

2010

Korte H. Wamsley v. The State of Utah : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KORTE H. WAMSLEY, JR., :
Petitioner/Appellant, :
vs. : Appellate Court No. 20100617
STATE OF UTAH, :
Respondent/Appellee. :

REPLY BRIEF OF APPELLANT

THIS APPEAL IS FROM A DISMISSAL OF THE TRIAL COURT OF A PETITION FILED UNDER THE POST CONVICTION REMEDIES ACT, U.C.A. §78B-9-101 ET SEQ. WHEREIN THE TRIAL COURT DISMISSED THE PETITION, PURSUANT TO A SUA SPONTE MOTION, THAT IT WAS TIME BARRED PURSUANT TO THE STATUTE OF LIMITATIONS PROVISION OF THAT ACT, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JOSEPH C. FRATTO, JR., PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
ARGUMENT	1
CONCLUSION	8
CERTIFICATE OF MAILING	9

ADDENDA:

Addendum A:	Petition for Relief Under Post Conviction Remedies Act
-------------	--

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)	3, 4, 8
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S. Ct. 792, (1963)	7, 8

UTAH STATE CASES

<i>Nelson v. Jacobsen</i> 669 P.2d 1207, 1213 (Utah, 1983)	7
--	---

STATUTES AND RULES

UNITED STATES CONSTITUTION

Fourteenth Amendment.....	4
---------------------------	---

UTAH CODE ANNOTATED

§78B-9-101	6
§78B-9-107(1)(e).....	3
§78B-9-107(3).....	3, 5
§78B-9-402(2)(A)	5, 6

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REPLY BRIEF OF APPELLANT

POINT I

**WAMSLEY'S PETITION FOR POSTCONVICTION
RELIEF WAS NOT TIME BARRED**

The State argues that the Petition for Postconviction Relief was time-barred under several theories. First, they state that the petition was not filed within one year of the date of Wamsley's sentence, a fact acknowledged by the defendant in its opening brief. (See page 14 of Appellants brief). Second, they claim that Wamsley knew of all the evidence prior to sentencing; and third, that there is no interest of justice exception for the late filing. Having already addressed the first of the State's claims in the opening brief, we now turn to the second claim.

A. The issue of newly discovered evidence was adequately briefed.

The State argues that Wamsley did not adequately brief the newly discovered evidence issue relying solely on the claim that Wamsley did not adequately set forth the facts in dispute. Wamsley, in his opening brief, made specific and clear allegations that, “the matter was filed within one year of the discovery of new evidence,” (brief page 14) and, “the primary item of evidence was a forged document that was not as it was purported to be.” (Brief page 15). Both of these items of evidence were specifically referred to in the statement of facts. See (brief page 9) which states, “Sometime later, during a collateral juvenile court proceeding, the Petitioner discovered that the State had withheld critical evidence regarding other similar allegations made by the alleged victim that could also not be substantiated by any hard evidence.” Also see (brief page 9) which states, “there was significant evidence to persuade a handwriting expert that the statements supposedly written by the alleged victims were written and signed by the Petitioner’s ex-wife. The information revealed in discovery pursuant to this juvenile court proceeding was substantial and would have altered the path of the entire prosecution.”

These two items of evidence, newly discovered, were alleged in the brief and specifically referenced in the body of the brief and were easily identifiable by the State in its brief. (See page 18-19 of State’s brief). Finally, the State’s claim

that the Wamsley knew of the forged documents as set forth on page 23 of the State's brief is incorrect. There were three different letters. One was the letter submitted for sentencing under Kaitlyn's name, which Wamsley acknowledges was a document not authored nor signed by Kaitlin. The other two were the original statements which were typed by the mother, Kathryn, and allegedly signed by Kaitlin and Korynne. Wamsley first received a copy of those two documents and discovered that the signature is Kathryn's and not Kaitlyn's or Korynne's in July 2008 in preparation for the juvenile court case. In addition, Wamsley discovered during the juvenile court hearing in December 2008 that the State had committed the *Brady*¹ violations in not previously disclosing to the defendant in a criminal case the additional critical information regarding similar allegations made by the alleged victim.

Given the factual basis set forth above, Wamsley clearly briefed the issue, including a thorough legal analysis setting forth the precedent regarding newly discovered evidence in a postconviction relief petition as set forth in UCA §78B-9-107(1)(e). The State thereafter argues that "the PCRA's state action tolling provision is inapplicable to the case". (Pg. 25 of State's brief) This theory is based on an argument that the *Brady* violation does not constitute a valid claim for the invocation of the tolling provision under Utah Code Ann. §78B-9-107(3). That

¹ (*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)).

provision provides in relevant part that the limitation period is tolled for any time “petitioner was prevented from filing a petition due to state action in violation of the United States Constitution.” Even a casual perusal of the case of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), would identify that a *Brady* violation is predicated on a Fourteenth Amendment violation of the United States Constitution. In that case the court began its analysis with the statement,

We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals—United States ex rel. Almeida v. Baldi, 195 F.2d 815, 33 A.L.R.2d 1407, and United States ex rel. Thompson v. Dye, 221 F.2d 763—which, we agree, state the correct constitutional rule. (*Brady v. Maryland* 373 U.S. 83, 86, 83 S.Ct. 1194, 1196 (U.S.Md. 1963))

Since this 1963 decision, a claim of violation under this case has thereafter become so commonly recited as a *Brady violation* that it scarcely needs to be fully cited, akin to a *Miranda* violation, etc. The fact that *Brady v. Maryland* is based upon a Fourteenth Amendment due process claim is also as obvious as a *Miranda* violation is based upon a Fifth Amendment claim. Wamsley clearly indicated in his opening brief that the postconviction relief claim was based upon a *Brady* violation of the withholding by the prosecution of exculpatory evidence. Where there exists a withholding of exculpatory evidence by the prosecution, a *Brady*

violation has occurred, and the tolling provision of Utah Code Ann. §78B-9-107(3) would automatically be invoked.

