

1990

Utah v. Dastrup : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 900144-CA
v. :
MARK RAYMOND DASTRUP, : Category No. 2
Defendant-Appellant. :

BRIEF OF APPELLEE

- - - - -

APPEAL FROM A DENIAL OF A MOTION TO WITHDRAW
A GUILTY PLEA TO TEN COUNTS OF FORGERY,
SECOND DEGREE FELONIES, IN VIOLATION OF UTAH
CODE ANN. § 76-6-501 (1990), SEVEN COUNTS OF
THEFT, SECOND DEGREE FELONIES, IN VIOLATION
OF UTAH CODE ANN. § 76-6-404 (1990), AND ONE
COUNT OF THEFT, A THIRD DEGREE FELONY, IN
VIOLATION OF UTAH CODE ANN. § 76-6-404
(1990), IN THE SIXTH JUDICIAL DISTRICT COURT,
IN AND FOR SEVIER COUNTY, STATE OF UTAH, THE
HONORABLE DON V. TIBBS PRESIDING.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
JURISDICTION AND NATURE OF PROCEEDINGS.....	1
STATEMENT OF ISSUES AND STANDARD OF APPELLATE REVIEW.....	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.....	2
STATEMENT OF THE CASE.....	3
STATEMENT OF THE FACTS.....	4
SUMMARY OF ARGUMENT.....	6
ARGUMENT	
THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA	6
CONCLUSION.....	10

TABLE OF AUTHORITIES

CASES CITED

	Page
<u>Boykin v. Alabama</u> 395 U.S. 238 (1968).....	8
<u>State v. Gentry</u> , 141 Utah Adv. Rep. 26 (Utah Ct. App. August 24, 1990).....	6,9
<u>State v. Gibbons</u> , 740 P.2d 1309 (Utah 1987).....	5,6,9
<u>State v. Hoff</u> , No. 90096.....	9
<u>State v. Maquire</u> No. 900045-CA (Utah Ct. App. Nov. 16, 1990).....	9
<u>State v. Mildenhall</u> , 747 P.2d 422 (Utah 1987).....	1
<u>State v. Pharris</u> , 143 Utah Adv. Rep. 35 (Utah Ct. App. Sept. 14, 1990).....	6,9
<u>State v. Powell</u> , No. 900202-CA (Utah Ct. App. Oct. 24, 1990).....	9
<u>State v. Vasilacopulos</u> , 756 P.2d 92 (Utah Ct. App.), <u>cert. denied</u> , 765 P.2d 1278 (Utah 1988).....	6

CONSTITUTIONAL, PROVISIONS, STATUTES & RULES

Utah Code Ann. § 76-6-404 (1990).....	1,3,4
Utah Code Ann. § 76-6-501 (1990).....	1,3,4
Utah Code Ann. § 77-35-11 (Supp. 1988) (amended 1989, repealed eff. July 1, 1990).....	2-3
Utah Code Ann. § 78-2a-3 (Supp. 1990).....	1
Utah R. Civ. P. 11.....	2,5,6, 7,8

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff-Appellee, : Case No. 900144-CA
v. :
MARK RAYMOND DASTRUP, : Category No. 2
Defendant-Appellant. :

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a denial of a motion to withdraw a guilty plea to ten counts of forgery, second degree felonies, in violation of Utah Code Ann. § 76-6-501 (1990), seven counts of theft, second degree felonies, in violation of Utah Code Ann. § 76-6-404 (1990), and one count of theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1990), in the Sixth Judicial District Court, in and for Sevier County, State of Utah, the Honorable Don V. Tibbs presiding. This Court has jurisdiction to hear this appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1990).

STATEMENT OF THE ISSUES AND STANDARD OF APPELLATE REVIEW

Did the taking of defendant's guilty plea conform with legal requirements? A reviewing court "will not interfere with a trial judge's determination that a defendant has failed to show good cause [for withdrawal of a guilty plea] unless it clearly appears that the trial judge abused his discretion." State v. Mildenhall, 747 P.2d 422, 424 (Utah 1987).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 77-35-11(e) (Supp. 1988) (amended 1989, repealed eff. July 1, 1990).¹

(e) The court may refuse to accept a plea of guilty or no contest and shall not accept such a plea until the court has made the findings:

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

(2) That the plea is voluntarily made;

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

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

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

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

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

¹ Effective April 24, 1989, former rule 11(e) was redesignated as rule 11(5). Although defendant cites rule 11(e) and rule 11(5) interchangeably throughout his brief, to avoid confusion the State will cite to rule 11(e), the rule in effect at the time defendant entered his guilty plea.

dismissal of other charges, the same shall be approved by the court. If recommendations as to sentence are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

STATEMENT OF THE CASE

On March 7, 1989, defendant was charged with 106 counts of forgery and theft (R. 1-28). The same day an amended information was filed charging defendant with ten counts of forgery, all second degree felonies, in violation of Utah Code Ann. § 76-6-501 (1990), seven counts of theft, all second degree felonies, in violation of Utah Code Ann. § 76-6-404 (1990), and one count of theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1990) (R. 39-44). On March 8, 1989, defendant pleaded guilty to all 18 counts (transcript of arraignment proceeding [hereinafter "T."] 11-15). Defendant was sentenced to serve a term of not less than 1 year nor more than 15 years at the Utah State Prison on each of the second degree felony counts, and a term not to exceed 5 years in the Utah State Prison on the third degree felony theft count, all sentences to be served concurrently (transcript of sentencing proceeding [hereinafter "T.A."] 18-19).

On August 1, 1989, defendant filed a request for withdrawal of guilty plea (R. 61-63). A hearing on defendant's motion was held February 7, 1990, and the trial court denied defendant's motion on that date (transcript of hearing on motion to withdraw guilty plea [hereinafter "T.B."] 8). Defendant filed his notice of appeal on March 8, 1990 (R. 104-105).

STATEMENT OF FACTS

On March 8, 1989, defendant entered a guilty plea to ten counts of forgery, all second degree felonies, in violation of Utah Code Ann. § 76-6-501 (1990), seven counts of theft, all second degree felonies, in violation of Utah Code Ann. § 76-6-404 (1990), and one count of theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1990) (T. 11-15) (a copy of the transcript of the arraignment [guilty plea hearing] is attached hereto as Addendum A).²

At the arraignment proceeding the trial court asked defendant his age, educational level and ability to read and write the English language (T. 3); whether defendant was under the influence of alcohol or narcotics or was suffering from any mental illness (T. 4); and whether defendant had any questions as to his constitutional rights enumerated by the court, including the right to representation by counsel, the right to a speedy trial by an impartial jury, the right of confrontation and cross examination, the right against compulsory self-incrimination, the right to obtain witnesses in his defense, the right to a unanimous verdict by the jury in order to secure a conviction, and the right to appeal (T. 5-6). In addition, the trial judge questioned defendant as to whether the plea was made absent threats or promises (T. 7); whether defendant actually committed

² At the time of filing of this brief, an original certified copy of the arraignment transcript was not available. The State used a copy of the transcript, received from defendant, for the preparation of its brief. Joseph Liddell, court reporter, will certify an original and submit it to this Court. The State trusts that the original, as so submitted, will be the same as Addendum A.

the forgeries and thefts set out in the amended information (T. 9-10); and whether defendant understood that the court, and not the attorneys, determined the penalty that would be assessed (T. 10). The trial court informed defendant of the minimum and maximum penalties that could be imposed (T. 4-5). The court was also made aware that the plea had been negotiated and specifically stated that it would not accept the plea unless defendant admitted that he had actually committed the crimes as set forth in the amended information (T. 9). Defendant, when asked by the court if he wanted the court to accept the plea bargain, responded affirmatively (Id.).

After defendant had responded to the questions to the satisfaction of the trial court, defendant signed an affidavit in support of his plea and entered guilty pleas to all 18 counts in the amended information (T. 9, 11-15) (a copy of defendant's affidavit is attached hereto as Addendum B). The trial court specifically found that defendant was advised of his constitutional rights and that defendant had made a voluntary and intelligent plea (T. 11).

