

2007

# Justin Brent Peterson v. Sheriff Aaron D. Kennard, Chief Paul Cunningham, Salt Lake County Jail, Taylorsville Justice Court : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JUSTIN BRENT PETERSON,

Petitioner and Appellant,

-vs-

SHERIFF AARON D. KENNARD,  
CHIEF PAUL CUNNINGHAM, SALT  
LAKE COUNTY JAIL, and  
TAYLORSVILLE JUSTICE COURT,

Respondents and Appellees.

Case No. 20070238

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BRIEF OF APPELLEE TAYLORSVILLE JUSTICE COURT

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UTAH APPELLATE COURTS

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Respondents and Appellees.

Case No. 20070238

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BRIEF OF APPELLEE TAYLORSVILLE JUSTICE COURT

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**STATEMENT OF ISSUES**

**Issue 1:** Are unusual circumstances present that justify a collateral attack on a criminal sentence, where petitioner Justin Brent Peterson ("Peterson") did not present a scintilla of evidence to support his counsel's allegation that he was denied his right to the assistance of counsel?

**Issue 2:** Did the court of appeals err in concluding, based on Peterson's written waiver of his right to counsel, that some evidence existed that Peterson waived his right to counsel, thus shifting the burden onto Peterson to overcome his conviction's presumption of regularity?



**Issue 3:** Whether the court of appeals incorrectly concluded that Peterson failed to meet his burden to overcome his conviction's presumption of regularity, where Peterson failed to testify that his waiver of his right to counsel was not knowing, voluntary, and intelligent?

### **STANDARD OF REVIEW**

This case is on appeal pursuant to this Court's Amended Order dated July 3, 2007 granting Peterson's petition for writ of certiorari. "On certiorari," this Court reviews "the decision of the court of appeals, not that of the district court. We conduct that review for correctness, ceding no deference to the court of appeals." State v. Von Ferguson, 2007 UT 1 (citations omitted).

### **TEXT OF SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## **STATEMENT OF THE CASE**

### **I. Nature of the Case and Proceedings Below**

This case is the result of Justin Brent Peterson (“Peterson”) filing a petition for post-conviction relief based on an alleged denial of his Sixth Amendment right to counsel. In February, 2000, Peterson was cited for possession of a controlled substance and possession of drug paraphernalia. Exhibit 8.

On July 18, 2000 (two days before he was scheduled for trial), Peterson appeared voluntarily in the Taylorsville Justice Court to plead guilty to the charges against him. R. 145:40, 44; Exhibit 8. Peterson read and signed a document entitled Defendant’s Waiver of Constitutional Rights (Exhibit 7), which included the waiver of Peterson’s right to counsel. R. 145:27, 41. Taylorsville Justice Court Judge Michael W. Kwan then went through his “typical” Rule 11 colloquy with Peterson, and Peterson entered a guilty plea to the charges against him. R. 145:57-58; Exhibit 8.

About two years later, on August 9, 2002, Peterson filed a petition for post-conviction relief (the “Petition”), claiming that Peterson “was sentenced to jail in violation of the Sixth Amendment to the United States Constitution and Alabama v. Shelton, 122 S.Ct. 1764 (2002).” R. 1. Although the Petition was supported by a memorandum of law, it was not supported by any affidavits or other sworn statements. See R. 1-9. Significantly, Peterson had not previously challenged his sentence through the avenue of a trial de novo in the district court.

On January 17, 2003, Judge Sandra N. Peuler of the Third District Court in and for Salt Lake County, State of Utah, held a hearing on the Petition. On February 20, 2003, the district court entered its order dismissing the Petition, finding that Peterson did not meet his burden of proof and that Peterson made a knowing, voluntary, and intelligent waiver of his right to counsel. R. 118.

Peterson appealed the dismissal of his Petition to the Utah Court of Appeals. R. 132-33. The court of appeals affirmed, holding that Peterson's post-conviction "challenge to his justice court convictions is barred by his failure to seek a trial de novo in the district court." Peterson v. Kennard, 2007 UT App 26, ¶ 17, 156 P.3d 834. The court of appeals also ruled that "[a]s an alternative ground upon which to affirm the district court's denial of Peterson's PCRA [Post-Conviction Remedies Act] action, we note that the record contains ample evidence to support the district court's determination that Peterson failed to prove a violation of his right to have counsel present at his justice court hearing." Id.

## **II. Statement of the Facts**

### **A. Events Leading to Peterson's Guilty Plea**

On or about February 24, 2000, Peterson was cited for possession of a controlled substance and drug paraphernalia. Exhibit 8. Peterson has never challenged the substance of the charged offenses. See Exhibit 8; R. 145:11-12 (“We are not challenging the conviction in this case. We are solely challenging the sentence . . .”).

On March 21, 2000, Peterson requested admission to the Taylorsville Substance Abuse Program. Exhibit 6; Exhibit 8. The Taylorsville Substance Abuse Program provides that upon acceptance and admission to the program that the applicant plead guilty and the guilty plea is held in abeyance pending successful completion of the program. See Exhibit 6. Upon completion of the program the plea will be withdrawn and charges dismissed. See id. Peterson signed, completed and submitted an “Application for Admission to City of Taylorsville Substance Abuse Court” (the “Application”). Exhibit 6. The Application included the following paragraph which Peterson initialed: “Counsel. I have the right to consult with and be represented by an attorney. If the judge were to determine that I am too poor to be able to hire a lawyer, then the judge could appoint one to represent me. I might later, if the judge determined I was able, be required to pay for the appointed lawyer’s service to me.” Id.

The Application also notified Peterson, among other things, of his right to a jury trial, that he was presumed innocent, that Taylorsville was required to prove the elements of his crime beyond a reasonable doubt, and that his conviction could be used to enhance penalties for any future convictions. Id.

Under the Taylorsville Justice Court's supervision, Peterson attended weekly drug court reviews from late March through late June 2000. Exhibit 8.

On June 27, 2000, the Taylorsville Justice Court determined that Peterson could not participate further in the Taylorsville Substance Abuse Program, and his case was set for trial on July 20, 2000. Id. The docket from the Taylorsville Justice Court shows that Peterson appeared before Judge Michael W. Kwan ("Judge Kwan") at least seven times between March and June 27, 2000. Id.

