

2000

Utah v. Dyan Lynn Martinez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
 :
 Plaintiff/Appellant, : Case No. 20001063-CA
 :
 v. :
 :
 DYAN LYNN MARTINEZ, : Priority No. 2
 :
 Defendant/Appellee. :

BRIEF OF APPELLEE

APPEAL AFTER CONVICTIONS FOR WORKERS COMPENSATION
INSURANCE FRAUD, A SECOND DEGREE FELONY, IN VIOLATION OF
UTAH CODE ANN. § 34a-2-110 (1990), AND ATTEMPTED POSSESSION OF A
CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, A THIRD
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(ii)
(1998), IN THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE
COUNTY, UTAH, THE HONORABLE ROGER A. LIVINGSTON, PRESIDING

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FILED
Utah Court of Appeals

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DYAN LYNN MARTINEZ,	:	Priority No. 2
Defendant/Appellee.	:	

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DYAN LYNN MARTINEZ,	:	Priority No. 2
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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for Workers Compensation Insurance Fraud, a second degree felony, and attempted possession of a controlled substance with intent to distribute, a third degree felony. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (Supp. 2001).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

- I. Did the trial court properly order restitution where the crime to which defendant pleaded guilty caused WCF to pay for medication it would not have otherwise paid for?**

“An appellate court will not disturb a trial court’s restitution order ‘unless it exceeds that prescribed by law or otherwise abused its discretion.’” *State v. Breeze*, 2001 UT App 200, ¶ 5, 29 P.3d 19 (citations omitted). However, if the claim involves a question of statutory interpretation, this Court “review[s] the trial court’s interpretation

of a statute for correctness and accord[s] no deference to its conclusions of law.” *State v. Galli*, 967 P.2d 930, 937 (Utah 1998) (citation and internal quotation marks omitted).

II. Did the trial court commit plain error in relying on unchallenged hearsay contained in defendant’s PSI where Utah courts have universally assumed PSIs are reliable?

To establish plain error, defendant must show that (1) an error occurred; (2) the error should have been obvious to the trial court; and (3) she would have obtained a more favorable result absent the error. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

III. Does evidence that defendant’s conduct caused WCF to pay for medication it would not have otherwise paid for support the trial court’s restitution order?

“To successfully challenge the sufficiency of the evidence [supporting a restitution order], appellant ‘must demonstrate that the clear weight of [the] evidence contradicts the trial court’s verdict.’” *State v. McBride*, 940 P.2d 539, 541 (Utah App. 1997) (quoting *State v. Gurr*, 904 P.2d 238, 242 (Utah App. 1995)).

IV. Did the trial court err in failing to make specific findings on the PSI issues explicitly raised in defendant’s brief where the first issue did not involve the PSI and the court addressed the second?

“Whether the trial court properly complied with a legal duty is a question of law that we review for correctness.” *State v. Veteto*, 2000 UT 62, ¶ 13, 6 P.3d 1133.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions and statutes are attached at Addendum A:

U.S. Const. amend. XIV, § 1;
Utah Const. Art. I, § 7;
Utah Code Ann. § 76-3-201 (1999);
Utah Code Ann. § 77-18-1 (1999).

STATEMENT OF THE CASE

Defendant was originally charged with one count of Workers' Compensation Insurance Fraud, one count of unlawful possession of a controlled substance [Oxycontin] with intent to distribute, and two counts of obtaining a controlled substance [Oxycontin] by fraud (R. 3-4). Pursuant to a plea agreement, defendant pleaded guilty to the first count as charged and to an amended second count charging attempted distribution of methamphetamine; the State agreed to dismiss the other charges (R. 38; R. 90:2-3, 12). The trial court sentenced defendant to consecutive terms of one to fifteen years on the fraud conviction and zero to five years on the distribution conviction (R. 91). The court then suspended the sentences and ordered defendant to serve 60 days in jail, complete 48 months of probation, and pay restitution in the amount of \$14,647 (R. 92-93). Defendant timely appealed (R. 64).

STATEMENT OF THE FACTS¹

In 1991, defendant injured her back while working at Olsen's Greenhouse Gardens (R. 5; R. 61:2). In 1994, as a result of this injury, defendant represented to the Utah Industrial Commission that she was permanently totally disabled (R. 5; R. 61:2). Worker's Compensation Fund ("WCF") agreed to continue to pay any medical expenses resulting from the injury (R. 5; R. 61:2). As part of this agreement, WCF paid defendant's bills for prescription drugs, totaling \$16,152.41 (R. 5; R. 61:2). The bulk of these bills (\$14,647) was attributable to Oxycontin, an opiate pain reliever and controlled substance ((R. 5; R. 61:2; R. 77:18).

While receiving benefits from WCF because of her permanent total disability, defendant began working 25 to 30 hours a week in a cafeteria at Salt Lake Community College under the assumed name of Deborah Lee Hardy (R. 5, 39; R. 61:2-3; R. 90:7). Her responsibilities included "lifting 20 pound buckets of ice at least twice a day, four to six hours of standing as a cashier, and cooking" (R. 61:3). Her supervisor reported that defendant did not appear to have any difficulty performing her duties (R. 61:3). Defendant did not report her employment to her treating physician, Dr. Dall, or her WCF claims adjuster (*Id.*).

¹Because defendant pleaded guilty to the charges before a preliminary hearing was held, the facts are taken from the probable cause statement supporting the information, the plea hearing, and defendant's presentence investigation report.

Despite her new employment, defendant continued to receive Oxycontin. Defendant represented to Dr. Dall that her back pain was so severe that she “was unable to function without continuous pain medication” (R. 61:3). According to defendant’s PSI, WCF would not have paid for defendant’s Oxycontin if it had known she was employed (R. 61:4; R. 77:9-10). Dr. Dall concurred that if defendant had been truthful, he would not have prescribed Oxycontin (R. 61:3-4).

On September 5, 2000, defendant pleaded guilty to Worker’s Compensation Insurance Fraud and Attempted Distribution of Methamphetamine (R. 38; R. 90:2-3, 12). As part of the plea agreement, the State agreed to dismiss two other counts that charged defendant with obtaining a controlled substance, Oxycontin, by fraud (R. 4, 38).

At sentencing, the State conceded that WCF was required to pay for some medication for defendant (R. 77:9). However, the State argued that defendant should pay restitution for the difference in cost between the Oxycontin and methadone, a cheaper drug often prescribed as an Oxycontin substitute (R. 77:8-11). When defendant objected to methadone as the substitute, the trial court ordered defendant to pay restitution in the full amount of the Oxycontin prescribed, \$14,647 (R. 92).

SUMMARY OF THE ARGUMENT

I. Under Utah’s restitution statute, a trial court must impose restitution for any damages resulting from a defendant’s criminal conduct. Here, defendant admitted that she intentionally obtained benefits from WCF under false pretenses by working

under an assumed name while receiving benefits for being unemployable. Because one of those benefits was payment for medication WCF would not have paid for if it had known defendant was working, the trial court properly ordered restitution in this case.

II. To succeed on her unpreserved claim that the trial court improperly relied on double and triple hearsay contained in her PSI, defendant must show that an error occurred, that the error should have been obvious to the trial court, and that the error harmed her. Defendant cannot do that here. Because the preparer of a PSI inevitably relies on third parties for information, a PSI always contains at least double hearsay. Yet, Utah case law has consistently held that a trial court may properly consider information contained in a PSI report so long as defendant is given the opportunity to challenge that information at sentencing. Indeed, *State v. Johnson*, 856 P.2d 1064 (Utah 1993)—the case on which defendant’s claim heavily rests—relies on information in a PSI. Thus, defendant cannot demonstrate that any error, let alone plain error, occurred.

III. Evidence that WCF would not have paid for defendant’s Oxycontin if it had known she was well enough to work supports the trial court’s restitution order. Thus, defendant’s insufficiency of the evidence claim fails.

IV. Utah courts are entitled to have the issues clearly defined on appeal. Here, defendant claims that the trial court erred in failing to address objections to her PSI on the record. However, in support of her claim, defendant makes several conclusory statements which, neither alone nor in conjunction with the record cites she supplies,

adequately identify the alleged objections she now claims should have been addressed. Because this part of her claim is inadequately briefed, this Court should refuse to consider it. Concerning the two issues defendant does adequately identify in her brief, both fail on the merits. The first issue, which addresses evidence outside of the PSI more than evidence inside it, was not raised clearly enough below to alert the trial court that action was warranted. The second issue was addressed by the trial court on the record.

ARGUMENT

I. THE TRIAL COURT PROPERLY ORDERED RESTITUTION WHERE THE CRIME TO WHICH DEFENDANT PLEADED GUILTY CAUSED WCF PECUNIARY DAMAGES

Defendant claims that the “sentencing court misapplied the restitution statute” by imposing restitution for conduct for which she “was not convicted, did not plead guilty, and did not admit responsibility.” Aplt. Br. at 12. Specifically, defendant claims that restitution for the cost of Oxycontin was improper because “the only charges that were related to Oxycontin were dismissed in exchange for her guilty plea.” Aplt. Br. at 16. Defendant’s claim is without merit.

This Court “will not disturb a trial court’s restitution order ‘unless it exceeds that prescribed by law or otherwise abused its discretion.’” *State v. Breeze*, 2001 UT App 200, ¶ 5, 29 P.3d 19 (citations omitted). However, when the claim involves a question of statutory interpretation, this Court “review[s] the trial court’s interpretation of a

statute for correctness and accord[s] no deference to its conclusions of law.” *State v. Galli*, 967 P.2d 930, 937 (Utah 1998) (citation and internal quotation marks omitted).

“When a person is convicted of criminal activity that has resulted in pecuniary damages, . . . the court shall order that the defendant make restitution to the victims of crime as provided in this subsection.” Utah Code Ann. §76-3-201(4)(a)(i). “Criminal activities” is defined in section 76-3-201(1)(b) as “any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court.” *Id.* § 76-3-201(1)(b); *see also State v. Watson*, 1999 UT App 273, ¶ 3, 987 P.2d 1289. Under this section, if “it is clear that but for [defendant’s admitted] criminal act,” the victim’s loss would not have occurred, the court must order defendant to make restitution to that victim. *State v. McBride*, 940 P.2d 539, 544 (Utah App. 1997)

Here, defendant pleaded guilty to “obtain[ing] workers compensation benefits by working under an assumed name while receiving benefits for being unemployable” (R. 39; Addendum B). Although defendant never admitted that WCF’s payment for her Oxycontin medication was one of those benefits, the record clearly establishes that it was. *Cf. McBride*, 940 P.2d at 544 (holding defendant convicted of joyriding was properly ordered to pay restitution to owner where car was impounded and then, due to police oversight, subsequently sold). According to defendant’s PSI, WCF would not have paid for defendant’s Oxycontin “had they known of defendant[s] gainful employment under the assumed name” (R. 61:4; Addendum B). The PSI also indicated

that, “[o]n March 1, 1999, Dr. Dall told WCF investigator McDonald that if he had known that defendant . . . was gainfully employed under an alias. . . . he would not have prescribed Oxycontin for [her]” (R. 61:3-4; Addendum C D). Finally, a status report from Dr. Dall dated May 31, 2000 indicated that, because “narcotic medications [like Oxycontin] have been disallowed for this lady” due to her criminal conduct, Dr. Dall did in fact—as the PSI suggested he would—stop prescribing defendant Oxycontin (R. 50; Addendum D).

This evidence was sufficient to support the trial court’s findings that defendant “would not have received Oxycontin at all had she been forthright and had she been not engaging in her fraudulent activities” (R. 77:16; Addendum E). Therefore, the trial court properly ordered defendant to pay restitution “for the medication she never should have obtained but for her lying, conniving, cheating conduct” (R. 77:17; Addendum E). *See* Utah Code Ann. § 76-3-201(4); *McBride*, 940 P.2d at 544 (holding that restitution is properly ordered where “it is clear that but for [defendant’s] criminal act,” the damages would not have occurred).

State v. Watson, 1999 UT App 273, 987 P.2d 1289, on which defendant relies, *see* Aplt. Br. at 14-15., is inapposite. In *Watson*, the defendant was originally charged with criminal homicide, attempted criminal homicide, and obstruction of justice because she allegedly drove co-defendants to and from a scene where the co-defendants killed one person and injured another, and then she sold the car in which she had driven them.

Watson, 1999 UT App 273, at ¶ 2. The murder and attempted murder charges against Watson were subsequently dismissed when she agreed to plead guilty to attempted obstruction of justice. *Id.* Despite never accepting responsibility for the other crimes or otherwise agreeing to pay restitution for them, defendant was nonetheless ordered to pay restitution for damages relating to the murder. *Id.* at ¶ 4. This Court held that such a restitution order was improper under section 76-3-201. *Id.* at ¶ 6.

In contrast to *Watson*, defendant here pleaded guilty to the exact conduct that caused WCF pecuniary damages. Specifically, defendant admitted to “obtain[ing] workers compensation benefits by working under an assumed name while receiving benefits for being unemployable” (R. 39; Addendum B). One of those benefits was WCF’s payment for Oxycontin (R. 5; R. 61:3-4; R. 77:9-10). Because the trial court here only ordered defendant to pay restitution for the pecuniary damages specifically caused by her admitted conduct, *Watson* does not apply.

Consequently, defendant’s claim fails.

II. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN RELYING ON UNCHALLENGED HEARSAY IN DEFENDANT’S PRESENTENCE INVESTIGATION REPORT

Defendant claims that the “sentencing court erred and violated [her] due process rights when it relied almost exclusively upon double and triple hearsay in determining the amount of restitution.” Aplt. Br. at 19. Specifically, defendant claims that the trial court improperly relied on the presentence investigation report, “which is itself hearsay.

contains statements made by the WCF investigation both those made by himself, which amount to double hearsay, and those made by Dr. Dall to the WCF investigator, which are triple hearsay.” Aplt. Br. at 20.

Because defendant did not raise this claim below, she asks this Court to review it for plain error. To show plain error, defendant must demonstrate that (1) an error occurred; (2) the error should have been obvious to the trial court; and (3) defendant would have obtained a more favorable result absent the error. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

Here, defendant claims the trial court committed plain error under *State v. Johnson*, 856 P.2d 1064 (Utah 1993), because it relied on the PSI that contained double and triple hearsay. According to defendant, *Johnson* held that such hearsay is necessarily unreliable and that a trial court therefore *always* errs in relying on such hearsay at sentencing. Such a reading of *Johnson*, however, would necessarily render consideration of *any* PSI at sentencing plain error. *Johnson* does not reach that far.

A. The general rule is that PSI’s, although at least double hearsay, are admissible at sentencing.

“The due process clause in both the United States and Utah Constitutions requires that a sentencing judge act on reasonably reliable and relevant information in exercising discretion in fixing a sentence.”” *State v. Patience*, 944 P.2d 381, 389 (Utah App. 1997) (quoting *State v. Johnson*, 856 P.2d 1064, 1071 (Utah 1993) (quoting *State v. Howell*, 707 P.2d 115, 118 (Utah 1985))); see also *State v. Gomez*, 887 P.2d 853, 854

(Utah 1994) . At the same time, however, because the objective at sentencing is to determine the most appropriate penalty for each individual defendant, a sentencing court “must be permitted to consider any and all information that reasonably may bear on the proper sentence for the particular defendant, given the crime committed.” *State v. Sanwick*, 713 P.2d 707, 708 (Utah 1986) (quoting *Wasman v. United States*, 468 U.S. 559, 563 (1984)); see also *Williams v. New York*, 337 U.S. 241, 247 (1949).