POINT II

WAMSLEY FILED A FACTUAL INNOCENCE PETITION

The State argues that Wamsley never filed a factual innocence petition. (See Point II of the State's brief). The State acknowledges that the Factual Innocence Statute is not ruled by a statute of limitations (State brief pg. 30), and therefore there is no time bar for a petition of a factual innocence. The State, however, argues that Wamsley did not file a factual innocence petition. (State brief pg. 37) The State thereafter makes a conclusory statement that a factual innocence petition must be filed separately from a PCRA petition. The State fails to cite any statutory or case precedent to support this allegation. The State further claims that Wamsley did not comply with the statutory requirements under UCA §78B-9-402(2)(A). That statute provides that a petition for determination of factual innocence must contain the following:

- (2)(a) The petition shall contain an assertion of factual innocence under oath by the petitioner, and shall aver, with supporting affidavits or other credible documents, that:
 - (i) newly discovered material evidence exists that, if credible, establishes that the petitioner is factually innocent;
 - (ii) the specific evidence identified by the petitioner in the petition establishes innocence;
 - (iii) the material evidence is not merely cumulative of evidence that was known;

(iv) the material evidence is not merely impeachment evidence; and
(v) viewed with all the other evidence, the newly discovered evidence demonstrates that the petitioner is factually innocent.
(Emphasis added)

A careful reading of the Wamsley's Petition for Relief under the Postconviction Remedies Act clearly shows that Wamsley cited to Utah Code Ann. §78B-9-101 et seq., indicating that he intended to utilize all of the provisions under that title. Specifically Wamsley cites to §78B-9-402, the statute that sets forth requirements for a petition for determination of factual innocence. In analyzing whether or not Wamsley's petition meets all the requirements in the statute set forth above, the petitioner would suggest that the entire petition was signed under a statement entitled "petitioner's verification under oath" and notarized by a legal notary public, thus meeting the first prong of that section. Wamsley clearly sets forth claims of newly discovered evidence that would establish the petitioner's innocence. Wamsley then sets forth on pages 2, 4, 5, and 6, of that petition the specific items of evidence that were illegally withheld by the prosecutor during the criminal prosecution. Wamsley implies that this evidence is not cumulative evidence of that which was known and that it is not merely impeachment evidence since it went to the heart of the case; and had the evidence been properly produced by the prosecution, Wamsley would never have entered his guilty plea. Finally, Wamsley states that the newly discovered evidence, especially when combined

with all other evidence, proves that the petitioner is factually innocent. On page 3 of that petition (a copy of which is attached as Addendum A to this reply brief)

Wamsley states,

“as provided in this petition a copy of the bar complaint clearly shows that witnesses were lying, and the preliminary transcript captures the lies. This removes the supposed factual basis for which the court accepted the plea... When a defendant enters a guilty plea but does not admit guilt, to ensure the plea is knowing and voluntary, the record must reveal either facts to support prosecution of defendant at trial or facts to suggest a defendant faces a substantial risk of conviction at trial.”

After viewing the petition in its entirety, Wamsley clearly meets all the requirements for a petition of factual innocence, and all of those requirements are set forth under an oath by the petitioner.

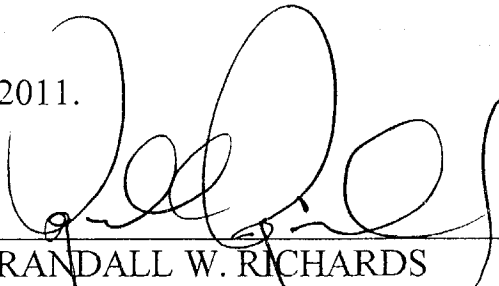
Courts have traditionally allowed pro se litigants some latitude in the filing of documents due to the fact that they are not law trained. In the case of *Nelson v. Jacobsen* 669 P.2d 1207, 1213 (Utah, 1983), the Court said, “we have also cautioned that ‘because of his lack of technical knowledge of law and procedure [a layman acting as his own attorney] should be accorded every consideration that may reasonably be indulged.’” (Citations omitted). In probably the most famous criminal case involving a pro se litigant, the Supreme Court of the United States accepted a handwritten petition for habeas corpus that did not meet all of the technical requirements, and issued the landmark decision of *Gideon v. Wainwright*,

372 U.S. 335, 83 S. Ct. 792, (1963). Likewise, the petitioner in this case should be afforded some latitude for minor technical violations, particularly in a petition for factual innocence.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests this Court to reverse the trial court and remand the case back for a hearing on the factual innocence claim based upon the *Brady violations* and the use of forged documents in obtaining the conviction. Wamsley further requests this Court to instruct the trial court to allow some limited discovery, specifically allowing the forensic handwriting expert, George Throckmorton, to analyze the two statements that were crucial in the determination by the petitioner to enter a plea of guilty. When this analysis establishes that the statements were forged documents, the defendant thereafter should be allowed to withdraw his guilty plea and proceed to trial if the State elects to go forth in light of the highly questionable evidence.