At the hearing on defendant's motion to withdraw his plea defendant declined to testify. His attorney argued that defendant's trial attorney had a conflict at the time he represented defendant (T.B. 3-4), that defendant had been denied equal protection of the law (T.B. 4-5) and that the trial court had not strictly complied with rule 11(e), Utah Rules of Criminal Procedure, pursuant to the requirements of State v. Gibbons, 740 P.2d 1309 (Utah 1987), in the taking of defendant's plea (T.B. 5). The trial court summarily denied defendant's motion (T.B. 8).

SUMMARY OF ARGUMENT

The trial court properly denied defendant's motion to withdraw his guilty plea because the record shows that defendant's plea was knowingly, intelligently and voluntarily made.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA

On appeal defendant asserts three bases for reversing the trial court's denial of his motion to withdraw his guilty plea. First, defendant states that the court did not comply with rule 11(e)(2), in that the record did not indicate that defendant specifically stated that his plea was voluntary. Second, defendant asserts that the court did not comply with the rule 11(e)(3) requirement that he know that by entering his plea he was waiving certain constitutional rights. Third, he claims that the record did not reflect that he understood the nature and elements of the offenses to which he entered a plea and that a guilty plea was an admission of those elements, as required by rule 11(e)(4). In presenting these arguments defendant relies on this Court's interpretation of State v. Gibbons, 740 P.2d 1309 (Utah 1987), as replacing the previous "record as a whole" test with an on-the-record "strict compliance" test in assessing the validity of a guilty plea. See, e.g., State v. Vasilacopulos, 756 P.2d 92 (Utah Ct. App.), cert. denied, 765 P.2d 1278 (Utah 1988); State v. Gentry, 141 Utah Adv. Rep. 26 (Utah Ct. App. August 24, 1990); State v. Pharris, 143 Utah Adv. Rep. 35 (Utah Ct. App. Sept. 14, 1990). If this Court applies an on-the-record

"strict compliance" test to the instant case, it can readily conclude that defendant's first and third allegations are without merit.

With regard to defendant's first allegation of error, the trial court specifically found that defendant's plea was voluntary, as required by rule 11(e)(2) (T. 11). On its face rule 11 requires only a finding by the court of voluntariness, not that a defendant specifically state that his plea is voluntary. In support of that finding, the trial court, on two occasions, told defendant that the court's role was to be sure his plea was voluntary (T. 4, 7.) The trial court also asked whether defendant was under the influence of alcohol or drugs, whether defendant was suffering from mental illness and whether defendant had been threatened (Id.). Defendant's responses satisfied the court, and its finding that the plea was voluntary is both supported by the record and in strict compliance with rule 11, as required by this Court.

Defendant's third contention, that he did not understand the nature and the elements of the offenses and that his plea was an admission of those elements, is meritless. At the defendant's arraignment he testified that he had finished grade 12 in school and could read and write the English language (T.3). Thereafter, the amended information, charging him with ten counts of forgery and eight counts of theft, was handed to defendant and read aloud in its entirety (T. 4). The statutory elements of each count were included in that information as well as a statement of the facts relating the statutory elements of

the offenses to defendant's case (see amended information, R. 39-44, attached hereto as Addendum C). Before accepting defendant's plea the trial court and defendant had the following exchange:

Q [trial court] Now, Mr. Dastrup, do you admit that you committed the forgeries, as set forth in the amended information, and committed the thefts on the dates, as set forth in the amended information?

A [defendant] Yes, sir.

(T. 9-10). The reading of each count and the elements thereof and defendant's admission to having committed the acts giving rise to the charges, in open court, satisfy any rule 11(e)(4) challenge.

Defendant's second allegation, that the trial court did not specifically inform him that by entering a guilty plea he was waiving certain constitutional rights, is technically true. However, the trial court did inform defendant of his specific constitutional rights against compulsory self-incrimination, to a trial by an impartial jury and to confront and cross-examine witnesses against him as required by rule 11(e)(3) (T. 6). See Boykin v. Alabama 395 U.S. 238, 243 (1968) (waiver of federal constitutional rights when a guilty plea is entered in a state criminal case includes the right against compulsory self-incrimination, the right to a trial by jury and the right to confront one's accusers). Although the trial court did not ask defendant on the record whether he understood that he was waiving those rights by pleading guilty, the manner in which the trial court explained those rights certainly reflects the fact that defendant knew he would not be exercising those rights by

pleading guilty. Moreover, defendant executed an affidavit in support of his plea and initialed, as having read, a paragraph explaining that he was waiving his statutory and constitutional rights (see statement of defendant, paragraph 12., R. 51). The record clearly reflects that defendant knew the rights he was waiving.

In the event that this Court finds defendant's second allegation meritorious, the State urges that the record as a whole standard be applied to find that defendant was properly apprised that he was waiving his constitutional rights in entering his plea. Although the State is aware of this Court's recent decisions concerning withdrawals of guilty pleas, it will continue to assert that Gibbons did not substantively change the rule on such cases. Consequently, the State has several cases pending before the Utah Supreme Court on this issue and will continue to urge that this Court reconsider its on-the-record "strict compliance" portion.³ Application of the record as a whole test would clearly support the trial court's finding that defendant's plea was knowingly and voluntarily made and its subsequent denial of defendant's motion to withdraw his guilty

³ The case of State v. Hoff, No. 90096, was argued before the Utah Supreme Court on November 14, 1990. The State has filed or is in the process of filing petitions for writ of certiorari in Gentry, Pharris, State v. Powell, No. 900202-CA (Utah Ct. App. Oct. 24, 1990), and State v. Maguire No. 900045-CA (Utah Ct. App. Nov. 16, 1990) (copy of the Gentry petition is attached hereto and incorporated herein as Addendum D). Although the State concedes that in light of the cases, this Court is unlikely to retreat from its conclusion that the record as a whole test no longer governs, it believes that continued argument on this point is necessary to preserve the issue for possible certiorari review.

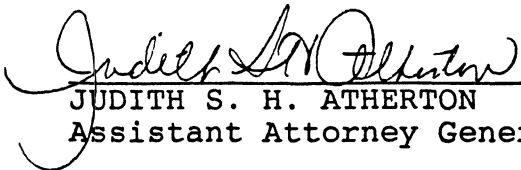
plea.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's denial of defendant's motion to withdraw his guilty plea.

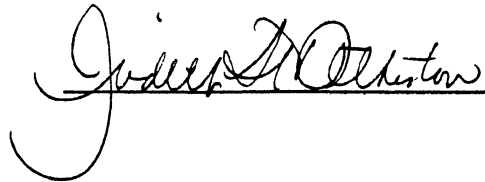
DATED this 12 day of December, 1990.

R. PAUL VAN DAM
Attorney General


JUDITH S. H. ATHERTON
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief of Appellee was mailed, postage pre-paid to Sheldon R. Carter, Harris, Carter & Harrison, 3325 N. University Ave., Ste. 200, Jamestown Square, Clocktower Bldg., Provo, UT 84604, this 12 day of December, 1990.



ADDENDA

ADDENDUM A

COPY

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR THE
COUNTY OF SEVIER, STATE OF UTAH

STATE OF UTAH,	:	CRIMINAL NO. 1165
Plaintiff,	:	<u>ARRAIGNMENT</u>
VS.	:	TRANSCRIPT OF PROCEEDINGS
MARK RAYMOND DASTRUP	:	
Defendant.	:	

BE IT REMEMBERED that on the 8th day of March 1989,
commencing at 10:00 a.m., that the above entitled matter came
on regularly before the Honorable Don V. Tibbs, Judge of the
Sixth Judicial District Court in and for the County of Sevier,
State of Utah, at the Sevier County Courthouse, Richfield,
Utah;

That on the 7th day of September, 1989, Mrs. Lisa
Dastrup requested a copy of the above entitled TRANSCRIPT OF
PROCEEDINGS and that TRANSCRIPT OF PROCEEDINGS appears herein
as follows:

J. M. LIDDELL, CSR, RPR
SIXTH JUDICIAL DISTRICT REPORTER
SANPETE COUNTY COURTHOUSE
MANTI, UTAH 84642

APPEARANCES

For the Plaintiff: R. DON BROWN
SEVIER COUNTY ATTORNEY
Sevier County Courthouse
Richfield, UT 84701

For the Defendant: LAWRENCE H. HUNT
ATTORNEY AT LAW
P.O. Box 310
Richfield, UT 84701

--ooOoo--

INDEX

Page No.

