

2010

Utah v. Michelle Ann Cox : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	
MICHELLE ANN COX,	:	Case No. 20100947-CA
	:	
Defendant/Appellant.	:	Appellant is not incarcerated.

REPLY BRIEF OF APPELLANT

Appeal from a conviction of Forgery, a third degree felony, in violation of Utah Code Ann. §76-6-501 (2008), and Theft by Deception, a Class A misdemeanor, in violation of Utah Code Ann. §76-6-405 (2008), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Judge Robert Faust presiding.

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TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	ii
<u>ARGUMENT</u>	1
I. THE INSTRUCTION REQUIRING THE DEFENDANT TO PRODUCE EVIDENCE OF AN “HONEST BELIEF” UNCONSTITUTIONALLY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT.	1
A. The State’s burden of proof includes both the burden of production and the burden of persuasion.	2
B. An instruction which correctly states the allocation of the burden of proof does not cure the error created by another instruction which erroneously places the burden of production on the defendant.	4
II. THE DOCTRINE OF INVITED ERROR DOES NOT PRECLUDE REVIEW FOR PLAIN ERROR IN THE PRESENT CASE.	5
III. TRIAL COUNSEL’S FAILURE TO REQUEST AN ACCURATE INSTRUCTION REGARDING THE BURDEN OF PROOF CANNOT BE ATTRIBUTED TO ANY SOUND TRIAL STRATEGY, AND SERVED TO DEPRIVE COX OF A FAIR TRIAL.	8
A. There is no conceivable tactical reason for trial counsel’s failure to request an accurate instruction regarding the burden of proof.	8
B. Trial counsel’s failure to request accurate instructions on the burden of proof created a reasonable probability that the outcome of the trial would have been different, and deprived Cox of a fair trial.	11
<u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

<i>In re. Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed. 2d 368 (1970)	9, 14
<i>Patterson v. New York</i> , 432 U.S. 197, 206 (1977)	1
<i>Schaffer v. Weast</i> , 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005)	2
<i>Searle v. Milburn Irrigation Co.</i> , 2006 UT 16, 133 P.3d 382	3
<i>Searle v. Milburn Irrigation Co.</i> , 2006 UT 16, ¶49 n.2, 133 P.3d 382	3
<i>State v. Alinas</i> , 2007 UT 83, 171 P.3d 1046	6
<i>State v. Anderson</i> , 929 P.2d 1107 (Utah 1996)	7, 8
<i>State v. Dunn</i> , 850 P.2d 1201 (Utah 1993)	7
<i>State v. Garcia</i> , 2001 UT App 19, 18 P.3d 1123	13
<i>State v. Geukgeuzian</i> , 2004 UT 16, 86 P.3d 742	6, 7
<i>State v. Hendricks</i> , 258 P.2d 452 (Utah 1953)	5, 9
<i>State v. Kihlstrom</i> , 1999 UT App 289, 988 P.2d 949	10
<i>State v. Lee</i> , 2006 UT 5, 128 P.3d 1179	13
<i>State v. Marchet</i> , 2009 UT App 262, 219 P.3d 75	4, 5
<i>State v. Moritzsky</i> , 771 P.2d 688 (Utah App. 1989)	10
<i>State v. Sellers</i> , 2011 UT App 38, 248 P.3d 70,	12-14
<i>State v. Tebbs</i> , 786 P.2d 775 (Utah App. 1980)	2
<i>State v. Templin</i> , 805 P.2d 182, (Utah 1990)	11-13
<i>State v. Walton</i> , 646 P.2d 689 (Utah 1982)	5, 7, 8

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) . . . 13,
14

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ARGUMENT

I. THE INSTRUCTION REQUIRING THE DEFENDANT TO PRODUCE EVIDENCE OF AN “HONEST BELIEF” UNCONSTITUTIONALLY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT.