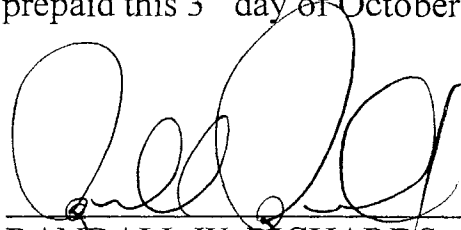
DATED this 3rd day of October 2011.



RANDALL W. RICHARDS
Attorney for Petitioner/Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing **Reply Brief of Appellant** together with a CD of the same to Mark Shurtleff, Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor , PO Box 140854 Salt Lake City, Utah 84114-0180, postage prepaid this 3rd day of October 2011.

A handwritten signature in black ink, appearing to read 'Randall W. Richards', is written over a horizontal line.

RANDALL W. RICHARDS
Attorney for Petitioner/Appellant

ADDENDUM A

JUN 22 2009

SALT LAKE COUNTY

By _____ Deputy Clerk

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IN THE THIRD DISTRICT COURT, WEST JORDAN DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KORTE H WAMSLEY, JR.)	PETITION FOR RELIEF UNDER THE
Plaintiff)	POST CONVICTION REMEDIES ACT
VS.)	Utah Code Ann. §78B-9-101, et seq.
)	Utah Rules of Civil Procedure 65C
STATE OF UTAH)	Case No. <u>090710281</u>
Respondant)	Judge _____

Comes now Korte H Wamsley, Jr., and Petitions the Court to vacate the Alford Plea and overturn the subsequent felony convictions entered into by the Third District Court, West Jordan Department, in and for Salt Lake County, State of Utah, Case number 051400719.

The plea and convictions were entered into on June 8, 2007, however the time to seek relief has been tolled for reasons provided throughout this petition. Relief is being sought under Utah Code Ann. §78B-9-101, et seq. for the following:

Utah Code Ann. §78B-9-104 The Plea itself is illegal due to its very nature and the circumstances surrounding it. Acceptance of the Plea by the Court also violated the Utah Rules for Criminal Procedures and the Plaintiff's Constitutional Rights. Neither was the Plea entered knowingly and voluntarily by the Plaintiff, evidence of which is presented with this Petition. Because the Plaintiff was incarcerated immediately after sentencing in the Salt

Lake County Jail, which does not have a law library, and because he could not get his attorney to respond to him while incarcerated, as is shown throughout the Memorandums of Points and Authorities, he was denied access to information regarding the plea's legality as well as access to the courts to contest it.

Utah Code Ann. §78B-9-402 and Utah Code §78B-9-104(e) New evidence is being submitted with this Petition that proves charges against the Plaintiff never should have been filed to begin with. The entire case was one of malicious prosecution that capitalized on the willingness of the State's supposed "Witnesses" to commit forgery and perjury, violating the Utah Rules for Criminal Procedures, and the Constitutional Rights of the Plaintiff. As of December, 2008, the Plaintiff also received new documents proving that the prosecutor illegally withheld evidence from the trial court. This evidence tolls the time allowed to enter this Petition, as dictated by Utah Code Ann. §78B-9-107(2) and Utah Code Ann. §78B-9-107(4)(b).

Since the Plaintiff is not able to afford counsel, he is acting *pro se* and asks the court to also apply all Utah Statutes they determine provide relief, and of which he may not be aware. The Plaintiff is submitting all required evidence as noted throughout the Memorandums of Points and Authorities that follow. For purposes of the court record, the Plaintiff first submitted a Petition on April 21, 2009 to the court of original jurisdiction, as required by the code, but did so under the criminal case number. The trial court dismissed that Petition on May 28th, 2009, since it was not filed as a "new action". (Exhibit A)

MEMORANDUM OF POINTS AND AUTHORITIES RE: ILLEGALITY OF PLEA

1. Under Rule 11(e)(4)(B) of the Utah Rules for Criminal Proceedings, for a plea to be entered, there must be a factual basis for the plea. A factual basis establishes that the charged crime was actually committed by the Plaintiff. The Alford plea was not entered due to sufficient evidence, and the court put this on record during the Plea Colloquy. (Exhibit B – June 8th Plea Colloquy, page 4, line 25 – page 5, line 7).

A trial court's failure to comply strictly with this rule in accepting a guilty or no contest plea is good cause as a matter of law, for the withdrawal of that plea, as was ruled on in State v. Gibbons, 740 P.2d 1309, as well as State v. Smith, 812 P.2d 470. According to these rulings, when a violation of this rule deprives a defendant of a constitutional right, which is clearly the case as outlined in the Plea submitted by the Plaintiff (Exhibit C), from pages 2 through 4, it is grounds for habeas corpus or other collateral relief.