TRANSCRIPT OF PROCEEDINGS	3
ARRAIGNMENT	3
PLEA AGREEMENT	7

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10:00 A.M.
8TH MARCH 1989

TRANSCRIPT OF PROCEEDINGS

THE COURT: The next matter is No. 1165, State of Utah vs. Mark Raymond Dastrup, Mr. Brown and Mr. Hunt. Is Mr. Dastrup present?

MR. HUNT: He is, Your Honor.

ARRAIGNMENT

THE COURT: The record should indicate that Mark Raymond Dastrup is present, personally. He's represented by his Attorney, Mr. Lawrence H. Hunt. The State of Utah is present represented by Mr. R. Don Brown. The matter's before the Court for arraignment purposes.

Is your true and correct name Mark Raymond Dastrup?

MR. DASTRUP: A Yes, sir. It is.

Q How old are you, sir?

A 26.

Q How far did you go through school?

A Through grade 12, high school.

Q Do you read and write the English language?

A Yes, sir.

Q Have you had an opportunity to talk with your Attorney this morning?

A Yes.

Q Do you need any additional time to talk to him before I go forward with this arraignment?

1 A No.

2 Q Are you under the influence of alcohol or narcotics
3 or suffering any mental illness?

4 A No.

5 Q At this time, Mr. Dastrup, I'll hand you a copy of
6 the document entitled Amended Information and hand your
7 Counsel a copy and I'll ask the Clerk to read the Amended
8 Information.

9 [INFORMATION READ]

10 THE COURT: The record should indicate that the
11 information has been read, with a copy delivered to the
12 Defendant.

13 Now Mr. Dastrup, it's my duty to advise you of your
14 constitutional rights, advise you of the consequence of the
15 matter before the Court, make sure you understand them, and
16 it's my duty to obtain a voluntary plea from you. So you
17 listen to me carefully, and if you have any questions, don't
18 hesitate to stop me and I'll answer them.

19 You're being charged with 18 different crimes.
20 They're either forgery or theft. Forgery is a crime
21 punishable--and this is count No. 1--is a crime and a felony
22 in the second degree. A felony in the second degree,
23 according to the laws of the State of Utah, is punishable by a
24 term of not less than 1 nor more than 15 years in the Utah
25 State Prison, or a fine up to \$10,000, or both fine and

1 imprisonment.

2 Count No. 2 is theft, a felony in the third degree.
3 A felony in the third degree is punishable by a term not to
4 exceed 5 years in the Utah State Prison, or a fine up to
5 \$5,000, or both.

6 Count 3 is theft, a felony in the second degree,
7 which is what I've indicated. Count 4 is theft, a felony in
8 the second degree; Count 5 is theft, a felony in the second
9 degree; Count 6 is theft, a felony in the second degree; Count
10 7 is theft, a felony in the second degree; Count 8 is theft, a
11 felony in the second degree; Count 9, is theft, a felony in
12 the second degree; Count 10 is forgery, a felony in the second
13 degree, and Count 11 is forgery, a felony in the second
14 degree; Count 12 is forgery, a felony in the second degree;
15 Count 13 is forgery, a felony in the second degree; Count 14,
16 Count 15, Count 16, Count 17, and Count 18 are all forgery,
17 felonies in the second degree.

18 Now, there being 18 different crimes, of course
19 there's 18 different punishments and these punishments can
20 either be consecutive or concurrent. That means they can
21 either follow each other or they can be at the same time,
22 depending upon the Court. So that's the consequence of the
23 matter before the Court.

24 You have certain constitutional rights in this
25 Court. First, you're entitled to be represented by an

1 Attorney at every step in the proceedings, and you're
2 represented by Mr. Hunt at this time.

3 You're entitled to a speedy trial by a impartial
4 Jury. You're entitled to confront and have your Attorney
5 cross examine in open Court any witnesses that appear against
6 you. You have a privilege against compulsory self
7 incrimination. That means you don't have to testify, if you
8 don't desire to. You may stand mute and say nothing and the
9 burden's still upon the State of Utah to prove you guilty,
10 beyond a reasonable doubt. Likewise, if you desire to
11 testify, you have that right.

12 You have a right to compulsory process for obtaining
13 witnesses in your defense. At the time of trial it requires a
14 unanimous verdict by the Jury to convict you, and if you are
15 convicted, you have the right to appeal the conviction to the
16 Court of Appeals of the State of Utah.

17 Now there are basically your constitutional rights.
18 Mr. Hunt, have you advised him of these rights?

19 MR. NUNT: I have, Your Honor.

20 THE COURT: In your opinion, does he understand
21 them?

22 A I believe so.

23 THE COURT: Do you have any questions you'd like to
24 ask me, Mr. Dastrup?

25 MR. DASTRUP: A No. I don't believe so.

1 THE COURT: Now, I'm interested only in a voluntary
2 plea, Mr. Dastrup. Has anyone made any promises to you or
3 threats against you for the purpose of obtaining a plea, one
4 way or the other, in this matter?

5 MR. BROWN: This is a negotiated plea, Your Honor.

6 THE COURT: All right. Then I'd like to know what
7 the plea bargain is, and Mr. Dastrup, you listen to this very
8 carefully, please.

9 PLEA AGREEMENT

10 MR. BROWN: Your Honor, the initial information
11 charged the Defendant with more than 100 counts, those counts
12 being theft and forgery. Subsequent to the filing of the
13 initial information, the State became aware of additional
14 evidence with regard to additional felony counts of theft
15 which could have been charged. I think it might help the
16 Court to be enlightened a little bit as to the circumstances
17 surrounding this incident.

18 The Defendant was employed as a bookkeeper for
19 Peterson, the victim in this action. As the bookkeeper he is
20 alleged by the State to have forged a certain number of checks
21 and issued those checks to himself and that he was unentitled
22 to the funds. In addition, there were various checks which
23 were signed in blank by authorized parties of Peterson
24 Distributing and then, as a bookkeeper, Mr. Dastrup would
25 execute those checks to himself and misappropriate those

1 funds.

2 After conferring with Mr. Hunt on behalf of Mr.
3 Dastrup, the State agreed to file the Amended Information
4 before the Court. Those theft counts that are included in the
5 information are an accumulation of the amounts, over six-month
6 incremental periods, of all of the checks that we are now
7 aware of that Mr. Dastrup misappropriated. However, we do
8 have an on-going investigation and we will apprise the Court
9 of any additional funds that we've located that have been
10 taken by Mr. Dastrup.

11 The State has agreed to file the information before
12 the Court, charges 18 counts in return for a plea of guilty by
13 the Defendant. And also, our understanding is that we will
14 present to the Court such additional amounts as we find during
15 the on-going investigation and that those amounts will be
16 included for purposes of restitution. That is the agreement.

17 THE COURT: So as I understand your agreement, he's
18 to enter a plea of guilty for each one of these counts then.

19 MR. BROWN: That's correct, Your Honor.

20 THE COURT: Is that your agreement, Mr. Hunt?

21 MR. HUNT: Yes. Just to declare any additional
22 amounts that are found would be just for the purpose of
23 restitution. There would be no new charges filed on those.

24 THE COURT: Is that your agreement, Mr. Brown?

25 MR. BROWN: It is, Your Honor.

1 THE COURT: Now Mr. Dastrup, Counsel have indicated
2 a plea bargain and the only way I'll accept this plea bargain
3 is on the basis that you admit that you actually committed the
4 forgeries and theft that you've been charged with and admit
5 the allegations as set forth in the Amended Information on
6 each of the particular facts. That's the only way I'll do it.
7 I don't want somebody coming in and pleading in my Court to
8 something that they didn't do. Do you understand that?

9 A Yes.

10 Q And likewise, I've instructed the State's Attorney
11 in these kinds of cases I want the statement signed by the
12 Defendant in writing, and a plea agreement. I assume you have
13 that.

14 MR. BROWN: We do, Your Honor.

15 THE COURT: And I would insist that that likewise be
16 executed in open Court and that you initial each one of the
17 paragraphs involved. I assume your Attorney has advised you
18 of that, Mr. Dastrup.