On July 18, 2000 (two days before his scheduled trial), Peterson appeared voluntarily in the Taylorsville Justice Court to plead guilty to these charges. R. 145:40, 44; Exhibit 8. Peterson testified that he was familiar with Judge Kwan by the time Peterson appeared before him on July 18, 2000. R. 145:33. Peterson also acknowledged that he "had appeared numerous times in front of Judge Kwan" before July 18, 2000. R.145:41. Likewise, Judge Kwan was also very familiar with Peterson. R. 145:55, 58-59. Peterson had "been a defendant" in Judge Kwan's court "for probably over a year on other matters." R. 145:59.

The "other matters" to which Judge Kwan referred related to charges brought against Peterson for (i) failing to stop at a controlled intersection in 1999

(Exhibit 1); (ii) playing loud music in 1999 (Exhibit 3); and (iii) failing to pay the fine associated with the failure to stop at a controlled intersection charges, resulting in the issuance of a warrant for his arrest (Exhibit 1). On February 24, 2000 (six months before Peterson agreed to plead guilty on the charges at issue in this case), Peterson was arrested and brought to Judge Kwan's court. Id. At this February 24, 2000 hearing, Judge Kwan advised Peterson of his Rule 11 rights, Peterson signed a "Defendant's Waiver of Constitutional Rights" and pleaded guilty to the failure to stop charges. Exhibit 1; Exhibit 2; R. 145:31. Also on February 24, 2000, Peterson signed a separate "Defendant's Waiver of Constitutional Rights" and pleaded guilty to charges against him for "loud music." Exhibit 3. Peterson waived his right to counsel with respect to both of the charges to which he pleaded guilty on February 24, 2000. Exhibit 2; Exhibit 3.

Moreover, in June 2000, Peterson pleaded guilty in the Midvale Justice Court to (i) reckless driving, possession of a controlled substance and possession of paraphernalia, and (ii) driving on a denied driver's license and failure to appear. Exhibit 4; Exhibit 5; R. 145:30. At this June 2000 hearing, the Midvale Justice Court advised Peterson of his rights and he waived his right to counsel in both of these cases. Exhibit 4; Exhibit 5.

## **B. Peterson's Guilty Plea**

On July 18, 2000, two days before his scheduled trial, Peterson appeared voluntarily in the Taylorsville Justice Court to plead guilty to the charges of possession of a controlled substance and possession of drug paraphernalia. R. 145:40, 44; Exhibit 8. Peterson entered Judge Kwan's courtroom, and remained there while Judge Kwan completed his afternoon calendar of about thirty to fifty cases. R: 145:59, 62.

After Judge Kwan completed his calendar, he wondered why Peterson remained in the courtroom. R. 145:64. Peterson's case was not scheduled for hearing that day. R. 145:59. Peterson said he wanted "to take care of" his case, and did not want to come back for his trial. R. 145:73. Judge Kwan told him to take the written Defendant's Waiver of Constitutional Rights (Exhibit 7) (the "Waiver") and "sit down and read it." R. 145:74. Peterson "was not happy" that Judge Kwan made him read the Waiver. R. 145:73.

Peterson acknowledged he signed the Waiver, R. 145:27, 41, which stated in part:

**COUNSEL.** I have the right to consult with and be represented by an attorney. If the judge were to determine that I am too poor to be able to hire a lawyer, then the judge could appoint one to represent me. I might later, if the judge determined I was able, be required to pay for the appointed lawyer's service to me.

Exhibit 7. Peterson signed his initials after this paragraph, indicating that he affirmatively waived his right to counsel.

The Waiver further informed Peterson of his right to a jury trial, his right to an appeal, that he was presumed innocent, that each element of the charged offense must be proven beyond a reasonable doubt, and that by entering a plea he could face enhanced penalties for future convictions. Id.

In addition to the Waiver, Peterson also executed a document entitled "Possession of Controlled Substance (marijuana)." Exhibit 9. This document explained the elements of the offense of possession of a controlled substance, described the applicable penalties for the crime, and the enhanced penalties that could apply to Peterson in the future. Id.

Judge Kwan remained on the bench while Peterson read, signed, and initialed the Waiver. R. 145:74. Judge Kwan testified that he knew "for a fact" that Peterson read the Waiver. R. 145:59.

After Peterson read, signed, and initialed his Waiver, Judge Kwan went through his "typical" Rule 11 colloquy twice with Peterson. R. 145:57-58. The reason Judge Kwan went through his Rule 11 colloquy twice is that Peterson had two separate criminal cases pending against him in Taylorsville (possession of a controlled substance and possession of drug paraphernalia), and he chose to plead guilty in both cases. See R. 115.

The docket of the Taylorsville Justice Court confirms that Peterson was advised of his Rule 11 rights. Exhibit 8. Judge Kwan testified that his Rule 11 colloquy included the following:



- Judge Kwan asked Peterson if he actually read the Waiver. R. 145:55-56.
- Judge Kwan asked Peterson if he read and understood the English language. R. 145:56.
- Judge Kwan asked Peterson if he understood that by entering a plea, Peterson would be giving up or waiving each of the constitutional rights listed on the Waiver. Id.
- Judge Kwan informed Peterson that he could go to jail. Id.
- Judge Kwan informed Peterson that if he wanted an attorney and could not afford one, “there was a process that we could go through to see if [Peterson] qualified to have one appointed [for him] at little or no cost.” R. 145:56-57.
- Judge Kwan asked Peterson if anybody promised him anything to induce him to enter his plea. R. 145:56.
- Judge Kwan asked Peterson if anyone threatened him or forced him to enter his plea. Id.

In addition, when Judge Kwan called his cases individually, he reads to the defendant “the charges, the date that it allegedly occurred, location.” R. 145:55.

Peterson admitted in his testimony that Judge Kwan advised him of most of these rights. R. 145:42-50. Specifically:

- Peterson testified that Judge Kwan told him “that by entering a guilty plea in this case that it could be used later to enhance another conviction.” R. 145: 42.
- Peterson testified that Judge Kwan asked if he read and understood the English language. R. 145:49-50.
- Peterson testified that Judge Kwan asked if he understood that by entering a guilty plea he was giving up the rights in the Waiver. R. 145:50.
- Peterson testified that Judge Kwan discussed “the consequences of a guilty plea . . . the fact that you could be sentenced to jail.” Id.
- Peterson testified that Judge Kwan explained “how long [Peterson] could be sentenced to jail before [he] entered [his] guilty plea.” Id.
- Peterson testified that Judge Kwan said that if he “couldn’t afford a lawyer and if [he] wanted one, the Court would appoint one.” R. 145:42.
- Peterson testified that Judge Kwan asked if he wanted a lawyer, R. 145:49, and Peterson indicated that he did not want a lawyer. Id.