To balance these potentially competing principles, courts have concluded that “the rules of evidence in general, and the rules on hearsay exceptions in particular, are inapplicable in sentencing proceedings.” *Sanwick*, 713 P.2d at 709; see also *State v. McBride*, 940 P.2d 539, 542 (Utah App. 1997); Utah R. Evid. 1101 (providing that rules of evidence do not apply at sentencing). However, due process and “fundamental principles of procedural fairness in sentencing require that a defendant have the right to examine and challenge the accuracy and reliability of the factual information upon which [his or her] sentence is based.” *Patience*, 944 P.2d at 389 (quoting *State v. Gomez*, 887 P.2d 853, 855 (Utah 1994)). Accordingly, “[h]earsay [is] admissible as long as the defendant [has] the opportunity to rebut the adverse evidence and to challenge the reliability of the evidence presented.” *Sanwick*, 713 P.2d at 709; *Patience*, 944 P.2d at 389.

Consistent with these rules, Utah law provides that prior to imposing sentence, “the court may, with the concurrence of the defendant, continue the date for [sentencing]

for the purpose of obtaining a presentence investigation report.” *Id.* § 77-18-1(5) (1999). This report is provided to “assist the courts in sentencing.” *id.* § 64-13-20(1)(a)(k). and shall include consideration “of the social, physical, and mental conditions and backgrounds of offenders.” *id.* § 64-13-20(10(a)(i), (1)(c)(i). It “shall” also include “a victim impact statement” and “a specific statement of pecuniary damages.” *Id.* § 77-18-1(5). A copy of the report must then be provided to defendant or her counsel at least three working days before sentencing. *Id.* § 77-18-1(6).

As defendant’s PSI exemplifies, the majority of the information contained in a PSI is gathered from third party sources. *See, e.g.*, R. 61 (noting sources as “Court dockets and District Attorney file”; “The defendant”: “Contact with Larry McDonald of the WCF”; “Documentation provided by the Salt Lake County Jail”; “Utah State Juvenile Court records”; “Contact with Eric Anderson of the United States Probation Office”; “Salt Lake City Gang Area Project records”); Addendum C.

Thus, “[b]y the very nature of a presentence investigation report, it is necessary to rely to a great extent upon hearsay information.” *State v. Ritsch*, 440 N.W.2d 689, 691 (Neb. 1989)(citation omitted); *see also State v. Sims*, 887 P.2d 72, 80 (Kan. 1994) (“Information required to be included in a presentence investigation report necessarily includes hearsay.”).

Nonetheless, “[u]nder the practice of individualizing punishments, investigation techniques have been given an important role.” *Williams v. New York*, 337 U.S. 241,

249 (1949). Thus, presentence investigation reports have become “a valuable sentencing aid,” *Williams v. State*, 601 So. 2d 1062, 1085 (Ala. Crim. Ct. 1992) (citation omitted), *aff’d without opinion*, 662 So. 2d 929 (Ala. 1992), and the probation officers who prepare them, “a valuable resource to judges.” *State v. Gomez*, 887 P.2d 853, 855 (Utah 1994). “To deprive sentencing judges of [the] kind of information [contained in such reports] would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.” *Williams*, 337 U.S. at 249-50. Moreover, “[t]he type and extent of this information make totally impractical if not impossible open court testimony with cross-examination.” *Id.* at 250. Such considerations “admonish [this Court] against treating the due-process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.” *Williams*, 337 U.S. at 250; *see also State v. Sims*, 887 P.2d 72, 80 (Kan. 1994) (holding strict application of evidentiary rules at sentencing “would deprive the court of the information necessary to fulfill its responsibilities”).

Consequently, Utah courts have consistently held that, unless “the accuracy of a report is contested,” “we must presume that reports prepared by professional probation officers . . . are generally reliable.” *Gardner v. Florida*, 430 U.S. 349, 359 (1977). *See State v. Gomez*, 887 P.2d 853, 855 (Utah 1994) (rejecting defendant’s due process claim

where defendant was provided copy of PSI before sentencing, had an opportunity to examine the report and challenge its contents, and failed to avail himself of that opportunity); *State v. Howell*, 707 P.2d 115, 118 (Utah 1985) (holding defendant must be supplied copy of presentence report to effectuate requirement that judge act on reasonably reliable and relevant information in fixing sentence); *State v. Anderson*, 632 P.2d 877, 878-79 (Utah 1981) (holding court did not err in considering information in PSI where it “[was] disclosed to the defendant who made no objection”); *State v. Lipsky*, 608 P.2d 1241, 1242 (Utah 1980) (holding “trial court may receive information concerning the defendant in the form of a pre-sentence report” as long as report is “disclosed to the defendant” and he has “the opportunity to bring . . . inaccuracies to the court’s attention”); *State v. Rhodes*, 818 P.2d 1048, 1050-51 (Utah App. 1991) (holding defendant’s due process rights are protected where defendant receives presentence report in time to effectively contest any perceived inaccuracies).

B. *Johnson* does not alter this rule.

In *State v. Johnson*, 856 P.2d 1064 (Utah 1993), Johnson, after being convicted for various sex crimes involving the same child, challenged the trial court’s reliance at sentencing on hearsay evidence that he had abused another victim. Johnson claimed that the evidence—which *was not* contained in a PSI but, rather, in a sexual abuse center’s report and various other documents—was unreliable double and triple hearsay and that the trial court therefore violated his due process rights by relying on it. *Id.* at 1070-71.

After reciting the above stated principles, the supreme court agreed with Johnson. Because “[n]ot only did the report consist almost entirely of double and triple hearsay, but also the hearsay statements contained numerous internal inconsistencies and speculative conclusions based on incomplete information and questionable factual assumptions,” the trial court erred in relying thereon. *Id.* at 1071-72.

Although it is true, as defendant notes, that *Johnson* states at one point that “double hearsay is so inherently unreliable and presents such a high probability for inaccuracy that it cannot stand alone as the basis for sentencing,” *Johnson*, at 1071, that statement has never been literally applied, especially to PSIs. As noted above, cases both before and after *Johnson* assume that, absent a defendant’s specific objection, PSIs are reliable. See *State v. Kohl*, 2000 UT 35, ¶ 34, 999 P.2d 7 (holding trial court has duty to resolve alleged inaccuracies where defendant “objected to the presentence report prepared in this case”); *State v. Jaeger*, 1999 UT 1, ¶¶ 42-45, 973 P.2d 404 (same); *Gomez*, 887 P.2d at 855; *Howell*, 707 P.2d at 118; *Anderson*, 632 P.2d at 878-79; *Lipsky*, 608 P.2d at 1242; *Rhodes*, 818 P.2d at 1050-51.

Moreover, *Johnson* itself relies on information in the defendant’s PSI in support of his appeal. See *Johnson*, 856 P.2d at 1073, 1074. In addition, it cites approvingly to *Lipsky*, see *Johnson*, 856 P.2d at 1073, which expressly held that a “trial court may receive information concerning the defendant in the form of a pre-sentence report” so

long as the report is “disclosed to the defendant” and he has “the opportunity to bring . . . inaccuracies to the court’s attention.” *Lipsky*, 608 P.2d at 878-79.

Thus, a reasonable interpretation of *Johnson* is that a trial court cannot rely on double or triple hearsay at sentencing where the defendant expressly challenges that hearsay and the hearsay on its face lacks sufficient indicia of reliability. *See Johnson*, 856 P.2d at 1072-73; *State v. Patience*, 944 P.2d 381, 389 (Utah App. 1997) (describing *Johnson* as holding that “report trial court relied on was inherently unreliable because it consisted of double and triple hearsay and ‘contained numerous internal consistencies and speculative conclusions based on incomplete information and questionable factual assumptions’”); *State ex rel. W.S.*, 939 P.2d 196, 201 (Utah App. 1997) (applying *Johnson* to parental termination case where “appellant objected repeatedly” to admission of pre-disposition report “because the caseworker . . . had no personal knowledge of the CPS investigations cited in the report” and where trial court did not allow appellant to testify “to rebut incidents cited in the pre-disposition report”). Absent objection, then, a trial court does not err under *Johnson* in assuming that a PSI is reliable.²

²The Ninth Circuit’s interpretation of *United States v. Weston*, 448 F.2d 626, 631 (9th Cir. 1971), cited by defendant and relied upon in *Johnson*, lends further support for this interpretation. In *Weston*, defendant “vigorously denied the accuracy of [other charges in the PSI] and objected to the judge’s consideration of them without more substantiation of them than appeared in the probation report.” Because “the other criminal conduct charged was very serious, and the factual basis for believing the charge was almost nil,” the Ninth Circuit agreed that the trial court erred in considering the

C. Because no established appellate law renders PSIs inadmissible at sentencing, defendant's plain error claim fails.

As stated above, to show plain error, defendant must demonstrate that (1) an error occurred; (2) the error should have been obvious to the trial court; and (3) defendant would have obtained a more favorable result absent the error. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993). However, an error is not obvious “where there is no settled appellate law to guide the trial court.” *State v. Ross*, 951 P.2d 236, 239 (Utah App. 1997) (citing *State v. Eldredge*, 773 P.2d 29, 35-36 (Utah 1989); *State v. Braun*, 787 P.2d 1336, 1341-42 (Utah App. 1990)).

Here, defendant cannot establish that any error, let alone obvious error, occurred in the trial court's reliance on unchallenged hearsay in her PSI. *Johnson*—the major case on which defendant relies—not only cites to information in defendant's PSI to support his appeal but also cites approvingly to a case that specifically held PSIs are admissible as long as they are subject to the defendant's challenge. *See Johnson*, 856 P.2d at 1071 (citing *Lipsky*, 608 P.2d 1241 (Utah 1980)); *Id.* at 1073-74 (citing PSI).

challenged evidence. *Id.* at 633.

Since then, however, the Ninth Circuit has determined that “*Weston* was decided under unique circumstances . . . because of the inherent difficulty for the defendant to prove or disprove the [charges] made against her in the presentence report.” *United States v. Miller*, 588 F.2d 1256, 1267 (9th Cir. 1978). Thus, *Weston* has been interpreted to hold only “that when allegations included in a presentence report are not within the defendant's power to meaningfully refute and are based on only the barest factual foundation, then the district judge cannot in fairness consider them.” *Id.*; *Charlesworth*, 217 F.3d at 1160-61; *United States v. Branco*, 798 F.2d 1302, 1306 (9th Cir. 1986).

In addition, all other Utah case law follows *Lipsky*'s rule. *See, e.g., Kohl*, 2000 UT 35, at ¶ 34; *Jaeger*, 1999 UT 1, at ¶¶ 42-45; *Gomez*, 887 P.2d at 855; *Howell*, 707 P.2d at 118; *Anderson*, 632 P.2d at 878-79; *Rhodes*, 818 P.2d at 1050-51.

Consequently, defendant has not established that the trial court committed error, let alone plain error, in relying on unchallenged information in her PSI. Thus, defendant's plain error claim fails.

III. THE TRIAL COURT'S RESTITUTION ORDER WAS PROPER WHERE DEFENDANT'S CONDUCT CAUSED WCF TO PAY FOR MEDICATION IT WOULD NOT HAVE OTHERWISE PAID FOR

Defendant claims that the evidence, "fully marshaled and regarded in the light most favorable to the sentencing court's determination, does not establish either that [her] admitted criminal acts were the 'but for' cause of pecuniary damages or that Methadone was a proper medication in lieu of Oxycontin." Aplt. Br. at 22.

A trial court's factual findings will be reversed only if they are against the clear weight of the evidence. *State ex rel. L.M.*, 2001 UT App 314, ¶ 14, 433 Utah Adv. Rep. 6; *State v. Andreason*, 2001 UT App 395, ¶ 4 n. 3, ___ Utah Adv. Rep. ___.

A. The evidence supports a "but for" connection between defendant's admitted conduct and WCF's pecuniary damages.

Defendant claims that the evidence "does not establish . . . that [her] admitted criminal acts were the 'but for' cause of pecuniary damages." Aplt. Br. at 22. *See State v. McBride*, 940 P.2d 539, 544 (Utah App. 1997) (holding that restitution is proper where loss would not have occurred but for defendant's criminal conduct).

In support of her argument, defendant marshals evidence (1) that Dr. Dall originally prescribed Oxycontin for defendant and that WCF originally paid for Oxycontin as part of defendant's permanent total disability benefits; (2) that during this same time, defendant worked part-time at a community college cafeteria under an assumed name; and (3) that, according to defendant's PSI, Dr. Dall would not have prescribed Oxycontin for defendant and WCF would not have paid for Oxycontin for defendant if they had known that she was employed. Aplt. Br. at 24.

Defendant then claims that this evidence is insufficient to support the trial court's "but for" finding because it is "directly contradicted by reliable evidence" (1) that defendant "was entitled to receive medical benefits regardless of any misconduct" and that "Oxycontin had been determined to be the appropriate medication," Aplt. Br. at 24-25, and (2) that "Dr. Dall would have continued to prescribe Oxycontin even had he known of [her] admitted misconduct of working under an assumed name," Aplt. Br. at 25. Neither of defendant's contentions survives scrutiny.

First, defendant does not show why her entitlement to receive medical benefits regardless of any misconduct necessarily equates to an entitlement to the specific narcotic Oxycontin. The fact that Dr. Dall prescribed Oxycontin for defendant after she fraudulently represented to him that "she was unable to function without continuous pain medication" (R. 61:3), does not establish such entitlement. As the trial court

appropriately noted. “Too bad she wasn’t honest enough to [] get the best prescription medication he could have given” (R. 77:19; Addendum E).

Second, defendant cannot show that “Dr. Dall would have continued to prescribe Oxycontin even had he known of [defendant’s] admitted misconduct of working under an assumed name.” Aplt. Br. at 25. In making that assertion, defendant relies on notes from Dr. Dall dated May 16, 2000 responding to WCF’s statement that it would no longer pay for Oxycontin. Aplt. Br. at 35-36. In those notes, Dr. Dall states that “it is my medical responsibility to provide appropriate treatment regardless of allegations until those allegations are proven” and that if “indeed, [defendant] has been abusing my prescriptions in terms of forging, selling, etc., then that would be a felony and I would provide no further medication but would agree with the recommendation for drug detox” (R. 48-49; Addendum D). Defendant claims that these notes show Dr. Dall would have stopped prescribing Oxycontin “only if [defendant] ‘has been abusing [his] prescriptions in terms of forging, selling, etc.’” Aplt. Br. at 25-26 (citing R. 48-49).

However, the doctor’s notes do no such thing. Rather, they only indicate that Dr. Dall would continue prescribing *a* medication until the allegations were proven, not that he would necessarily continue prescribing Oxycontin. Indeed, Dr. Dall’s willingness to prescribe something other than Oxycontin is made clear on the very next page of the record—Dr. Dall’s notes dated May 31, 2000, in which he writes that “there is enough evidence against her that prescribing controlled substances for this lady is not

appropriate.” that defendant “understands my inability to prescribe controlled substances.” that WCF “has indicated [it] will pay for nonnarcotic medications.” and that he has thus “written a prescription for that today” (R. 50: Addendum D).

Thus, the evidence before the trial court at sentencing established (1) that WCF would not have paid for defendant’s Oxycontin if it had known she was working; (2) that Dr. Dall told WCF he would not have prescribed the Oxycontin if he had known defendant was working; and (3) that, in light of defendant’s conduct and WCF’s unwillingness to continue paying for Oxycontin, Dr. Dall stopped prescribing defendant Oxycontin (R. 50; R. 61:3-4). This evidence was sufficient to establish that “but for” defendant’s working under an assumed name and concealing her employment from WCF, WCF would not have paid for and Dr. Dall would not have prescribed her Oxycontin. *See McBride*, 940 P.2d at 544).

Consequently, defendant’s claim fails.

B. The trial court did not consider the cost of methadone in calculating the amount of restitution.

Defendant claims that the trial court improperly “determined that [she] owed restitution for the cost of Oxycontin minus the cost of Methadone” because there was insufficient evidence to establish “that Methadone was a proper medication in lieu of Oxycontin,” *Aplt. Br.* at 22-23. However, because the trial court never found that methadone was a proper medication in lieu of Oxycontin, defendant’s claim fails.

