some trial judges have already begun to acknowledge and accept the duty owed to alien defendants.

CONCLUSION

The cumulative errors of failure to advice of the right to a speedy public trial by an impartial jury, the omission to advice the defendant of the minimum sentence and lack of establishing the foundation facts of the elements of violation of a protective order were clearly harmful to the defendant. Add the ineffectiveness of counsel, that the plea was involuntary, the lack due process and equal protection, and the court of review can readily see that there was no fair and adversarial trial was given to the defendant. The fact that one cannot have confidence in the outcome of the case seems to be the inescapable conclusion.

Defendant respectfully requests that this court reverse the trial court's denial of her motion to extend the time within which to file a motion to withdraw her guilty plea and to withdraw her guilty be reversed, that the thirty day limitation be declared unconstitutional, and that State v. McFadden and State v. Price be modified, amended and reversed as suggested herein.

Respectfully submitted, this 14th day of October, 1999.



Lynn C. McMurray
Attorney for Defendant-Appellant

FILED

Utah Court of Appeals

OCT 14 1999

Julia D'Alessandro
Clerk of the Court

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IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

STATE OF UTAH,

Plaintiff/Appellee,

vs.

MARHA TARNAWIECKI,

Defendant/Appellant

CERTIFICATE OF SERVICE
OF APPEAL BRIEF

Case No. 990225-CA

I hereby certify that this day I caused two copies of the Opening Brief of Appellant

Marha Tarnawiecki in the above-captioned matter to be hand delivered to the:

J. Frederick Voros, Jr., Esq.
Assistant Attorney General
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DATED this 14th day of October, 1999.

FILED
Utah Court of Appeals
OCT 21 1999
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IN THE COURT OF APPEALS
IN AND FOR THE STATE OF UTAH

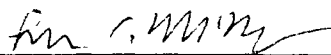
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| STATE OF UTAH, Plaintiff/Appellee, vs. MARHA TARNAWIECKI, Defendant/Appellant | ADDENDUM TO APPELLANT'S OPENING BRIEF Case No. 990225-CA |
|---|---|

The above-named appellant hereby submits this addendum to her opening brief.

An index appears on page 2.

DATED this 21st day of October, 1999.

McMurray, McMurray, Dale &
Parkinson, P.C.

By: 
Lynn C. McMurray
Attorneys for Defendant/Appellant

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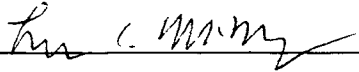
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Certificate of Service

I certify that a true and correct copy of the foregoing document was delivered to the person(s) indicated below in the method(s) indicated this 21st day of October, 1999:

J. Frederick Voros, Jr., Esq.
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- ☒ First class mail
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U. S. Constitution, Amendment V

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

U. S. Constitution, Amendment XIV

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

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

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

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

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

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

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

Article I, Section 12. [Rights of accused persons.]

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

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

76-5-201. Criminal homicide -- Elements -- Designations of offenses.

(1) (a) A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, including an unborn child.

(b) There shall be no cause of action for criminal homicide for the death of an unborn child caused by an abortion.

(2) Criminal homicide is aggravated murder, murder, manslaughter, child abuse homicide, homicide by assault, negligent homicide, or automobile homicide.

77-13-6 Withdrawal of plea.

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2) (a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.

(b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.

(3) This section does not restrict the rights of an imprisoned person under Rule 65B, Utah Rules of Civil Procedure.

78-35a-101 Short title.

This act shall be known as the "Post-Conviction Remedies Act."

Rule 65B. Extraordinary relief.

(a) *Availability of remedy.* Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful restraint on personal liberty), paragraph (c) (involving the wrongful use of public or corporate authority) or paragraph (d) (involving the wrongful use of judicial authority, the failure to exercise such authority, and actions by the Board of Pardons and Parole). There shall be no special form of writ. Except for instances governed by Rule 65C, the procedures in this rule shall govern proceedings on all petitions for extraordinary relief. To the extent that this rule does not provide special procedures, proceedings on petitions for extraordinary relief shall be governed by the procedures set forth elsewhere in these rules.

(b) *Wrongful restraints on personal liberty.*

(1) *Scope.* Except for instances governed by Rule 65C, this paragraph shall govern all petitions claiming that a person has been wrongfully restrained of personal liberty, and the court may grant relief appropriate under this paragraph.

(2) *Commencement.* The proceeding shall be commenced by filing a petition with the clerk of the court in the district in which the petitioner is restrained or the respondent resides or in which the alleged restraint is occurring.

(3) *Contents of the petition and attachments.* The petition shall contain a short, plain statement of the facts on the basis of which the petitioner seeks relief. It shall identify the respondent and the place where the person is restrained. It shall state the cause or pretense of the restraint, if known by the petitioner. It shall state whether the legality of the restraint has already been adjudicated in a prior proceeding and, if so, the reasons for the denial of relief in the prior proceeding. The petitioner shall attach to the petition any legal process available to the petitioner that resulted in restraint. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior proceeding that adjudicated the legality of the restraint.

