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Utah v. Richard W. Jones : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff-Appellee,

vs.

RICHARD W. JONES,

Defendant-Appellant.

Case No. 900526-CA

Priority No. 2

REPLY BRIEF OF APPELLANT

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Defendant-Appellant.

REPLY BRIEF OF APPELLANT

This Brief is in response to the Brief of Appellee submitted to this Court on May 28, 1991. In order to clarify the position of the appellant the organization of the State will be retained within this Brief.

STANDARD OF APPELLATE REVIEW

The State misconstrues the standard of review in this case. The defendant is not seeking to "set aside a sentence imposed by the trial court" as stated by the appellee. (Appellee's Brief, pp. 1-2). Rather, Defendant is seeking specific performance of the plea agreement which was the ultimate result of the sentencing proceeding. Santobello v. New York, 404 U.S. 57 (1971); State v. Kay, 717 P.2d 1294 (Utah 1986).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The State proclaims that "no constitutional provisions, statutes or rules are directly applicable to the resolution of this appeal." (Appellee's Brief, p. 2). This statement simply is

incorrect. There can be no question but that Rule 11 of the Utah Rules of Criminal Procedure must be examined in depth before this case can be decided. In addition, the due process and double jeopardy clauses of the United States Constitution and the Utah Constitution also require that a court which has accepted a plea agreement must in fact carry out that agreement except in the most extraordinary cases. The specific provisions of statutory and constitutional law will be addressed infra in this Brief.

STATEMENT OF FACTS

The State has seriously omitted essential statement of facts to a determination of this case. The sequence of events which occurred in this case are critical in understanding the argument now advanced by the appellant.

As noted in Appellant's Opening Brief most of the negotiations concerning this case had already occurred in the Circuit Court. As of April 20, 1990 Defendant and the State had reached a tentative agreement that Defendant would plead to one count of the indictment and that the remaining charges would be dismissed. At that point the prosecutor was requesting that Defendant plea guilty to a second degree felony with the provision that the prosecutor would recommend counseling in lieu of incarceration. Defendant, on the other hand, asserted that he would only plead guilty to a third degree felony. See Transcript of April 20, 1990 attached herein as Addendum 1. In any event, however, by the time the case reached the District Court the only matter left to be resolved between the State and the defendant was the degree of the felony and not the number of charges to be tried.

The uncontested affidavit of the defendant filed in the District Court describes this early sequence of events. (R. 50-53). The defendant specifically wrote a letter on June 12, 1990 to his attorney Gilbert Athay formally demanding that Mr. Athay file a "Motion for Acceptance of a Rule 11(8)(b) Plea." (R. 56-57) (A copy of this letter is contained herein as Addendum 2). In this letter the defendant stated that he would not agree to pleading to a second degree felony charge unless the court had under Rule 11(8)(b) formally approved the plea agreement thereby assuring the defendant he would not be incarcerated. He specifically told Mr. Athay in the letter:

I once told you that if push came to shove, I would eventually accept a second degree plea with the prosecutor's recommendation of no incarceration. However, after reading of several cases where people ended in prison for one to fifteen year terms after making a plea bargain carrying such a prosecutor recommendation, I will not accept such an arrangement unless it be under Rule 11(8)(b) of the Utah Rules of Criminal Procedure. (R. at 56).

The next significant event which occurred but which the State makes no mention of was the conversation Defendant had with the prosecutor on the morning of July 30, 1990. In the uncontradicted affidavit of co-counsel Lorin Pace the following summary is made:

That on the morning of July 30, 1990, the date set for entering a plea, Defendant personally spoke to Tom Vuyk, the prosecutor in the subject case, who told Defendant that he wanted Defendant to plead to a second degree felony in order that the State have a larger deterrent to assure that Defendant completed counseling and did not violate probation. This conversation has been confirmed to your affiant by the prosecutor.

That upon receiving this promise from the prosecutor, Defendant agreed that he would enter into a plea bargain involving his pleading guilty to one second degree felony count, provided that the State make the

same promise of disposition for therapy and probation in lieu of incarceration, as well as to dismiss all other counts and cases and to file no further charges against the defendant. (R. 106).

The defendant believed at this point in time that a bargain had indeed been made. Defendant agreed to allow the State to obtain a second degree felony conviction in exchange for its promise that Defendant would not be incarcerated but would receive therapy at an appropriate facility.

The appellee has stated a portion of the July 30 transcript in its Brief. (Appellee's Brief, pp. 2-3). However, this quotation is taken out of context and in its correct application actually supports the argument now being made by the defendant. Prior to the July 30 hearing the defendant was asked to sign a document entitled "Statement of Defendant, Certificate of Counsel and Order." Defendant's attorney and the prosecutor had already signed this document. (R. 99-104) (contained in the Addendum to this Brief as Addendum 3). Paragraph 13 states the following:

My plea of guilty is 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. See above also. (R. 102-103).

In fact, there was no "Plea Agreement" in existence at that time and the "See above" were handwritten statements which essentially was the plea bargain. These statements said:

(1) State moves to dismiss all other counts and charges.

(2) State will recomend [sic] treatment in a residential treatment center in lieu of incarceration.

(3) No new charges will be filed by the State regarding cases now known to it. (R. 103). (Emphasis

added).

As will be noted in paragraph 2 above the handwritten plea agreement contains a word which is not part of the English language namely "recomend". The importance of this misspelling will be seen as the scenario of events unfolds.

On July 30 the lower court asked the defendant if he understood that the maximum fine and imprisonment for a second degree felony was \$10,000 and 15 years. He replied that he understood. (Tr. July 30, 1990, p. 6). The court then stated, "Anybody is entitled to make a recommendation, but I'm not bound to follow it. Do you understand that?" The defendant replied, "I do." (Id. p. 7). This quotation is what the state now relies upon. (Appellee's Brief, p. 3). The court then painstakingly went through the various elements required in a Rule 11 guilty plea and the rights that he was giving up. (Id. at 9-12). The lower court in sensing that the defendant had some doubts concerning the language in the plea agreement then stated the following:

You may not like the plea you're entering, but that's not the criteria. I am sure you would like to enter no plea, and leave here today with no charges, but that's not going to happen, because the State won't agree to it. So you've got a couple of alternatives. We can either pursue this plea bargain, and based on what I've heard at this point in time, I'm willing to approve it, or we can go to trial. And the decision really is yours. I want to make sure you have had enough time to think about this, because this is a serious decision in your life. And if you plead guilty here today, you will be a convicted felon, and you'll be a convicted felon in a type of crime that is looked upon in this, as most communities, as a crime, if we categorize crime, as one of the more base ones. Id. at 13. (Emphasis added).