Defendant's PSI stated "that while defendant . . . was receiving \$14,647.00 in WCF prescription benefits for the prescribed Oxycontin, she was gainfully employed . . . under [an] assumed name" (R. 61:2-3; Addendum B). The PSI then calculated restitution costs for Oxycontin at \$14, 377.56, "the cost difference between the Oxycontin [defendant] received over an 18 month time period and Methadone [which] is substantially cheaper to prescribe, and is considered a substitute medication for the Oxycontin" (R. 61:7; R. 77:9).

At sentencing, defendant objected to the use of methadone as an off-set to the cost of Oxycontin, arguing that "the formula of comparing Oxycontin to methadone is based on [a] false premise" (R. 77:15; Addendum E). Defendant explained: "The state is calculating this number based on the assumption of methadone which is a very low cost drug would have been prescribed"; however, a note from Dr. Dall "says we started her on methadone [and] [s]he had a severe skin rash" (R. 77:17; Addendum E).

In response to defendant's argument, the trial court stated: "Let's not offset the methadone. Let's just have her pay for the medication she never should have obtained If you don't want to have an offset for what it would have cost for methadone that's fine with me" (R. 77:17; Addendum E). "I was wanting to deduct what they would have been willing to prescribe. You told me not to do that, so that's okay. Let's not do that" (R. 77:18; Addendum E). The trial court then ordered defendant to pay

restitution in the amount of \$14,647, the full amount that defendant received “in WCF prescription benefits for the prescribed Oxycontin” (R. 61:2; R. 92).

Because the trial court never found that “Methadone was a proper medication in lieu of Oxycontin,” Aplt. Br. at 22, defendant’s challenge to the sufficiency of the evidence supporting such a finding fails.³

IV. DEFENDANT’S CLAIM THAT THE TRIAL COURT ERRED IN FAILING TO CORRECT ALLEGED INACCURACIES IN HER PSI IS INADEQUATELY BRIEF AND SHOULD NOT BE REACHED; THE ONE ALLEGED OBJECTION IDENTIFIED IN HER BRIEF DID NOT WARRANT TRIAL COURT ACTION.

Defendant claims that the trial court “erred because it did not make specific findings on the record after [she] repeatedly objected to the contents of the [PSI] and asked the court to correct mistakes in the report.” Aplt. Br. at 28. However, only two

³To the extent defendant’s claim rests on a contention that the trial court should have used some other medication as a substitute for Oxycontin rather than methadone, that claim fails because any error was invited. This Court will not consider “an error committed at trial when [the complaining] party led the trial court into committing the error.” *State v. Betha*, 957 P.2d 611, 617 (Utah App. 1998) (quoting *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993)). Here, defendant argued that methadone was not an appropriate substitute for Oxycontin because it allegedly gave her a severe skin rash (R. 77:17). Accepting defendant’s argument, the trial court decided not to offset the cost of the Oxycontin with the cost of methadone (R. 17-18). Defendant neither objected to that decision nor offered any evidence that a different medication was a more appropriate substitute for Oxycontin than methadone. Thus, defendant invited any error caused by the trial court’s failure to consider other possible substitutes. *See State v. Anderson*, 929 P.2d 1107, 1109 (Utah 1996) (holding defendant “cannot lead the court into error by failing to object and then later, when he is displeased with the verdict, profit by his actions” (citations and internal quotation marks omitted); *Betha*, 957 P.2d at 617 (holding defendant cannot complain on appeal where “it was defendant’s counsel who requested the court’s ruling”).

alleged objections are identifiable from defendant's brief. Because the bases of her remaining conclusory statements are unclear from the record, this Court should refuse to consider them. The two bases identified in defendant's brief fail on the merits.

Section 77-18-1(6)(a) of the Utah Code provides that "[a]ny alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department [of corrections] prior to sentencing, shall be brought to the attention of the sentencing judge." Utah Code Ann. § 77-18-1(6)(a) (1999). The court may then grant the parties "an additional ten working days to resolve the alleged inaccuracies." *Id.* If the inaccuracies remain unresolved, "the court shall make a determination of relevance and accuracy on the record." *Id.*

As the supreme court has held, this section "requires the sentencing judge to consider the party's objections to the report, make findings on the record as to whether the information objected to is accurate, and determine on the record whether that information is relevant to the issue of sentencing." *State v. Jaeger*, 1999 UT 1, ¶¶ 44-45, 973 P.2d 404; *see also State v. Veteto*, 2000 UT 62, ¶ 13, 6 P.3d 1133.

A. Defendant's claims are inadequately briefed.

Under rule 24(a)(9) of the Utah Rules of Appellate Procedure, defendant's brief must contain an argument "with citations to the authorities, statutes, and parts of the record relied on." Utah R. App. P. 24(a)(9). Thus, this Court "is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in

which the appealing party may dump the burden of argument and research.” *State v. Montoya*, 937 P.2d 145, 150 (Utah App. 1997) (quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)) (additional citation omitted). Utah courts have consistently refused to consider issues that have not been adequately briefed. *See State v. Thomas*, 961 P.2d 299, 304-05 (Utah 1998); *State v. Yates*, 834 P.2d 599, 602 (Utah App. 1992); *see also MacKay v. Hardy*, 973 P.2d 941, 947-49 (Utah 1998); *Walker v. U.S. Gen., Inc.*, 916 P.2d 903, 908 (Utah 1996); *Burns v. Summerhays*, 927 P.2d 197, 198 (Utah App. 1996).

Here, defendant claims that the trial court erred in failing to make specific findings on the record after she “objected repeatedly to the [PSI’s] inclusion of conduct for which she was not convicted, did not plead guilty, and did not admit responsibility” and objected “concerning the [PSI’s] assumptions that Ms. Martinez was not entitled to receive medical benefits, that Oxycontin would not have been prescribed based on her admitted conduct, and that Methadone would have been prescribed in the absence of fraud.” Aplt. Br. at 30. Defendant then cites to various pages of the record. Aplt. Br. at 28 (citing to R. 77:7, 11-13, 17, 19-20); Aplt. Br. at 30 (citing to same). However, no explicit objections to defendant’s PSI appear on those pages. Thus, both the State and this Court must guess as to what specific objections defendant now claims were made. *See Montoya*, 937 P.2d at 150 (holding issues on appeal should be “clearly defined”).

Consequently, this Court should refuse to consider this part of defendant’s claim.

B. Because defendant never asked the trial court to correct her PSI in connection with her attorney's alleged fraud, this claim is waived; in any case, the challenged statements did not appear in the PSI but, rather, in a different part of the record.

“A general rule of appellate review in criminal cases in Utah is that a contemporaneous objection or some form of specific preservation of claims of error must be made a part of the trial court record before an appellate court will review such claim on appeal.” *State v. Tillman*, 750 P.2d 546, 551 (Utah 1988). “One of the primary reasons for [this rule] is to assure that the trial court has the first opportunity to address a claim that it erred.” *State v. Johnson*, 821 P.2d 1150, 1161 (Utah 1992). Thus, “[t]he objection must be specific enough to give the trial court notice of the very error of which counsel complains.” *State v. Bryant*, 965 P.2d 539, 546 (Utah App. 1998) (citation and internal quotation marks omitted). Otherwise, “that issue is not properly preserved for appeal,” *State v. Larsen*, 865 P.2d 1355, 1363 n.12 (Utah 1993)).

Here, defendant claims that the trial court made “no specific findings” and “did not even address” defense counsel’s alleged claim that the PSI inaccurately portrayed him as a participant in defendant’s fraud. Aplt. Br. at 30. However, defendant never specifically objected to the PSI’s statements concerning her attorney’s alleged conduct and never specifically asked the trial court to make any correction thereto. Rather, as defendant herself acknowledges in her brief, counsel stated only that “[t]here’s one major correction *or clarification* and these the court needs to take notice of” (R. 77:7; Addendum E) (emphasis added). Then, after explaining that clarification, counsel

concluded by stating, “I mean it’s obvious that those assertions are simply untrue in regard to [defendant] and I” (R. 77:7; Addendum E). Nothing in counsel’s statements would have alerted the trial court that a correction to the PSI was requested. Thus, no objection to the PSI was raised in a manner “specific enough to give the trial court notice of the very error of which counsel complains.” *Bryant*, 965 P.2d at 546; *see also Veeto*, 2001 UT 62, ¶ 15, 6 P.3d 1133 (noting defendant both raised his objections before the trial court and presented evidence thereon); *Kohl*, 2000 UT 35, at ¶ 34 (noting defendant “objected” to the PSI and “[s]pecifically” identified his claims). Consequently this claim was waived.

In any case, it was not the PSI that contained the objectionable material. The PSI states only that “defendant’s attorney . . . sent a fax to WCF in early October consisting of Court dockets from the current case” on which he had “circled only Counts Three and Four . . . highlighting the fact these charges had been dismissed, and as a result WCF should pay for the Oxycontin” (R. 61:6). Thus, the PSI does not necessarily suggest that defense counsel had done anything improper. Rather, it was another part of the record, a fax sheet from WCF to the prosecutor concerning defense counsel’s fax, that suggested defendant “is continuing the same fraud for which she plead guilty” and that “[n]ow it would appear she has her public defender assisting her in this misrepresentation” (R. 45). Because defendant’s objection did not in fact involve the PSI, neither section 77-18-1(6)(a) nor *Jaeger*, 1999 UT 1, apply.

Consequently, defendant's claim on this basis fails.

C. Defendant's objection to methadone as an Oxycontin substitute was addressed by the trial court on the record.

Finally, defendant claims that the trial court failed to make findings concerning the PSI's assumption "that [she] was lying when she said that she was allergic to Methadone." Aplt. Br. at 30 (citing R. 77:17, 19-20; Addendum E). However, in fact, the trial court implicitly accepted defendant's contention that she was allergic to methadone when it stated, "Let's not offset the methadone." (R. 77:17; Addendum E). *See* Point III.B. *supra*. Although it is true that "[s]tatements concerning the court's view of the defendant and the case in general . . . do not fully meet the requirements of section 77-18-1(6)(a)," *Jaegar*, 1999 UT 1, ¶ 45, the trial court's statement here was not "general" but rather specifically addressed defendant's claim, indicating its acceptance of defendant's argument and its determination that whether defendant was able to take methadone "[was] [ir]relevant to the issue of sentencing." *Id.* at ¶ 44.⁴

Consequently, defendant's claim on this basis also fails.

⁴To the extent this Court determines the trial court's finding on this matter is insufficient, "the proper remedy is to remand [the] case to the trial court with instructions that it expressly resolve [the defendant's] objections in full compliance with section 77-18-1(60(a))." *State v. Jaeger*, 1999 UT 1, ¶ 45, 973 P.2d 404.

CONCLUSION

Based on the foregoing, the State asks this Court to affirm the trial court's restitution order. If this Court concludes that additional findings concerning the PSI's accuracy are required, this Court should remand the matter to the trial court for that limited purpose.

RESPECTFULLY SUBMITTED 25 January 2002.

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CERTIFICATE OF MAILING

I certify that on 25 January 2002, I caused to be delivered four accurate copies of this **BRIEF OF APPELLEE** to Patrick W. Corum, Joan C. Watt, and Ralph W. Dellapiana, Salt Lake Legal Defender Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, attorneys for appellant.

Karen A. Klucznik

Addenda

Addendum A

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law

PART 2

SENTENCING

76-3-201. Definitions — Sentences or combination of sentences allowed — Civil penalties — Restitution — Hearing.

- (1) As used in this section:
 - (a) "Conviction" includes a:
 - (i) judgment of guilt; and
 - (ii) plea of guilty.
 - (b) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.
 - (c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.
 - (d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including the accrual of interest from the time of sentencing, insured damages, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Subsection (4)(c).
 - (e)
 - (i) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.
 - (ii) "Victim" does not include any coparticipant in the defendant's criminal activities.
- (2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:
 - (a) to pay a fine;
 - (b) to removal or disqualification from public or private office;
 - (c) to probation unless otherwise specifically provided by law;
 - (d) to imprisonment;
 - (e) to life imprisonment;
 - (f) on or after April 27, 1992, to life in prison without parole; or
 - (g) to death.
- (3)
 - (a) This chapter does not deprive a court of authority conferred by law to:
 - (i) forfeit property;
 - (ii) dissolve a corporation;
 - (iii) suspend or cancel a license;
 - (iv) permit removal of a person from office;
 - (v) cite for contempt; or
 - (vi) impose any other civil penalty.
 - (b) A civil penalty may be included in a sentence.

- (4) (a) (i) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this subsection, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement. For purposes of restitution, a victim has the meaning as defined in Subsection (1)(e).
- (ii) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (4)(c) and (4)(d).
- (iii) If the court finds the defendant owes restitution, the clerk of the court shall enter an order of complete restitution as defined in Subsection (8)(b) on the civil judgment docket and provide notice of the order to the parties.
- (iv) The order is considered a legal judgment enforceable under the Utah Rules of Civil Procedure, and the person in whose favor the restitution order is entered may seek enforcement of the restitution order in accordance with the Utah Rules of Civil Procedure. In addition, the Department of Corrections may, on behalf of the person in whose favor the restitution order is entered, enforce the restitution order as judgment creditor under the Utah Rules of Civil Procedure.
- (v) If the defendant fails to obey a court order for payment of restitution and the victim or department elects to pursue collection of the order by civil process, the victim shall be entitled to recover reasonable attorney's fees.
- (vi) A judgment ordering restitution constitutes a lien when recorded in a judgment docket and shall have the same effect and is subject to the same rules as a judgment for money in a civil action. Interest shall accrue on the amount ordered from the time of sentencing.
- (vii) The Department of Corrections shall make rules permitting the restitution payments to be credited to principal first and the remainder of payments credited to interest in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.
- (b) (i) If a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition.
- (ii) In determining whether restitution is appropriate, the court shall consider the criteria in Subsection (4)(c).
- (c) In determining restitution, the court shall determine complete restitution and court-ordered restitution.
- (i) Complete restitution means the restitution necessary to compensate a victim for all losses caused by the defendant.
- (ii) Court-ordered restitution means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing.
- (iii) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (8).

- (d) (i) If the court determines that restitution is appropriate or inappropriate under this subsection, the court shall make the reasons for the decision a part of the court record.
 - (ii) In any civil action brought by a victim to enforce the judgment, the defendant shall be entitled to offset any amounts that have been paid as part of court-ordered restitution to the victim.
 - (iii) A judgment ordering restitution constitutes a lien when recorded in a judgment docket and shall have the same effect and is subject to the same rules as a judgment for money in a civil action. Interest shall accrue on the amount ordered from the time of sentencing.
 - (iv) The Department of Corrections shall make rules permitting the restitution payments to be credited to principal first and the remainder of payments credited to interest in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.
 - (e) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall at the time of sentencing allow the defendant a full hearing on the issue.
- (5) (a) In addition to any other sentence the court may impose, the court shall order the defendant to pay restitution of governmental transportation expenses if the defendant was:
- (i) transported pursuant to court order from one county to another within the state at governmental expense to resolve pending criminal charges;
 - (ii) charged with a felony or a class A, B, or C misdemeanor; and
 - (iii) convicted of a crime.
- (b) The court may not order the defendant to pay restitution of governmental transportation expenses if any of the following apply:
- (i) the defendant is charged with an infraction or on a subsequent failure to appear a warrant is issued for an infraction; or
 - (ii) the defendant was not transported pursuant to a court order.
- (c) (i) Restitution of governmental transportation expenses under Subsection (5)(a)(i) shall be calculated according to the following schedule:
- (A) \$75 for up to 100 miles a defendant is transported;
 - (B) \$125 for 100 up to 200 miles a defendant is transported;
- and
- (C) \$250 for 200 miles or more a defendant is transported.
- (ii) The schedule of restitution under Subsection (5)(c)(i) applies to each defendant transported regardless of the number of defendants actually transported in a single trip.
- (6) (a) If a statute under which the defendant was convicted mandates that one of three stated minimum terms shall be imposed, the court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.
- (b) Prior to or at the time of sentencing, either party may submit a statement identifying circumstances in aggravation or mitigation or presenting additional facts. If the statement is in writing, it shall be filed with the court and served on the opposing party at least four days prior to the time set for sentencing.
- (c) In determining whether there are circumstances that justify imposition of the highest or lowest term, the court may consider the record in

the case, the probation officer's report, other reports, including reports received under Section 76-3-404, statements in aggravation or mitigation submitted by the prosecution or the defendant, and any further evidence introduced at the sentencing hearing.