Based on Judge Kwan’s close familiarity with Peterson through this case and other cases, Judge Kwan concluded that Peterson “understood his rights.” R. 145:60. Indeed, Judge Kwan “would not have gone forward” had he “even suspected” that Peterson did not understand his rights. Id.

## **SUMMARY OF THE ARGUMENT**

The crux of this appeal is whether a naked allegation that a defendant was denied his right to counsel, without even a scintilla of supporting evidence, is sufficient to overcome the presumption of regularity that attaches to a criminal conviction.

It is undisputed in this case that Peterson was convicted in the Taylorsville Justice Court and that he failed to avail himself of his right to a trial de novo in district court. Under this Court's precedents, Peterson's claim for post-conviction relief is therefore barred unless he can demonstrate that "unusual circumstances" excuse his failure to exhaust his legal remedies.

There are no unusual circumstances in this case. As a threshold matter, Peterson's claim that he was deprived of his right to counsel is not facially plausible. He did not testify that he did not waive his right to counsel, or that his waiver was not knowing, voluntary, or intelligent. The mere fact that Peterson was not represented by counsel does not constitute unusual circumstances. This Court should not permit the unusual circumstances exception to swallow the rule, thus undermining the policy in favor of the finality of criminal convictions.

But even if this Court were to find that unusual circumstances were present, the court of appeals was correct in alternatively ruling that the presumption of regularity attaches to Peterson's conviction. There is ample evidence that Peterson waived his right to counsel, and the court of appeals did

not err in finding that Peterson's written waiver of his right to counsel constituted evidence sufficient to cloak Peterson's conviction with the presumption of regularity. The court of appeals properly found that the evidence presented by Peterson, including his own self-serving testimony, was inadequate to overcome the presumption of regularity. There is no evidence in the record that Peterson's plea was not knowing, voluntary, or intelligent.

Nevertheless, should this Court determine that Peterson adduced sufficient evidence to overcome the presumption of regularity, the record demonstrates that Peterson's waiver of his right to counsel comported with constitutional standards. Peterson was advised of the nature of the charges against him, of his right to counsel, and the range of punishments possible upon his guilty plea. These warnings satisfy the requirements of Iowa v. Tovar, 541 U.S. 77 (2004) to waive the right to counsel in the context of a guilty plea. And even if this Court's pre-Tovar requirements were applied, the record shows that Peterson was adequately advised concerning his rights to make a knowing, voluntary, and intelligent waiver of his right to counsel.

## **ARGUMENT**

- I. Peterson's Constitutional Claim Is Not Facially Plausible, and Therefore No Unusual Circumstances Are Present that Could Justify Post-Conviction Relief**
  - A. This Court Rejects Post-Conviction Challenges that Are Not Facially Plausible**

Peterson contends that a mere naked allegation that a defendant's Sixth Amendment right to counsel was violated is sufficient to constitute unusual circumstances that justify post-conviction review. Peterson is wrong. This Court requires a facially plausible allegation of a constitutional violation, and Peterson's claim is not facially plausible because he produced no evidence in the district court to support his claim.

Under this Court's procedural bar jurisprudence, defendants are not eligible for post-conviction relief unless they first exhaust their legal remedies. Lucero v. Kennard, 2005 UT 79, ¶ 32, 125 P.3d 917. Justice court defendants must pursue a trial de novo to exhaust their legal remedies. Id. at ¶ 41. Peterson did not pursue a trial de novo, and therefore his constitutional challenge to his sentence is barred unless he can demonstrate that "unusual circumstances" excuse his failure to exhaust his legal remedies. See id. at ¶ 42.

"To qualify for the unusual circumstances exception to the procedural bar rules, a petitioner must demonstrate that 'an obvious injustice or a substantial and prejudicial denial of a constitutional right' has occurred." Id. at ¶ 45 (quoting

Carter v. Galetka, 2001 UT 96, ¶ 15, 44 P.3d 626). Claims that constitutional rights were violated, without more, do not automatically rise to the level of unusual circumstances. See Benvenuto v. State, 2007 UT 53, ¶¶ 27-35, 582 Utah Adv. Rep. 22 (ineffective assistance of counsel claim time barred); Gardner v. Galetka, 2004 UT 42, ¶ 16, 94 P.3d 263 (ineffective assistance of counsel claim not an unusual circumstance where it was not facially plausible); Rudolph v. Galetka, 2002 UT 7, ¶¶ 3, 6, 43 P.3d 467 (claim that defendant was denied right to represent himself not constitute an unusual circumstance); Gardner v. Holden, 888 P.2d 608, 614 (Utah 1995) (meritless constitutional claims that court should have advised defendant of right to remain silent and that defendant's due process rights violated, were not unusual circumstances).

This Court has made it clear that it does not consider whether unusual circumstances exist where the claim is not "facially plausible." Gardner v. Galetka, 2007 UT 3, ¶ 30, 151 P.3d 968; Gardner v. Galetka, 2004 UT 42, ¶ 16, 94 P.2d 263. Were it otherwise, the "unusual circumstances" exception would swallow the rule that a defendant must first exhaust legal remedies before seeking post-conviction relief. A justice court defendant could challenge a sentence years after it was issued based on a claimed constitutional violation, without a scintilla of supporting evidence. If this Court's procedural bar jurisprudence has any vitality, a defendant must have some evidence to support a post-conviction challenge, or that challenge must be precluded.

**B. Peterson's Claim that He Was Deprived of His Right to Counsel Is Not Facially Plausible**

This Court's recent decision in State v. Von Ferguson clarified the minimal evidentiary burden that is required to rebut the presumption of regularity that attaches to a criminal conviction. 2007 UT 1, ¶ 40-41. To meet this minimal evidentiary burden established by Von Ferguson, Peterson is required to "present 'some evidence that he . . . was not represented by counsel and did not knowingly waive counsel.'" Id. at ¶ 40 (quoting State v. Triptow, 770 P.2d 146, 149 (Utah 1989)). The Von Ferguson Court further clarified that the requirement of "some evidence" may be satisfied by a defendant's own testimony." Id.