The defendant then stated that he would like more time to go

over the paperwork and to make sure that nothing was missing. (Id. at 14). He emphasized, "It could be that I'm just paranoid, but, Your Honor, I would feel better for some more time." (Id. at 15).

At the conclusion of the July 30 hearing the defendant had declined to sign the "Statement of Defendant." That day he began to prepare a supplement to that document. As stated in his uncontradicted affidavit:

7. I drafted a Plea Agreement which stated my understanding and intent which was attached to the court requested document. It was first presented to counsel who modified the agreement, including the types of cases which could not be filed against me. The completed document reflected my intention and the State's promise that I be commended for treatment in a residential treatment center. The words and forms were accepted by the State of Utah.

8. Said Plea Agreement is attached (a separate document), paragraph 2 of which includes the language "the State will re-recommend Defendant to be treated in a program of a residential treatment center in lieu of incarceration.

9. Deponent took the agreement to be one in which he would be commended to a probation program for treatment in a residential community center. This is not happening. (R. 52).

The uncontradicted affidavit of Lorin Pace also supports this version of events by the defendant. Mr. Pace stated:

6. That upon further review of the documents, Defendant felt strongly that a separate instrument entitled "Plea Agreement" be prepared and attached to the Defendant's Statement, in order to make clear that the State promised that the disposition of the case would include probation and therapy in lieu of incarceration, as well as the other points mentioned. While doing this, Defendant noted that counsel had misspelled the word commend by using the form "comend" in making brief written notes on the defendant's statement. Counsel had spelled the word "recomend" which was understood by Defendant to "again commend" Defendant to probation as he had been entrusted to probation in an expunged 1976 case. To be consistent

with this meaning, Defendant properly spelled the word "re-commend" which means to "again entrust" and has no other connotation to Defendant. (R. 96).

The "Plea Agreement" referred to in these affidavits (R. 42) (contained as an Addendum 4 to this Brief and also to that of Appellee) contained the critical language in paragraph 2 which stated:

The State will re-commend Defendant to be treated in a program of a residential treatment center in lieu of incarceration. That "residential treatment center" means Bonneville Community Center, Fremont Community Center, or a program mutually agreeable to Defendant and the Probation Department. (R. 42).

On July 31 this Agreement was signed by Mr. Vuyk, the Salt Lake Deputy County Attorney, by Mr. Athay and by the Defendant. The defendant also signed, at this time, the "Statement of Defendant."

It should be noted at this point that several statements by the appellee are incorrect relating to these events. For example, the State has incorrectly cited the quotation of the July 30 hearing as "September 30, 1990". (Appellee's Brief, p. 3). The State has also said "On the following day, July 31, 1990, Defendant, his attorney and the prosecuting attorney entered into a Plea Agreement." (Appellee's Brief, pp. 3-4). More correctly, the defendant had previously on the day before studied an Agreement and the document prepared by the defendant was a clarification of the Plea Agreement, which was not signed by Defendant until July 31, 1991 when he stood before the Court after it had accepted the Plea Agreement which guaranteed Defendant should receive probation and treatment in lieu of incarceration.

Finally, the appellee asserts that "the 'State' also agreed to

're-commend' that Defendant be treated in a program of a residential treatment center in lieu of incarceration..." (Appellee's Brief, p. 4) (Emphasis added). The appellee has misquoted the syntax of the Plea Agreement to conform to the language interpretation now argued by the State. The Agreement does not state "that Defendant be treated" but instead states "Defendant to be treated in a program of a residential treatment center." The syntax of the disputed sentence must be examined correctly and should not be distorted by the appellee to meet its own interpretation.

Thus, as of July 31, 1990 the defendant, according to his undisputed affidavits, believed that in exchange for pleading guilty to a second degree felony rather than his sought-after third degree felony he would be turned over to a residential treatment program and not have to face prison. This would occur, according to the defendant, if the lower court approved the Plea Agreement entered into by the parties.

A reading of the July 31 transcript again shows that Defendant's belief and interpretation is consistent with what actually occurred.

On Page 4 of the transcript the Court reviewed the newly prepared "Plea Agreement" with the defendant. The following dialogue occurred between the Court and the defendant:

THE COURT: Also, the State apparently agrees to recommend some type of an in-patient treatment facility such as Bonneville or Fremont or something like that.

MR. JONES: I understand that.

THE COURT: Part of the Plea Agreement says, and I'll make sure that you understand this now, if it's not one of those two, Bonneville or Fremont, then it will be a mutually agreeable facility between yourself and Adult Probation and Parole. Is that part of your understanding?

* * *

MR. JONES: Yes.

THE COURT: I can tell you right now, I don't approve of that. I will not allow you to have any input into where you're going to go if you're on probation. So you need to know that right up front.

MR. JONES: So you would just take their recommendation?

THE COURT: Whatever they want. If I put you on probation, you go where they say you go. I can tell you right now, I won't follow that, even if I decide to put you on probation. All right. So if--with those things in mind, you understand that the potential maximum punishment in this case, if I determine it's appropriate, Mr. Jones, is a period of incarceration in the Utah State Prison of not less than one, no more than fifteen years, and/or a \$10,000 fine. Do you understand that's a possibility in this case?

MR. JONES: I understand. (Tr. July 31, 1990, pp. 4-6). (Emphasis added).

To the defendant, this dialogue meant that if the lower court did not approve the Plea Agreement then the defendant would be subject to imprisonment and would have to decide if he wished to continue to maintain his guilty plea or to then go to trial. The Court then once again went through all of the rights given up in a guilty plea as the Court had done on the prior day with the exception that he made no mention that the Court was not bound by any recommendation made by the prosecutor. (Id. pp. 7-10).