2. Again, in pleas under North Carolina vs. Alford, where a defendant necessarily does not admit to all elements of the charged crimes, *the record must be sufficient* to satisfy the trial court and/or a reviewing court that the State's case is strong enough to warrant acceptance of the plea when the Defendant has not admitted guilt. Prosecutor Sean Torriente's Certificate of Prosecuting Attorney claiming, "There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense for which the plea is entered..." is not factual or sufficient grounds for the court to accept an Alford Plea.

Prosecutor Sean Torriente, at sentencing on Oct. 10, 2007, and now on permanent Court record, made a public statement, "that this case isn't about credibility" after his witness, Korynne Wamsley, disclosed to the court that it was "hard" for her "not to lie" and that she lies because she's "just used to it," that she lies "without even knowing it" because she has "lied so

many times.” (Exhibit D, Sentencing Colloquy, Page 8). The State had nothing but Witness statements on which to base this case. The very fact that Mr. Torriente admitted before the Court that “this case isn’t about credibility”, when that is all his charges were based on, was sufficient to prove to the Court that the State’s case had no merit and there was, in fact, *insufficient* evidence. Actually, by stating this, Mr. Torriente is admitting he had no evidence at all. Adding to this that Mr. Torriente’s second “victim/witness”, Kaitlin Wamsley, is now on the court’s record as accusing four separate and distinct individuals of sexually abusing her (Exhibit E, Page 4 of Bar Complaint plus Bar Complaint Exhibits M and N) and, on December 9, 2008, was recently discovered to have accused a fifth individual of having sexually abused her at the same time she was accusing the other four, (Exhibit F - DCFS Statement), we see even further why Mr. Torriente admits his case “is not about credibility”. The Plea, without a factual basis, is completely invalid.

3. The trial court relied on the Preliminary Hearing for its evidence without reviewing it (Exhibit B - Page 6, lines 16 – 20). As provided in this Petition, a copy of the Bar Complaint clearly shows the witnesses were lying, and the Preliminary transcript captures these lies. (Exhibit E). This removes the supposed factual basis on which the court accepted the plea (Exhibit B – Page 6, lines 16 – 20). In State vs. McEwan, 2000 UT APP 118, the court ruled, “When a defendant enters a guilty plea but does not admit guilt, to ensure the plea is knowing and voluntary, ‘the record must reveal either facts that would support the prosecution of a defendant at trial or facts that would suggest a defendant faces a substantial risk of conviction at trial.’...Moreover, for pleas entered after State v. Gibbons...the trial court must determine that this burden has been met at the plea hearing before it accepts the guilty plea.” The plea colloquy clearly shows this was not done merely by using the Preliminary as evidence.

4. Under Rule 11(e)(5) the defendant must be advised that there is the possibility of the imposition of consecutive sentences. The defendant was never advised of this (Exhibit B).
5. In State v. Gibbons, 740 P.2d at 1313 the court ruled, "It is not sufficient to assume that defense attorneys make sure that their clients fully understand the contents of the affidavit. The duty to ensure that defendants know and understand the rights they are surrendering when pleading guilty rests not on the parties, but on the trial court." The trial court clearly relied on the defendant knowing these rights through his defense counsel. (Exhibit B).
6. The Alford Plea entered by the Plaintiff contained a promise of value that was used to coerce the Plaintiff into entering it. The Plea (Exhibit C) clearly states on page 4, "Defendant will not serve prison time," and this arrangement was approved by the court and such approval added to the Plea on page 5 and incorporated into the Sentence (Exhibit D – Sentencing Colloquy, Page 20). At the time of sentencing a 90 day review was established, purportedly because the Court, "Would be interested in knowing what sex offender treatment may be available at that time or what other appropriate arrangements such as work release may be available." (Exhibit D – Sentencing Colloquy, Page 21) After Sentencing, but prior to this 90 day review, which occurred on January 14, 2008, Mr. Yengich claimed that the court ordered him to enter a motion on behalf of the Plaintiff (Exhibit G – e-mail from Ron) requesting transfer to a State Adult Correctional Facility. The Plaintiff had been unable to get his attorney to respond to his efforts to contact him since Sentencing, and had no knowledge that such a motion had been entered (Exhibit H - letter from Korte, e-mail to Ron). He was neither consulted nor did he concur with this action (Exhibit I – e-mail from Plaintiff's wife stating Plaintiff did not accept Motion). The court's direction in telling Mr. Yengich to enter the Motion that would change the Plaintiff's Sentence was confirmed during the review when Judge Adkins, now on Court record,

declared that he had never intended the review for any purpose other than “an inpatient program if there was one available.” (Exhibit J –January 14, 2008 Review Colloquy) According to Black’s Law Dictionary, Eighth Edition, “Prison” is “a State or Federal facility of confinement for convicted criminals....,” and is also termed an “adult correctional institution”. As such, the Court made it clear that the promise of “no Prison” was used solely to coerce the Plaintiff into entering the Plea since the Court’s intent all along was to sentence the Plaintiff to a Utah Department of Corrections facility.