19 MR. DASTRUP: Yes, sir.

20 THE COURT: Now, you want me to accept this plea
21 bargain then at this time, Mr. Dastrup?

22 A Yes, sir.

23 Q Now Mr. Dastrup, do you admit that you committed
24 the forgeries, as set forth in the amended information, and
25 committed the thefts on the dates, as set forth in the amended

1 information?

2 A Yes, sir.

3 THE COURT: All right. The record may so show. You
4 may execute the agreement at this time.

5 [AGREEMENT EXECUTED BY DEFENDANT AND COUNSEL]

6 THE COURT: Now, let me just explain one other
7 thing, Mr. Dastrup, before you sign this. This Court takes
8 the position as to what a person is charged with, that's up to
9 the State of Utah to determine. In other words, the Court
10 doesn't make charges against anyone, so that's a matter for
11 the State of Utah to determine. When it gets to the penalty
12 phase of the case, then that's for the Court to determine.
13 That's not for Counsel. So while I hear recommendations
14 concerning the penalty phase, I'm the one that's going to have
15 to make that determination. You've advised him of that, Mr.
16 Hunt?

17 MR. HUNT: I have, Your Honor.

18 THE COURT: And you understand that, Mr. Dastrup?

19 MR. DASTRUP: Yes. I believe so.

20 THE COURT: Thank you. The record should indicate
21 that the Court accepts the plea bargain.

22 The record should indicate that Mr. Dastrup has
23 executed in open Court a statement of the Defendant concerning
24 these offenses. I would like him to initial each one of these
25 paragraphs, Counsel.

1 [INDICATED]

2 MR. HUNT: Okay.

3 [COUNSEL AND DEFENDANT RESPONDED]

4 THE COURT: The record should indicate that the
5 State's Attorney, Mr. Hunt, and Mr. Dastrup have executed a
6 plea agreement.

7 The Court's of the opinion that the Defendant has
8 been advised of his constitutional rights, the consequence of
9 the matter before the Court. The Court's of the opinion that
10 he intelligently understands why he's here and that his plea
11 is voluntary, and the Court approves the plea bargain, as set
12 forth by Counsel.

13 THE COURT: If you'll please stand, again, Mr.
14 Dastrup.

15 [DEFENDANT RESPONDED]

16 THE COURT: Mr. Mark Dastrup, as to Count No. 1,
17 forgery, a felony in the second degree, what is your plea?
18 Guilty or not guilty?

19 A Guilty, sir.

20 Q The record should indicate Mark Dastrup enters a
21 plea of guilty to Count 1.

22 Mr. Mark Dastrup, as to Count No. 2, theft, a felony
23 in the third degree, what is your plea? Guilty or not guilty?

24 A Guilty.

25 Q The Defendant enters a plea of guilty to Count No.

1 2.

2 Mr. Mark Dastrup, as to Count No. 3, theft, what is
3 your plea? Guilty or not guilty?

4 A Guilty.

5 Q The Defendant, Mark Dastrup, enters a plea of
6 guilty to Count No. 3, theft.

7 Mr. Mark Dastrup, as to Count No. 4, theft, a felony
8 in the second degree, what is your plea? Guilty or not
9 guilty?

10 A Guilty.

11 Q The record should indicate Mark Dastrup has entered
12 a plea of guilty to Count No. 4, theft.

13 Mr. Mark Dastrup, as to Count No. 5, theft, a felony
14 in the second degree, what is your plea? Guilty or not
15 guilty?

16 A Guilty.

17 Q The record should indicate that Mark Dastrup enters
18 a plea of guilty to Count No. 5, theft.

19 As to Count No. 6, theft, a felony in the second
20 degree, Mr. Mark Dastrup, what's your plea? Guilty or not
21 guilty?

22 A Guilty.

23 Q The record should indicate Mr. Mark Dastrup enters
24 a plea of guilty to Count No. 6, theft.

25 Mr. Mark Dastrup, as to Count No. 7, theft, a felony

1 in the second degree, what is your plea? Guilty or not
2 guilty?

3 A Guilty.

4 Q The Defendant, Mark Dastrup, enters a plea of
5 guilty to Count No. 7, theft.

6 Mr. Mark Dastrup, as to Count No. 8, theft, a felony
7 in the second degree, what is your plea? Guilty or not
8 guilty?

9 A Guilty.

10 Q The record should indicate that Mark Dastrup enters
11 a plea of guilty to Count No. 8.

12 Mr. Mark Dastrup, as to Count No. 9, theft, a felony
13 in the second degree, what is your plea? Guilty or not
14 guilty?

15 A Guilty.

16 Q The Defendant, Mark Dastrup, enters a plea of
17 guilty to Count No. 9, theft.

18 Mr. Mark Dastrup, as to Count No. 10, forgery, a
19 felony in the second degree, what is your plea? Guilty or not
20 guilty?

21 A Guilty.

22 Q The record should indicate Mark Dastrup enters a
23 plea of guilty to Count No. 10.

24 Mr. Mark Dastrup, as to Count No. 11, forgery, a
25 felony in the second degree, what is your plea? Guilty or not

1 guilty?

2 A Guilty.

3 Q The Defendant enters a plea of guilty to Count No.
4 11, forgery.

5 Mr. Mark Dastrup, as to Count No. 12, forgery, a
6 felony in the second degree, what is your plea? Guilty or not
7 guilty?

8 A Guilty.

9 Q The record should indicate that the Defendant
10 enters a plea of guilty to Count No. 12.

11 As to Count No. 14, forgery, a felony in the second
12 degree, what is your plea? Guilty or not guilty?

13 A Guilty.

14 Q The record should indicate that the Defendant
15 enters a plea of guilty to Count No. 13.

16 As to Count No. 14, Mr. Mark Dastrup, forgery, a
17 felony in the second degree, what is your plea? Guilty or not
18 guilty?

19 A Guilty.

20 Q The Defendant enters a plea of guilty to Count No.
21 14.

22 As to Count No. 15, forgery, a felony in the second
23 degree, Mr. Mark Dastrup, what is your plea? Guilty or not
24 guilty?

25 A Guilty.

1 Q The record should indicate Defendant enters a plea
2 of guilty to Count No. 15.

3 Mr. Mark Dastrup, as to Count No. 16, forgery, a
4 felony in the second degree, what is your plea? Guilty or not
5 guilty?

6 A Guilty.

7 Q The Defendant enters a plea of guilty to Count 16.

8 Mr. Mark Dastrup, as to Count No. 17, forgery, a
9 felony in the second degree, what is your plea? Guilty or not
10 guilty?

11 A Guilty.

12 Q The record should indicate that the Defendant
13 enters a plea of guilty to Count No. 17.

14 Mr. Mark Dastrup, as to Count No. 18, forgery, a
15 felony in the second degree, what is your plea? Guilty or not
16 guilty?

17 A Guilty.

18 Q The record should indicate Defendant enters a plea
19 of guilty to Count No. 18.

20 What's your recommendation, Mr. Brown?

21 MR. BROWN: Your Honor, I believe a presentence
22 report is appropriate.

23 MR. HUNT: We agree, Your Honor.

24 THE COURT: Mr. Dastrup, both Counsel have
25 requested, before I pronounce sentence, that they would desire

1 to have a presentence investigation; do you have any objection
2 to such a procedure?

3 A No, sir.

4 Q Now, it will probably take 30 days, so you'd be
5 waiving your right to be sentenced immediately; you understand
6 that, don't you?

7 A Yes.

8 THE COURT: At the request of Counsel and at the
9 request of the Defendant, this matter is referred to the
10 Department of Adult Probation and Parole for a presentence
11 investigation and report. Who is going to handle the case?

12 [PROBATION OFFICER RESPONDED]

13 THE COURT: This gentlemen standing, Mr. Dastrup, is
14 my Probation Officer and he will be handling your case. His
15 name is Mr. Richard Bagley. He'll be meeting with you, and
16 this matter will come before the Court for sentencing on--can
17 you do it by the 5th of April, Mr. Bagley?

18 MR. BAGLEY: He's local. I can handle it, Your
19 Honor.

20 THE COURT: All right. This matter will come before
21 the Court for sentencing on the 5th day of April at 10:00
22 o'clock a.m.