When the Court ultimately accepted the guilty plea (Id. at 12-13) the defendant believed that the Court under Rule 11(8)(b)

had "approved the proposed disposition." When the Court referred the defendant to the Adult Probation and Parole Department he believed that the Probation Department would determine an appropriate treatment center for him but that in no event would he be sent to prison.

On August 29, 1990 the defendant filed a "Request for Clarification of Plea Bargain or Thereafter in the Alternative for Leave to Withdraw Plea." It was filed by attorney Lorin Pace. (R. 48). On September 6, 1990 Gilbert Athay withdrew as Defendant's attorney. (R. 58). On September 14, 1990 Jerome Mooney, a newly retained attorney, filed a "Memorandum in Support of Request for Clarification of Plea Agreement or Withdrawal of Plea." (R. 59-76). This Memorandum stated, in part:

In reliance on his understanding and intent of the Plea Agreement and upon demand from his probation officer that it was required and necessary, Mr. Jones disclosed confidential information about his pedophilic behavior. He assumed that this information was required in order for a "purging" of his conduct to occur, to demonstrate his good faith in entering into the plea bargain, and for the purpose of protecting the children involved in this matter, his family, and society by his obtaining treatment for his disorder. After reading the Presentence Report issued by the Adult Probation and Parol Department, Mr. Jones is now aware that this Department will recommend a prison sentence rather than the therapy which was the goal of the Plea Agreement. The Defendant, Mr. Jones, therefore respectfully requests that his Motion for Clarification of Plea Agreement be heard prior to his sentencing in this matter. (R. 62).

At a hearing on September 17, 1990 Defendant's new attorney, Mr. Mooney, argued that the defendant was seeking specific performance of the plea bargain that he had entered into. It was at this point that the lower court made the following statement:

I have serious questions whether this motion has any merit, because I specifically recall that we spent a substantial amount of time, Mr. Jones and I, determining whether or not he wanted to enter into this plea. And I suspect this record will clearly show, that I told Mr. Jones that I was not bound by anything the State agreed to. I tell every criminal defendant that, and I think that will show in the record. If not, you may have something. (Tr. September 17, 1990, p. 9).

As has been noted, however, the record shows that the Court did not personally inform the defendant at the time the plea was taken on July 31, 1991, that the Court was not bound.

At the same time Mr. Mooney "renewed his 'Motion to Continue the Sentencing' particularly in light of the fact that I have Dr. Victor Cline in the courtroom today." (Id. p. 4). Dr. Cline then testified as to a five-week-\$20,000 program in Minnesota which he believed would be extremely beneficial to the defendant before any sentence should be imposed. (Id. at pp. 10-16). The court took both the Motion for Specific Performance of Vacation of the Plea and the Motion for Continuance under advisement. (Id. at 17-18).

It is again noteworthy that on September 24, 1990 the day before sentencing Defendant filed a Motion to Withdraw his Request for Leave to Vacate his Plea (R. 127) and also filed a motion to "Strike Irrelevant Portion of the Presentence Report Inconsistent With Plea Agreement." He also filed a memorandum in support of the latter motion. (R. 115-25).

On September 25, 1990 Mr. Mooney argued before the Court that the Court had approved the Plea Agreement with the modification that the defendant could not approve a treatment facility. In light of this approval under Rule 11(8)(b) the Probation Department

should have been directed to determine a treatment facility rather than recommending prison which was contrary to the Plea Agreement. Mr. Mooney acknowledged that Mr. Jones understood in the July 30 form affidavit that the Court was not bound by the recommendations of the prosecution. However, he clearly pointed out that in the subsequent July 31 hearing this statement was not made. (Tr. September 25, 1990 pp. 17-18).

The lower court after reviewing the transcripts concluded that:

There is absolutely nothing in this record that could lead a person to reasonably believe that I bound myself in any fashion to any type of a sentence. There is not a Rule 11 conditional plea. There is not one word in the transcript, or the Plea Agreement that suggests that this is a conditional plea under Rule 11." (Id. at 21).

The Court denied the Motion for Specific Performance and to Strike the Probation Department report. (Id. at 20-24). The Court also denied Defendant's Motion to Continue the sentencing to allow the defendant to go to the Minnesota program. (Id. at 29). As noted by the State in its Brief (Appellee's Brief, p. 6) the Court determined that since no previous agreement had been entered into with the defendant the Court was free to sentence the defendant to prison and chose to do so.

ARGUMENT

THE DEFENDANT IS ENTITLED TO SPECIFIC PERFORMANCE OF HIS RULE 11(8)(b) PLEA AGREEMENT AND THE LOWER COURT ERRED IN SENTENCING DEFENDANT TO PRISON.

The State in the Argument portion of its Brief has misconstrued Defendant's contentions and has somewhat distorted the

record as it now exists. (Appellee's Brief, pp. 7-10). These contentions will now be examined.

This case is one of first impression before this Court. Unlike most cases, the defendant is not requesting that his guilty plea be vacated but is instead specifically requesting performance of the Agreement. Both the United States Supreme Court in Santobello v. New York, 404 U.S. 257 (1971) and the Utah Supreme Court in State v. Kay, 717 P.2d 1294 (Utah 1986) recognize that plea bargains are matters of contract and that where a defendant has taken steps in reliance on a plea bargain agreement that may prejudice him in a subsequent trial he is entitled to specific performance of that agreement. 717 P.2d at 1306. This Court in State v. Thurston, 781 P.2d 1296 (Utah App. 1989) addressed a claim that a plea bargain had been violated when a law enforcement agency recommended prison even though the prosecutor recommended treatment. This Court, however, has not specifically addressed the Rule 11(8)(b) option made available to criminal defendants and therefore this case is important to establish guidance to other courts, prosecutors and defendants.

Rule 11(8)(b) states the following:

When a tentative plea agreement has been reached that contemplates entry of a plea in the expectation that other charges will be dropped or dismissed the judge, upon request of the parties, may permit the disclosure to him of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether he will approve the proposed disposition.

Moreover, subdivision (c) provides:

If the judge then decides that final disposition

should not be in conformity with the plea agreement, he shall advise the defendant and then call upon the defendant to either affirm or withdraw his plea.