The evidence presented by Peterson in the district court did not satisfy the minimal evidentiary burden established by this Court in Von Ferguson. It is true that the only evidence presented by Peterson was his self-serving testimony. However, nowhere in his testimony does Peterson claim that he did not waive his right to counsel or that his waiver was not knowing, voluntary, or intelligent. Peterson has never claimed that his waiver was involuntary; or that he did not understand what he was doing when he waived his right to counsel; or that he lacked the intelligence to understand the consequences of the waiver of the right to counsel.<sup>1</sup>

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<sup>1</sup> While Peterson's counsel made statements to this effect, R. 145:15, 17, these statements were not supported by evidence and have no evidentiary value. Peterson's evidence (consisting solely of his own testimony) did not include any testimony that his waiver was not voluntary, knowing, or intelligent.

Peterson's Petition (R. 1) fails to assert that his waiver was not knowing, voluntary, or intelligent. At most, the unverified Petition asserts that Peterson "was sentenced to jail in violation of the Sixth Amendment." Id. Likewise, not once in Peterson's testimony did he claim that his waiver was not knowing, voluntary, or intelligent. See R. 145:25-51. This case is thus easily distinguishable from Von Ferguson because the defendant in Von Ferguson testified that he did not waive his right to counsel. Von Ferguson, 2007 UT 1 at ¶ 41. By contrast, Peterson admitted in his testimony that he waived his right to counsel. R. 145:41-42, 45-46, 49.

The question is thus whether Peterson's counsel's naked allegations of a constitutional violation are sufficient to meet Peterson's burden to demonstrate that his waiver of the right to counsel was invalid. The United States Supreme Court considered this issue in Iowa v. Tovar, 541 U.S. 77 (2004). Tovar, like the instant case, arose out of a "collateral attack on an uncounseled conviction." Id. at 92. The Court recognized that in this procedural context, "it is the defendant's burden to prove that he did not completely and intelligently waive his right to the assistance of counsel." Id. The Court noted that the defendant "has never claimed that he did not fully understand the charge or the range of punishment for the crime prior to pleading guilty," id., nor did the defendant "assert that he was unaware of his right to be counseled prior to and at his arraignment." Id. at 93. Instead, the defendant in Tovar maintained that his waiver of counsel was invalid



because the trial court had inadequately warned him of the dangers and disadvantages of self-representation. Id. at 85. In a unanimous decision, the Supreme Court reversed the Iowa Supreme Court's holding that the defendant's waiver of his Sixth Amendment rights was invalid. Id. at 94.

Peterson is in a similar situation to the Tovar defendant, as Peterson never claimed that his waiver of his right to counsel was not voluntary, knowing, or intelligent. In the absence of any evidence that Peterson's waiver of counsel was not voluntary, knowing, or intelligent, Peterson has failed to meet his burden to prove his waiver of Sixth Amendment rights was invalid. Cf. Moench v. State, 2004 UT App 57, ¶¶1, 16-18, 88 P.3d 353 (considering merits of petition for post-conviction relief where defendant claimed that he did not enter "a voluntary and knowledgeable guilty plea").

Peterson has utterly failed to meet his minimal evidentiary burden to show that his waiver of the right to counsel was not knowing, voluntary, and intelligent. Peterson has the acknowledged burden of introducing evidence that his waiver of counsel was not knowing, voluntary, and intelligent. He has admitted that his waiver was voluntary, and he had not testified or otherwise produced evidence to show that his waiver was not knowing or intelligent. Peterson's post-conviction collateral attack on his sentence is not facially plausible.

**C. The Fact that Peterson Was Not Represented by Counsel Does Not Represent “Unusual Circumstances” to Justify His Failure to Seek a Trial De Novo**

Peterson cites to exactly one fact that he claims constitutes “unusual circumstances”: he was not represented by counsel in the justice court proceedings. But Peterson does not cite a single case which has found that a convicted defendant’s pro se status, standing alone, was sufficient to meet the “unusual circumstances” exception to the exhaustion of remedies requirement.

Taylorville respectfully submits that this Court should construe the “unusual circumstances” exception as an exception. It is the exception to the rule, reserved for cases that fall outside the norm. If Peterson’s argument were accepted, then every single pro se defendant would effectively have an unlimited period of time to collaterally challenge their convictions. This “would allow that exception to swallow up the rule, thereby transforming habeas corpus from an extraordinary remedy into an alternative appeal mechanism in contravention of the finality of criminal judgments that is the settled policy of this state.” Codianna v. Morris, 660 P.2d 1101, 1105 (Utah 1983).

The cases Peterson relies upon to the contrary are distinguishable. Several of them are cases involving the ineffective assistance of counsel, which present very different considerations. One of the cases Peterson cites, Rudolph v. Galetka, points out that “[w]hen trial counsel represents [a] defendant on

appeal an ineffective assistance claim cannot be raised because it is unreasonable to expect [trial counsel] to raise the issue of [her] own ineffectiveness at trial on direct appeal.” 2002 UT 7, ¶ 7, 43 P.3d 467 (quoting State v. Labrum, 881 P.2d 900, 907 (Utah Ct. App. 1994)). Indeed, in another case Peterson cites, Chess v. Smith, the defendant’s counsel advised the defendant “that he stood ‘a substantial chance’ of receiving a much harsher sentence upon retrial and thus was advised not to pursue an appeal.” 617 P.2d 341, 343 (Utah 1980). This Court stated that “[t]his advice was clearly contrary to the law.” Id. These abuses that are inherent in an ineffective assistance of counsel claim are simply not present where a defendant proceeds pro se.

Other cases relied on by Peterson are within the class of “numerous Utah cases which have addressed the merits of habeas claims even though the issues raised were known or should have been known to petitioner and his counsel at the time of conviction and should have been raised on appeal.” Codianna, 660 P.2d at 1114 (Stewart, J., concurring). Brown v. Turner, 440 P.2d 968 (Utah 1968) and Webster v. Jones, 587 P.2d 528 (Utah 1978) fall within this class. See Codianna, 660 P.2d at 1114 (Stewart, J., concurring) (finding that “[a] reading” of [Brown v. Turner] makes clear that the petitioner either knew or should have known at the time of his conviction of those errors that were later asserted in his habeas petition.”) None of these decisions found any unusual circumstances

present to justify the defendant's failure to raise Sixth Amendment claims on direct appeal.