7. The Plaintiff exercised his right to withdraw the Plea in a timely manner by notifying his counsel before sentencing that he wished to do so. (Exhibit K – July 3, 2007 e-mail) He demanded that Mr. Yengich withdraw the plea, use the forged letter submitted by Kathryn Wamsley for sentencing to prove perjury to the Court, and subpoena documents that would provide further evidence in his defense. (Exhibit L - Aug. 13, 2007 letter from Ron, Aug. 23, 2007 e-mail from Ron). Mr. Yengich refused to request the subpoenas, made a call to the Plaintiff’s therapist, Margo Miles, who had encouraged the Plaintiff to fight and not enter a plea, and told Ms. Miles that the Plaintiff was lying to her about what he had really done to his girls, which caused Ms. Miles to withdraw as the Plaintiff’s therapist. The defense attorney, an officer of the legal system, violated his client’s constitutional rights when he refused to withdraw the Plea for him, and made it a matter of coercion in forcing the Plea on his client by lying to the client’s therapist, an invaluable emotional support during this time, and threatening the Plaintiff if he tried to withdraw the Plea (Exhibit L). This action by the Defense Counsel gives the Plaintiff the right to seek relief under Utah Code Ann. §78B-9-104(1)(d).

**MEMORANDUM OF POINTS AND AUTHORITIES RE: CONVICION OBTAINED
BY PLEA OF GUILTY THAT WAS UNLAWFULLY INDUCED OR NOT MADE
VOLUNTARILY WITH UNDERSTANDING OF THE NATURE OF THE CHARGE
AND THE CONSEQUENCES OF THE PLEA DUE TO INEFFECTIVE
ASSISTANCE OF COUNSEL**

1. It is an integral and important part of this country's judicial system that the attorney client relationship be one of integrity. Attorneys are to represent the best interests of their client in all instances and at all times. An attorney who fails to do so has not only betrayed the trust and confidence of his client, but has misrepresented the entire legal system because attorneys are considered officers of the legal system. Following outlines the course of action, lies and coercion used by Defense Attorney, Ron Yengich, to trick and then intimidate the Plaintiff into taking an Alford Plea:
 - A. The Defense Attorney deliberately and willfully lied to his client, Korte Wamsley, about the use of an Alford Plea and what its consequences were. After sequestering the Plaintiff in a conference room, refusing to allow him to have family or anyone else with him, refusing to let him talk to anyone else via phone, and confining the Plaintiff with himself and Private Investigator Gary Potter, the following statements about the plea and its consequences were made by Ron Yengich, or in his presence and with his consent, by Gary Potter:
 - (i) The State was offering this plea as their way of saying the Plaintiff was innocent. Any judge in the land who read the plea would understand this, and it would help the Plaintiff in a custody battle for his children.
 - (ii) An Alford Plea could be used by innocent people for any reason simply to stop a trial, which would enable the Plaintiff to spare his girls the humiliation of being branded liars

in a public courtroom. Under Utah or Federal Law, the sole purpose for entering an Alford Plea is if there is sufficient evidence to convict. Mr. Yengich knew this, but deliberately lied to his client about the use of such a Plea, thereby causing his client to enter the Plea without knowledge. This is confirmed by his statement to the court that the plea was being entered by the Plaintiff “to complete this case for the reasons that you’ve indicated you are entering the plea...”

- (iii) Part of Probation would be to bring about reunification with the Plaintiff’s girls. (Exhibit K – E-mail to Ron).
- (iv) Per Gary Potter (while Yengich remained silent, thereby tacitly agreeing) the State would reduce and then dismiss the convictions in “two to three years” and “It would be as though it never happened.”
- (v) Mr. Yengich claimed that Mr. Torriente was offering such an “exceptional plea” because he did not want to go to trial with Kathryn Wamsley as his main witness since he recognized that Kathryn Wamsley was a “liar and lunatic”. This statement was repeated when Suzanne Wamsley attended a second meeting with Mr. Yengich. When asked why the State did not then simply drop the charges, in both meetings Mr. Yengich responded that the State could not just drop charges since their witnesses refused to recant. When asked if Judge Adkins was aware of this, Mr Yengich claimed that the judge knew exactly what was going on. (Exhibit M – Proof Prosecutor made statement and Yengich was asked if Judge knew).
- (vi) The Plaintiff was told he would not be on the Sex Offender Registry, which Mr. Yengich later claimed he did not promise but that he would “see what he could do”.

- (vii) Mr. Yengich assured the Plaintiff this was the correct course of action by making the statement, "If you were my own son, I'd tell you to take this".

When an attorney lies to his client in the manner Mr. Yengich lied to the Plaintiff, the attorney's actions, according to the Utah Rules for Professional Conduct, constitute "fraud – any conduct that...has a purpose to deceive." The Plaintiff was relying on his lawyer to provide him with an informed understanding of his legal rights and obligations and their practical implications. Through these actions, the Defense Attorney, an officer of the legal system, deprived the Plaintiff of a true understanding of the nature and elements of the Plea and its consequences. Because of his reliance on his lawyer's deliberately deceptive information, the Plaintiff cannot be considered as having entered the Plea with knowledge or voluntarily.

The act of sequestering the Plaintiff, as described in (A) above, also constitutes coercion, as ruled on by the U.S. Supreme Court in *Chambers v. Florida*, and is enough in and of itself to make the Plea inadmissible.