23 Now, Mr. Dastrup, you'll be meeting with my
24 Probation Officer immediately, as soon as he can take time to
25 talk to you. I would advise you that he'll be making a very

1 detailed investigation report, in writing, to me. So be
2 absolutely honest with him and cooperate so he can do the best
3 job possible. Now, if you are not honest with him and you
4 don't cooperate with him, he's going to put it in his report
5 and I wouldn't have any alternative but to take that into
6 consideration; do you understand what I'm saying?

7 MR. DASTRUP: Yes, sir.

8 Q Are you out on bail? Or are you in custody?

9 A I'm out on bail.

10 THE COURT: Is there any objection if the bond, as
11 set by the Magistrate, remains in effect?

12 MR. BROWN: No, Your Honor.

13 MR. HUNT: None, Your Honor.

14 THE COURT: All right. The bond, as set by the
15 Magistrate, shall remain in effect and I'll see you on April
16 5th for sentencing.

17 Listen to me very carefully, Mr. Dastrup. It's the
18 further order of this Court that you shall not use intoxicants
19 of any type; no wine, no whiskey, no beer. You shall not use
20 any illegal drugs. Unless they're prescription medicine given
21 to you by a physician, you shall not use them.

22 You shall not violate any law of any community,
23 state, or nation in which you are located. If you violate any
24 law, I'll have to take that into consideration; do you
25 understand what I'm saying?

1 MR. DASTRUP: Yes, sir.

2 THE COURT: All right. Good luck, and we'll see you
3 on the day I stated, the 5th of April.

4 [WHEREUPON THE ABOVE ENTITLED PROCEEDINGS WERE
5 COMPLETED]

6 --ooOoo--

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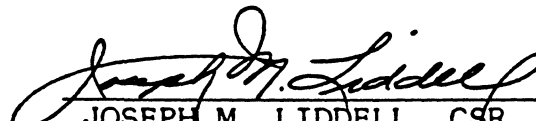
1 STATE OF UTAH)
) SS.
 2 COUNTY OF SEVIER)

3 REPORTER'S CERTIFICATE

4 I, JOSEPH M. LIDDELL, CSR, RPR, Official Reporter
 5 for the Sixth Judicial District Court, County of Sevier, State
 6 of Utah, hereby certify that I did at the time, date and place
 7 as set forth herein report the proceedings had in stenographic
 8 notes; that the foregoing pages, numbered 1 - 19, inclusive,
 9 constitute a true, correct and complete transcript of my notes
 10 as reduced to typewritten form by me or under my direction.

11 I further certify that I am not an agent, attorney
 12 or counsel for any of the parties hereto, nor am I interested
 13 in the outcome thereof.

14 IN WITNESS WHEREOF I have subscribed my name and
 15 affixed my seal this 9th day of September 1989.

16
 17 
 18 JOSEPH M. LIDDELL, CSR, RPR
 Notary Public in and for the
 State of Utah
 19 [License No. 219-1801-1]

20 My Commission Expires:
 5-6-90

21 --ooOoo--

22

23

24

25

ADDENDUM B

LAWRENCE H. HUNT (3934)
Attorney for Defendant
355 West 100 North #200
P.O. Box 310
Richfield, Utah 84701

SEVIER COUNTY
RECEIVED NO. 1165
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DEVON POULSON, CLERK
BY Norrena DEPUTY
S. Roberts

IN THE DISTRICT COURT OF THE SEVIER JUDICIAL DISTRICT
STATE OF UTAH

THE STATE OF UTAH,	:	
	:	
Plaintiff,	:	STATEMENT OF DEFENDANT
	:	
vs.	:	
	:	
MARK DASTRUP,	:	Criminal No. <u>1165</u>
	:	
Defendant.	:	

COMES NOW, Mark Dastrup, the Defendant in this case and hereby acknowledges and certifies the following:

I have entered a plea of guilty to the following crime(s):

~~1.~~ 10 counts of Forgery, a second degree felony, punishable by a prison term of 1 to 15 years in the state prison and a fine of \$10,000.00

~~2.~~ 8 counts of Theft, ^{1 count of third degree felony & 7 counts of a second degree felony} a third degree felony, punishable by ^{degree} a prison term of up to 5 years in the state prison and a fine of ^{felony} \$5,000.00.

~~3.~~ I have received a copy of the information against me, I have read it, and I understand the nature and elements of the offense(s) for which I am pleading guilty.

~~4.~~ The elements of the crime(s) of which I am charged are as follows: That on the dates set forth in the information I signed a name on a check other than my own. Further, that on the dates as set forth on the information I obtained control of money belonging to another with the intent to deprive the owner of said money.

My conduct, and the conduct of other persons for which I am

criminally liable, that constitutes the elements of the crime(s) charged are as follows: That I signed the name of another person to a check and obtained money without the owner's permission.

now I am entering this/these plea(s) voluntarily and with knowledge and understanding of the following facts:

now 1. I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the Court at no cost to me.

now 2. I have not waived my right to counsel.

now 3. If I have waived my right to counsel, I have read this statement and understand the nature and elements of the charges, my rights in this and other proceedings and the consequences of my plea of guilty.

now 4. I have not waived my right to counsel, my attorney is Lawrence H. Hunt, and I have had an opportunity to discuss this statement, my rights and the consequences of my guilty plea with my attorney.

now 5. I know that I have a right to a trial by jury.

now 6. I know that if I wish to have a trial I have the right to confront and cross-examine witnesses against me or to have them cross-examine witnesses against me or to have them cross-examined by my attorney. I also know that I have the right to have my witnesses subpoenaed at State expense to testify in Court upon my behalf.

now 7. I know that I have a right to testify in my own behalf but if I choose not to do so I can not be compelled to testify or give evidence against myself and no adverse inferences will be drawn against me if I do not testify.

now 8. I know that if I wish to contest the charge against me I need only plead "not guilty" and the matter will be set for trial, at which time the State of Utah will have the burden of proving each element of the charge beyond a reasonable doubt. If the trial is before a jury the verdict must be unanimous.

mp 9. I know that under the Constitution of Utah that if I were tried and convicted by a jury or by the Judge that I would have the right to appeal my conviction and sentence to the Utah Court of Appeals or, where allowed, to the Supreme Court of Utah and that if I could not afford to pay the costs for such appeal, those costs would be paid by the State.

mp 10. I know that the maximum possible sentence may be imposed upon my plea of guilty, and that sentence may be for a prison term, fine, or both. I know that in addition to any fine, a 25% surcharge, required by Utah Code Annotated 63-63-9, will be imposed. I also know that I may be ordered by the Court to make restitution to any victim or victims of my crimes.

mp 11. I know that imprisonment may be for consecutive periods, or the fine for additional amounts, if my plea is to be more than one charge. I also know that if I am on probation, parole or awaiting sentencing on another offense of which I have been convicted or to which I have pleaded guilty, my plea in the present action may result in consecutive sentences being imposed upon me.

mp 12. I know and understand that by pleading guilty I am waiving my statutory and constitutional rights set out in the preceding paragraphs. I also know that by entering such plea(s) I am admitting and do so admit that I have committed the conduct alleged and I am guilty of the crime(s) for which my plea(s) is/are entered.

mp 13. My plea(s) of guilty is/are not the result of a plea bargain between myself and the prosecuting attorney. the promises, duties and provisions of this plea bargain, if any, are fully contained in the Plea Agreement attached to this Affidavit.

mp 14. I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing made or sought by either defense counsel or the prosecuting attorney are not binding on the Judge. I also know that any opinions they express to me as to what they believe the Court may do are also not binding on the Court.

~~mp~~15. No threats, coercion, or unlawful influence of any kind have been made to induce me to plead guilty, and no promises, except those contained herein and in the attached plea agreement, have been made to me.

~~mp~~16. I have read this statement, or I have had it read to me by my attorney, and I understand its provisions. I know that I am free to change or delete anything contained in this Affidavit. I do not wish to make any changes because all of the statements are correct.

~~mp~~17. I am satisfied with the advice and assistance of my attorney.

~~mp~~18. I am 26 years of age; I have attended school through the 12th grade and I can read and understand the English language. I was not under the influence of any drugs, medication or intoxicants when the decision to enter the plea(s) was made. I am not presently under the influence of any drugs, medication or intoxicants.