(d) The court shall set forth on the record the facts supporting and reasons for imposing the upper or lower term.

(e) In determining a just sentence, the court shall consider sentencing guidelines regarding aggravating and mitigating circumstances promulgated by the Sentencing Commission.

(7) If during the commission of a crime described as child kidnaping, rape of a child, object rape of a child, sodomy upon a child, or sexual abuse of a child, the defendant causes substantial bodily injury to the child, and if the charge is set forth in the information or indictment and admitted by the defendant, or found true by a judge or jury at trial, the defendant shall be sentenced to the highest minimum term in state prison. This subsection takes precedence over any conflicting provision of law.

(8) (a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense, that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; the cost of necessary physical and occupational therapy and rehabilitation; and the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim; and

(iii) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsection (8)(b) and:

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines make restitution inappropriate.

(d) The court may decline to make an order or may defer entering an order of restitution if the court determines that the complication and prolongation of the sentencing process, as a result of considering an order

of restitution under this subsection, substantially outweighs the need to provide restitution to the victim.

History: C. 1953, 76-3-201, enacted by L. 1973, ch. 196, § 76-3-201; 1979, ch. 69, § 1; 1981, ch. 59, § 1; 1983, ch. 85, § 1; 1983, ch. 88, § 3; 1984, ch. 18, § 1; 1986, ch. 156, § 1; 1987, ch. 107, § 1; 1990, ch. 81, § 1; 1992, ch. 142, § 1; 1993, ch. 17, § 1; 1994, ch. 13, § 19; 1995, ch. 111, § 1; 1995, ch. 117, § 1; 1995, ch. 301, § 1; 1995, ch. 337, § 1; 1995 (1st S.S.), ch. 10, § 1; 1996, ch. 40, § 1; 1996, ch. 79, § 98; 1996, ch. 241, §§ 2, 3; 1998, ch. 149, § 1; 1999, ch. 270, § 15.

Amendment Notes. — The 1995 amendment by ch. 111, effective May 1, 1995, added “or for conduct for which the defendant has agreed to make restitution as part of a plea agreement” and made a related change in Subsection (4)(a)(i).

The 1995 amendment by ch. 117, effective May 1, 1995, inserted “the accrual of interest from the time of sentencing” in Subsection (1)(d), changed “person adjudged guilty” to “person convicted” in Subsection (2), and added Subsections (4)(a)(iii) and (4)(d)(iii).

The 1995 amendment by ch. 301, effective May 1, 1995, added “and as further defined in Subsection (4)(c)” at the end of Subsection (1)(d); rewrote Subsection (4) to revise the criteria and procedures for ordering restitution; added Subsection (8); and made several stylistic changes.

The 1995 amendment by ch. 337, effective April 29, 1996, added Subsection (2)(g), redesignated former Subsection (2)(g) as Subsection (2)(h), and deleted former Subsection (7)(c), requiring sentencing to the aggravated mandatory term in cases of substantial bodily injury to children during the commission of child kidnapping or various listed child sexual assaults.

The 1995 (1st S.S.) amendment, effective April 29, 1996, substituted “April 29, 1996” for “May 1, 1995” in Subsection (2)(g).

The 1996 amendment by ch. 40, effective April 29, 1996, deleted former Subsection (2)(g), which read: “on or after April 29, 1996, to imprisonment at not less than five years and which may be for life for an offense under Title 76, Chapter 5, Part 4, and Sections 76-5-301.1 and 76-5-302; or” and redesignated former Sub-

section (2)(h) as Subsection (2)(g); deleted former Subsection (7), relating to resentencing of a defendant subject to mandatory sentencing under Subsection (6); and added Subsection (7).

The 1996 amendment by ch. 79, effective April 29, 1996, in Subsection (2)(b) substituted “removal or disqualification from” for “removal from or disqualification of” and in Subsection (4)(a)(i) added “Section” before “77-37-2.”

The 1996 amendment by ch. 241, §§ 2 and 3, effective April 29, 1996, added Subsections (4)(a)(vii) and (4)(d)(iv).

The 1998 amendment, effective May 4, 1998, in Subsection (4)(a)(i) substituted “Subsection (1)(e)” for “Section 77-38-2” and deleted “and family member has the meaning as defined in Section 77-37-2” from the end and changed the style of the internal references in Subsections (5)(c)(i), (5)(c)(ii), and (8)(c).

The 1999 amendment, effective May 3, 1999, in Subsection (6)(e), substituted “aggravating and mitigating circumstances” for “aggravation and mitigation” and “Sentencing Commission” for “Commission on Criminal and Juvenile Justice” and made stylistic changes.

Compiler’s Notes. — Laws 1995, ch. 301, § 6 provides that the amendments in ch. 117 to Subsection (4)(a)(iii) shall merge into this section, as amended by ch. 301, as Subsection (4)(a)(vi).

Laws 1995, ch. 337 was effective May 1, 1995; however, § 76-3-201.3 postponed the amendment of this section by ch. 337 until April 29, 1996.

Cross-References. — Commission on Criminal and Juvenile Justice, § 63-25a-101 et seq.

Division of Finance, § 63A-3-101 et seq.

Removal of officers, § 77-6-1 et seq.

Restitution as condition of probation, § 77-18-1.

Sentence, judgment and commitment, Rule 22, R.Crim.P.

Special release from city or county jail, purposes, conditions and limitations, § 77-19-3 et seq.

Uniform misdemeanor fine/bail schedule, Code of Judicial Administration, Appx. C.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.

Aggravating factors.

— Bodily injury to victim.

— Severity of offense.

— Sufficient.

Arrest record.

— Effect on sentence.

Credit for pretrial detention.

Discretion of court.

Effect of noncompliance.

Informal procedure.

77-18-1. Suspension of sentence — Pleas held in abeyance — Probation — Supervision — Presentence investigation — Standards — Confidentiality — Terms and conditions — Restitution — Termination, revocation, modification, or extension — Hearings — Electronic monitoring.

(1) On a plea of guilty or no contest entered by a defendant in conjunction with a plea in abeyance agreement, the court may hold the plea in abeyance as provided in Title 77, Chapter 2a, Pleas in Abeyance, and under the terms of the plea in abeyance agreement.

(2) (a) On a plea of guilty, guilty and mentally ill, no contest, or conviction of any crime or offense, the court may suspend the imposition or execution of sentence and place the defendant on probation. The court may place the defendant:

(i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;

(ii) on probation with an agency of local government or with a private organization; or

(iii) on bench probation under the jurisdiction of the sentencing court.

(b) (i) The legal custody of all probationers under the supervision of the department is with the department.

(ii) The legal custody of all probationers under the jurisdiction of the sentencing court is vested as ordered by the court.

(iii) The court has continuing jurisdiction over all probationers.

(3) (a) The department shall establish supervision and presentence investigation standards for all individuals referred to the department. These standards shall be based on:

(i) the type of offense;

(ii) the demand for services;

(iii) the availability of agency resources;

(iv) the public safety; and

(v) other criteria established by the department to determine what level of services shall be provided.

(b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and the Board of Pardons and Parole on an annual basis for review and comment prior to adoption by the department.

(c) The Judicial Council and the department shall establish procedures to implement the supervision and investigation standards.

(d) The Judicial Council and the department shall annually consider modifications to the standards based upon criteria in Subsection (3)(a) and other criteria as they consider appropriate.

(e) The Judicial Council and the department shall annually prepare an impact report and submit it to the appropriate legislative appropriations subcommittee.

(4) Notwithstanding other provisions of law, the department is not required to supervise the probation of persons convicted of class B or C misdemeanors or infractions or to conduct presentence investigation reports on class C misdemeanors or infractions. However, the department may supervise the probation of class B misdemeanants in accordance with department standards.

- (5) (a) Prior to the imposition of any sentence, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the department or information from other sources about the defendant.
- (b) The presentence investigation report shall include a victim impact statement describing the effect of the crime on the victim and the victim's family. The victim impact statement shall:
- (i) identify the victim of the offense;
 - (ii) include a specific statement of the recommended amount of complete restitution as defined in Subsection 76-3-201(4), accompanied by a recommendation from the department regarding the payment of court-ordered restitution as defined in Subsection 76-3-201(4) by the defendant;
 - (iii) identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
 - (iv) describe any change in the victim's personal welfare or familial relationships as a result of the offense;
 - (v) identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and
 - (vi) contain any other information related to the impact of the offense upon the victim or the victim's family that is relevant to the trial court's sentencing determination.
- (c) The presentence investigation report shall include a specific statement of pecuniary damages, accompanied by a recommendation from the department regarding the payment of restitution with interest by the defendant in accordance with Subsection 76-3-201(4).
- (d) The contents of the presentence investigation report, including any diagnostic evaluation report ordered by the court under Section 76-3-404, are protected and are not available except by court order for purposes of sentencing as provided by rule of the Judicial Council or for use by the department.
- (6) (a) The department shall provide the presentence investigation report to the defendant's attorney, or the defendant if not represented by counsel, the prosecutor, and the court for review, three working days prior to sentencing. Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge, and the judge may grant an additional ten working days to resolve the alleged inaccuracies of the report with the department. If after ten working days the inaccuracies cannot be resolved, the court shall make a determination of relevance and accuracy on the record.
- (b) If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.
- (7) At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant.

(8) While on probation, and as a condition of probation, the court may require that the defendant:

- (a) perform any or all of the following:
 - (i) pay, in one or several sums, any fine imposed at the time of being placed on probation;
 - (ii) pay amounts required under Title 77, Chapter 32a, Defense Costs;
 - (iii) provide for the support of others for whose support he is legally liable;
 - (iv) participate in available treatment programs;
 - (v) serve a period of time, not to exceed one year, in a county jail designated by the department, after considering any recommendation by the court as to which jail the court finds most appropriate;
 - (vi) serve a term of home confinement, which may include the use of electronic monitoring;
 - (vii) participate in compensatory service restitution programs, including the compensatory service program provided in Section 78-11-20.7;
 - (viii) pay for the costs of investigation, probation, and treatment services;
 - (ix) make restitution or reparation to the victim or victims with interest in accordance with Subsection 76-3-201(4); and
 - (x) comply with other terms and conditions the court considers appropriate; and
- (b) if convicted on or after May 5, 1997:
 - (i) complete high school classwork and obtain a high school graduation diploma, a GED certificate, or a vocational certificate at the defendant's own expense if the defendant has not received the diploma, GED certificate, or vocational certificate prior to being placed on probation; or
 - (ii) provide documentation of the inability to obtain one of the items listed in Subsection (8)(b)(i) because of:
 - (A) a diagnosed learning disability; or
 - (B) other justified cause.

(9) The department shall collect and disburse the account receivable as defined by Section 76-3-201.1, with interest and any other costs assessed under Section 64-13-21 during:

- (a) the parole period and any extension of that period in accordance with Subsection 77-27-6(4); and
- (b) the probation period in cases for which the court orders supervised probation and any extension of that period by the department in accordance with Subsection 77-18-1(10).

- (10) (a) (i) Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions.
- (ii) (A) If, upon expiration or termination of the probation period under Subsection (10)(a)(i), there remains an unpaid balance upon the account receivable as defined in Section 76-3-201.1, the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable.

(B) In accordance with Section 77-18-6, the court shall record in the registry of civil judgments any unpaid balance not already recorded and immediately transfer responsibility to collect the account to the Office of State Debt Collection.

(iii) Upon motion of the Office of State Debt Collection, prosecutor, victim, or upon its own motion, the court may require the defendant to show cause why his failure to pay should not be treated as contempt of court.

(b) (i) The department shall notify the sentencing court, the Office of State Debt Collection, and the prosecuting attorney in writing in advance in all cases when termination of supervised probation will occur by law.

(ii) The notification shall include a probation progress report and complete report of details on outstanding accounts receivable.

(11) (a) (i) Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation.

(ii) Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.

(b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court.

(12) (a) (i) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.

(ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

(b) (i) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified.

(ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended.

(c) (i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing.

(ii) The defendant shall show good cause for a continuance.

(iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent.

(iv) The order shall also inform the defendant of a right to present evidence.

(d) (i) At the hearing, the defendant shall admit or deny the allegations of the affidavit.

(ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations.

(iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders.

(iv) The defendant may call witnesses, appear and speak in his own behalf, and present evidence.

(e) (i) After the hearing the court shall make findings of fact.

(ii) Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew.

(iii) If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.

(13) Restitution imposed under this chapter and interest accruing in accordance with Subsection 76-3-201(4) is considered a debt for willful and malicious injury for purposes of exceptions listed to discharge in bankruptcy as provided in Title 11 U.S.C.A. Sec. 523, 1985.

(14) The court may order the defendant to commit himself to the custody of the Division of Mental Health for treatment at the Utah State Hospital as a condition of probation or stay of sentence, only after the superintendent of the Utah State Hospital or his designee has certified to the court that:

(a) the defendant is appropriate for and can benefit from treatment at the state hospital;

(b) treatment space at the hospital is available for the defendant; and

(c) persons described in Subsection 62A-12-209(2)(g) are receiving priority for treatment over the defendants described in this Subsection (14).

(15) Presentence investigation reports, including presentence diagnostic evaluations, are classified protected in accordance with Title 63, Chapter 2, Government Records Access and Management Act. Notwithstanding Sections 63-2-403 and 63-2-404, the State Records Committee may not order the disclosure of a presentence investigation report. Except for disclosure at the time of sentencing pursuant to this section, the department may disclose the presentence investigation only when:

(a) ordered by the court pursuant to Subsection 63-2-202(7);

(b) requested by a law enforcement agency or other agency approved by the department for purposes of supervision, confinement, and treatment of the offender;

(c) requested by the Board of Pardons and Parole;

(d) requested by the subject of the presentence investigation report or the subject's authorized representative; or

(e) requested by the victim of the crime discussed in the presentence investigation report or the victim's authorized representative, provided that the disclosure to the victim shall include only information relating to statements or materials provided by the victim, to the circumstances of the crime including statements by the defendant, or to the impact of the crime on the victim or the victim's household.

(16) (a) The court shall consider home confinement as a condition of probation under the supervision of the department, except as provided in Sections 76-3-406 and 76-5-406.5.

(b) The department shall establish procedures and standards for home confinement, including electronic monitoring, for all individuals referred to the department in accordance with Subsection (17).

17) (a) If the court places the defendant on probation under this section, it may order the defendant to participate in home confinement through the use of electronic monitoring as described in this section until further order of the court.

(b) The electronic monitoring shall alert the department and the appropriate law enforcement unit of the defendant's whereabouts.

(c) The electronic monitoring device shall be used under conditions which require:

(i) the defendant to wear an electronic monitoring device at all times; and

(ii) that a device be placed in the home of the defendant, so that the defendant's compliance with the court's order may be monitored.

(d) If a court orders a defendant to participate in home confinement through electronic monitoring as a condition of probation under this section, it shall:

(i) place the defendant on probation under the supervision of the Department of Corrections;

(ii) order the department to place an electronic monitoring device on the defendant and install electronic monitoring equipment in the residence of the defendant; and

(iii) order the defendant to pay the costs associated with home confinement to the department or the program provider.

(e) The department shall pay the costs of home confinement through electronic monitoring only for those persons who have been determined to be indigent by the court.

(f) The department may provide the electronic monitoring described in this section either directly or by contract with a private provider.