**MEMORANDUM OF POINTS AND AUTHORITIES RE: ADDITIONAL
VIOLATIONS OF THE PLAINTIFF'S CONSTITUTIONAL RIGHTS AND
VIOLATIONS OF URCrP**

Utah Code Ann. §78B-9-104(1)(a) grants post-conviction relief when convictions are obtained or sentences imposed in violation of the United States Constitution or Utah Constitution.

1. Mr. Yengich's pattern of postponing trials at the last minute, with the court's approval but without his client's, not only proves that he never intended to defend his client, hence Mr. Yengich's lies in coercing the Plaintiff into taking a plea, but also served as a violation of the Plaintiff's Sixth Amendment right to have a Speedy Trial by dragging the Plaintiff's case out over a period of twenty three months. The Plaintiff was never given prior notice of trial delays created by the Defense Counsel, has never given his Defense Counsel permission to delay a single trial date, and is even on record as complaining about it. (Exhibit N – E-mail to Ron 2/28/07)
- (i) In December of 2006, on the Friday before Monday's jury selection for trial, Mr. Yengich postponed the trial date without consulting his client. This postponement resulted after the Plaintiff refused to take a proffered plea. The Defense Counsel claimed he (the Defense Counsel) exercised his right to postpone the trial because the Prosecutor had "submitted new evidence," but then refused to expand on or clarify this claim. Mr. Yengich then tried to avoid all questions from the Plaintiff about what this new evidence was. When the Plaintiff persisted, upset that such an emotionally devastating and taxing event was to be postponed, and without ever having been consulted by his attorney about it, a copy of a single page statement was sent to him a few weeks later that was not new evidence. Mr. Yengich had delayed the trial without his client's consent or foreknowledge, and without valid reason.

- (ii) In April of 2007, Mr. Yengich once again postponed the trial, claiming he was to appear before a Federal Grand Jury during the same week in which the Plaintiff's trial was to be held, even though the Plaintiff's trial had been scheduled four months prior.
- (iii) The third trial date was set for June, 2007. When the Plaintiff once again refused a proffered plea, it was then that Mr. Yengich set forth the lies listed in Memorandum of Points and Authorities Re: Conviction obtained...due to ineffective Counsel(1) (A).

In Barker v. Wingo, the U.S. Supreme Court ruled that a delay of one year or more from the date on which the speedy trial right "attaches" (the date of arrest or indictment, whichever first occurs) was termed "presumptively prejudicial". In addition to being a violation of the Plaintiff's Constitutional Rights, this action also violates URCrP Rule 25 (b)(1) which requires the court to dismiss the information or indictment when there is unreasonable or unconstitutional delay in bringing the defendant to trial. The Plaintiff was kept waiting for a trial for twenty three months, eleven months beyond what the Supreme Court already considers "presumptively prejudicial."

2. The Plea was submitted with the intent of including the Plaintiff's statement, as is his right under URCrP Rule 22 (a). This is clearly indicated on the Plea Colloquy (Exhibit B) on page 1, lines 27 and 28, and again on page 5, line 3. Under Rule 22 (a) before imposing sentence the court shall afford the defendant the opportunity to make a statement and to present information in mitigation of punishment, or show any legal cause why sentence should not be imposed. The Defense Counsel submitted the Plea without the attached statement, an oversight not corrected by the Court. The Defense Counsel also failed to

submit the evidence of perjury the Plaintiff specifically asked him to submit at sentencing. By these omissions, both the Court and Mr. Yengich violated this rule.

3. Utah Code Ann. §78B-9-104(1)(c) allows for post-conviction relief when the sentence was imposed...in violation of the controlling statutory provisions. Under URCrP, Rule 22, (c)(1), following imposition of sentence, the court shall advise the defendant of the defendant's right to appeal and the time within which any appeal shall be filed. The Court failed to do so. (Exhibit D – Sentencing Colloquy).

4. The Plaintiff was incarcerated within two days of sentencing, and Salt Lake County Jail does not contain a Law Library or any way to research the Plea and its implications, effectively denying the Plaintiff the information needed to submit a Petition to the Court once he discovered his attorney's duplicity and refusal to present evidence at sentencing. The refusal of his attorney to communicate with him, as evidenced in Memorandum of Points and Authorities Re: Illegality of Plea, (6), also served to deny the Plaintiff the right to appeal the sentence. These actions served to violate the Plaintiff's Constitutional Right to "meaningful access to the courts", a right which, had the Plea been valid, he had still not given up.

**MEMORANDUM OF POINTS AND AUTHORITIES RE: MALICIOUS
PROSECUTION, FORGERY, PERJURY AND UNCONSTITUTIONAL FAILURE**

**OF THE PROSECUTION TO DISCLOSE TO THE DEFENDANT EVIDENCE
FAVORABLE TO THE DEFENDANT**

Utah Code Ann. §78B-9-402(2)(a)(v) states that, viewed with all the other evidence, the newly discovered evidence demonstrates that the petitioner is factually innocent....

Thus these Statements of Fact combine the accumulation of old with new evidence that was unavailable until recently.