This Court's recent decision of Benvenuto v. State, 2007 UT 53, 582 Utah Adv. Rep. 22, presented facts very similar to the instant case. There, a defendant "waited several years after the expiration of the PCRA limitations period to file his petition for post-conviction relief." Id. at ¶ 33. The defendant argued that his delay was justified because he could not afford to retain an attorney. Id. This Court found that this justification was "simply inadequate," and that the defendant did not "meet the interests of justice exception to the statute of limitations. As such, his claims are time barred under the PCRA." Id. at ¶¶ 34-35.

Like the petitioner in Benvenuto, Peterson's pro se status alone is insufficient to create "unusual circumstances." There is no reason that Peterson could not have sought a trial de novo and subsequently requested the appointment of counsel to assist Peterson in pursuing his claims. Id. at ¶ 34. In the absence of "unusual circumstances," Peterson's claims are barred by his failure to first pursue a trial de novo.

**II. Should this Court Reach the Merits of Peterson’s Petition, it Should Affirm the Court of Appeals’ Ruling that Peterson Failed to Prove a Violation of His Right to Counsel**

**A. The Presumption of Regularity Attaches to Peterson’s Conviction Because There Is Ample Evidence that Peterson Waived His Right to Counsel**

This Court has recently clarified the burdens of proof that apply where a defendant challenges an uncounseled conviction based on an alleged deprivation of the defendant’s right to counsel. In Lucero v. Kennard, this Court ruled that a “court may not presume waiver of the right to counsel unless there is some evidence that the defendant affirmatively acquiesced to the waiver of counsel.” 2005 UT 79, ¶ 25, 125 P.3d 917. Furthermore, in State v. Von Ferguson, this ruling was clarified: “it is impermissible to presume a waiver of counsel where a trial record is silent on the issue of waiver.” 2007 UT 1, ¶ 37. The court of appeals in this case correctly allocated the burdens of proof: “where there is some evidence that a defendant has acquiesced in the trial court’s failure to appoint counsel, the burden of proof shifts to the defendant to establish that he did not validly waive his right to counsel.” Peterson v. Kennard, 2007 UT App 26, ¶ 14, 156 P.3d 834.

Thus, the threshold question is whether there is “some evidence” that Peterson waived his right to counsel. The court of appeals focused on the Waiver, which is perhaps the strongest evidence of Peterson’s waiver of his right

to counsel. Indeed, Peterson admitted that he signed the Waiver, R. 145:27, 41, which stated in part:

**COUNSEL.** I have the right to consult with and be represented by an attorney. If the judge were to determine that I am too poor to be able to hire a lawyer, then the judge could appoint one to represent me. I might later, if the judge determined I was able, be required to pay for the appointed lawyer's service to me.

Exhibit 7. Peterson signed his initials after this paragraph, indicating that he affirmatively waived his right to counsel.

Although certainly the Waiver is sufficient standing alone to constitute "some evidence" that Peterson waived his right to counsel, the record in this case is replete with evidence of Peterson's waiver. This includes the justice court's docket entry, which indicates that Peterson was advised of his Rule 11 rights. Exhibit 8. Pursuant to Utah Code Ann. § 78-5-122 (2002): "Entries in a justice court judge's docket under Section 78-5-121, certified by the judge or his successor in office, are prima facie evidence of the facts stated." Utah R. Crim. P. 11(e) provides in part that a court may not accept a guilty plea unless the judge has found that "if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel." Accordingly, the docket constitutes prima facie evidence that Peterson knowingly waived his right to counsel.

Moreover, Peterson admitted in his testimony that he waived his right to counsel. R. 145:41-42, 45-46, 49. Furthermore, in connection with the charges

at issue, Peterson also signed an “Application for Admission to City of Taylorsville Substance Abuse Court” (the “Application”). Exhibit 6. The Application included the following paragraph which Peterson initialed: “Counsel. I have the right to consult with and be represented by an attorney. If the judge were to determine that I am too poor to be able to hire a lawyer, then the judge could appoint one to represent me. I might later, if the judge determined I was able, be required to pay for the appointed lawyer’s service to me.” Id.

The evidence that Peterson waived his right to counsel far exceeded this Court’s minimal “some evidence” standard. The court of appeals in this case correctly found that the Waiver “alone is sufficient to evidence Peterson’s affirmative acquiescence in the justice court’s failure to appoint counsel and shift the burden of establishing a Sixth Amendment violation onto Peterson.” Peterson v. Kennard, 2007 UT App 26, ¶ 16, 156 P.3d 834.

**B. Peterson Failed to Adduce Any Evidence that He Did Not Waive His Right to Counsel or that His Waiver Was Not Knowing, Voluntary, and Intelligent**

To rebut the presumption of regularity that attaches to Peterson’s conviction, it is his burden to come forward with “some evidence to rebut the presumption of regularity.” State v. Von Ferguson, 2007 UT 1, ¶ 41. It is not enough for Peterson to “merely produce a copy of the conviction reflecting that he was not represented by counsel.” Id. Thus, in Von Ferguson, a defendant’s

testimony that he “did not waive his right to counsel” was sufficient to overcome the presumption of regularity. Id.

It is true that Peterson testified in the district court concerning the circumstances of his guilty plea. But in stark contrast to Von Ferguson, Peterson admitted in his testimony that his plea was voluntary. R. 145:41-42, 45-46, 49. Peterson did not testify that he did not waive his right to counsel. Likewise, not once in Peterson’s testimony did he claim that his waiver was not knowing, voluntary, or intelligent. See R. 145:25-51.

Given the presumption of regularity, and in the absence of even a scintilla of evidence to rebut the presumption, Peterson’s conviction must stand. The court of appeals correctly concluded that “Peterson failed to meet his burden of proving a violation” of his right to counsel. Peterson v. Kennard, 2007 UT App 26, ¶ 16, 156 P.3d 834.