Immediately preceding this section of Rule 11 is subparagraph (7)(b) which states, "if sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to the sentence is not binding on the court."

Unfortunately, Rule 11 is not written with great clarity. There is no specific procedure outlined as to how paragraph (8) can be specifically employed by a defendant to avoid the problems which occurred in the instant case. Here, there can be no doubt but that the defendant believed that he had entered into an agreement with the State whereas he would plead guilty to a second degree felony in exchange for a guarantee that he would not be incarcerated. Under his belief the written documents submitted to the lower court clearly evidenced this proposal and the lower court accepted it with the exception of modifying the portion allowing the defendant to choose his own rehabilitation center. In the defendant's mind the state was no longer "recommending" a course of action to the court but instead an agreement had been cut and the lower court had approved it.

The State, on the other hand, argues that the lower court did not bind itself as to the action of the prosecutor but instead was free to send the defendant to prison or to treatment. Under the State's argument at no time did the lower court approve the agreement between the State and the defendant under Rule 8(b) and (c) but instead proceeded under Rule 7(b) and informed the defendant that no recommendations of the prosecutor were binding

upon the court.

The application of these two subdivisions of Rule 8 require differing results. If, in fact, a lower court approves a plea agreement then the State is clearly bound by its bargain. United States v. Holman, 728 F.2d 809, 813 (6th Cir. 1984); United States v. Cruz, 709 F.2d 111 (1st Cir. 1983); State v. Kay, 717 P.2d 1294 (Utah 1986). At that point, the defendant has the option of vacating his plea or requesting specific enforcement of the plea agreement. United States v. Cruz, 709 F.2d 111 (1st Cir. 1983); United States v. Mercer, 691 F.2d 343 (7th Cir. 1982).

On the other hand, if a binding Rule 11(8)(b) agreement has not been made by the lower court but the lower court fails to advise the defendant that he is not bound by the recommendations of the state then such failure results in the vacation of the guilty plea. State v. Thurston, 781 P.2d 1296 (Utah App. 1989). In the instant case, Defendant would be entitled as a matter of law to withdrawing his guilty plea had he not been prejudiced by entering into the Plea Agreement and by his subsequent conduct in reliance upon the Agreement. For purposes of clarifying the arguments of the State, therefore, the defendant will address both the vacation of the guilty plea and the specific performance of the Plea Agreement.

A. The Lower Court Clearly Failed to Meet the Requirements of Rule 11 and Therefore Defendant, if He Desired, Could Vacate His Guilty Plea.

Rule 11(7)(b) specifically states that the Court "shall advise the defendant personally that any recommendation as to sentence

is not binding on the court." (Emphasis added). The Utah Supreme Court as well as this Court has repeatedly held that the time for such advice must be at the time the plea is taken. As recently as July 3, 1991 the Utah Supreme Court stated:

The rule announced in Gibbons was intended to ensure that the record demonstrates that the judge who takes the plea personally establishes that a defendant's guilty plea is truly knowing and voluntary. To that end, Gibbons requires that at the time a guilty plea is entered the judge should establish on the record that the defendant knowingly waived his or her constitutional rights and understood the elements of the crime. State v. Hoff, 164 Utah Adv. Rep. 21, 22 (July 3, 1991) (emphasis added); see also State v. Pharris, 798 P.2d 772 (Utah App. 1990).

There can be no doubt in the record that the lower court on July 31, 1990, the date the sentence was entered, did not inform the defendant that the Court was not bound by any recommendation of the prosecutor. The citation to the previous day of July 30, 1990 by the State is of no avail. (Appellee's Brief, p. 3). Also, the State's reliance upon the fact that the lower court advised the defendant that he could receive a prison sentence of up to one to fifteen years is also of no assistance to it. (Appellee's Brief, p. 4, 9). The Court was specifically required by Rule 11(5)(e) to inform the defendant as to the minimum and maximum sentence that could be imposed as to the offense. This advice was in no way related to the other obligation under Rule 7(b) to inform Defendant concerning recommendations not being binding on the court.

Thus, since under Gibbons the Court must strictly comply with the requirements of Rule 11 as to those cases in which pleas are taken after Gibbons was decided, it is apparent that the lower court failed in its obligation to personally inform the defendant

on the day of the plea that the "recommendation" of the prosecutor was not binding upon the court. See State v. Hoff, supra. Defendant could clearly, were there not other factors involved, request that his guilty plea be vacated and that he proceed with trial.

B. Because the Defendant Entered Into a Valid Plea Agreement Which Was Approved By the Court in Accordance with Rule 11(8)(b) and (c) the Defendant is Now Entitled to Specific Performance of Such Agreement.

The Utah Supreme Court has recognized the contractual nature of a plea bargain. In State v. West, 765 P.2d 891 (Utah 1988) the court stated:

To deny defendant relief on the merits, we would have to assume that he willingly bargained to plead guilty, expecting and receiving nothing in return. This assumption is highly speculative and implausible where a plea bargain is involved. The nature of plea bargains requires the exchange of consideration, allowing the parties involved to reach a mutually desirable agreement. A plea bargain is a contractual relationship in which consideration is passed. See, Santobello v. New York, 404 U.S. 257 (1971); 2 Wharton's Criminal Procedure, §341 (1975).

In fact, the remedy for a defendant where the state fails to fulfill its side of the bargain is frequently specific performance. See, 81 C.J.S. Specific Performance, §103 (1977); Annot., Supreme Court Views as to Plea Bargaining and Its Effects, 50 L.Ed.2d 876 (1978). A plea bargain does not involve a situation where a defendant willingly pleads guilty to a crime, neither asking or expecting anything in return. Id. at 893.

The facts in this case clearly illustrate the above principle. In exchange for waiving the preliminary hearing at the circuit court level the defendant entered into a preliminary agreement with the prosecutor that all charges would be dropped if the defendant pled guilty to one charge of sexual abuse. Thus, contrary to the

State's assertion (Appellee's Brief, p. 8) the decision to dismiss the other five charges had already been agreed upon before the defendant even reached the District Court. The sole question remaining for determination was whether Defendant would plead guilty to a second or to a third degree felony. As noted in the recitation of facts, Defendant finally agreed to plead guilty to the second degree felony on the theory that the prosecutor wanted a "larger club" to hold over Defendant's head should he fail to complete his treatment program. Conversely, the defendant believed that he was receiving a pre-approved Rule 11(8)(b) plea agreement which would commend him to a residential treatment center.