Addendum B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
EN EL TRIBUNAL JUDICIAL DEL TERCER DISTRITO
CONDADO DE SALT LAKE, ESTADO DE UTAH

THE STATE OF UTAH,
EL ESTADO DE UTAH,

Plaintiff,
El Demandante,

versus
contra

Dyan Lynn Martinez
Defendant
El Acusado

: STATEMENT OF DEFENDANT,
CERTIFICATE OF COUNSEL AND ORDER
EL DOCUMENTO DECLARATORIO DEL
ACUSADO, LOS CERTIFICADOS DE LOS
ABOGADOS Y LA ORDEN DEL JUEZ

: CASE NO. 991921564 FS
Nº DE CASO

COMES NOW Dyan Martinez, the defendant in this case, and hereby
acknowledges and certifies the following:

COMPARECE _____, el acusado en este caso, y por este medio
reconoce y certifica lo siguiente:

I am entering a plea of guilty to the following crime(s):
Me declaro culpable del siguiente delito(s):

	<u>CRIME & STATUTORY PROVISION</u>	<u>DEGREE</u>	<u>PUNISHMENT</u> Min/Max and/or Minimum Mandatory
	<u>EL DELITO Y LA DISPOSICION ESTABLECIDA POR LA LEY</u>	<u>GRADO</u>	<u>EL CASTIGO</u> Mínimo, máximo y/o mínimo obligatorio
A.	<u>'Workers' Compensation Insurance Fraud</u>	<u>2d degree felony</u>	<u>1-15 yrs prison + \$2-10,000 fine + 35%</u>
B.	<u>Attempted Distribution of Methamphetamine</u>	<u>3d degree felony</u>	<u>0-5 yrs prison + \$0-5000 fine</u>
C.			
D.	<u>Terms: Counts III & IV will be dismissed; State will recommend Probationary Sentence (with perhaps minimal jail term)</u>		

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

He recibido una copia del Documento Acusatorio, la he leído, y entiendo la naturaleza y los elementos del delito(s) por el cual me declaro culpable.

The elements of the crime(s) of which I am charged are as follows:

Los elementos del delito(s) del cual se me acusa son los siguientes:

On 2/27/96 → 3/4/99, Defendant intentionally obtained workers compensation benefits under false pretenses; and on or about 9/8/98 attempted to offer or agree to distribute methamphetamine

My conduct and the conduct of other persons for which I am criminally liable that constitutes the elements of the crime(s) charged is as follows:

Mi conducta y la conducta de otras personas por la cual soy penalmente responsable, y que constituye los elementos del delito(s) imputado, es la siguiente:

From about 2/27/96 → 3/4/99, I Juan Martinez obtained workers compensation benefits by working under an assumed name while receiving benefits for being unemployable; and on or about 9/8/98 I attempted to distribute methamphetamine by asking another person if he wanted to obtain some from me.

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

Doy entrada a esta declaración(es) voluntariamente y con el conocimiento y el entendimiento de la siguiente información:

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.

1. Sé que tengo el derecho a ser representado por un abogado, y si no tengo los fondos para contratar uno, el tribunal me asignará un abogado sin cobrarme. Reconozco que una condición de mi pena puede ser que se me requiera pagar una cantidad, determinada por el tribunal, para reembolsar el costo del abogado, si es que se me asignara uno.

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:

2. (No he) (he) renunciado al derecho a tener un abogado. Si he renunciado al derecho a tener un abogado, lo he hecho a sabiendas, inteligente y voluntariamente por las siguientes razones:

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 case and other proceedings, and the consequences of my plea of guilty.

3. Si he renunciado al derecho a tener un abogado, he leído este documento y entiendo la naturaleza y los elementos de los cargos, mis derechos en este caso y otros actos procesales, y las consecuencias de mi declaración de culpabilidad.

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

4. Si no he renunciado al derecho a tener un abogado, mi abogado es _____, y he tenido la oportunidad de hablar con mi abogado en detalle sobre este documento, mis derechos y las consecuencias de mi declaración de culpabilidad.

5. I know that I have a right to a speedy trial in open court by an impartial jury and that I am giving up that right by pleading guilty.

5. Sé que tengo el derecho a tener un juicio público sin demora ante un jurado imparcial, y que al declararme culpable renuncio a ese derecho.

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 in my behalf. I understand that I am giving up these rights if I plead guilty.

6. Sé que si deseo tener un juicio, tengo el derecho a carear y repreguntar a los testigos en mi contra, o hacer que mi abogado les repregunte. También sé que tengo el derecho a obligar a mis testigo(s), por medio de un citatorio costado por el Estado, a testificar a mi favor en el tribunal. Entiendo que al declararme culpable renuncio a estos derechos.

7. I know that I have a right to testify in my own behalf; but if I choose not to do so, I cannot be compelled to testify or give evidence against myself; and no adverse inferences will be drawn against me if I do not testify. I understand that I am giving up these rights if I plead guilty.

7. Sé que tengo el derecho a testificar a mi favor, pero si elijo no hacerlo, no se me puede obligar a testificar o a dar pruebas en mi contra, y ninguna inferencia desfavorable se sacará en mi contra si no testifico. Entiendo que al declararme culpable renuncio a estos derechos.

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.

8. Sé que si deseo disputar la acusación, sólo necesito declararme inocente y el asunto se fijará para un juicio. En el juicio el Estado de Utah tendrá la obligación de probar cada elemento de la acusación sin que quepa duda razonable. Si el juicio es ante un jurado, el veredicto tiene que ser unánime.

9. I understand the fact that as a defendant I enjoy the right of a presumption of innocence. I understand that I am presumed innocent until the State proves my guilt beyond a reasonable doubt, if this case is tried to a jury, or until I plead guilty. I understand that I give up the right to the presumption of innocence if I plead guilty.

9. Entiendo que como acusado gozo del derecho a la presunción de inocencia. Entiendo que se supone que soy inocente hasta que el Estado pruebe en un juicio ante un jurado que soy culpable sin que quepa duda razonable, o hasta que me declare culpable si decido no tener un juicio. Entiendo que renuncio al derecho a la presunción de inocencia si me declaro culpable.

10. I know that under the Constitution of Utah, if I were tried and convicted by a jury or by the Judge, 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. I understand that I am giving up these rights if I plead guilty.

10. Sé que bajo la Constitución de Utah, si el jurado o el Juez me enjuiciara y condenara, tendría el derecho a apelar mi condena y pena en la Corte de Apelaciones de Utah o, donde se permita, en la Corte Suprema de Utah, y si no tuviera los fondos para pagar por los gastos de tal apelación, esos gastos los pagaría el Estado. Entiendo que renuncio a estos derechos si me declaro culpable.

11. I know the maximum sentence that may be imposed for each offense to which I plead guilty. I know that by pleading guilty to an offense that carries a minimum mandatory sentence, I will be subjecting myself to serving a minimum mandatory sentence for that offense. I know that the sentence may be consecutive and may be for a prison term, fine, or both. I know that in addition to a fine, an eighty-five percent (85%) surcharge will be imposed. I also know that I may be ordered by the Court to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed, if any, as a result of this plea agreement.

11. Sé cual es la pena máxima que se puede imponer por cada delito por el cual me declaro culpable. Sé que al declararme culpable de un delito que lleva una pena mínima obligatoria, me estaré sometiendo a cumplir esa pena mínima obligatoria por ese delito. Sé que las penas pueden ser consecutivas y pueden consistir en una condena penitenciaria, una multa, o ambas. Sé que además de una multa, se impondrá un recargo de ochenta y cinco por ciento (85%). También sé que el Juez me puede ordenar indemnizar a cualquier víctima(s) de mis delitos, incluyendo cualquier restitución que se deba en los cargos retirados como resultado de este convenio declaratorio, si éstos existieran.

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

12. Sé que el encarcelamiento puede ser por periodos consecutivos, o la multa en una cantidad adicional, si me declaro culpable de más de un delito. También sé que si estoy bajo libertad condicional probatoria ("probation"), o libertad preparatoria ("parole"), o esperando la imposición de la pena por otro delito del cual he sido condenado o por el cual me he declarado culpable, mi declaración de culpabilidad en la presente acción puede resultar en que se me impongan penas consecutivas.

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

13. Sé y entiendo que al declararme culpable renuncio a los derechos legales y constitucionales enumerados en los párrafos anteriores. También sé que al dar entrada a tal declaración(es), admito que he cometido la conducta que se alega y que soy culpable del delito(s) por el cual se da entrada a mi declaración(es).

14. My plea(s) of guilty (is) (is not) the result of a plea bargain between myself and the prosecuting attorney. The promises, duties, and provisions of this plea bargain, if any, are fully contained in this statement.

14. Mi declaración de culpabilidad (es) (no es) el resultado de un convenio declaratorio entre el abogado acusador y yo. Las promesas, obligaciones y estipulaciones de este convenio declaratorio, si existen algunas, se encuentran en su totalidad en este documento.

15. I know and understand that any motion to withdraw my plea(s) of guilty must be for good cause, in writing, and must be filed within thirty (30) days after entry of my guilty plea.

15. Sé y entiendo que cualquier petición para retirar mi declaración(es) de culpabilidad ha de interponerse dentro de treinta (30) días después de dar entrada a dicha declaración(es), y esto ha de ser por escrito, y debe existir causa justificada.

16. 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, is 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. Sé que el Juez no tiene que regirse por cualquier concesión de cargo o de pena, o recomendación de libertad condicional probatoria o pena suspendida, incluyendo una reducción de los cargos para la imposición de la pena hecha o solicitada por el abogado defensor o el abogado acusador. También sé que el Juez tampoco tiene que regirse por cualquier opinión que me expresen en cuanto a lo que ellos creen que pueda hacer el Juez.

17. No threats, coercion, or unlawful influence of any kind has been made to induce me to plead guilty, and no promises except those contained in this statement have been made to me.

17. No se me ha amenazado, coaccionado, o influenciado ilegalmente para inducirme a declararme culpable, y no se me ha hecho ninguna promesa excepto las contenidas en este documento.

18. 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. He leído este documento, o mi abogado me lo ha leído, y entiendo sus estipulaciones. Sé que puedo cambiar o tachar cualquier cosa contenida en este documento. No deseo hacer ningún cambio porque todas las afirmaciones son correctas.

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

19. Estoy satisfecho con el asesoramiento y la ayuda de mi abogado.

20. I am 42 years of age; I have attended school through the GED grade; and I can read and understand the English language. If I do not understand English, 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. Tengo _____ años de edad, he asistido a la escuela hasta el _____ grado y puedo leer y entender español. Si no entiendo inglés, se me ha proporcionado un intérprete. No estaba bajo la influencia de ninguna droga, medicamento o bebida alcohólica que pudiera perjudicar mi criterio cuando se tomó la decisión de dar entrada a la declaración(es). Actualmente no estoy bajo la influencia de ninguna droga, medicamento o bebida alcohólica que perjudique mi criterio.

21. 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.

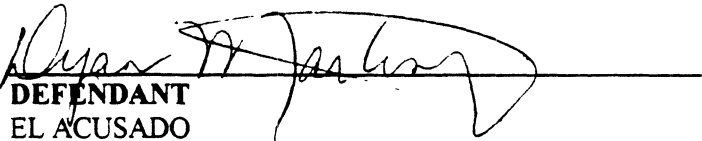
21. Creo estar en sano juicio, con capacidad mental de entender los actos procesales y las consecuencias de mi declaración, y libre de cualquier enfermedad mental, defecto o impedimento que me previniera dar entrada a mi declaración a sabiendas, inteligente y voluntariamente.

22. Other:

22. Añadido:

Dated this 5th day of September, ~~1999~~ 2000

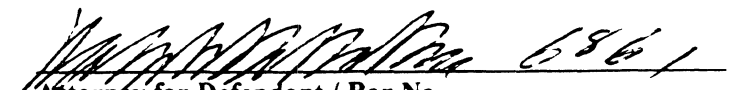
Fechado el día _____ del mes de _____ de 1999.


DEFENDANT
EL ACUSADO

CERTIFICATE OF DEFENSE ATTORNEY
EL CERTIFICADO DEL ABOGADO DEFENSOR

I certify that I am the attorney for _____, 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.

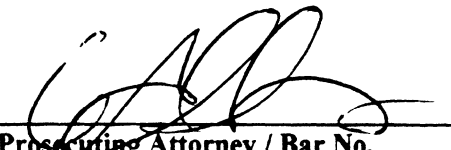
Certifico que soy el abogado de _____, el antedicho acusado(a), y sé que él (ella) ha leído el documento, o que se lo he leído yo, y lo he discutido con él (ella), y creo que entiende el significado del contenido en su totalidad, y creo que está mental y físicamente competente. A mi leal saber y entender, después de una investigación apropiada, los elementos del delito(s) y la sinopsis factual de la conducta delictiva del acusado están estipulados correctamente, y éstos, junto con las otras proclamaciones y afirmaciones hechas por el acusado en el affidavit anterior, son certeros y verdaderos.


Attorney for Defendant / Bar No. 6861
El Abogado del Acusado / N° de Abogacía

**CERTIFICATE OF PROSECUTING ATTORNEY
EL CERTIFICADO DEL ABOGADO ACUSADOR**

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

Certifico que soy el abogado del Estado de Utah en la causa en contra de _____, el acusado. He revisado este Documento Declaratorio del Acusado y encuentro que la base factual de la conducta delictiva del acusado que constituye el delito es verdadera y correcta. No se le ha ofrecido al acusado ningún incentivo inapropiado, amenaza o coacción para alentar una declaración de culpabilidad. Las negociaciones declaratorias se encuentran en su totalidad en el Documento y en el Convenio Declaratorio, o como complemento en las actas del tribunal. Existe motivo fundado para creer que la prueba respaldaría la condena del acusado por el delito(s) ante el cual se da entrada a la declaración(es), y la aceptación de esta declaración(es) beneficiaría a la ciudadanía.

 (5713)

Prosecuting Attorney / Bar No.
El Abogado Acusador / N° de Abogacía


**ORDER
LA ORDEN DEL JUEZ**

Based on the facts set forth in the foregoing Statement and the certification of the defendant and counsel, the Court witnesses the signatures and finds the defendant's plea(s) of guilty is freely and voluntarily made, and it is so ordered that the defendant's plea(s) of guilty to the charge(s) set forth in the Statement be accepted and entered.

Basado en los hechos presentados en el Documento anterior y la certificación del acusado y de los abogados, el Juez atestigua las firmas y determina que la declaración(es) de culpabilidad del acusado se hace libre y voluntariamente, y así se ordena que la declaración(es) de culpabilidad del acusado por el cargo(s) expuesto en el Documento sea aceptada y asentada.

Dated this 5 day of Sept, 1999.

Fechado el día _____ de _____ de 1999.



DISTRICT COURT JUDGE
El JUEZ DEL TRIBUNAL DEL DISTRITO

Addendum C

11/6
PRIVATE

FILED DIST
Third

STATE OF UTAH
ADULT PROBATION AND PAROLE *By*
REGION III OFFICE
36 West Fremont Avenue
Salt Lake City, Utah 84101
Telephone: 239-2103

Deputy P.C.

PRESENTENCE INVESTIGATION REPORT

Date Due: 10-18-00
Sentencing Date: 10-23-00

JUDGE ROGER A. LIVINGSTON THIRD DISTRICT COURT

SALT LAKE SALT LAKE UTAH
(CITY) (COUNTY)

C. TODD ORGILL CONTRACT INVESTIGATOR

NAME: MARTINEZ, DYAN LYNN
ALIASES: DYAN STEWARD; DYAN
PIEMME
ADDRESS: 1410 W. 600 SO.
SLC, UT 84104

BIRTHDATE: 08-18-58 **AGE:** 42

BIRTHPLACE: REDDING, CA
LEGAL RESIDENCE: UTAH
MARITAL STATUS: MARRIED

COURT CASE NO: 991921564

OBSCIS NO: 141737

CO-DEFENDANTS: NONE

OFFENSE: WORKERS COMPENSATION FRAUD.
F2; ATT. POSS C/S W/ INTENT TO DIST., F3

PLEA: GUILTY **DATE:** 09-05-00

PROS. ATTORNEY: CLARK HARMS

DEF. ATTORNEY: RALPH DELLAPIANA

PLEA BARGAIN:

The defendant was originally charged with Count One, Workers Compensation Insurance Fraud, Second Degree Felony; Count Two, Unlawful Possession of a Controlled Substance with Intent to Distribute, Second Degree Felony; Count Three, Obtaining a Controlled Substance by Fraud, Third Degree Felony; and Count Four, Obtaining a Controlled Substance by Fraud, Third Degree Felony. Through plea negotiations, Count Two was amended to Attempted Possession of a Controlled Substance with Intent to Distribute, Third Degree Felony, and Counts Three and Four were dismissed. The defendant pled guilty to Count One as charged, and the amended Count Two charge.