**C. Even Assuming Peterson Produced Evidence to Rebut the Presumption of Regularity, His Waiver of Counsel Was Constitutionally Valid**

**1. Standards for Waiver of the Right to Counsel**

Peterson’s argument focuses on a rigid mantra that he claims a court must recite for a waiver of the right to counsel to be valid. The United States Supreme Court rejected a similar argument that a court must conduct a specific colloquy for the waiver of the right to counsel to be effective. See Iowa v. Tovar, 541 U.S. 77,



88 (2004) (“We have not, however, prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel”). To the contrary, “[t]he information a defendant must possess in order to make an intelligent decision . . . will depend on a range of case-specific factors, including the defendant’s education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.” Id.; accord State v. Pedockie, 2006 UT 28, ¶ 40, 137 P.3d 716 (“we have recognized that the validity of a defendant’s waiver turns upon the particular facts and circumstances surrounding each case”).

In the context of the waiver of counsel to enter a guilty plea, the Sixth Amendment “is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon entry of a guilty plea.” Tovar, 541 U.S. at 81. The United States Supreme Court clarified that a more searching colloquy is required where a defendant seeks to proceed through trial pro se. Id. at 90; cf. State v. Pedockie, 2006 UT 28, ¶¶ 42, 50, 51, 137 P.3d 716 (requiring a more searching colloquy where defendant seeks to proceed through trial pro se).

However, “at earlier stages of the criminal process, a less searching or formal colloquy may suffice.” Tovar, 541 U.S. at 89. This is so “not because pretrial proceedings are ‘less important’ than trial, but because, at that stage, ‘the

full dangers and disadvantages of self-representation . . . are less substantial and more obvious to the accused than they are at trial.” Id. at 90 (quoting Patterson v. Illinois, 487 U.S. 285, 299 (1988)).

Before the Tovar decision, this Court ruled that “before a defendant can waive the right to counsel, ‘the defendant “should be made aware of the dangers and disadvantages of self-representation, so that . . . he knows what he is doing and his choice is made with eyes open.”” State v. Arguelles, 2003 UT 1, ¶ 70, 63 P.2d 731 (quoting State v. Frampton, 737 P.2d 183, 187 (Utah 1987) (quoting Faretta v. California, 422 U.S. 806, 835 (1975)). To establish the validity of a waiver of the right to counsel, trial courts should do the following:

(1) advise the defendant of his constitutional right to the assistance of counsel, as well as his constitutional right to defend himself; (2) ascertain that the defendant possesses the intelligence and capacity to understand and appreciate the consequences of the decision to represent himself, including the expectation that the defendant will comply with technical rules and the recognition that presenting a defense is not just a matter of telling one’s story; and (3) ascertain that the defendant comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case.

State v. Arguelles, 2003 UT 1, ¶ 70, 63 P.2d 731 (quoting State v. Heaton, 958 P.2d 911, 918 (Utah 1998)).

Taylorville contends that Tovar overruled Utah precedent to the extent Utah cases may require a more searching colloquy to waive the right to counsel in the context of a guilty plea. See Tovar, 541 U.S. at 81 (overruling Iowa

Supreme Court's requirement of two specific warnings that were not necessary under the Sixth Amendment).<sup>2</sup> However, as will be demonstrated below, even if the more detailed requirements of the pre-Tovar Utah precedent are applied, Peterson's waiver of his right to counsel was valid.

## **2. Peterson's Waiver of Counsel Was Valid Under the Tovar Court's Standards**

Tovar enunciated the standard for a valid waiver of the right to counsel in the context of entering a guilty plea as follows: "The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." Id. The constitutional requirement was satisfied in this case.

First, Peterson was informed of the nature of the charges against him. It is undisputed that Peterson signed Exhibit 9, which indicates that Peterson was charged with possession of controlled substance. Moreover, when Judge Kwan called Peterson's case, he read to Peterson "the charges, the date that it allegedly occurred, location." R. 145:55. It is also clear that Peterson knew the nature of the charges against him based on the Waiver, which contained a handwritten notation (presumably Peterson's own handwritten notation) near the

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<sup>2</sup> Peterson has not challenged his sentence on the basis of the Utah Constitution, instead, he has relied solely on the Sixth Amendment to the United States Constitution. See R. 1-5; Peterson's Brief at 1-2.

top of the Waiver “POCS + PODP,” or possession of controlled substance and possession of drug paraphernalia. Exhibit 7. Moreover, Peterson has never contended that he did not understand the nature of the charges against him.

The docket of the Taylorsville Justice Court independently satisfies this requirement. The docket indicated that Peterson was advised of his Rule 11 rights. Exhibit 8. Further, the district court found that Peterson was advised of his Rule 11 rights twice on July 18, 2000. R. 115. Pursuant to Utah Code Ann. § 78-5-122 (2002): “Entries in a justice court judge’s docket under Section 78-5-121, certified by the judge or his successor in office, are *prima facie* evidence of the facts stated.” Utah R. Crim. P. 11(e) provides in part that a court may not accept a guilty plea unless the judge has found that “the defendant understands the nature and elements of the offense to which the plea is entered . . .” Utah R. Crim. P. 11(e)(4)(A). Accordingly, the docket constitutes prima facie evidence that Peterson was informed of the nature of the charges against him.

Second, Peterson was informed of his right to be counseled regarding his plea. Utah R. Crim. P. 11(e)(1) requires a judge to determine that “if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel.” Since the docket (Exhibit 8) indicates that Peterson was advised of his Rule 11 rights, the docket is prima facie evidence that Peterson knowingly waived his right to counsel.

The evidence in the district court was consistent with the docket entry. Peterson admitted in his testimony that Judge Kwan told him that if he “couldn’t afford a lawyer and if [he] wanted one, the Court would appoint one for [him].” R. 145:42. Peterson also conceded that Judge Kwan asked if Peterson wanted a lawyer, R. 145:49, and Peterson indicated that he did not want a lawyer. Id. Further, the Waiver Peterson executed advised him: “I have the right to consult with and be represented by an attorney. If the judge were to determine that I am too poor to be able to hire a lawyer, then the judge could appoint one to represent me. I might later, if the judge determined I was able, be required to pay for the appointed lawyer’s service to me.” Exhibit 7. Finally, Peterson executed the Application (Exhibit 6) which also informed him of his right to counsel.

Third, Peterson was advised of the range of allowable punishments attendant upon the entry of a guilty plea. Utah R. Crim. P. 11(e)(5) requires a judge accepting a guilty plea to determine that “the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of consecutive sentences.” Since the docket indicates that Peterson was advised of his Rule 11 rights (Exhibit 8), the docket entry is prima facie evidence that Peterson was advised of the range of punishments he faced as a result of his guilty plea.