(4) *Memorandum of authorities.* The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(5) *Dismissal of frivolous claims.* On review of the petition, if it is apparent to the court that the legality of the restraint has already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face and the reasons for this conclusion. The order need not state findings of fact or conclusions of law. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal.

(6) *Responsive pleadings.* If the petition is not dismissed as being frivolous on its face, the court shall direct the clerk of the court to serve a copy of the petition and a copy of any memorandum upon the respondent by mail. At the same time, the court may issue an order directing the respondent to answer or otherwise respond to the petition, specifying a time within which the respondent must comply. If the circumstances require, the court may also issue an order directing the respondent to appear before the court for a hearing on the legality of the restraint. An answer to a petition shall state plainly whether the respondent has restrained the person alleged to have been restrained, whether the person so restrained has been transferred to any other person, and if so, the identity of the transferee, the date of the transfer, and the reason or authority for the transfer. Nothing in this paragraph shall be construed to prohibit the court from ruling upon the petition based upon a dispositive motion.

(7) *Temporary relief.* If it appears that the person alleged to be restrained will be removed from the court's jurisdiction or will suffer irreparable injury before compliance with the hearing order can be enforced, the court shall issue a warrant directing the sheriff to bring the respondent before the court to be dealt with according to law. Pending a determination of the petition, the court may place the person alleged to have been restrained in the custody of such other persons as may be appropriate.

(8) *Alternative service of the hearing order.* If the respondent cannot be found, or if it appears that a person other than the respondent has custody of the person alleged to be restrained, the hearing order and any other process issued by the court may be served on the person having custody in the manner and with the same effect as if that person had been named as respondent in the action.

(9) *Avoidance of service by respondent.* If anyone having custody of the person alleged to be restrained avoids service of the hearing order or attempts wrongfully to remove the person from the court's jurisdiction, the sheriff shall immediately arrest the responsible person. The sheriff shall forthwith bring the person arrested before the court to be dealt with according to law.

(10) *Hearing or other proceedings.* In the event that the court orders a hearing, the court shall hear the matter in a summary fashion and shall render

judgment accordingly. The respondent or other person having custody shall appear with the person alleged to be restrained or shall state the reasons for failing to do so. The court may nevertheless direct the respondent to bring before it the person alleged to be restrained. If the petitioner waives the right to be present at the hearing, the court shall modify the hearing order accordingly. The hearing order shall not be disobeyed for any defect of form or any misdescription in the order or the petition, if enough is stated to impart the meaning and intent of the proceeding to the respondent.

(c) *Wrongful use of or failure to exercise public authority.*

(1) *Who may petition the court; security.* The attorney general may, and when directed to do so by the governor shall, petition the court for relief on the grounds enumerated in this paragraph. Any person who is not required to be represented by the attorney general and who is aggrieved or threatened by one of the acts enumerated in subparagraph (2) of this paragraph may petition the court under this paragraph if (A) the person claims to be entitled to an office unlawfully held by another or (B) if the attorney general fails to file a petition under this paragraph after receiving notice of the person's claim. A petition filed by a person other than the attorney general under this paragraph shall be brought in the name of the petitioner, and the petition shall be accompanied by an undertaking with sufficient sureties to pay any judgment for costs and damages that may be recovered against the petitioner in the proceeding. The sureties shall be in the form for bonds on appeal provided for in Rule 73

(2) *Grounds for relief.* Appropriate relief may be granted. (A) where a person usurps, intrudes into, or unlawfully holds or exercises a public office, whether civil or military, a franchise, or an office in a corporation created by the authority of the state of Utah; (B) where a public officer does or permits any act that results in a forfeiture of the office; (C) where persons act as a corporation in the state of Utah without being legally incorporated; (D) where any corporation has violated the laws of the state of Utah relating to the creation, alteration or renewal of corporations, or (E) where any corporation has forfeited or misused its corporate rights, privileges or franchises

(3) *Proceedings on the petition.* On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may also grant temporary relief in accordance with the terms of Rule 65A

(d) *Wrongful use of judicial authority or failure to comply with duty actions by board of pardons and parole*

(1) *Who may petition.* A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph may petition the court for relief

(2) *Grounds for relief.* Appropriate relief may be granted (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion, (B) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty or office, trust or station, (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled, or (D) where the Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law

(3) *Proceedings on the petition.* On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may direct the inferior court, administrative agency, officer, corporation or other person named as respondent to deliver to the court a transcript or other record of the proceedings. The court may also grant temporary relief in accordance with the terms of Rule 65A

(4) *Scope of review.* Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority.
(Amended effective September 1, 1991; May 1, 1993; July 1, 1996.)

Rule 11. Pleas.

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

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

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

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

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

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

(2) the plea is voluntarily made;

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

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

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

(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;

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

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

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

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

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

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

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

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

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

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

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

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

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

(Amended effective May 1, 1993; January 1, 1996; November 1, 1997.)

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by

the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.

(Amended effective October 1, 1992; February 11, 1998.)