In her opening brief, Defendant (hereinafter “Cox”) argues that the Due Process requirements of both the federal and state constitutions placed upon the State “the burden of proving that Cox did not believe that she was authorized to cash the check and receive the funds therefrom.” Br. Appellant at 15. The State does not appear to contest this assertion, and acknowledges that the prosecution “bears the burden ‘to prove beyond a reasonable doubt every fact necessary to constitute the crime with which [a defendant] is charged.’” Br. Appellee at 17 (alteration in original) (quoting *Patterson v. New York*, 432 U.S. 197, 206, 97 S.Ct. 239, 53 L.Ed.2d 281 (1977)) (further citation omitted). Contrary to this constitutional requirement, Instruction No. 33 (the “honest belief” instruction) required Cox to present evidence that she had an honest belief that she was lawfully entitled to cash the check in question and receive the proceeds therefrom. *See*, R. 94.

A. The State's burden of proof includes both the burden of production and the burden of persuasion.

The State notes that the challenged instruction “advised the jury that *Defendant* had the responsibility or *burden of production*” with regard to the presentation of evidence that the Defendant had an honest belief that she had the right to obtain the property in question. Br. Appellee at 20 (emphasis added). Yet the State asserts that “Defendant does not contest this allocation of the *burden of production*.” Br. Appellee at 21 (emphasis in original). The State appears to misunderstand Cox’s position.

The first issue on appeal, as set forth in the Statement of Issues in Cox’s opening brief, raises the question of “[w]hether the burden of proof was shifted to the defendant in violation of her constitutional Due Process rights when the jury was instructed that the defendant was required to present evidence that she had an honest belief that she was lawfully entitled to cash the check and receive the proceeds therefrom.” Br. Appellant at 1. In Cox’s opening brief, Cox clearly asserts that the “requirement that [she] present evidence that she had an honest belief that she was legally entitled to cash the check is in direct conflict with the constitutional requirement that the State bear the burden of proving that she did not believe she was lawfully entitled to cash the check.” Br. Appellant at 16 (citing *State v. Tebbs*, 786 P.2d 775, 777-78 (Utah App. 1980) (further citation omitted)). This burden of producing evidence of relevant to Cox’s *mens rea* is a part of the burden of proof which constitutionally must be born by the State.

The concept of “burden of proof” encompasses two distinct burdens: the “burden of production” and the “burden of persuasion.” *Schaffer v. Weast*, 546 U.S. 49, 56, 126

S.Ct. 528, 163 L.Ed.2d 387 (2005). “Burden of production’ refers to ‘a party’s duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling.’” *Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶49 n.2, 133 P.3d 382 (quoting *Black’s Law Dictionary* 190 (7th ed. 1999)). “Burden of persuasion’ refers to ‘a party’s duty to convince the fact-finder to view the facts in a way that favors that party.’” *Id.* “[B]urden of proof is a catchall term that encompasses both the burden of persuasion and the burden of production and generally refers to ‘a party’s duty to prove a disputed assertion or charge.’” *Id.*

The State’s contention that Cox “does not contest [the] allocation of the *burden of production*,” Br. Appellee at 21, fails to acknowledge the legal principle that the burden of production is a necessary part of the burden of proof. The State’s burden of proof includes both the burden of production and the burden of persuasion. *See, e.g., Schaffer*, 546 U.S. at 56. Whether specifically framed as a challenge to the shifting of the burden of “production” or under the broader term burden of “proof,” Cox has made a clear challenge to the instruction as unconstitutionally requiring her to produce evidence of an innocent mental state. *See*, Br. Appellant at 16 (“[the] requirement that Cox present evidence that she had an honest belief that she was legally entitled to cash the check is in direct conflict with the constitutional requirement that the State bear the burden of proving that she did not believe she was lawfully entitled to cash the check”).

B. An instruction which correctly states the allocation of the burden of proof does not cure the error created by another instruction which erroneously places the burden of production on the defendant.

The State's position relies heavily on the argument that the instructions, taken as a whole, correctly advised the jury on the required burden of proof. *See*, Br. Appellee at 15-17. In support of its position, the State quotes several jury instructions given in the present case, and asserts that those instructions correctly stated the burden of proof. *See*, Br. Appellee 15-16.