SOURCE OF INFORMATION:

Court dockets and District Attorney file

OFFICIAL VERSION OF OFFENSE:

On November 10, 1991, the defendant, Dyan Lynn Martinez ("Martinez"), was employed by Olsen's Greenhouse Gardens, an insured of the Worker's Compensation Fund of Utah ("WCF"). On November 11, 1991, defendant Martinez reported to her employer she had injured her back the previous day (November 10, 1991), while moving a bench in the course of her employment. On November 21, 1991, a claim was filed with WCF in the form of an Employers Initial Report of Injury, which claim resulted in the payment by WCF of medical and lost wage benefits totaling \$123,463.98, including three surgeries and lost wages compensation after each surgery.

On March 21, 1994, defendant Martinez represented to the Utah Industrial Commission she was permanently totally disabled (PTD) as a result of the November 10, 1991 industrial injury. As part of the Compensation Agreement, WCF agreed that medical expenses resulting from the industrial injury would continue to be paid by WCF. Because of this agreement, WCF received three bills from United Drugs from August 4, 1997 to March 4, 1999, listing prescriptions over an extended period of time (six months to a year for each separate bill). The three bills totaled \$16,152.41. A majority of the bill (\$14,647.00) was for a single prescription drug, Oxycontin, an opiate pain reliever, which is also a schedule II controlled substance.

WCF Investigator Larry McDonald discovered that while defendant Martinez was receiving \$14,647.00 in WCF prescription benefits for the prescribed Oxycontin, she was gainfully employed from February 27, 1996 to February of 1997, and from February, 1998 to September 29, 1998 by Salt Lake Community College (South Campus) Food Services, under the assumed

OFFICIAL VERSION OF OFFENSE: (continued)

name of Deborah Lee Hardy, and an assumed Social Security Number of 560-13-1654 (which had legitimately been issued to Linda Elain Berchard). During her terms of employment with Salt Lake Community College, defendant Martinez worked between 25 to 30 hours per week in the cafeteria. Defendant Martinez's supervisor, Kevin Doney, told WCF Investigator McDonald that he observed no difficulty for defendant Martinez aka Hardy performing her assigned duties which included lifting 20 pound buckets of ice at least twice a day, four to six hours of standing as a cashier, and cooking. Defendant Martinez obtained Utah Identification Card #159923646 in the name of Deborah Lee Hardy. Defendant Martinez omitted all reference to her gainful employment in her communications with Dr. Dall and WCF claims adjuster Lorena Ericson.

On September 22, 1997, defendant Martinez represented to Dr. Joel T. Dall, M.D. and WCF that because of continuing back pain, she was unable to function without continuous pain medication. Dr. Dall prescribed Oxycontin. From September 22, 1997 through March 4, 1999, defendant Martinez represented to Dr. Dall and WCF that her need for Oxycontin increased from 10 gm to 120 mg a day.

From September 22, 1997 through December 31, 1997, Dr. Dall intended to prescribe defendant Martinez a total of 246 Oxycontin 10 mg pills. However, through artifice, scheme and fraud, defendant Martinez was able to obtain actual prescriptions for 450 Oxycontin 10mg pills.

From January 1, 1998 through December 31, 1998, Dr. Dall intended to prescribe defendant Martinez a total of 2160 Oxycontin 10 mg pills. However, through artifice, scheme and fraud defendant Martinez was able to obtain actual prescriptions for 3600 Oxycontin 10mg pills, and was able to obtain actual medications totaling 4410 Oxycontin 10mg pills. On November 17, 1998, Dr. Dall confronted defendant Martinez about her obtaining more Oxycontin than he intended, and defendant Martinez misrepresented to him that she was really only getting 180 tablets. Contrary to Dr. Dall's instructions, defendant Martinez continued to obtain amounts of Oxycontin far exceeding the amount Dr. Dall intended.

Special Agent Montefusco found two prescription bottles of Oxycontin, in the name of Martinez, in the possession of Sundowners during the arrests and round-up of the Salt Lake City Chapter of the Sundowner Motorcycle Club in January and February of 1999.

On March 1, 1999, Dr. Dall told WCF investigator McDonald that if he had known that defendant Martinez was gainfully employed under an alias, or was receiving an average of approximately 360 Oxycontin 10mg pills per month, he would not have prescribed Oxycontin for

OFFICIAL VERSION OF OFFENSE: (continued)

the defendant.

WCF reports that had they known of defendant Martinez's gainful employment under the assumed name, her medical and prescription benefits would have been terminated, and no Oxycontin would have been prescribed by Dr. Dall or paid for by WCF. The Oxycontin obtained by defendant Martinez by means of false representations and omissions cost WCF \$14,647.00.

On or about September 8, 1998, Richard (Blue) Knudsen and Defendant Dyan Lynn Martinez engaged in conversation at, 17 South 800 West, Salt Lake City, Utah, during which Knudsen stated to the Defendant, "Do you want dope? I'll bring you some dope tomorrow. I'll be able to get you at least half... I could get at least a half gram...." The Defendant replied, "all right."

On or about October 8, 1998, in a telephone conversation with Richard (Blue) Knudsen, over telephone number (801) 363-4470, subscribed to 17 South 800 West, Salt lake City, Utah, the Defendant stated, that she just got home and was calling to tell Knudsen that she is "pretty in pink." The Defendant asks Knudsen "either way you can swing it?" to which Knudsen replies in the affirmative. The Defendant then states, "That would be great because I need to try and come up with some cash for Cork, cause he needs some help on that, okay?" Knudsen again replied in the affirmative.

The results of an investigation of over one year conducted by the FBI and the Salt Lake City Police Department which revealed that both the Defendant and Knudsen uses, possess and distribute the Schedule II controlled substance, Oxycontin.

Based upon FBI Special Agent Montefusco's experience, training and belief, as well as upon the results of this investigation, it was his opinion that the phrase "pretty in pink" specifically refers to the possession of 10mg tablet of Oxycontin, and that the subject of the defendant's telephone calls from September 8, 1998, to October 8, 1998 is and was the distribution of Oxycontin (Oxycodone), a Schedule II controlled substance.

During the arrests of members of the Sundowners Motorcycle Club and their associates in late January and early February of 1999, two of the persons arrested were in possession of prescription bottles of Oxycontin, which had been prescribed to, and obtained by the Defendant.

SOURCE OF INFORMATION:

District Attorney file and Probable Cause Statement

DEFENDANT'S VERSION OF OFFENSE:

"Jan 28, 1999 FBI arrested me for arranging to distribute along with Salt Lake City Sundowners. They stopped me and Mike Steward when we left the clubhouse. They wouldn't explain why other than to say it was part of a bigger investigation. I was bailed out. Then arrested 24 hrs later when I went to pick up my truck at the FBI Bldg. I was reincarcerated on the same charge that I was currently on bail on. They said they weren't interested in me but certain members of the club. They asked me to testify against them in court and they would let me go. I said no I had no knowledge of what they were talking about. So they threatened to file charges of securities fraud, comp. fraud and anything else they could dig up, and they did. The fraud charges stemmed from '96 when my first husband was alive. He was very sick and we couldn't afford to pay for his necessary medication so after exhausting all avenues of possible assistance I attempted to work part time under an alias but was fired for excessive absence. My first husband was a Sundowner and died Jan 6, 1999 23 days before the arrests. I believe I made a bad choice in trying to work but at the time my concern was for my husband of 21 yrs marriage. I didn't want to see him die, unfortunately he did and everything has been a nightmare since.

/s/ Dyan Martinez "09-15-00"

SOURCE OF INFORMATION:

The defendant

CO-DEFENDANT STATUS:

There are no co-defendants in the current matter.

SOURCE OF INFORMATION:

District Attorney file

VICTIM IMPACT STATEMENT:

Larry C. McDonald, Investigator for the Worker's Compensation Fund of Utah, stated since the defendant served several months in a federal prison and was placed on Supervised Release through the United States Probation Office, she has continued to try and obtain Oxycontin. Mr. McDonald clarified that since the current case came to fruition officials of WCF stated they would not pay for any more Oxycontin in the future due to her extended abuse of the narcotic. Despite this agreement, Mr. McDonald stated the defendant recently returned to Joel T. Dall, M.D., and received yet another prescription for Oxycontin. Further, he noted Ms. Martinez has repeatedly called the adjuster at WCF and indicated the criminal drug charges involving Oxycontin had been dismissed, and as a result WCF should be obligated to pay for the prescription medication. He noted the defendant's attorney, Ralph Dellapiana, also sent a fax to WCF in early October consisting of Court dockets from the current case. In the Court dockets, Mr. McDonald stated Mr. Dellapiana circled only Counts Three and Four of the current case highlighting the fact these charges had been dismissed, and as a result WCF should pay for the Oxycontin.

Mr. McDonald noted that an alternative to the Oxycontin is Methadone. He noted the defendant claims she cannot take Methadone because she develops a rash. Mr. McDonald surmised that her developing a rash is not the real reason she does not want Methadone. Instead, he surmised she does not want Methadone because it has no street value, in contrast to the Oxycontin.

He noted the large amounts of Oxycontin obtained by the defendant in the past far exceeded one persons dosage. He noted the only time such a large amount of Oxycontin is prescribed is when the patient is a terminal cancer patient that is due to expire soon. Mr. McDonald stated he has no doubts the defendant was distributing the Oxycontin to her associates.

Also of concern to Mr. McDonald was the fact Dr. Dall continues to prescribe the defendant Oxycontin. He noted it is evident from Dr. Dall's own notes that he is accepting the defendant's claim all drug charges pertaining to Oxycontin has been dismissed despite his ongoing contact with WCF and the fact Ms. Martinez served several months in a federal prison.

Mr. McDonald recommended the defendant "serve some time," and be required to enter a drug rehabilitation program. He noted Ms. Martinez is abusing a system that is intended to protect injured workers. Mr. McDonald stated this premise makes her behavior even more "despicable."

SOURCE OF INFORMATION:

Contact with Larry McDonald of the WCF

RESTITUTION:

<u>COURT CASE #</u>	<u>COUNT #</u>	<u>VICTIM</u>	<u>AMOUNT</u>
991921564	1	Worker's Compensation Fund of Utah	\$17,690.16

Comments:

The above figure includes \$14,377.56 financial loss from fraud, \$2,340.00 investigative costs, \$642.00 in surveillance, \$180.00 administrative costs, \$135.00 clerical costs, and \$15.60 copying costs. The \$14,377.56 is the cost difference between the Oxycontin Ms. Martinez received over an 18 month time period and Methadone. Per Mr. McDonald, the Methadone is substantially cheaper to prescribe, and is considered a substitute medication for the Oxycontin.

SOURCE OF INFORMATION:

Contact with Larry McDonald of the WCF

CUSTODY STATUS:

The defendant was booked into the Salt Lake County Jail on May 11, 1999, and was released on December 17, 1999. Therefore, as of the October 23, 2000, sentencing date, Ms. Martinez has served 220 days in jail.

SOURCE OF INFORMATION:

Documentation provided by the Salt Lake County Jail

JUVENILE RECORD:

The defendant does not possess a history of Juvenile Court referrals in the State of Utah.

PAGE 8
PRESENTENCE INVESTIGATION REPORT
MARTINEZ, DYAN LYNN

SOURCE OF INFORMATION:

Utah State Juvenile Court records

ADULT RECORD:

<u>DATE</u>	<u>AGENCY</u>	<u>OFFENSE</u>	<u>DISPOSITION</u>
01-28-99	FBI - SLC, UT	Unlawful Dist. C/S	None Listed
02-03-99	FBI - SLC, UT	WAS Dist. / Offer / Arrange to Dist. Counterfeit C/S, Felony	Dismissed (991902495)
05-11-99	U.S. Marshall's Service	WAS Insurance Fraud; WAS Poss. C/S, Second Degree Felony; WAS Poss. C/S w/ Intent to Dist., Third Degree Felony	CURRENT OFFENSE
		WAS Poss. Contraband by Prisoner, Third Degree Felony;	Convicted of Poss. Contraband by Prisoner, Class A Misd., 90 days jail (991700477, Second District Court, Farmington. UT)
		WAS Agg. Assault, Third Degree Felony	Dismissed (991908657)

Comments:

Although not listed on the rap sheets received by this investigator, the defendant was convicted of Fraudulent Concealment of Employment, Felony (Social Security Fraud) in United States District Court. She was ordered to serve 12 months in a Federal Prison, and placed on 36 months supervised release through the United States Probation Office.

SOURCE OF INFORMATION:

Salt Lake County Sheriff's Office rap sheet (SO# 234496), Utah Criminal History record (SID# 512753), Court dockets, the defendant, and contact with Eric Anderson of the United States Probation Office

PENDING CASES:

It appears the defendant has no pending cases.

SOURCE OF INFORMATION:

Court dockets

PROBATION/PAROLE HISTORY:

On April 24, 2000, the defendant was granted supervised release through the United States Probation Office after pleading guilty to Fraudulent Conceal of Employment, Felony (Social Security Fraud) in United States District Court. Although the specific conditions of her parole agreement is not known, Eric Anderson of the United States Probation Office in Ogden, Utah noted the defendant is "doing well." He indicated the defendant has completed mental health treatment through ISAT, is making restitution payments as required, and has tested negative on all urinalysis tests. Mr. Anderson stated he plans to be present for the sentencing scheduled on October 23, 2000.

SOURCE OF INFORMATION:

Contact with Eric Anderson of the United States Probation Office (1-801-625-5680, ext. 77)

BACKGROUND AND PRESENT LIVING SITUATION:

•Dyan Lynn Martinez was born in Redding, California on August 18, 1958. The defendant, and her two older sisters, were raised in a middle economic environment by both natural parents. Reportedly, the defendant's father was employed as an operating engineer, while her mother was a teacher. Although the defendant described her childhood as "good," she noted her father was physically abusive and an "asshole." Due to the continued problems she had with her father, she left home at age 13 and lived with friends.. Thereafter, she never had contact with any of her family again. At age 22, the defendant left California and moved to Utah where she has

BACKGROUND AND PRESENT LIVING SITUATION: (continued)

continued to reside. The defendant has not had any contact with her parents or siblings in nearly 30 years.

Currently, the defendant is residing with her husband, Mike Steward, in Salt Lake City, Utah.

SOURCE OF INFORMATION:

The defendant

MARITAL HISTORY:

On August 12, 1978, the defendant married Mike Martinez in California. Mr. Martinez died on January 6, 1999 of diabetes. Two children, currently ages 21 and 17, were born to this relationship.

On August 17, 1999, the defendant married Mike Steward in Utah. They have remained married. No children have been born to this relationship.

SOURCE OF INFORMATION:

The defendant

EDUCATION:

The defendant withdrew from El Capitan High School, located in San Diego, California, during the tenth grade. She withdrew from school prematurely because she was "working full-time." Per the defendant, she obtained her GED while in a Carsell, Texas Federal Prison earlier this year. At an unspecified time in the past, the defendant attended the Grossmont Junior College in LaMesa, California for three semesters. Ms. Martinez entered Grossmont after lying about obtaining her high school diploma. She did not express a desire to obtain additional schooling in the future.

SOURCE OF INFORMATION:

The defendant

GANG AFFILIATIONS:

The defendant is not affiliated with any local gangs.