There is no question but that the prosecutor willingly signed the "Plea Agreement" which supplemented the original form agreement. Paragraph 2 of that Agreement clearly proclaimed "the State will re-commend Defendant to be treated in a program of a residential treatment center in lieu of incarceration." There is also no question but that the lower court read this agreement and modified it by stating that the defendant would not be allowed to mutually select his own treatment center. Defendant was therefore clearly entitled to believe that the Court had pre-approved as required by Rule 11(8)(b) and as Defendant had requested from his attorney the Plea Agreement and that it would stand with the exception of his selection of a treatment center.

Before the sentence was imposed of incarceration and after Defendant saw that the Agreement as he understood it was not being fulfilled by the State he submitted an affidavit of Dr. Thomas Huckin who is an acknowledged expert in English language usage at

the University of Utah. (R. 109). Dr. Huckin in his affidavit (a copy of which is contained as Addendum 5) stated the following:

In my judgment, the word "re-commend" is a legitimate English word meaning "commend again" as used in the sentence, "The State will re-commend Defendant to be treated in a program of a residential treatment center in lieu of incarceration," the word appears to have that meaning (assuming standard formal English orthography and syntax).

It is quite possible that someone reading that sentence would think that the writer intended to mean "recommend" but the writer claims that he meant "commend again" and the spelling of the word ("re-commend") and the syntactic structure of the sentence supports his claim.

The plea agreement signed by the prosecutor and approved by the lower court was clear and unambiguous. Even if both the prosecutor and the court were under the mistaken notion that Defendant believed the State was only "recommending" a treatment program the plain language of the agreement controls. In United States v. Partida-Parra, 859 F.2d 629 (9th Cir. 1988) the prosecutor mistakenly signed a plea agreement in which the wrong section of the federal code was cited thereby allowing defendant to plead guilty to a misdemeanor rather than to a felony. The district court allowed the government to rescind the agreement but the Ninth Circuit Court of Appeals held that the agreement was binding upon the government and that the defendant was entitled to specific performance.

The United States Supreme Court has held that if a plea bargain is shown to have been contrary to the rights of a defendant, there are two options available for the court. First, the court, upon the request of the defendant, may withdraw the

guilty plea and place the defendant in as near a position as possible prior to the plea agreement having been made. Second, the court may order specific performance of the plea agreement regardless of the protests of the government. Santobello v. New York, 404 U.S. 257 (1971).

The Supreme Court in Kay, supra, held that while nothing in Rule 11 specifically allows a conditional plea to be made, there is also nothing which prohibits a conditional plea from being entered. In fact, the Court found that the better reasoned cases and policy considerations allow a court to disclose a proposed sentence as part of the plea bargaining process so long as a judge acts as a moderator and not as an advocate. Id. at 1300-01. The court stated:

In fact, subpart (e)(6) of the 1983 Rule 11 [subsequently renumbered in the 1989 amendment with no change in meaning] requires the judge to inform the defendant that the judge is not bound by any recommendations of the prosecutor as to the sentence, yet it implicitly recognizes that the judge must be able to exercise broad discretion in sentencing. Essentially, subpart (e)(6) assures a prosecutor cannot limit the trial judge's authority in sentencing, but it does not prohibit the judge from committing himself to imposing a particular sentence as a condition of a plea agreement. Id. at 1300, fn. 5. (Emphasis added).

In the instant case, it is apparent that the trial court bound itself with the prosecutor as to the specific disposition of the case. By informing the defendant that the court would not allow the defendant to pick an alternate residence site, the court expressly or impliedly approved the other terms of the Plea Agreement. Thus, Defendant entered a conditional plea that he would waive his constitutional right to a jury trial in exchange

for the State dismissing the other counts and cases against him and that he definitely be placed in a probationary treatment program and not in prison.

In Kay, the Utah Supreme Court noted the similarities and differences between the State Rule 11 and the Federal Rule 11. Contrary to the statements of the appellee (Appellee's Brief, p. 9) the Utah Court adopted many of the cases interpreting the Federal Rule 11 and applied them to the State rule. The court noted, for example, that while the State Rule suggests that a trial court can withdraw a plea agreement even after a guilty plea has been formally accepted and entered on the record (which is directly contrary to the Federal Rule), nevertheless "this power, should not be taken literally. In appropriate circumstances, due process and double jeopardy considerations will prohibit the judges from reniging on the agreement." Id. at 1299, fn. 3.

The Supreme Court in Kay approved the procedure utilized by the First Circuit•Court of Appeals in United States v. Cruz, 709 F.2d 111 (1st Cir. 1983) in determining whether a guilty plea can be set aside or specifically performed. The Cruz case is closely analogous to the instant case. In that case the defendant was indicted for aiding and abetting and possession with intent to distribute cocaine. Pursuant to a plea bargain between the defendant and the government the U.S. Attorney filed an information charging defendant with simple possession of cocaine which was a misdemeanor. Also, the government agreed to recommend that the defendant be placed on probation. The defendant was informed that the prosecutor's recommendation of probation was not

binding on the court and that he could receive the maximum sentence under the state of a fine of \$1,000 or imprisonment for not more than one year or both. At the conclusion of defendant's interrogation the trial court stated:

After having addressed the defendant personally, after having ascertained that he knows what is contained in the information filed this morning with the court and that he knows his right to a trial by jury and the effects of pleading guilty, whereby he is waiving all his rights, he knows what the maximum punishment is and he is voluntarily pleading guilty, therefore I will accept the same and a judgment of guilty would be entered as to the one count in the information. I will order a presentence report and at the time the same has been prepared we would set the case for sentence. Id. at 112.