The State correctly asserts that a jury instruction must be read in context with the other instructions that were provided to the jury. Br. Appellee at 17 (citing *State v. Marchet*, 2009 UT App 262, ¶23, 219 P.3d 75). The State further suggests that reversal is not required "merely because one instruction, standing alone, is not as accurate as it might have been." Br. Appellee (quoting *Marchet*, 2009 UT App 262, ¶23). The State's reliance on *Marchet* is misplaced.

Marchet involved an appeal from a conviction for the crime of rape. *Marchet* challenged the elements instruction given to the jury, claiming that it did not "adequately inform the jury that the State had the burden of proving his mental state with regard to each element of the crime of rape." *Marchet*, 2009 UT App 262, ¶21. The Court of Appeals clearly held that "[c]ontrary to *Marchet*'s assertions, [the challenged jury instruction] accurately identified each element of the crime of rape and correctly stated the applicable mental state." *Id.* at ¶22.

In *Marchet*, while the challenged instruction may not have been a perfect or ideal instruction, it nevertheless was an accurate statement of the law. The present case differs from *Marchet* in that the “honest belief” instruction was an incorrect statement of the law.

“It is elementary that in criminal cases the State has the burden of proving every essential element of the crime beyond a reasonable doubt.” *State v. Hendricks*, 258 P.2d 452, 453 (Utah 1953). Contrary to this constitutional requirement, the “honest belief” instruction shifted the burden to Cox to produce evidence that she had an innocent mental state.

While it is true that jury instructions must be considered as a whole, an instruction that correctly states the burden of proof does not cure another instruction which unconstitutionally shifts the burden of producing evidence to the defendant. *See, Hendricks*, 258 P.2d at 453; *State v. Walton*, 646 P.2d 689, 692 (Utah 1982). Although certain instructions may have correctly stated the burden of proof, the “honest belief” instruction was in direct conflict with such instructions. Where jury instructions “are in irreconcilable conflict, they could but confuse or mislead a jury” and reversal is required. *Hendricks*, 258 P.2d at 453.

II. THE DOCTRINE OF INVITED ERROR DOES NOT PRECLUDE REVIEW FOR PLAIN ERROR IN THE PRESENT CASE.

The State asserts that the doctrine of invited error should act to bar plain error review of the “honest belief” instruction, by suggesting that Cox “affirmatively approved” the instruction below. *See*, Br. Appellee at 11-13. The State supports this position by suggesting that where the record “does not indicate any response from [defense counsel]”

and “indicates that defense counsel gave ‘[n]o verbal response,’” the record should be interpreted as demonstrating affirmative approval of the jury instruction by defense counsel. Br. Appellee at 11-12.

The State cites no authority for the proposition that “no response” from defense counsel has the same legal effect as an affirmative approval of a jury instruction. The authorities cited by the State are readily distinguishable from the present case.

The State cites *State v. Geukgeuzian*, 2004 UT 16, 86 P.3d 742, for the proposition that the invited error doctrine applies when a party “fail[s] to object to an instruction when specifically queried by the court.” Br. Appellee at 13 (alteration in original). The present case is distinguishable from *Geukgeuzian*.

The Utah Supreme Court acknowledged in *Geukgeuzian* that “a party who fails to object to or give an instruction may have an instruction assigned as error under the manifest injustice exception. . . .”¹ 2004 UT 16, ¶9 (citing Utah R. Crim. Pro. 19(e)). *Geukgeuzian* states that a reviewing court will not engage in review for manifest injustice “if counsel, either by statement or act, *affirmatively represented* to the court that he or she had no objection to the jury instruction.” *Geukgeuzian*, 2004 UT 16 at ¶9 (citation omitted, emphasis added).

Unlike the present case in which the State proposed the problematic jury instruction, the defendant in *Geukgeuzian* affirmatively proposed to the trial court the jury

¹“In most circumstances, the term ‘manifest injustice’ is synonymous with the ‘plain error’ standard.” *State v. Alinas*, 2007 UT 83, ¶10, 171 P.3d 1046 (citations and internal quotation marks omitted).

instruction that was subsequently complained of on appeal. 2004 UT 16 at ¶8. Thus, the Supreme Court held that the defendant had invited the error. *Id.* at ¶12.