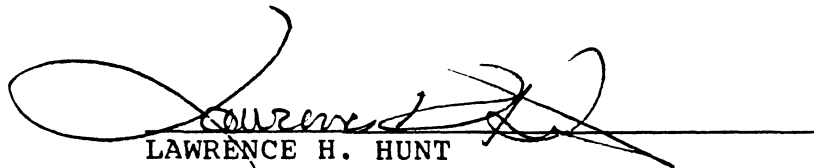
~~mp~~19. I believe myself to be of a sound and discerning mind, mentally capable of understanding the proceedings and the consequences of my plea and free of any mental disease, defect or impairment that would prevent me from knowingly, intelligently and voluntarily entering my plea.

DATED this 0th day of March, 1989.

Mark Dastrup
MARK DASTRUP
DEFENDANT

CERTIFICATE OF ATTORNEY

I certify that I am the attorney for Mark Dastrup, the Defendant above, and that I know he has read the statement or that I have read it to him and I have discussed it with him/her and believe that he fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated and these, along with the other representations and declarations made by the defendant in the foregoing Affidavit, are accurate and true.



LAWRENCE H. HUNT
ATTORNEY FOR DEFENDANT

CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in the case against Mark Dastrup, Defendant. I have reviewed this statement of the Defendant and find that the declarations, including the elements of the offense of the charge(s) and the factual synopsis of the Defendant's criminal conduct which constitutes the offense are true and correct. No improper inducements, threats or coercion to encourage a plea have been offered Defendant. The plea negotiations are fully contained in the statement and in the attached plea agreement or as supplemented on record before the Court. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense(s) for which the plea(s) is/are entered and acceptance of the plea(s) would serve the public interest.



PROSECUTING ATTORNEY

ORDER

Based upon the facts set forth in the foregoing statement and certification, the Court finds the Defendant's plea of guilty is freely and voluntarily made and it is so ordered that the Defendant's plea of guilty to the charge(s) set forth in the statement be accepted and entered.

DONE IN COURT this 5th day of ^{April}~~March~~, 1989.

DON V. TIBBS
DISTRICT COURT JUDGE

ADDENDUM C

R. Don Brown #0464
Sevier County Attorney
County Courthouse
Richfield, Utah 84701
Telephone: 896-6812

SEVIER COUNTY
RECEIVED NO. 1165
'89 MAR 7 PM 3 26

IN THE SIXTH JUDICIAL DISTRICT COURT OF SEVIER COUNTY
STATE OF UTAH
BY Norma DEPUTY
S. Poline

STATE OF UTAH,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	AMENDED
	:	INFORMATION
MARK DASTRUP,	:	
	:	
Defendant.	:	Case No. <u>1165</u>

The undersigned, R. Don Brown, Sevier County Attorney, states on information and belief that the Defendant committed the crimes of:

COUNT I: FORGERY, contrary to Section 76-6-501, Utah Code Annotated, 1953 as amended, in that said Defendant did with a purpose to defraud, make, complete, execute, authenticate, issue, transfer, publish or utter a writing so that the writing purported to be the act of another, to-wit: Check #8629 written on the account of Kay Peterson Distributing Inc., dated April 5, 1985, for the amount of \$100.00, the same constituting a Felony of the Second Degree.

COUNT II: THEFT, contrary to Sections 76-6-404 et seq., Utah Code Annotated, 1953 as amended, in that said Defendant did obtain or exercise unauthorized control over property of Kay Peterson Distributing Inc. having a value in excess of \$250.00 with the purpose to deprive the owner thereof at Richfield City, County of Sevier, State of Utah, during the period from April 1, 1985, through June 30, 1985, to-wit: \$700.00, the same constituting a Third Degree Felony.

COUNT III: THEFT, contrary to Sections 76-6-404 et seq., Utah Code Annotated, 1953 as amended, in that said Defendant did obtain or exercise unauthorized control over property of Kay Peterson Distributing Inc. having a value in excess of \$1,000.00 with the purpose to deprive the owner thereof at Richfield City, County of Sevier, State of Utah, during the period January 1, 1986, through June 30, 1986, to-wit: \$4,640.00, the same constituting a Second Degree Felony.

COUNT IV: THEFT, contrary to Sections 76-6-404 et seq., Utah Code Annotated, 1953 as amended, in that said Defendant did obtain or exercise unauthorized control over property of Kay Peterson Distributing Inc. having a value in excess of \$1,000.00 with the purpose to deprive the owner thereof at Richfield City, County of Sevier, State of Utah, during the period July 1, 1986, through December 31, 1986, to-wit: \$7,280.00, the same constituting a Second Degree Felony.

COUNT V: THEFT, contrary to Sections 76-6-404 et seq., Utah Code Annotated, 1953 as amended, in that said Defendant did obtain or exercise unauthorized control over property of Kay Peterson Distributing Inc. having a value in excess of \$1,000.00 with the purpose to deprive the owner thereof at Richfield City, County of Sevier, State of Utah, during the period January 1, 1987, through June 30, 1987, to-wit: \$12,783.06, the same constituting a Second Degree Felony.

COUNT VI: THEFT, contrary to Sections 76-6-404 et seq., Utah Code Annotated, 1953 as amended, in that said Defendant did obtain or exercise unauthorized control over property of Kay Peterson Distributing Inc. having a value in excess of \$1,000.00 with the purpose to deprive the owner thereof at

Richfield City, County of Sevier, State of Utah, during the period July 1, 1987 through December 31, 1987, to-wit: \$1,245.11, the same constituting a Second Degree Felony.

COUNT VII: THEFT, contrary to Sections 76-6-404 et seq., Utah Code Annotated, 1953 as amended, in that said Defendant did obtain or exercise unauthorized control over property of Kay Peterson Distributing Inc. having a value in excess of \$1,000.00 with the purpose to deprive the owner thereof at Richfield City, County of Sevier, State of Utah, during the period January 1, 1988, through June 30, 1988, to-wit: \$12,330.20, the same constituting a Second Degree Felony.

COUNT VIII: THEFT, contrary to Sections 76-6-404 et seq., Utah Code Annotated, 1953 as amended, in that said Defendant did obtain or exercise unauthorized control over property of Kay Peterson Distributing Inc. having a value in excess of \$1,000.00 with the purpose to deprive the owner thereof at Richfield City, County of Sevier, State of Utah, during the period July 1, 1988, through December 31, 1988, to-wit: \$22,612.28, the same constituting a Second Degree Felony.

COUNT IX: THEFT, contrary to Sections 76-6-404 et seq., Utah Code Annotated, 1953 as amended, in that said Defendant did obtain or exercise unauthorized control over property of Kay Peterson Distributing Inc. having a value in excess of \$1,000.00 with the purpose to deprive the owner thereof at Richfield City, County of Sevier, State of Utah, during January, 1989, to-wit: \$3,355.18, the same constituting a Second Degree Felony.

COUNT X: FORGERY, contrary to Section 76-6-501, Utah Code Annotated, 1953 as amended, in that said Defendant did with a purpose to defraud, make, complete, execute, authenticate, issue, transfer, publish or

utter a writing so that the writing purported to be the act of another, to-wit: Check #11650 written on the account of Kay Peterson Distributing Inc., dated August 30, 1986, for the amount of \$700.00, the same constituting a Felony of the Second Degree.

COUNT XI: FORGERY, contrary to Section 76-6-501, Utah Code Annotated, 1953 as amended, in that said Defendant did with a purpose to defraud, make, complete, execute, authenticate, issue, transfer, publish or utter a writing so that the writing purported to be the act of another, to-wit: Check #11773 written on the account of Kay Peterson Distributing Inc., dated September 18, 1986, for the amount of \$750.00, the same constituting a Felony of the Second Degree.

COUNT XII: FORGERY, contrary to Section 76-6-501, Utah Code Annotated, 1953 as amended, in that said Defendant did with a purpose to defraud, make, complete, execute, authenticate, issue, transfer, publish or utter a writing so that the writing purported to be the act of another, to-wit: Check #11853 written on the account of Kay Peterson Distributing Inc., dated September 29, 1986, for the amount of \$700.00, the same constituting a Felony of the Second Degree.