The First Circuit Court of Appeals found it was clear that the trial court had "unqualifiedly accepted the plea bargain." Under the Federal Rules of Criminal Procedure a court is given the option to accept a plea, reject a plea, or defer acceptance or rejection until it has an opportunity to consider the presentence report. On December 11, the day of sentencing, the court rejected the plea bargain. The court said that in light of the sentences of four and eight-year imprisonment given to other defendants justice would not be done in defendant's case if probation for one year was the sentence.

The defendant appealed on the basis that the lower court did not have the right to vacate the plea bargain and asked for specific performance. The First Circuit Court of Appeals agreed and stated:

There is no authority for the District Court's action in the instant case. Of course, the Court initially had discretion to accept or reject the plea agreement or defer determination until, with the

defendant's permission, it had examined the presentence report. But, once the court accepted the agreement, thereby binding the defendant and the prosecution, it could not simply change its mind on the basis of information in the presentence report, at least where that information revealed less than fraud on the court. Id. at 114-15. (Emphasis added).

The State contends that the lower court simply "accepted Defendant's guilty plea" and did not "specifically or by inference accept the Plea Agreement." (Appellee's Brief, p. 10, fn. 4). This statement is simply incorrect. On June 30, in urging the defendant to take time to examine the documents before entering his plea the court specifically stated, "We can either pursue this plea bargain, and based on what I've heard at this point in time, I'm willing to approve it, or we can go to trial." (Tr. July 30, 1990, p. 13). This statement made directly to the defendant certainly gave the defendant the understanding that the Court was examining the agreement and not merely accepting his plea.

Furthermore, the Court's modification of the choice of rehabilitation centers together with the failure of the Court in the July 31 hearing to inform the defendant that he was not bound by any recommendation of the prosecutor also strongly indicated that the Court was accepting the Agreement as written and not merely accepting a plea to a charge.

Finally, it is important to note in this case that the defendant raised the objections to the interpretation now urged by the State even before he received any sentence. This is not the typical "sour grapes" appeal in which the defendant is disappointed at the time of sentencing and thereafter concocts a defense as to why the sentence should not be imposed. Here, the defendant

strenuously objected to the presentence report prepared by the Adult Parole and Probation Department recommending prison even though, as far as the defendant knew, the Court would honor the agreement and send the defendant to a rehabilitation center. While Defendant originally sought to withdraw his plea he determined that because of the statements he made to the probation department, police agencies, witnesses and others in reliance upon the Plea Agreement that he could not receive a fair trial and therefore specific performance of the Agreement was the only option available. See, Phillips v. United States, 679 F.2d 192 (9th Cir. 1982); Stowers v. State, 363 N.E.2d 978 (Ind. 1977).

It is therefore submitted that when the entire series of factual events are examined, when the language of the various documents are examined, when the context of the various court hearings and dialogue is examined, that the contention by the State in its Brief that Defendant got what he had bargained for is simply incorrect. Defendant bargained for a treatment program in exchange for a second degree felony plea. Instead, he received a prison sentence to which he would never had agreed to on the basis of a second degree felony. The defendant is therefore entitled to now assert the basis of his bargain and to be allowed into a residential treatment center to be selected by the Probation Department and approved by the lower court. There is simply no other option available to the defendant under the facts of this case even though he would clearly be entitled to vacate his guilty plea were he not irreparably harmed by his conduct in reliance upon the bargain.

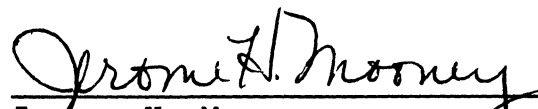
CONCLUSION

This case is important to the defendant because he has now been wrongfully incarcerated. It is also important, however, to establish legal standards for Rule 11(8)(b) and for specific performance of guilty pleas.

Defendant is entitled to receive out of prison treatment since that is what he negotiated--in exchange the State avoided a costly trial and received a second degree felony conviction. The lower court was incorrect in concluding that the "Plea Agreement" was not a binding agreement which required treatment not prison.

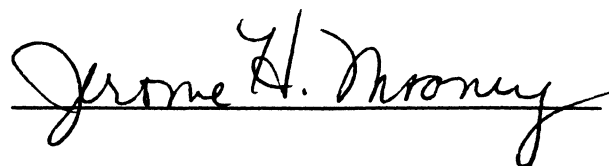
For the preceding reasons, therefore, Defendant is entitled to specific performance of his Agreement--immediate release from prison and enrollment in a residential treatment program.

DATED this 5th day of August, 1991.


Jerome H. Mooney
Attorney for Defendant-Appellant

MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing Reply Brief of Appellant to R. Paul Van Dam, Attorney General and Judith S.H. Atherton, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114 this 5th day of August, 1991.



ADDENDUM

Transcript from Tape Recording Obtained from Susanne Humphries

Third Circuit Court: Judge Palmer, Friday, April 20, 1990, 9:30 A.M.

Judge Palmer (JP): Richard Jones?

D. Gilbert Athay, Defense Attorney (DA):

A -- Gilbert Athay appearing on behalf of Mr. Jones.
He is present.

JP: Okay. I understand you've waived reading of the information?

DA: That's correct your Honor. This matter is on for preliminary hearing for next week. This is the matter tht I talked to you about --

JP: Yes.

DA: -- a couple of days ago.

JP: And you wish to wave that hearing?

DA: We have reached an - a - a tentative agreement - a - with the County attorney's office. We are in the process of finalizing negotiations: The County Attorney has offered to permit Mr. Jones to plea to one second degree felony - that being a Non minimum mandatory prison sentence case. They have agreed to recommend counseling in lieu of incarceration. We have offered to plea to one third degree, with the same terms applying, and we are going to resolve this case somewhere between these two - a - parameters.

JP: Okay.

DA: -- And with that understanding, your Honor, Mr Jones --

(inaudiable comments between DA and Defendant)

With that Understanding, your Honor, Mr. Jones has agreed to give up and allay his preliminary hearing - a - on the -- what do we have -- three files -- three cases.

JP: Yes. They are here. Is that correct Mr. Jones?

Defendant Jones (DJ):

Well, your Honor, (cleared through)
Included in the Understanding was that all other charges were Dismissed and no other charges be filed.

DA: That will happen.

JP: Yes. There are four files her Mr. Athay.