The State further cites *State v. Medina*, 738 P.2d 1021 (Utah 1987) and *State v. Anderson*, 929 P.2d 1107 (Utah 1996) in support of its invited error analysis.² Br. Appellee at 13. These cases are also distinguishable from the present case.

In *Medina*, the court declined to review for manifest injustice an instruction challenged on appeal where defense counsel at trial “actively represented to the court that she had read the instruction and had no objection to it.” 738 P.2d at 1023. The court noted that defense counsel at trial “consciously chose not to assert any objection that might have been raised and affirmatively led the trial court to believe that there was nothing wrong with the instruction.” *Id.*

The Supreme Court in *Anderson*, holding that defense counsel had invited any error in relation to a particular jury instruction, noted that “defense counsel read the instruction and then affirmatively stated that she had no objection.” 929 P.2d at 1109. The *Anderson* court further noted that defense counsel “failed to object to the instruction at the trial, *even when specifically queried by the court.*” *Id.* at 1108 (emphasis added).

In both *Anderson* and *Medina*, there was a specific inquiry or representation made with regard to the specific jury instruction language at issue on appeal. *Anderson*, 929

²The State also cites to *State v. Dunn*, 850 P.2d 1201 (Utah 1993). However, *Dunn* invokes the invited error doctrine in connection with an issue involving the admissibility of evidence, and is therefore not relevant to the analysis in the present case. *See, Id.* at 1220-21.

P.2d at 1108-09; *Medina*, 738 P.2d at 1023. Further, the defendant in both *Medina* and *Anderson* affirmatively stated that there was no objection to the jury instruction that was specifically in question. *Anderson*, 929 P.2d at 1108-09; *Medina*, 738 P.2d at 1023.

In the present case, there was no specific discussion of the jury instruction at issue on appeal, nor did defense counsel make an affirmative representation to the court that the instruction was correct. The record is silent in regard to any response from defense counsel regarding the now-challenged instruction. As set forth above, this does not meet the standards for invoking the invited error doctrine.

III. TRIAL COUNSEL'S FAILURE TO REQUEST AN ACCURATE INSTRUCTION REGARDING THE BURDEN OF PROOF CANNOT BE ATTRIBUTED TO ANY SOUND TRIAL STRATEGY, AND SERVED TO DEPRIVE COX OF A FAIR TRIAL.

The State argues that Cox's claim of ineffective assistance of counsel should be denied because trial counsel's actions were based on tactical or strategic decisions, and because there is not a reasonable probability that the outcome of the case would have been different but for counsel's performance. *See*, Br. Appellee at 14-26. For the reasons discussed below, these arguments fail.

A. There is no conceivable tactical reason for trial counsel's failure to request an accurate instruction regarding the burden of proof.

The State argues that Cox's claim of ineffective assistance of counsel must fail because "trial counsel had legitimate, strategic reasons for not objecting" to the honest belief instruction. Br. Appellee at 23. In support of this position, the State suggests that the "'honest belief' instruction was favorable to Defendant" because it "emphasized to

the jury that the prosecution was required to prove all elements of the offense.” Br. Appellee at 25.

In making this argument, the State appears to refer to the final sentence of the instruction which states that the “State retains its burden of proof beyond a reasonable doubt on all elements of the offense charged.” *See*, R. 94. Cox’s claim on appeal, however, is that the first portion of the instruction unconstitutionally shifts the burden to the defendant to produce evidence of an innocent mental state. Br. Appellant at 10-18.

Assuming, *arguendo*, that the final sentence of the instruction contains a correct statement of the law, the first part of the instruction still contains language that unconstitutionally shifts to Cox the burden of producing evidence of her innocent mental state. *See*, Br. Appellant at 9-26. Because both offenses charged in this case require proof of a guilty *mens rea*, the shifting of the burden required Cox to produce evidence to disprove that element of the charges. *Id.* at 9-21. The State has not cited to, and defense counsel is unaware of, any legal authority indicating that a defendant is somehow put at a strategic advantage by being required to bear the burden of producing evidence to disprove an element of a crime.