COUNT XIII: FORGERY, contrary to Section 76-6-501, Utah Code Annotated, 1953 as amended, in that said Defendant did with a purpose to defraud, make, complete, execute, authenticate, issue, transfer, publish or utter a writing so that the writing purported to be the act of another, to-wit: Check #11898 written on the account of Kay Peterson Distributing Inc., dated October 3, 1986, for the amount of \$350.00, the same constituting a Felony of the Second Degree.

COUNT XIV: FORGERY, contrary to Section 76-6-501, Utah Code Annotated, 1953 as amended, in that said Defendant did with a purpose to defraud, make, complete, execute, authenticate, issue, transfer, publish or utter a writing so that the writing purported to be the act of another, to-wit: Check #12154 written on the account of Kay Peterson Distributing Inc., dated December 2, 1986, for the amount of \$850.00, the same constituting a Felony of the Second Degree.

COUNT XV: FORGERY, contrary to Section 76-6-501, Utah Code Annotated, 1953 as amended, in that said Defendant did with a purpose to defraud, make, complete, execute, authenticate, issue, transfer, publish or utter a writing so that the writing purported to be the act of another, to-wit: Check #12179 written on the account of Kay Peterson Distributing Inc., dated December 15, 1986, for the amount of \$900.00, the same constituting a Felony of the Second Degree.

COUNT XVI: FORGERY, contrary to Section 76-6-501, Utah Code Annotated, 1953 as amended, in that said Defendant did with a purpose to defraud, make, complete, execute, authenticate, issue, transfer, publish or utter a writing so that the writing purported to be the act of another, to-wit: Check #12230 written on the account of Kay Peterson Distributing Inc., dated January 5, 1987, for the amount of \$800.00, the same constituting a Felony of the Second Degree.

COUNT XVII: FORGERY, contrary to Section 76-6-501, Utah Code Annotated, 1953 as amended, in that said Defendant did with a purpose to defraud, make, complete, execute, authenticate, issue, transfer, publish or utter a writing so that the writing purported to be the act of another, to-

wit: Check #12256 written on the account of Kay Peterson Distributing Inc., dated January 15, 1987, for the amount of \$800.00, the same constituting a Felony of the Second Degree.

COUNT XVIII: FORGERY, contrary to Section 76-6-501, Utah Code Annotated, 1953 as amended, in that said Defendant did with a purpose to defraud, make, complete, execute, authenticate, issue, transfer, publish or utter a writing so that the writing purported to be the act of another, to-wit: Check #12257 written on the account of Kay Peterson Distributing Inc., dated January 21, 1987, for the amount of \$549.05, the same constituting a Felony of the Second Degree.

This information is based on evidence obtained from the following witnesses: John Evans, Kenley Peterson

Authorized for presentment and filing on
the 7th day of March, 1989.



R. DON BROWN
Sevier County Attorney

ADDENDUM D

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Petitioner, : Case No.
v. :
FRANK DAVID GENTRY, : Category No. 13
Defendant-Respondent. :

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS
- - - - -

QUESTIONS PRESENTED FOR REVIEW

The sole question presented for review is whether the court of appeals erroneously held that State v. Gibbons, 740 P.2d 1309 (Utah 1987), adopted a "strict compliance" with rule 11(5), Utah Rules of Criminal Procedure, which supersedes the "record as a whole" test traditionally applied on review to determine whether a guilty plea was knowingly and voluntarily entered.

OPINION BELOW

The court of appeals' opinion was issued on August 24, 1990, and appears in State v. Gentry, 141 Utah Adv. Rep. 26 (Utah Ct. App. Aug. 24, 1990) (a copy of the court's opinion is contained in the addendum).

JURISDICTION OF THIS COURT

This Court has jurisdiction to consider this petition under Utah Code Ann. § 78-2-2(3)(a) (Supp. 1990).

STATEMENT OF THE CASE

Defendant, Frank David Gentry, was charged with theft by deception, a third degree felony, under Utah Code Ann. § 76-6-405 (1990), and criminal trespass, a class C misdemeanor, under Utah Code Ann. § 76-6-206 (1990).

After defendant pled not guilty to the charges, trial commenced before the district court sitting without a jury. After the close of the evidence, but prior to closing arguments, defendant changed his plea from not guilty to guilty of theft, a third degree felony. The State dismissed the criminal trespass charge. The trial court stayed imposition of sentence and placed defendant on eighteen months' probation.

Over two months after the acceptance of his guilty plea, defendant moved to withdraw it. The trial court denied this motion.

On appeal, the court of appeals reversed the trial court's denial of defendant's motion to withdraw his guilty plea and remanded the case for a new trial on the original charges. State v. Gentry, 141 Utah Adv. Rep. 26 (Utah Ct. App. Aug. 24, 1990).

STATEMENT OF FACTS

A recitation of the facts of defendant's crimes is not necessary for purposes of this petition.¹ The relevant facts are those stated above in the Statement of the Case.

¹ The facts underlying the charges against defendant are accurately summarized in the court of appeals' opinion. Gentry, 141 Utah Adv. Rep. at 26-27.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY HELD THAT STATE V. GIBBONS, 740 P.2D 1309 (UTAH 1987), ADOPTED A TEST OF STRICT COMPLIANCE WITH RULE 11(5), UTAH RULES OF CRIMINAL PROCEDURE, WHICH SUPERSEDES THE "RECORD AS A WHOLE" TEST TRADITIONALLY APPLIED ON REVIEW TO DETERMINE WHETHER A GUILTY PLEA WAS KNOWINGLY AND VOLUNTARILY ENTERED.

On appeal to the court of appeals, defendant argued, inter alia, that the trial court abused its discretion in denying his motion to withdraw his guilty plea because "the trial court failed to explain to [him] the elements and facts of the crime of theft before he pled guilty, and . . . further erred by relying on an incomplete record as a substitute for Rule 11 compliance[] in determining that [he] entered his plea with full knowledge and understanding of its consequences." State v. Gentry, 141 Utah Adv. Rep. at 27. The State responded that, under the "record as a whole" test traditionally applied by this Court on post-conviction review of the voluntariness of a guilty plea, see, e.g., Jolivet v. Cook, 784 P.2d 1148 (Utah 1989), cert. denied, 110 S. Ct. 751 (1990); State v. Copeland, 765 P.2d 1266 (Utah 1988); State v. Miller, 718 P.2d 403, 405 (Utah 1986) (per curiam), the trial court had not abused its discretion.²

² The "record as a whole" test was stated in Miller as follows:

[T]he absence of a finding under [rule 11] is not critical so long as the record as a whole affirmatively establishes that the defendant entered his plea with full knowledge and understanding of its consequences and of the rights he was waiving.

In reversing and remanding to allow defendant to withdraw his guilty plea, the court of appeals definitively rejected the State's argument that the "record as a whole" test applied, concluding that in State v. Gibbons, this Court "effectively replac[ed] the 'record as a whole' test with a strict Rule 11(5) compliance test in accepting a defendant's guilty plea," Gentry, 141 Utah Adv. Rep. at 28--i.e., if the trial court has not strictly complied with rule 11(5), the guilty plea, although perhaps otherwise voluntary, must automatically be vacated. This conclusion misconstrues Gibbons and ignores significant language in both pre-Gibbons and post-Gibbons opinions of this Court that clearly cuts against the notion that Gibbons abandoned the record as a whole test for determining the voluntariness, and thus validity, of a guilty plea.

In Gibbons, this Court did not review either the trial court's ruling on a motion to withdraw a guilty plea or the voluntariness of the defendant's guilty pleas. Rather, the Court, in the context of remanding the case because an attack on the voluntariness of a guilty plea must first be presented to the trial court in the form of a motion to withdraw, concluded that "a statement of the law concerning the taking of guilty pleas in all trial courts in this state is appropriate." Gibbons, 740 P.2d at 1312. It then set out the specific requirements for taking of guilty pleas under rule 11 for the purpose of assisting the trial court on remand in determining the validity of the defendant's pleas. Ibid. The Gibbons Court did not even mention the record as a whole test for determining voluntariness of a

guilty plea, and the reason seems obvious: the Court was not reviewing the trial court record to determine the voluntariness of the defendant's pleas. Thus, the court of appeals' conclusion that Gibbons replaced the record as a whole test with a strict compliance test reads far too much into Gibbons. The Gibbons Court simply did not address that issue.