DA: Okay

JP: You understand the rights you give up then by waiving your preliminary hearing Mr. Jones?

DJ: I Do.

JP: And that's what you wish to do?

DJ: Under these Conditions, Yes.

JP: Alright, let the record show the Defendant has summarily and voluntarily waived his preliminary hearing and is Ordered bound over for Arraignment in District Court. That is before Judge Timothy Hansen on April 30th, Mr. Athay, at 9 A.M.

DA: Thank you your Honor. May we be excused?

JP: You May.

DA & DJ: Thank You.

EXHIBIT #2

Richard W. Jones
Box 526234
Salt Lake City, Utah 84152
Telephone: 467-7262

June 12, 1990

D. Gilbert Athay
72 East 400 South, Suite 325
Salt Lake City, Utah 84111

RE: Demand for filing of Motion For Acceptance Of A Rule 11(8)(b)
Plea under the Utah Rules of Criminal Procedure,
and supporting information.

Dear Gil,

I am writing this letter to formally demand that you file a Motion For Acceptance Of A Rule 11(8)(b) Plea with Judge Timothy Hansen pertaining to the Criminal actions against me in Third District Court. In addition, I shall have a brief in support of this motion prepared and filed.

There are several very compelling reasons for this, but none are more relevant than the fact that I am the Defendant and want the motion filed. No argument about how Utah Judges over the past 10 years have not granted such motions, or that you are too busy, have any bearing on this matter.

If the legislature did not see conditions under which a Rule 11(8)(b) plea is warranted, it would not be provided for by Statute. A good Judge like Timothy Hansen will hear the motion in good faith as part of his judicial duty, and will not be biased by convention, but will rule on the merits of the motion.

The compelling reasons for the Court to consider are that the prosecutor truly feels that prison would serve no useful purpose in my case, and I should take counseling instead. He also would like to see a 1 to 15 year deterrent to the possibility of probation violation. His RECOMMENDATION to this effect is being made in good faith, but the Judge will not necessarily believe that because a plea bargain is being made. Though the size of the deterrent makes no difference to me, because I know that I will never violate probation, the possibility that the Judge may not understand the case fully and order a prison sentence, makes a Second Degree plea unacceptable unless it be with the judges prior approval of the proposed disposition.

I once told you that if push came to shove, I would eventually accept a Second Degree Plea with the prosecutor's recommendation of no incarceration. However, after reading of several cases where people ended in prison for 1 to 15 year terms after making a plea bargain carrying such a prosecutor recommendation, I will not accept such an arrangement unless it be under rule 11(8)(b) of the Utah Rules of Criminal Procedure.

before the Judge so that he will be able to see that the charges were made in excess of what really happened. No general talk about the judge already understanding that police put things in police reports which are not true, and prosecutors file extra charges as a tactic when they know that the charges will not hold up, is going to weigh as heavily as the actual facts.

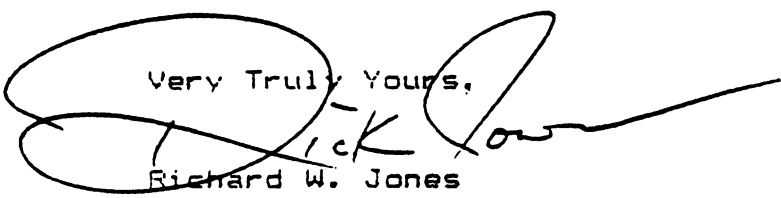
The Attorney Fee Agreement which we signed requires that you either get the charges dismissed or obtain a plea bargain acceptable to me. If you fail to do that, I am entitled to get the \$15,000 consideration back. A Second Degree Felony plea is Not acceptable to me unless it were made in abeyance or under Rule 11 with the good faith recommendations that the prosecutor has offered.

Unless certain rumors that I have heard are true, the prosecutor will accept the Motion whole heartedly as the solution in acheiving the good faith offer that he made to us 4 months ago. In any event, he must accept it as a reasonable effort to complete our negotiations.

I may confirm other requests which I have made of you with future letters, but I believe that this Rule 11 action may make those issues mute.

Thank you for your courage and wisdom. But most of all, thank you for helping me file this Rule 11 Motion. It will make all the difference.

Very Truly Yours,


Richard W. Jones

I have received a copy of the (charge) (information) against me, I have read it, and I understand the nature and elements of the offense(s) for which I am pleading (guilty) (~~no~~ contest).

The elements of the crime(s) of which I am charged are as follows: Under Circumstances Not Amounting to Rape of a Child, or Sodomy upon a child the defendant took indecent liberties with a child with the intent to Arouse or gratify the Sexual desire of Any person.

or about 12/12/82 Lizzie and I went into the bedroom and I took my sweat pants completely off. She kneeled beside me on the bed as I layed down. I lifted my shirt up and began to play with my penis. She kept saying, "Now can I open it?" as my penis started to become erect. but I refused, saying that it was not hard yet. Finally, I was fully erect. Lizzie looked at me and said again, "Now can I?" I said, "Oh, Lizzie. if you let me finish and shoot sperm on you. then you can open it". She said, "How do I do it?" I asked her to lay down and lift up her shirt. She lifted it up exposing herself from her waste, almost to her neck. I kneeled beside her and masturbated until sperm squirted onto her stomach. "Lizzie! Hold still". I said. "You will get it on your clothes. Just hold still. I will be right back". I went into the bathroom and moistened a towel on one side, then returned to her and cleaned and dried her stomach. My fantasy had been fulfilled.

and with knowledge and understanding of the following facts:

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. I recognize that a condition of my sentence may be to require me to pay an amount, as determined by the court, to recoup the cost of counsel if so appointed for me.

N/A. 2. I (have not) (have) waived my right to counsel. If I have waived my right to counsel, I have done so knowingly,

intelligently and voluntarily for the following reasons:

N/A 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.

4. If I have not waived my right to counsel, my attorney is D. Gilbert Athay, and I have had an opportunity to discuss this statement, my rights and the consequences of my guilty plea with my attorney.

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

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-examined by my attorney. I also know that I have the right to compel my witness(es) by subpoena at state expense to testify in court upon my behalf.

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.

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 the trial 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.