Contrary to the State’s position, it is well-established that a defendant’s Due Process rights under both the United States and Utah constitutions are violated by shifting the burden to a defendant to disprove an essential element of a crime. *See, In re. Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed. 2d 368 (1970); *State v. Hendricks*, 258 P.2d 452, 453 (Utah 1953) (stating “[i]t is elementary that in criminal cases the State has

the burden of proving every essential element of the crime beyond a reasonable doubt”); *State v. Kihlstrom*, 1999 UT App 289, ¶10 n.5, 988 P.2d 949 (stating that “the prosecution must prove guilt beyond a reasonable doubt; the defendant need not prove innocence”). Trial counsel’s failure to request an accurate instruction on the burden of proof cannot be dismissed as a strategic or tactical decision. *See, State v. Moritzsky*, 771 P.2d 688 (Utah App. 1989).

Moritzsky involved a claim of ineffective assistance based on trial counsel’s failure to request an accurate instruction relating to the burden of proof on the affirmative defense of “defense of habitation.” *Id.* at 691. Specifically, trial counsel had failed to request an instruction that informed the jury of the statutory presumption that the defendant had acted reasonably. *Id.* at 690.

The court in *Moritzsky* held,

[C]ounsel’s actions [cannot] be chalked up to trial tactics or the like. . . . Obviously, there is no tactical explanation for requesting a defense of habitation instruction without inclusion of the beneficial presumption. . . . The lack of any conceivable tactical basis for the omission distinguishes this case from many of the previous cases where ineffective assistance of counsel claims were rejected.

Id. at 692. Similarly, in the present case, there is no conceivable tactical basis for trial counsel’s failure to request an instruction that accurately stated the burden of proof requirements.

B. Trial counsel's failure to request accurate instructions on the burden of proof created a reasonable probability that the outcome of the trial would have been different, and deprived Cox of a fair trial.

The State argues, under its ineffective assistance analysis, that Cox has failed to show a reasonable probability that, but for the ineffective assistance of trial counsel, the result of the trial would have been different. Br. Appellee at 19 (citing *State v. Templin*, 805 P.2d 182, 187 (Utah 1990) (further quotation and citation omitted). The State's position rests largely on the argument that a "reasonable probability is one that undermines confidence in the outcome" of the trial. Br. Appellee at 19-20 (citing *Templin*, 805 P.2d at 187).

The State correctly quotes *Templin* as stating that "[i]n making this determination, an appellate court should consider the totality of the evidence, taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record." Br. Appellee at 20 (quoting *Templin*, 805 P.2d at 187). However, the nature of the case in *Templin* distinguishes it from the present case.

Templin involved a charge of rape where "the only issue in contention [at trial] was whether the victim in the case . . . consented to sexual intercourse with the defendant. . . ." 805 P.2d at 183-84. The allegation of ineffective assistance of counsel was based on a claim that trial counsel had failed to contact or call as witnesses several individuals who would have provided testimony contradictory to the testimony of the alleged victim in the case. *Id.* at 185.

The defendant in *Templin* had provided trial counsel with the names and addresses of several individuals who had been with both the defendant and the alleged victim on the night in question. *Id.* If called to testify at trial, these individuals “would have testified to the amount of consensual physical contact that occurred between [the defendant and the alleged victim]” and would have “contradicted several aspects of [the alleged victim’s] testimony.” *Id.*

In *Templin*, the question before the court was whether there was a reasonable probability that the additional evidence that could have been presented by the defense at trial would have made a difference in the outcome of the trial. *Id.* at 186-87. In such a context, it makes sense for the court to require that the “totality of the evidence” be considered in making that determination. *See, Id.* at 187.

However, the present case does not involve any question of whether trial counsel should have presented additional evidence. Instead, the present case involves a question of whether the honest belief instruction unconstitutionally shifted the burden to the defendant to produce evidence of her innocence.