Furthermore, certain language in several post-Gibbons opinions of this Court strongly suggests that the record as a whole test was not modified by Gibbons. For example, in Jolivet v. Cook, this Court stated:

We first address Jolivet's claim that his guilty pleas were unknowing and involuntary. Specifically, Jolivet argues that Judge Burns erred in the taking of his guilty pleas because he did not make findings that Jolivet understood the elements of each crime charged and how those elements related to the facts, as required by State v. Gibbons, 740 P.2d 1309 (Utah 1987), or that Jolivet knew the possibility of the imposition of consecutive sentences. In fact, Jolivet claims that he did not know or understand these things when he entered his pleas.

[Rule 11(5)(d)] requires that before a trial court accepts a guilty plea, it must find that the defendant understands the nature and elements of the offense to which he or she is entering the plea. In Gibbons, this Court stated that in making this finding, the trial court must ensure that the defendant understands "the elements of the crimes charged and the relationship of the law to the facts." Id. at 1312. In addition, [rule 11(5)(e)] requires that before the trial court accepts a guilty plea, it must find that the defendant knows of the possibility of the imposition of consecutive sentences. The record clearly shows that at the time the guilty pleas were accepted, Judge Burns did not make the findings required by [rule 11(5)], i.e., that Jolivet understood the elements of each crime charged and how these elements related to the facts

and that Jolivet knew the possibility of the imposition of consecutive sentences. However, this Court has held, "[T]he absence of a finding under [rule 11] is not critical so long as the record as a whole affirmatively establishes that the defendant entered his plea with full knowledge and understanding of its consequences and of the rights he was waiving." State v. Miller, 718 P.2d 403, 405 (Utah 1986); Brooks v. Morris, 709 P.2d 310, 311 (Utah 1985); Warner v. Morris, 709 P.2d 309, 310 (Utah 1985).

784 P.2d at 1149-50 (footnotes omitted). And in State v. Copeland, the Court, without citing Gibbons, said:

The United States Supreme Court has said, "[T]here is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him." McCarthy, 394 U.S. at 470, 89 S.Ct. at 1173 (emphasis in the original). We think the most effective way to do this is to have the defendant state in his own words his understanding of the offense and the actions which make him guilty of the offense. By this statement, the trial court can assure itself that the defendant is truly submitting a voluntary and knowing plea. Moreover, the record on appeal will clearly reflect the defendant's understanding. Although this method is therefore preferable to others, it is not absolutely required. The test is voluntariness. We hold that the record demonstrates that defendant admitted acts sufficient to justify his conviction of the offense to which he pleaded guilty.

765 P.2d at 1273 (footnote omitted and emphasis added).

Although both Jolivet and Copeland involved pre-Gibbons guilty pleas, Gentry, 141 Utah Adv. Rep. at 28, this Court did not note or attach any significance to that fact in either opinion, and, in fact, directly applied Gibbons in Jolivet in concluding that although the trial court did not strictly comply with rule 11, the record as a whole demonstrated that Jolivet

entered his guilty pleas knowingly and voluntarily. Jolivet, 784 P.2d at 1149-51. This seriously undermines the court of appeals' effort to distinguish Jolivet and Copeland on the basis that the record as a whole test was applied in those cases because they involved pre-Gibbons guilty pleas.³ Significantly, in State v. Smith, 777 P.2d 464 (Utah 1989), which involved a post-Gibbons guilty plea, this Court appeared to apply the record as whole test in reversing the trial court's denial of the defendant's motion to withdraw.⁴

Finally, that the record as a whole test represents the most reasonable standard upon which to assess a post-conviction attack on the voluntariness of a guilty plea is made clear in the following passage from State v. Kay, 717 P.2d 1294 (Utah 1986):

A final word on the State's Rule 11 arguments. In its zeal to set aside Kay's guilty pleas or renege on the bargain that was struck, the State has argued, in effect, that otherwise voluntary and lawful guilty pleas should always be voided when the trial court violates any provision of Rule 11. The concurring opinions of Chief Justice Hall and Justice Howe adopt this reasoning as well. This position is shortsighted, for to follow

³ It is not clear what significance State v. Hickman, 779 P.2d 670 (Utah 1989) (per curiam), which was issued five days before Jolivet, has in this inquiry. Unlike Jolivet, Hickman declined to apply Gibbons to a pre-Gibbons guilty plea on the ground that Gibbons represented a clear break from the past and would therefore not be applied retroactively. Hickman, 779 P.2d at 672 n.1. Insofar as Hickman might be read to support the court of appeals' strict compliance test, it is inconsistent with Jolivet and should not be followed.

⁴ The court of appeals obviously disagrees with this reading of Smith, having cited it in support of its decision in the instant case, Gentry, 141 Utah Adv. Rep. at 28, and stating directly in State v. Pharris, Case No. 890549-CA, slip op. at 8 n.6 (Utah Ct. App. Sept. 14, 1990), a case issued after Gentry, that Smith applied the "strict compliance test articulated in Gibbons."

it would be to sanction a remedy far worse than the wrong. If we were to hold any violation of Rule 11 automatically voids the resultant plea, even when the plea is knowingly and voluntarily entered, we would encourage defendant's, convicted and sentenced after such a plea, to attack their convictions for purely tactical reasons, either by direct appeal or by seeking habeas corpus long after the fact. We have refused to overturn convictions upon such challenges in the past, e.g., State v. Knowles, Utah, 709 P.2d 311 (1985); State v. Morris, Utah, 709 P.2d 310 (1985), [sic] and we find no reason to encourage such attacks in the future.

Overturning such convictions--which we would have to do if we embraced the rationale advanced by the State and the Chief Justice's concurring opinion--would require the State to re prosecute numerous defendants, probably long after the challenged guilty pleas were entered and when the passage of time would make re prosecution impractical, if not impossible. Almost certainly, the ultimate result would be to free a number of convicted persons for nothing more than technical errors in the acceptance of their voluntary guilty pleas.

717 P.2d at 1301-02 (footnote omitted)⁵. This view is consistent with the harmless error rule long recognized by this court in a variety of contexts. See, e.g., State v. Johnson, 771 P.2d 1071

⁵ Most jurisdictions apply a record as a whole test rather than the strict compliance rule adopted by the court of appeals. See, e.g., United States v. Barry, 895 F.2d 702 (10th Cir. 1990) (district court's failure to strictly comply with rule 11 does not warrant reversal where defendant's knowledge of rights waived was otherwise apparent); Wood v. State, 190 Ga.App. 179, 378 S.E.2d 520 (Ga. App. 1989) (where defendant was otherwise informed of rights waived, harmless error standard is applied to trial court's failure to comply with rule governing taking of pleas); People v. Bettistea, 181 Mich.App. 194, 448 N.W.2d 781, 783 (Mich. App. 1989) ("record as a whole" demonstrated that plea was made knowingly and voluntarily); People v. Harris, 61 N.Y.2d 9, 459 N.E.2d 170 (N.Y. 1983) (voluntariness of plea determined by considering all relevant circumstances surrounding it, not by judge's ritualistic recitation of rights waived).

(Utah 1989) (harmless error standard for nonconstitutional error); State v. Verde, 770 P.2d 116, 121 n.8 (Utah 1989) ("with respect to certain constitutional errors, we must place on the State the burden of proving that the error was harmless beyond a reasonable doubt"). See also Utah R. Crim. P. 30(a); Utah R. Evid. 103(a); Utah R. Civ. P. 61. Interestingly, the court of appeals did not so much as mention Kay, even though the State cited the foregoing quoted language from Kay to it in its brief. See State v. Gentry, Case No. 890145-CA, Br. of Appellee at 17-18.

In sum, a careful reading of Gibbons and this Court's pre- and post-Gibbons decisions indicates that the court of appeals erred in holding that Gibbons replaced the record as a whole test with a strict compliance test. A strict compliance test is not required either by Gibbons or logic.

Accordingly, this Court should grant certiorari because the court of appeals has rendered a decision on a question of law which is in conflict with decisions of this Court. Utah R. App. P. 46(b). Insofar as the issue of what standard applies on review of the voluntariness of a guilty plea is unsettled in light of Gibbons, certiorari should be granted because the court of appeals has decided an important question of law which should be settled by this Court. Utah R. App. P. 46(d).