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, the Utah Supreme Court and that if I could not afford to pay the costs for such appeal, those costs would be paid by the state.

10. I know the maximum sentence that may be imposed for ~~each~~ ^{THE} offense to which I plead (guilty) (~~no contest~~). (I know that by pleading (guilty) (~~no contest~~) to an offense that

N/A. -- carries a minimum mandatory sentence that I will be subjecting myself to serving a minimum mandatory sentence for that offense. I know that the sentences may be consecutive and may be for a prison term, fine, or both.) I know that in addition to a fine a twenty-five percent (25%) surcharge, required by Utah Code Annotated 63-63a-4, will be imposed. I also know that I may be ordered by the court to make restitution to any victim(s) of my crimes.

11. I know that imprisonment may be for consecutive periods, or the fine for additional amounts, if my plea is to 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 plead guilty, my plea in the present action may result in consecutive sentences being imposed upon me.

12. I know and understand that by pleading (guilty) (~~no contest~~) I am waiving my statutory and constitutional rights set out in the preceding paragraphs. I also know that by entering such plea(§) I am admitting and do so admit that I have committed the conduct alleged and I am guilty of the crime(§) for which my plea(§) is/are entered.

13. My plea(§) of (guilty) (~~no contest~~) (is) (~~is not~~) the result of a plea bargain between myself and the prosecuting attorney. The promises, duties and provisions of this plea

- ① - State move to dismiss other counts & cases
- ② State will ~~provide~~ treatment in a residential treatment center in lieu of incarceration.
- ③ ~~There~~ No new charges will be filed by the State regarding cases now known to it.

bargain, if any, are fully contained in the Plea Agreement attached to this affidavit. See Abax also.

14. I know and understand that if I desire to withdraw my plea(~~s~~) of (guilty) (~~no contest~~) I must do so by filing a motion within thirty (30) days after entry of my plea.

15. 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.

16. 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} ~~and in the attached~~ _{plea agreement}, have been made to me.

17. 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 statement. I do not wish to make any ^{changes} because all of the statements are correct.

18. I am satisfied with the advice and assistance of my attorney.

19. I am 45 years of age; I have attended school through the B.S + 6th grade and I can read and understand the English language or an interpreter has been provided to me. I was not under the influence of any drugs, medication or intoxicants which would impair my judgment when the decision was made to enter the plea(~~s~~). I am not presently under the influence of any drug, medication or intoxicants which impair my judgment.

20. I believe myself to be of 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 28/5 day of July, 1990.

All items marked N/A do not apply to this case

DEFENDANT

CERTIFICATE OF ATTORNEY

I certify that I am the attorney for Richard W. Jones the defendant above, and that I know he/she has read the statement or that I have read it to him/her and I have discussed it with him/her and believe that he/she 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.

Robert V. Utter 0143

ATTORNEY FOR DEFENDANT, BAR NUMBER

CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in a case against Richard W. Jones, defendant. I have

D. GILBERT ATHAY #0140
Attorney for Defendant
70 East 400 South, Suite 325
Salt Lake City, Utah 84111

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

THE STATE OF UTAH,

PLEA AGREEMENT

Plaintiff,

Criminal Nos. 901900701,

901900702, 901900703,

RICHARD W. JONES DOB 10-19-44,

901900704.

Defendant.

PURSUANT TO the Statement of Defendant to which this instrument
is attached, the parties hereby set forth the following Plea
Agreement:

1. That all other counts and cases pending against the Defendant
shall be dismissed, except for count III of case #901900701 which
shall be reduced to Sexual abuse of a child, which is a second degree
felony which carries a sentence of 1 to 15 year imprisonment, and/or
\$10,000 fine, and can be suspended.

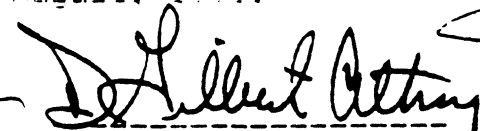
2. The State will re-recommend Defendant to be treated in a program
of a residential treatment center in lieu of incarceration. That
"residential treatment center" means Bonneville Community Center,
Fremont Community Center, or a program mutually agreeable to Defendant
and the probation department.

3. That unless authorized in writing by the defendant, no new
charges will be filed by the State pertaining to cases or information
now known to it or of a similar nature.

Dated this ^{July} 31st day of August, 1990.



Prosecuting Attorney



Defense Attorney



Defendant

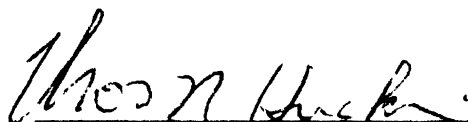
AFFIDAVIT

I, Thomas N. Huckin, am an expert in English language usage. I have a Ph.D. in Linguistics from the University of Washington and an A.B. in English from Princeton. I have taught English as an Assistant Professor at the University of Michigan, as an Associate Professor at Carnegie Mellon University, and, since last year, as an Associate Professor at the University of Utah, where I also direct the University Writing Program. I have written four books and more than 25 scholarly papers on the English language, and have been cited as an authority in Webster's Dictionary of English Usage (1989).

I have read Exhibit #1, a Plea Agreement between the State of Utah, Plaintiff, and Richard W. Jones, Defendant, dated July 31, 1990, and an accompanying affidavit from Attorney Lorin N. Pace dated September 14, 1990. Further, I have heard from the Defendant his version of the events described in the affidavit, which are essentially in agreement with that description.

In my judgment, the word "re-commend" is a legitimate English word meaning "commend again." As used in the sentence, "The State will re-commend Defendant to be treated in a program of a residential treatment center in lieu of incarceration," the word appears to have that meaning (assuming standard formal English orthography and syntax).

It is quite possible that someone reading that sentence would think that the writer intended to mean "recommend." But the writer claims that he meant "commend again," and the spelling of the word ("re-commend") and the syntactic structure of the sentence support his claim. At this point, we cannot know for sure what was in the writer's mind at the time he wrote the sentence. But his position is clear, consistent, and reasonable -- as far as I can tell -- and those who signed the document did not challenge his usage. Therefore, I think he deserves the benefit of any doubt.

 9/14/90
Thomas N. Huckin Date

APPENDIX "D"