SOURCE OF INFORMATION:

Salt Lake City Gang Area Project records

PHYSICAL HEALTH:

In 1991, the defendant injured her back while working. Specifically, the defendant suffered herniated discs. Since the injury, the defendant has had four back surgeries. Currently, the defendant is not ingesting any prescription medication. Ms. Martinez indicated she has been prohibited from ingesting certain types of medication due to the nature of the current charges.

SOURCE OF INFORMATION:

The defendant

MENTAL HEALTH:

The defendant described her current emotional health as "good." She acknowledged that after being released from federal prison in April of the current year she went to ISAT for an evaluation. After completing the evaluation, Ms. Martinez stated ISAT officials required she attend four mental health sessions. Reportedly, she initiated the sessions on September 19, 2000. She has never taken medication for emotional or psychiatric problems. Ms. Martinez has never considered suicide, nor has she been physically or sexually abused in the past.

SOURCE OF INFORMATION:

The defendant

ALCOHOL HISTORY:

The defendant initially began using alcohol as a teenager. She denied ever abusing the substance, and noted she has never receiving counseling for alcohol abuse. Currently, the defendant rarely consumes alcohol. Reportedly, she has had approximately three beers since April of the current year. Ms. Martinez did not express a desire to participate in alcohol abuse

ALCOHOL HISTORY: (continued)

counseling at the current time. She denied being under the influence of alcohol at any time during the commitment of the current offense.

SOURCE OF INFORMATION:

The defendant

DRUG HISTORY:

The defendant used marijuana occasionally as a teenager. She denied using any other substances, and has never received any therapy that addresses drug issues. Ms. Martinez did not express a desire to participate in drug abuse counseling at the current time. She denied being under the influence of any illicit drugs during the course of the present offense.

SOURCE OF INFORMATION:

The defendant

EMPLOYMENT HISTORY:

The defendant's Social Security Number is 560-11-1456

<u>EMPLOYER</u>	<u>WAGE</u>	<u>TITLE</u>	<u>START/END</u>	<u>REASON FOR LEAVING</u>
Olson's Greenhouse	Unspecified	Grower	Nine years ago	Unspecified

Comments:

Reportedly, Olson's Greenhouse was the place of employment where she injured her back. Ms. Martinez has not worked in nearly nine years.

SOURCE OF INFORMATION:

The defendant

FINANCIAL SITUATION:

The defendant receives \$239 per month from Social Security, and \$1,040 from Worker's Compensation Fund of Utah. Her husband's gross month income is approximately \$1,080. Their monthly expenses, which include utilities (\$300), food (\$400), rent (\$264), insurance (\$54), restitution (\$100), and storage (\$108), amounts to \$1,226. In 1988, the defendant filed bankruptcy. Her only listed asset is a 1973 Ford truck worth \$500. She has no assets.

SOURCE OF INFORMATION:

The defendant

MILITARY RECORD:

The defendant has never been a member of the United States Armed Forces.

SOURCE OF INFORMATION:

The defendant

COLLATERAL CONTACTS:

This investigator was unable to establish contact with the assigned prosecutor, Clark Harms, prior to the date of dictation.

EVALUATIVE SUMMARY:

Now appearing before the court for sentencing on the offense of Workers Compensation Insurance Fraud, Second Degree Felony, and Attempted Possession of a Controlled Substance with Intent to Distribute, Third Degree Felony is Dyan Lynn Martinez, a 42 year old female. Utah State Juvenile Court records failed to reveal any previous referrals. As an adult, the defendant has been arrested two prior times and been convicted of one felony and one misdemeanor. Ms. Martinez served several months in a Texas federal prison for the felony conviction, and has been on Supervised Release through the United States Probation Office since April of the current year. She has no pending cases at the current time.

For an extended period of time the defendant abused a system established to assist individuals hurt while on the job. Not only did she continue receiving payments from the Worker's

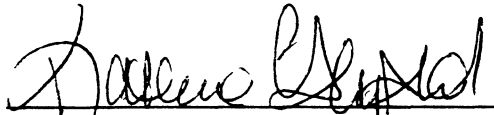
EVALUATIVE SUMMARY: (continued)

Compensation Fund of Utah while working at the Salt Lake Community College, but she also was able to distribute Oxycontin to her Sundowner associates by altering the prescription to obtain large quantities of the drug. Not only is this conduct completely inappropriate and deserved of jail time, but there have also been allegations she has recently contacted WCF on an incessant basis claiming they should pay for the drug because all charges pertaining to the Oxycontin have been dismissed. Obviously, these claims are simply untrue as evidenced by the defendant's guilty plea to Count Two of the current case.

Although the defendant denied having a substance abuse problem, this agency believes that based upon the nature of the current offense, and the allegations she has continued to try and obtain Oxycontin, it appears a substance abuse evaluation is warranted. If determined appropriate as a result of the evaluation, the defendant should be required to participate in drug treatment.

**REPORT PREPARED BY,
C. TODD ORGILL, CONTRACT INVESTIGATOR**

APPROVED,

A handwritten signature in black ink, appearing to read "Katherine Shepherd", is written over a horizontal line.

**KATHERINE SHEPHERD,
ASSISTANT REGIONAL ADMINISTRATOR
COURT SERVICES UNIT**

AGENCY RECOMMENDATION

It is the recommendation of the Staff of Court Services, Adult Probation and Parole, the defendant be granted supervised probation under the following conditions:

1. The defendant serve 120 days in the Salt Lake County Jail with no credit for time served;
2. The defendant pay a \$400 fine, plus an 85% surcharge;
3. The defendant pay a recoupment fee for the services of her Court appointed attorney;
4. The defendant pay \$17,690.16 restitution to Worker's Compensation Fund of Utah;
5. The defendant obtain a substance abuse evaluation administered through an appropriate agency, and comply with any treatment measures recommended thereafter;
6. The defendant abide by all guidelines of the Worker's Compensation Fund of Utah;
7. The defendant abide by all conditions of her Supervised Release Agreement through the United States Probation Office;
8. The defendant ingest medications as prescribed by a licensed physician. These medications should be approved by her assigned probation officer;
9. The defendant use no alcohol or illicit drugs while on probation and not frequent establishments where alcohol is the chief item of order;
10. The defendant submit her person, auto, place of residence or any property under her control to search for the detection of alcohol or drugs by the probation officer, and submit to drug testing at the request of the probation officer;
11. The defendant not frequent places where drugs are used or sold, not associate with persons known to use non-prescribed controlled substances, and not obtain prescriptions for controlled substances without prior knowledge of the probation officer.

**REPORT PREPARED BY,
C. TODD ORGILL, CONTRACT INVESTIGATOR**

APPROVED,



**KATHERINE SHEPHERD,
ASSISTANT REGIONAL ADMINISTRATOR
COURT SERVICES UNIT**

FORM 1
CRIMINAL HISTORY ASSESSMENT

These are guidelines only. They do not create any right or expectation on behalf of the offender.

PRIOR FELONY CONVICTIONS
(SEPARATE CRIMINAL CONVICTIONS)

- 0 NONE
2 ONE
 4 TWO 1
 6 THREE
 8 MORE THAN THREE

PRIOR MISDEMEANOR CONVICTIONS
(SEPARATE CRIMINAL CONVICTIONS)
(INCLUDES DUI & RECKLESS)
(EXCLUDES OTHER TRAFFIC)

- 0 NONE
1 ONE
 2 TWO TO FOUR 1
 3 FIVE TO SEVEN
 4 MORE THAN SEVEN

PRIOR JUVENILE ADJUDICATIONS
(ADJUDICATIONS FOR OFFENSES THAT
WOULD HAVE BEEN FELONIES IF
COMMITTED BY AND ADULT)(THREE
MISDEMEANOR ADJUDICATIONS EQUAL
ONE FELONY ADJUDICATION)

- 0 NONE**
 1 ONE
 2 TWO TO FOUR 0
 3 MORE THAN FOUR
 4 SECURE PLACEMENT

SUPERVISION HISTORY
(ADULT OR JUVENILE)

- 0 NO PRIOR SUPERVISION**
 1 PRIOR SUPERVISION
 2 PRIOR RESIDENTIAL PLACEMENT
 3 PRIOR REVOCATION
 4 ACT OCCURRED WHILE UNDER CURRENT
SUPERVISION OR PRE-TRIAL RELEASE

SUPERVISION RISK
(ADULT OR JUVENILE)

- 0 NO ESCAPES OR ABSCONDINGS**
 1 FAILURE TO REPORT (ACTIVE OFFENSE) OR
OUTSTANDING WARRANT
 2 ABSCONDED FROM SUPERVISION
 3 ABSCONDED FROM RESIDENTIAL PROGRAM
 4 ESCAPED FROM CONFINEMENT

VIOLENCE HISTORY
(PRIOR JUVENILE OR ADULT CONVICTION
FOR AN OFFENSE WHICH INCLUDES USE
OF A WEAPON, PHYSICAL FORCE,
THREAT OF FORCE, OR SEXUAL ABUSE)

- 0 NONE**
 1 MISDEMEANOR
 2 3rd DEGREE FELONY
 3 2nd DEGREE FELONY
 4 1st DEGREE FELONY

WEAPONS USE IN CURRENT OFFENSE
(ONLY WHEN CURRENT CONVICTION
DOES NOT REFLECT WEAPON USE OR
WHEN STATUTORY ENHANCEMENT IS
NOT INVOLVED)

- 1 CONSTRUCTIVE POSSESSION
 2 ACTUAL POSSESSION
 3 DISPLAYED OR BRANDISHED
 4 ACTUAL USE
 6 INJURY CAUSED

TOTAL PLACEMENT SCORE: 3

CRIMINAL HISTORY RO	
V	16 +
IV	12 - 15
III	8 - 11
II	4 - 7
I	0 - 3
PLEASE CIRCLE THE CORRECT CATEGORY	

CONSECUTIVE ENHANCEMENTS: 40% of the shorter sentence is to be added to the full length of the longer sentence.

CONCURRENT ENHANCEMENTS: 10% of the shorter sentence is to be added to the full length of the longer sentence.

Matrix timeframes refer to imprisonment only. Refer to the categorization of offenses. Capitol offenses are not considered within the context of the sentencing guidelines.

	ACTIVE CONVICTIONS	CRIME CATEGORY	TIME
MOST SERIOUS	<u>Worker's Compensation Insurance Fraud, F2</u>	<u>H</u>	
NEXT MOST SERIOUS	<u>Att. Poss. C/S w/ Intent to Dist., F3</u>	<u>I</u>	
OTHER	<u></u>	<u></u>	
OTHER	<u></u>	<u></u>	
OFFENDER NAME: <u>Dyan Lynn Martinez</u> DATE SCORED: <u>10-19-00</u> SCORER'S NAME: <u>C. Todd Orgill</u>			

OFFENDER NAME: Dyan Lynn Martinez DATE SCORED: 10-19-00 SCORER'S NAME: C. Todd Orgill

CRIME CATEGORY

		CRIME CATEGORY								
		A	B	C	D	E	F	G	H	I
		1st Degree Murder	2nd Degree Death	1st Degree Person	3rd Degree Death	1st Degree Other	2nd Degree Person	3rd Degree Person	2nd Degree Other	3rd Degree Other
CRIMINAL JUSTICE TRAINING	V	24 YRS	8 YRS	10 YRS	48 MOS	84 MOS	60 MOS	36 MOS	30 MOS	20 MO
	IV	22 YRS	7 YRS	9 YRS	42 MOS	78 MOS	48 MOS	30 MOS	24 MOS	
	III	20 YRS	6 YRS	8 YRS	36 MOS	72 MOS	36 MOS	Intermediate Sanctions		
	II	18 YRS	5 YRS	7 YRS	24 MOS			20 MOS	18 MOS	10 MO
	I	16 YRS	4 YRS			60 MOS	24 MOS	12 MOS	16 MOS	9 MOS

Imprisonment

Regular Probation

Misde-meanors

Form 4
AGGRAVATING AND MITIGATING CIRCUMSTANCES
(Use Form 3 also for Mandatory Imprisonment Sex Offender Sentences)

Circle the numbers of circumstances that may justify departure from the guidelines. Reference the page number of the presentence investigation where the judge can find supportive information.

This list of aggravating and mitigating factors is non-exhaustive and illustrative only.

Aggravating Circumstances

Only use aggravating circumstances if they are not an element of the offense.

PSI Page #

- 1. Established instances of repetitive criminal conduct.
- 2. Multiple documented incidents of violence not resulting in conviction. (Requires court approved stipulation)
- 3. Offender presents a serious threat of violent behavior.
- 4. Victim was particularly vulnerable.
- 5. Injury to person or property loss was unusually extensive.
- 6. Offense was characterized by extreme cruelty or depravity.
- 7. There were multiple charges or victims.
- 8. Offender's attitude is not conducive to supervision in a less restrictive setting.
- 9. Offender continued criminal activity subsequent to arrest.
- 10. Sex Offenses: Correction's formal assessment procedures classify as an high risk offender.
- 11. Offender was in position of authority over victim(s).
- 12. Other (specify) _____

Mitigating Circumstances

- 1. Offender's criminal conduct neither caused nor threatened serious harm.
- 2. Offender acted under strong provocation.
- 3. There were substantial grounds to excuse or justify criminal behavior, though failing to establish a defense.
- 4. Offender is young.
- 5. Offender assisted law enforcement in the resolution of other crimes.
- 6. Restitution would be severely compromised by incarceration.
- 7. Offender's attitude suggests amenability to supervision.
- 8. Offender has exceptionally good employment and/or family relationships.
- 9. Imprisonment would entail excessive hardship on offender or dependents.
- 10. Offender has extended period of arrest-free street time.
- 11. Offender was less active participant in the crime.
- 12. All offenses were from a single criminal episode.
- 13. Offender has completed or has nearly completed payment of restitution.
- 14. Other (Specify) _____

PLEASE COMPLETE THIS SECTION

DAYS OF JAIL CREDIT 220 days

GUIDELINE RECOMMENDATION Probation

AP&P RECOMMENDATIONS Probation

REASON FOR DEPARTURE _____

OFFENDER NAME: Dyan Lynn Martinez DATE SCORED: 10-19-00 SCORER'S NAME: C. Todd Orgill

Addendum D

S: Dyan returns for followup. It has been about 14 months since I last saw her. Unfortunately for her, she was taken to jail and though she states that charges were dropped, they kept her in jail for about one year. She just got out a couple of weeks ago.

During her time, she was managed with Flexeril, Naprosyn and occasional Percocet.

She presents at this time wishing to go back onto the long-acting narcotics. The Oxycontin was very helpful but as indicated earlier, that was part of the reason she was jailed. We started her on Methadone and she had a severe skin rash to that which did not clear as we had hoped with the steroids.

After discussing our options, therefore, we have decided to go with MS Contin and we will begin at 60 mg po b.i.d. based on the fact that that was her Oxycontin dose. We will want to see her back in two weeks to assess her response and tolerance of the medication.

P: At the same time, she needs to be on an anti-inflammatory. She has done well with Relafen in the past but with the development of the Cox 2 anti-inflammatories that are safer and less expensive, I think it is best to go with a trial of one of those. I have, therefore, given her samples of each and when she comes back in two weeks, we will assess which one was best and best tolerated.

Lastly, I should say that she does attest today that she is taking no other medications or illicit drugs.

ADDENDUM: I received a call from Lorena at Workers Compensation. They are denying payment for her oxycontin stating that because of the ongoing investigations regarding her use of oxycontin they do not feel that it is necessary treatment. She does not dispute the fact that the patient needs treatment and that our only treatments available (having exhausted physical therapy surgery, injection therapy, etc.) is medications. She does not dispute the fact that short-acting narcotic medications pose a much greater risk for abuse but does not think that medications should be approved pending the ongoing litigation. The fact that the methadone was approved without hesitation but under the same circumstances does concern me.

This patient has a suspected history of abuse of medications though I am unaware of any direct proof. Of course, as indicated above, litigation is pending and until that time all allegations are, in my mind, just allegations. I feel that we are at greater risk for her abusing drugs if we withhold them than if we provide something that has a very low abuse potential, such as MS Contin. Certainly if she knows of a way to abuse the morphine and MS Contin, that would change my opinion but I am unaware of any at this point in time.