1. Charges filed against the Plaintiff were based on statements created and forged by Witness, Kathryn Wamsley, who at the time they were filed, was seeking a divorce from Plaintiff that would grant her sole custody of their children and all marital assets. (Exhibit O – proof of forgeries). This was discovered when files were turned over to the Plaintiff's current wife by defense counsel in July of 2008.
2. Prosecutor Sean Torriente advised the defense counsel, Ron Yengich, that his witness, Kathryn Wamsley, was “a liar and a lunatic”, yet no where is there a record of Mr. Torriente or Mr. Yengich disclosing this to the Court. (Exhibit E – Bar Complaint, Exhibit M – letters, e-mails to Ron Yengich). Both Mr. Torriente and Mr. Yengich, as lawyers, are considered officers of the legal system and both are obligated to provide such relevant discovery to the Court.

Mr. Torriente, as prosecutor, violated the Utah Rules for Criminal Procedures (henceforth URCrP), Rule 16 by failing to come forth with this information. While Rule 16 of the URCrP states that the prosecutor shall disclose to the defense “upon request”, in Parsons v. Galetka, 57 F. Supp. 2d 1151 a broader disclosure obligation is imposed on the prosecutor. The prosecutor is obliged to make disclosure on a continuing basis without a request, which Mr. Torriente clearly failed to do. Mr. Yengich violated Rule 16(d) of the

URCrP, which requires him to also make continuing disclosure. The failure to disclose this pertinent information to the court prevented the Court from exercising its right under URCrP Rule 25 to dismiss the case, as well as serving to bias the Court against the Plaintiff in its consideration of all information presented.

3. Prosecutor Sean Torriente, at sentencing on Oct. 10, 2007, and now on permanent Court record, made a public statement, "that this case isn't about credibility" after his witness, Korynne Wamsley, disclosed to the court that it was "hard" for her "not to lie" and that she lies because she's "just used to it;" that she lies "without even knowing it" because she has "lied so many times." The State had nothing but Witness statements on which to base this case. Such an admission by Mr. Torriente proves corruption of the judicial procedure from the moment charges were filed, since they were based on forgeries, all the way through sentencing. At this admission by both the Witness and the Prosecutor, the Plea and the charges should have been dismissed by the Court. (Exhibit D – Sentencing Colloquy, Page 8)
4. Prosecutor Sean Torriente had copies of a DCFS discovery showing that the two alleged victims, Kaitlin and Korynne Wamsley, were sexually involved with each other for years prior to making any allegations against the Plaintiff, yet the Prosecutor withheld this evidence from the court. (Exhibit F - Discovery, irrelevant text blocked to protect other children) Mr. Torriente claimed to the court that Korynne Wamsley's ongoing sexual behavior resulted from sexual abuse by her father, deliberate perjury given his undisclosed knowledge. Mr. Torriente's involvement in Korynne's subsequent incarceration and two years of State custody (Korynne was not allowed home until she agreed to make statements against her father at sentencing) can only be construed as

coercing a witness. One week prior to her mother claiming Korynne was sexually abusing her little brother, which lead to Mr. Torriente charging her and having her removed from the home to State custody, Korynne had reported to her grandmother that she would not go along with her mother's "divorce scheme". Without Korynne as a "victim/witness" to strengthen his case, Mr. Torriente knew it would quickly be thrown out. While the Plaintiff does not know which specific law Mr. Torriente violated, he has no doubt that attacking and incarcerating an unwilling and defenseless twelve year old girl who refuses to lie for him is a serious crime. The Plaintiff was never advised, as was his legal right, of what was happening to his daughter.

Withholding this evidence served to prejudice the court into believing the girls had no prior sexual encounters before the supposed "touching" by their father, and Mr. Torriente actively attempted to claim to the court that Korynne's subsequent deviant behavior/incarceration was the result of sexual abuse reactivity caused by her being "touched" by her father. Proof is provided herein that Korynne is actually on court record, under sworn oath, as stating that her father never touched her in any manner that can be remotely construed as sex abuse. (Exhibit E - Bar Complaint, Pages 4 & 5 with accompany exhibits specific to Bar Complaint). The Plaintiff only recently received a copy of this Discovery, having been illegally denied it prior to Dec. 9th, 2008, when a Motion entered into Juvenile Court forced its being given to him.

5. Defense Attorney Ron Yengich was provided with notice that the letter supposedly submitted by Kaitlin for sentencing was another forgery actually being submitted by her mother and Mr. Torriente (Exhibit P – e-mail to Ron, Submission by Torriente). In addition, Defense Attorney Ron Yengich was also provided with pictures of Kaitlin

Wamsley that proved to the court she continued to go along with her mother and Mr. Torriente when it came to acting out a charade (perjury) that mocked the Court. (Exhibit Q(i), (ii) – pictures of Kaitlin). Mr. Yengich refused to present this to the Court, but did not inform his client that he had no intention of doing so, thus violating his client's trust and his position as an Officer of the Legal System. Also, once again, a violation of URCrP, Rule 16(d).