Again, the testimony in the proceeding below was consistent with the docket. Peterson admitted that Judge Kwan told him “that by entering a guilty plea in this case that it could be used later on to enhance another conviction.” R. 145:42. Peterson also admitted that Judge Kwan discussed with him “the consequences of a guilty plea . . . the fact that you could be sentenced to jail.” R. 145:50. And Peterson acknowledged that Judge Kwan explained to him “how long [Peterson] could be sentenced to jail before [he] entered [his] guilty plea.” R. 145:50. Peterson also executed Exhibit 9, which explains the penalty and enhanced penalty applicable to possession of marijuana. Moreover, Peterson has never claimed that he did not understand the range of allowable punishments attendant to pleading guilty in this case.

In sum, even if this Court determines that Peterson presented sufficient evidence in the district court to overcome the presumption of regularity, the information and warnings the Taylorsville Justice Court conveyed to Peterson satisfied the Tovar standard.

### **3. Peterson’s Waiver of Counsel Was Valid Under the Pre-Tovar Utah Precedent**

Tovar implicitly overruled Utah precedent to the extent it required information in addition to the Tovar standard to be conveyed to a defendant pleading guilty without counsel. As an example, under pre-Tovar precedent, a judge is arguably required to inform a defendant waiving counsel that the

defendant will need to comply with technical rules, such as the rules of evidence. See State v. Arguelles, 2003 UT 1, ¶ 70, 63 P.3d 731.<sup>3</sup> While this type of warning would make sense for a criminal defendant proceeding to trial pro se, it has no application to a defendant who is simply pleading guilty two days before a scheduled trial. Said another way, Tovar clarified that a wooden recitation of specific warnings which are irrelevant to pleading guilty is not required.

Nonetheless, even if the more exacting standards of Utah's pre-Tovar case law are considered, Peterson's waiver of his right to counsel was still valid.

**a. Peterson Was Aware of the Dangers and Disadvantages of Self-Representation**

Peterson was aware of the dangers and disadvantages of self-representation when he waived his right to counsel in this case. As stated by this Court, a defendant ""should be made aware of the dangers and disadvantages of self-representation, so that . . . he knows what he is doing and his choice is made with eyes open."" Id. (emphasis added) (quoting State v. Frampton, 737 P.2d 183, 187 (Utah 1987) (quoting Faretta v. California, 422 U.S. 806, 835 (1975))).

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<sup>3</sup> Peterson's brief on this appeal (page 42) makes this precise argument: Peterson should have been asked about his knowledge of the rules of evidence. The rules of evidence have no bearing on a decision to plead guilty without the benefit of counsel, although they would certainly be relevant in the context of a defendant seeking to waive counsel at trial.

Here, Judge Kwan specifically testified that he “was comfortable that [Peterson] understood English and he understood what we were talking about and he understood the consequences of what he was doing.” R: 145:74 (emphasis added). Judge Kwan formed this opinion based on his close familiarity with Peterson on several cases over the year before Peterson signed the Waiver. Indeed, Judge Kwan “would not have gone forward” had he “even suspected” that Peterson did not understand his rights. R: 145:60.

Peterson was also intimately familiar with the consequences of pleading guilty pro se as a result of his having done so in two cases before the Midvale Justice Court approximately six months before he waived his right to counsel in this case. Exhibit 4; Exhibit 5. Peterson had also pleaded guilty and waived counsel in connection with two separate cases in the Taylorsville Justice Court in 1999, the year before the guilty pleas in the instant case. Exhibit 2; Exhibit 3. Peterson was no novice to the criminal justice system and the consequences of waiving counsel and pleading guilty to crimes.

Given this evidence that Peterson was intimately familiar with the dangers and disadvantages of proceeding without counsel, and the lack of evidence to the contrary, the district court’s finding that Peterson’s waiver of his right to counsel was “knowing, voluntary, and intelligent” (R. 118) was entirely appropriate.



**b. Peterson was Advised of His Right to Counsel, and Exercised His Right to Defend Himself**

It is undisputed that Judge Kwan advised Peterson of his right to counsel. Peterson testified that Judge Kwan asked if Peterson wanted a lawyer, R. 145:49, and Peterson indicated that he did not want a lawyer. Id. Peterson also testified that Judge Kwan told him that if he “couldn’t afford a lawyer and if [he] wanted one, the Court would appoint one for [him].” R. 145:42. The Waiver Peterson signed also explained Peterson’s right to an attorney, and that “[i]f the judge were to determine that I am too poor to be able to hire a lawyer, then the judge could appoint one to represent me.” Exhibit 7. Peterson also signed the Application (Exhibit 6) which informed Peterson of his right to counsel.

Peterson argues on this appeal that he was not adequately informed of his right to self-representation. Peterson’s Brief at 31. But it is beyond dispute that Peterson knew of this right, since he in fact exercised it in this case (and other cases). It strains credulity for Peterson to suggest that his sentence should be overturned because he was not advised of a right that he not only knew of, but in fact exercised.

**c. Judge Kwan Ascertained that Peterson Possessed the Intelligence and Capacity to Understand and Appreciate the Consequences of his Decision to Represent Himself**

Judge Kwan was very familiar with Peterson and his capacity when Peterson entered his guilty plea on July 18, 2000. R. 145:55, 59. Indeed,

Peterson had appeared before Judge Kwan at least seven times between March and June 27, 2000. Exhibit 8. Peterson testified that he was familiar with Judge Kwan by the time he appeared before him on July 18, 2000. R. 145:33.

Peterson also acknowledged that he “had appeared numerous times in front of Judge Kwan” before executing the Waiver. R.145:41. Peterson had “been a defendant” in Judge Kwan’s court “for probably over a year on other matters.” R. 145:59. It is within the context of a defendant and a judge who were very familiar with each other that Peterson’s waiver of his right to counsel must be considered.

Judge Kwan remained on the bench while Peterson read and signed his Waiver. R.145:74. Judge Kwan testified that he knew “for a fact” that Peterson read the Waiver. R.145:59.

After Peterson read and signed the Waiver, Judge Kwan asked Peterson if he actually read the Waiver, and asked Peterson if he read and understood the English language. R. 145:55-56. Peterson conceded that Judge Kwan asked Peterson if he read and understood the English language. R. 145:49-50.