The case of *State v. Sellers*, 2011 UT App 38, 248 P.3d 70, is more directly on point. In *Sellers*, the issue before the court was whether trial counsel was ineffective for failing to request an instruction which accurately stated the law regarding the burden of proof in the case. *Sellers*, 2011 UT App 38 at ¶¶14-15. The court determined that trial counsel’s performance was deficient, and then addressed the question of prejudice. *Id.* at ¶¶17-19.

The court noted that to show prejudice, the defendant must show that “but for counsel’s deficient performance there is a reasonable probability that the outcome of the trial would have been different.” *Id.* at ¶9 (quoting *State v. Lee*, 2006 UT 5, ¶37, 128 P.3d 1179); accord, *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) (observing that “a reasonable probability is a probability sufficient to undermine confidence in the outcome”). “[S]tated in other words, [a reasonable probability exists when] the errors were ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *Sellers*, 2011 UT App 38 at ¶9 (quoting *Strickland*, 466 U.S. at 687).

In *Sellers*, the appellate court determined that the jury instruction did not adequately address the issue of burden of proof, and that there was a possibility that the jury had inferred from the instructions that the burden of proof was on the defendant. *Sellers*, 2011 UT App 38 at ¶19. Although the court could not say that the jury actually did make such an inference, the possibility of such an inference being made was sufficient to undermine the court’s confidence in the verdict. *Id.* (citing *State v. García*, 2001 UT App 19, ¶16, 18 P.3d 1123). “That lack of confidence equates to a reasonable probability that [the defendant] would have received a more favorable outcome had his counsel not performed deficiently.” *Id.* The court thus reversed the conviction and remanded the case for a new trial. *Id.*


Fundamental to the right to a fair trial is the requirement that the prosecution bear the burden of proving each essential element of the charged offense. *See, e.g., In re.*

Winship, 397 U.S. at 364. When trial counsel's deficient performance is "so serious as to deprive the defendant of a fair trial" a reasonable probability exists that the outcome of the trial would have been different. *Sellers*, 2011 UT App 38 at ¶9 (quoting *Strickland*, 466 U.S. at 687). In the present case, therefore, trial counsel's failure to request accurate instructions on the burden of proof acted to deprive Cox of a fair trial. *See, Sellers*, 2011 UT App 38 at ¶9. The conviction should therefore be reversed, and the case remanded for a new trial.

CONCLUSION

Based on the foregoing arguments, and those in Appellant's opening brief, Cox respectfully requests: for the first issue raised in Appellant's opening brief, that the convictions on all counts be reversed and remanded for a new trial; for the second issue raised in Appellant's opening brief, that the sentence for theft by deception be vacated and the case be remanded for a new sentencing hearing.

SUBMITTED this 12th day of March, 2012.


STEPHEN W. HOWARD
Attorney for Defendant/Appellant

CERTIFICATE OF LENGTH

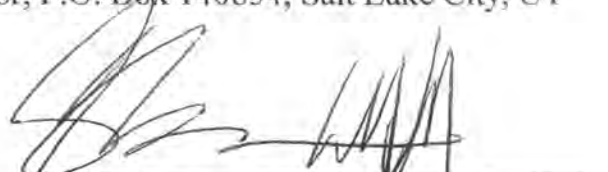
I, STEPHEN W. HOWARD, hereby certify that the foregoing brief complies with the length requirements for a reply brief as set forth in the Utah Rules of Appellate Procedure.

DATED this 12th day of March, 2012.


STEPHEN W. HOWARD

CERTIFICATE OF DELIVERY

I, STEPHEN W. HOWARD, hereby certify that I have caused to be delivered the eight copies of the foregoing with an electronic courtesy copy to the Utah Court of Appeals, 450 South State Street, 5th Floor, P.O. Box 140320, Salt Lake City, Utah 84114-0230, and two copies of the foregoing with an electronic courtesy copy to the Attorney General's Office, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, UT 84114-0854, this 12th day of March, 2012.


STEPHEN W. HOWARD

Delivered to the Utah Court of Appeals and the Attorney General as indicated above this 12th day of March, 2012.