6. Mr. Yengich had evidence in the form of audio tapes the Plaintiff gave Private Investigator Gary Potter. Korte Wamsley tape recorded his ex-wife, Kathryn Wamsley, the instigator of this malicious case, confessing that she knew their eldest daughter was given to great embellishment and was making up her stories, a key factor given Kathryn Wamsley had testified that she herself had typed the Statement for Kaitlin Wamsley in which sex abuse by her father is claimed. (Exhibit O – Kathryn Wamsley's Police Statement). He also tape recorded Kathryn Wamsley confessing that she has practiced a lesbian life style, and that their daughters, the two alleged victims, had been experimenting sexually on each other without his knowledge, but with hers. Strong testimony in proving that Kathryn Wamsley was very motivated in removing men from her life and in hiding what was really going on with her girls. In a third tape, Kathryn Wamsley tells the Plaintiff he will "hate her" for what she and the Prosecutor, Sean Torriente, have "collaborated" to do to him. These tapes were turned over to Gary Potter, the Private Investigator used by Mr. Yengich to supposedly investigate this case. Counsel for the Defense failed to use this evidence to get the case dismissed.

When the Plaintiff asked to have his tapes returned so he could use them in family court, Mr. Potter claimed they had been lost. That the tapes existed is proven by Mr.

Torriente's comment in a November 22, 2006 pre-trial conference in which he desperately asks if the defense is going to submit tapes that he knows they have for a Dec. 8, 2006 trial, as well as an e-mail sent by Gary Potter to the Plaintiff (Exhibit R - e-mail).

7. New Evidence is submitted with this Petition that proves a crime was never committed by the Plaintiff in this case. The new polygraph and psychosexual are conclusive, providing additional evidence that a crime was never committed. (Exhibit S – copies of polygraph, psychosexual, Raskin affidavit).

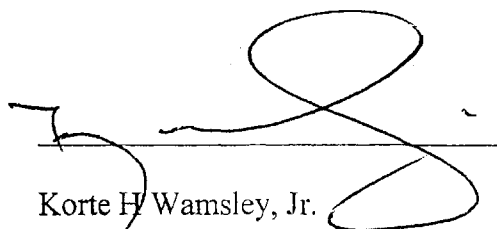
PETITION

WHEREBY the Plaintiff, Korte H Wamsley, Jr., petitions the Court to to take the following actions:

1. As allowed by Utah Code Ann. §78B-9-101 et seq. vacate the Alford Plea entered into on June 8, 2007, in its entirety and overturn the convictions entered into against the Plaintiff under the Post-Conviction Remedies Act.
2. Use its judicial discretion, for substantial cause and in furtherance of justice, to dismiss the charges filed against the Plaintiff on the basis of Evidentiary Insufficiency and the facts of malicious prosecution, fraud and perjury presented herein.
3. Use its judicial discretion, for substantial cause and in furtherance of justice, to dismiss the charges filed against the Plaintiff because of the unreasonable and unconstitutional delay in bringing the Plaintiff to trial.

4. Use its judicial discretion to remedy any prejudice to the Plaintiff resulting from the many breaches to the Utah Rules for Criminal Procedures and both the Utah Constitution and the Constitution of the United States of America as outlined in this Petition.

This Petition for Relief Under the Post-Conviction Remedies Act, Utah Code Ann. § 78B-9-101, et seq. is entered into on this 22 day of June, 2009.

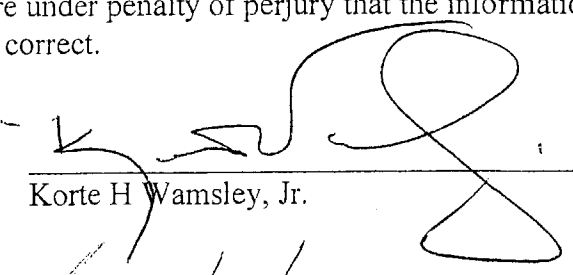


Korte H. Wamsley, Jr.

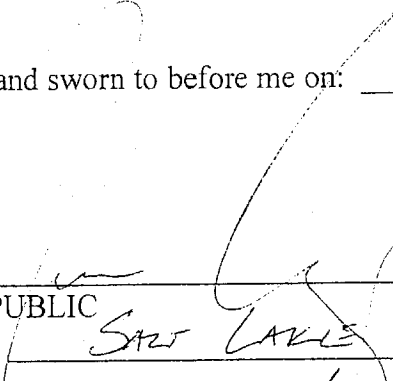
PETITIONER'S VERIFICATION UNDER OATH

STATE OF UTAH
COUNT OF SALT LAKE } ss.

I, the undersigned petitioner, declare under penalty of perjury that the information I have provided in this petition is true and correct.


Korte H Wamsley, Jr.

Subscribed and sworn to before me on: 6/22/09


NOTARY PUBLIC

Residing in: SALT LAKE

My Commission Expires: 12/15/10



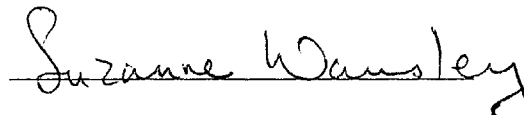
NOTARY PUBLIC
TANNER GUZY
1344 West 4675 South
Riverdale, Utah 84405
My Commission Expires
DECEMBER 15, 2010
STATE OF UTAH

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITION FOR RELIEF UNDER THE POST-CONVICTION REMEDIES ACT, Utah Code Ann. §78B-9-101 et seq. and Utah Rules of Civil Procedure 65C was mailed on the 22nd day of June, 2009 as follows:

LOHRA MILLER
District Attorney for Salt Lake County
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MARK SHURTLEFF
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Suzanne Wamsley