Based on Judge Kwan’s close familiarity with Peterson on several cases over the year before Peterson signed the Waiver, Judge Kwan concluded that Peterson “understood his rights.” R. 145:60. Indeed, Judge Kwan “would not have gone forward” had he “even suspected” that Peterson did not understand his rights. Id. Although Judge Kwan did not specifically recall whether he asked Peterson about his educational level, by June 18, 2000 Judge Kwan “was

comfortable that [Peterson] understood English and understood what we were talking about and he understood the consequences of what he was doing.” R. 145:74. Similarly, in Moench v. State, 2004 UT App 57, ¶ 19, the court of appeals found that a defendant’s waiver of counsel was valid based in part on testimony of defendant’s attorney “that he was confident that Defendant understood the contents of the plea affidavit.”

It is also noteworthy that Peterson was not a novice to the criminal justice system, and was not unfamiliar with the concept of pleading guilty and waiving his right to counsel. See State v. McDonald, 922 P.2d 776, 785 (Utah Ct. App. 1996) (taking into account that defendant “had previously been involved in a trial” in determining defendant intelligently waived his right to counsel); cf. State v. Valencia, 2001 UT App. 159, ¶ 22, 27 P.3d 573 (taking into consideration fact that defendant “had never experienced a jury trial”). Less than six months before Peterson appeared to plead guilty on the charges at issue in the instant case, Peterson had appeared before Judge Kwan, pleaded guilty, and waived his right to counsel in connection with two separate cases. Exhibit 1; Exhibit 2; Exhibit 3. Furthermore, about a month before Peterson pleaded guilty to the charges at issue in this case, Peterson appeared in two separate cases in the Midvale Justice Court, pleaded guilty, and waived his right to counsel. Exhibit 4; Exhibit 5.

Given Peterson’s prior experiences in the Taylorsville Justice Court and other courts in waiving his right to counsel, Judge Kwan’s close familiarity with

Peterson, and the record in the proceeding below, it is apparent that Judge Kwan ascertained that Peterson had the intelligence and capacity to understand his decision to waive the right to counsel. Indeed, the district court found that “based upon the judge’s familiarity and experience with Mr. Peterson, he determined that Mr. Peterson was able to represent himself.” R. 110-11. Notably, Peterson has not claimed that he lacked the intelligence or capacity to understand what he was doing on July 18, 2000. Since there is evidence that Peterson’s waiver was intelligent, and no evidence to the contrary, the district court did not err in finding that Peterson’s waiver of the right to counsel was intelligent. R. 118.

**d. Judge Kwan Ascertained that Peterson Comprehended the Nature of the Charges and Proceedings and the Range of Permissible Punishments**

It is beyond dispute that Peterson was informed of the nature of the charges against him and the range of permissible punishments. The docket of the Taylorsville Justice Court alone satisfies this requirement. The docket indicated that Peterson was advised of his Rule 11 rights. Likewise, the district court found that Judge Kwan completed two Rule 11 colloquies with Peterson on July 18, 2000. R. 115. Utah R. Crim. P. 11(e) provides in part that a court may not accept a guilty plea unless the judge has found that “the defendant understands the nature and elements of the offense to which the plea is entered . . .” Utah R. Crim. P. 11(e)(4)(A). This rule also requires the court to determine that “the defendant

knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered.” Utah R. Crim. P. 11(e)(5). Since the docket entry constitutes prima facie evidence of the facts stated, Utah Code Ann. § 78-5-122 (2002), the docket is prima facie evidence that Peterson was advised of the nature of the charges against him and the range of permissible punishments.

Moreover, Peterson’s own testimony establishes that he knew of the range of punishments he could face by pleading guilty. Peterson admitted that Judge Kwan told him “that by entering a guilty plea in this case that it could be used later on to enhance another conviction.” R. 145:42. Peterson also admitted that Judge Kwan discussed with him “the consequences of a guilty plea . . . the fact that you could be sentenced to jail.” R. 145:50. And Peterson acknowledged that Judge Kwan explained to him “how long [Peterson] could be sentenced to jail before [he] entered [his] guilty plea.” R. 145:50. In addition to this colloquy, Peterson executed Exhibit 9, which explains the penalty and enhanced penalty applicable to possession of marijuana.

The evidence in the district court also demonstrated that Peterson was informed of the nature of the charges against him. Peterson signed Exhibit 9, which indicates that Peterson was charged with Possession of Controlled Substance (marijuana). Moreover, when Judge Kwan called his cases, he reads

to the defendant “the charges, the date that it allegedly occurred, location.” R. 145:55. It is also clear that Peterson knew the nature of the charges against him based on his executing the Waiver, which stated at the top that the charges against him were “POCS + PODP,” or possession of controlled substance and possession of drug paraphernalia. Exhibit 7.

In short, there was ample evidence to demonstrate that Peterson’s guilty plea was knowing, intelligent, and voluntary, even if the factors considered by pre-Tovar Utah decisions are considered. The district court correctly concluded that Peterson “made a knowing, voluntary and intelligent waiver of his right to counsel,” (R. 118), and therefore the court of appeals decision should be affirmed, should the Court reach the merits of Peterson’s Petition.

## **CONCLUSION**

There is no evidence in the record that Peterson did not waive his right to counsel, or that Peterson's waiver was not knowing, voluntary, or intelligent. Under these circumstances, Peterson's counsel's argument that his waiver violated the Sixth Amendment is not facially plausible, and accordingly there are no unusual circumstances present to justify Peterson's collateral attack on his sentence. Even if the Court were to consider the merits of Peterson's request for post-conviction relief, given that not even a scintilla of evidence supports Peterson's claim that he was deprived of his right to counsel, the presumption of regularity must prevail. This Court should affirm the court of appeals' alternative holdings that Peterson did not demonstrate that unusual circumstances existed to justify post-conviction relief, and that on the merits Peterson failed to meet his burden to prove a violation of his right to counsel.

Respectfully Submitted this 26th day of September, 2007.

PARSONS KINGHORN HARRIS  
A Professional Corporation


By: 

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John N. Brems  
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CERTIFICATE OF SERVICE

I certify that two true and correct copies of the foregoing Brief of Taylorsville Justice Court were hand-delivered this 26th day of September, 2007, to Joan C. Watt, Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, and to Karl Hendrickson, Salt Lake County District Attorney's Office, 2001 South State Street, Suite S3600, Salt Lake City, Utah 84190-1200.

  
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George B. Hofmann