The bottom line is that Workers Compensation will not pay for medications. They are okay with the pool therapy. I feel it my medical responsibility to provide appropriate treatment regardless of allegations until those allegations are proven. If, indeed, she has been abusing my prescriptions in terms of forging, selling, etc., then that would be a felony and I would provide no further medication but would agree with the recommendation for drug detox.

JTD:dw

Martinez, Dyan L.

47561

5-31-2000 Joel T. Dall, M.D.

Dyan returns for follow-up. As I think I have indicated in my previous charts, narcotic medications have been disallowed for this lady. I have met with the FBI agent who indicates that there is enough evidence against her that prescribing controlled substances for this lady is not appropriate. This was explained to the patient who was very understanding. She states that she had "role call" yesterday and has a preliminary hearing on her drug related charges on the 29th of June. Until things are cleared up one way or the other, she understands my inability to prescribe controlled substances.

She reports that the Vioxx and Celebrex were both helpful, Celebrex more so. Lorena has indicated that she will pay for nonnarcotic medications and so I have written a prescription for that today. Also, she is to continue with her pool therapy.

We will make no other changes at this time and I will see her back in one month.

JTD/ga

Addendum E

ORIGINAL

FILED DISTRICT COURT
Third Judicial District

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
SALT LAKE DEPARTMENT

JAN 08 2000
SALT LAKE COUNTY

Deputy Clerk

***.

THE STATE OF UTAH,)

Plaintiff,)

vs.)

Case No. 991921564FS

DYAN LYNN MARTINEZ,)

Defendant.)

BEFORE THE HONORABLE ROGER A. LIVINGSTON

Monday, November 6, 2000

9:34 A.M.

TRANSCRIPT OF VIDEO RECORDING OF SENTENCING

FILED

FEB 21 2001

COURT OF APPEALS

20001063-CA

Transcribed By:
PAM SMITH, CSR, RMR
3454 Creek Road
Salt Lake City, Utah 84121
(801) 942-6430

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APPEARANCE OF COUNSEL:

For the Plaintiff:

MR. CLARK HARMS
Assistant Salt Lake County
District Attorney
231 East 400 South
Salt Lake City, Utah 84111

For the Defendant:

MR. RALPH W. DELLAPIANA
Salt Lake Legal Defender
Association
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

1 MONDAY, NOVEMBER 6, 2000, SALT LAKE CITY, UTAH
2 PROCEEDINGS.

3 THE BAILIFF: Call the Dyan Martinez case.

4 THE COURT: This is the time then set for
5 sentencing in the matter of State of Utah versus Dyan Lynn
6 Martinez. Looked at the -- this is two felony offenses, a
7 second degree felony, workers compensation fraud, and a third
8 degree felony, attempted possession with intent to
9 distribute.

10 Ms. Martinez' attorney, Mr. Dellapiana, is here
11 representing the accused in this case, and Mr. Clark Harms is
12 representing the State of Utah. Okay. Mr. Dellapiana.

13 MR. DELLAPIANA: Judge, a couple of primary
14 issues I have with the agency recommendation and one is the
15 request for additional jail time or jail time at this point.
16 There's several reasons I think the court should consider in
17 considering our request to stay any additional jail time. The
18 first is that Ms. Martinez' criminal history places her in
19 the level one category, the lowest category, which indicates
20 that she should be on a regular probation.

21 About a week and a half ago I spoke with Ed
22 McConkie, the executive director of the Utah Sentencing
23 Commission came to our office for a presentation about the
24 sentencing guidelines, and he was asked whether it was the
25 commission's view if somebody in the regular probation

1 category was contemplated to be doing jail time, and his
2 statement was that, no, they assumed that somebody in the
3 regular probation category would be on straight street
4 supervision.

5 Certainly it's within the court's discretion to
6 impose additional jail despite that but I think it's an
7 important consideration.

8 The second reason is that as part of the same code
9 of conduct that resulted in the Count I in this case, the
10 workers compensation case, she was also prosecuted for social
11 security fraud for working under a false name during this
12 same time. As a result of that charge Ms. Martinez was
13 sentenced to serve 12 months in federal prison which she did
14 complete. And that's -- so she knows what punishment is
15 about.

16 In our view the cases, although not exactly --
17 don't have the same exact elements are somewhat related and
18 -- and both the fact that she served a substantial amount of
19 time and knows what punishment -- that punishment follows
20 criminal conduct and because the charges are somewhat related
21 I think the court ought to take that into account.

22 She did some jail time in addition, another reason
23 -- in addition to the federal time she did some jail time
24 being held in State custody she wasn't given credit for in
25 the federal case. It's not a lot. It was -- according to her

1 federal probation officer, Eric Anderson, who's present, she
2 was in custody from April 1st of 1999 to April 25th of 2000.
3 And that's 12 months plus 24 days. Apparently in the federal
4 time they give you 12 months, you do 12 months. So it looks
5 like there was maybe 24 days that she did in State custody on
6 the state hold -- state detainer for this case that the
7 federal court's did not give her credit for. And that ought
8 to be taken into account.

9 Another reason that the court can probably
10 consider not imposing any additional jail is that she's
11 amenable -- she demonstrated that she's amenable to
12 supervision in her federal probation. She checks in
13 regularly. She's subject to random urinalysis which have all
14 been clean. She completed a mental health evaluation and
15 follow-up sessions. She's paying restitution in regard to the
16 social security count at the rate of a hundred dollars a
17 month on a regular basis.

18 THE COURT: How much was the fine for social
19 security?

20 MR. DELLAPIANA: \$1,248 I believe is the number
21 I have here. Scheduled to have those payments completed at
22 the rate she's paying by April of 2001.

23 Another reason that the court ought to consider
24 not imposing additional jail is that she's never been on a
25 supervised probation before. It's my view that prior to being

1 incarcerated a person ought to have a chance at supervised
2 probation when they're -- and that's of course related to the
3 regular probation argument I was making based on her criminal
4 history.

5 Another reason, I don't know that this is one of
6 the more important reasons or not but it is one of the
7 mitigating factors on the -- in the -- in the sentencing
8 guidelines and that's the effect on the family or dependents
9 of Ms. Martinez. She has a 17 year old daughter who's
10 pregnant. She's due to deliver in January. She's considered
11 high risk because of her age and because it's her first
12 pregnancy. Her father, Dyan's husband, is deceased. The
13 details of that are referred to in the presentence report.

14 She -- Dyan drives her daughter to child birth
15 classes and medical appointments and is presently buying her
16 groceries and contributing to her household to the extent of
17 about \$300 a month.

18 So those are reasons that the court ought to
19 consider not imposing jail. There's some -- two other areas
20 that I'd like to address. One is -- I'll describe as
21 corrections to the presentence report and the other is
22 restitution. I'm not sure if I want to go through -- I
23 probably should go through page by page the presentence
24 report but there's two -- there's two -- well, let's do one
25 first.

1 There's one major correction or clarification and
2 these the court needs to take notice of, and that's that --
3 we raised that last time we were here for sentencing. That
4 has to do with the allegation that Ms. Martinez and I as her
5 attorney have in some way recently been trying to commit
6 fraud upon the Worker's Compensation Fund. Those allegations
7 relate to a fax that I sent to Worker's Compensation Fund
8 adjustor and to Dr. Dall, Workers Compensation doctor, that
9 had been treating Ms. Martinez for several years now in which
10 I indicated that the charges relating to distribution of
11 prescription medications were dismissed.

12 And for reasons which I don't know the -- the --
13 maybe it was because merely -- the mere reliance on the
14 docket of the court doesn't -- didn't provide enough clear
15 indication to a non-attorney, somebody who's not used to
16 dealing with those on a regular basis to where they could
17 understand that that's what happened. Certainly the Court's
18 -- the court's information is clear in that regard, the
19 amended information we pled to in the plea form, and because
20 of that it's -- I mean it's obvious that those assertions are
21 simply untrue in regard to Ms. Martinez and I.

22 THE COURT: How much do you believe restitution
23 is then, Mr. Dellapiana. 14,647?

24 MR. HARMS: Your Honor, I'll address that when I
25 talk about restitution. There were a number of questions you

1 asked last week I have the answers to.

2 THE COURT: Okay. Great.

3 MR. DELLAPIANA: Would you like me to address my
4 (inaudible) on restitution first?

5 THE COURT: Let's let Mr. Harms and if you
6 disagree with that -- (inaudible).

7 MR. HARMS: Your Honor, let me just limit my
8 comments right now to the restitution.

9 THE COURT: Okay. Great.

10 MR. HARMS: I spoke to Brent McDonald the
11 workers compensation fund and apparently up until 1995 the
12 law of the State of Utah was that once someone was determined
13 by the Industrial Commission to have been permanently fully
14 disabled that decision is irrevocable and cannot be reviewed.
15 In 1995 a person went to request petitions of the workers
16 compensation fund. The legislature changed that law.

17 Ms. Martinez was declared permanently, totally
18 disabled prior to 1995, prior to the date of the legislation.
19 Consequently the State of Utah is bound by the law as it was
20 in place at the time of her award and determination of
21 eligibility. The State of Utah is prevented from any
22 reconsideration of that eligibility and is prevented from any
23 reconsideration of that award.

24 Consequently, despite the fact that she was
25 working Workers Compensation Fund would have had to pay for

1 pain medicine. Had they known what they know they would have
2 prescribed a different prescription and the \$14,377.56 is the
3 rate of difference between what she was prescribed and what
4 they would have prescribed had they known the true facts. The
5 law would have required them to prescribe, however, some form
6 of medication.

7 THE COURT: Even though she was working?

8 MR. HARMS: Correct.

9 THE COURT: And what is it that they did not
10 know? That she was -- that the prescription Oxycontin was
11 being distributed to Sundowners?

12 MR. HARMS: They didn't know that. They didn't
13 know -- specifically they didn't know how many pills she was
14 obtaining compared to how many she was prescribed. That
15 amount and that specific fact would have caused them to
16 prescribe something else because of the very notion of the
17 discrepancy.

18 If I can approach, Your Honor, it's -- this is the
19 same chart we've used throughout this prosecution.

20 Those are the prescriptions each -- the shaded
21 area is the number of pills obtained. The bold line that goes
22 horizontally across the bottom quarter of that page at the --
23 about the 200 level, 180 level, that's the actual
24 prescription that she had authority to obtain and the rest of
25 the shaded area above that is the number of pills she

1 actually obtained.

2 Given that fact they would have prescribed her
3 something that was nonaddictive without really going into
4 whether not or not she was addicted or not, without going
5 into whether or not she was giving the pills to somebody else
6 or not, that fact alone would have caused them to prescribe a
7 lesser alternative medication as opposed to the Oxycontin.

8 THE COURT: Well, I'm just a little bit troubled
9 with the substituting one prescription for another. It seems
10 to me based on what you told me about her irrevocable
11 entitlement to prescription reimbursement payment through
12 workers compensation that her doctors prescribed 246 10
13 milligram pills. Through artifice, scheme and defraud she
14 obtained 450. Why isn't the restitution between the 246 and
15 450?

16 MR. HARMS: I think because workers compensation
17 looked at this as a case where they still would have been
18 prescribing something. They would not have prescribed
19 Oxycontin as the (inaudible) of abuse of that specific drug.
20 Consequently they would have prescribed this other drug.
21 That's just how they looked at it. So that's where that
22 number of restitution comes from. The rest of the
23 restitution, the difference between the 17690 and the 14377
24 are investigative costs, administrative costs, clerical and
25 copying costs involved in the investigation by workers comp

1 which I think are appropriate given her specific conviction
2 of workers compensation fraud.

3 THE COURT: What was your clients conduct that
4 allowed the tablets to go from the 246 to 450? Was it a
5 simple change in prescription or what was it?

6 MR. DELLAPIANA: Change in her prescription
7 based on her thirty day reviews and consultations with the
8 doctor who after discussing with her her course of treatment
9 prescribed the medications that she received.

10 THE COURT: What did she do just make a pen and
11 ink change to the prescription?

12 MR. DELLAPIANA: She didn't forge anything. She
13 didn't change anything.

14 THE COURT: What did she do?

15 MR. DELLAPIANA: These are our -- judge our
16 position is that all the medications she was prescribed were
17 prescribed by the doctor after consultation. The entry of her
18 plea was that she was --

19 THE COURT: What's the artifice, scheme and
20 fraud to then obtain these pills.

21 MR. DELLAPIANA: Well, the state is presenting
22 the charge in relation to the workers compensation fraud as
23 -- as a fraud to obtain medications. The -- that's not what
24 Ms. Martinez admitted in her plea. She -- she indicated that
25 she had misrepresented to the Workers Compensation Fund that

1 she was not employed when in fact she was employed using a
2 false name and receiving employment payments and salary at
3 the same time she was receiving Workers Compensation payments
4 due to -- alleging or based on the prior determination that
5 she was unable to work. She denies falsely obtaining
6 medications.

7 THE COURT: She used the assumed name?

8 MR. DELLAPIANA: Not for medications.

9 THE COURT: What was the assumed name for?

10 MR. DELLAPIANA: To --

11 THE COURT: To what?

12 MR. DELLAPIANA: To work under a -- to work and
13 receive -- make money at the same time she was --

14 THE COURT: You work. You don't use an assumed
15 name. Why do you have to use soft language to couch criminal
16 conduct? She's working off social security. What's she
17 doing? Why use an assumed name?

18 MS. MARTINEZ: When I was working?

19 THE COURT: Yes.

20 MS. MARTINEZ: So that I --

21 THE COURT: I'll play the stupid one. Okay, how
22 did the Oxycontin enter the Sundowners?

23 MR. DELLAPIANA: Judge there were two
24 bottles --

25 THE COURT: What -- how did -- I understand

1 that.

2 MR. DELLAPIANA: She spent time with the
3 Sundowners including in the --

4 THE COURT: It's hard for me to say this. She
5 obtained this prescription she wasn't using, distributed it
6 through her husband to her former husband to the Sundowners,
7 is that right?

8 MR. DELLAPIANA: That is not right.

9 THE COURT: Okay. How did it get there then?

10 MR. DELLAPIANA: She --

11 MS. MARTINEZ: I left the bottle there.

12 THE COURT: You what?

13 MS. MARTINEZ: When they arrested us I had my
14 prescription on me. And there was another bottle, an older
15 bottle that was empty that was in the club house that I left
16 there previously. And there was nothing illegal going on. I
17 mean, my husband was a member and I spent time down there. He
18 was a bar manager so we spent time down there.

19 THE COURT: Okay. What else do you have then?
20 What did you want to state say your bottom line figure, Mr.
21 Dellapiana? What do you believe is the restitution?

22 MR. DELLAPIANA: I want to hear the state's
23 figure if I could.

24 THE COURT: They're with the -- the State's
25 taking the position that the restitution is \$17,690 dollars,

1 is that right?

2 MR. HARMS: Yes, Your Honor.

3 MR. DELLAPIANA: All right, Judge. We're
4 opposed to imposition of any restitution. Let me state my
5 reasons. First, at least any of the proposed restitution.

6 First, the -- the salary, the overhead
7 investigation costs while I haven't seen any case law on
8 point I'm going to object to as being general overhead costs
9 that don't -- that don't produce any marginal additional cost
10 to the Workers Compensation fund. These are salaried
11 employees. They get paid either way. And that's -- the total
12 of that is \$2,982 dollars involving investigation and
13 surveillance expenses. We're opposed to any order relating to
14 that amount.

15 In relation to the \$14,377 that's described as
16 relating to the Oxycontin, first I'd note that charges
17 relating to the distribution of Oxycontin were dismissed. I
18 don't think restitution is therefore appropriate.

19 Second, the -- using that figure assumes that
20 she's not eligible for benefits for the payment of her
21 medications. As even the state has admitted she's guaranteed
22 to be eligible for medical benefits by state law and by the
23 terms of her settlement agreement. So imposing that figure
24 assumes that she was never eligible for benefits.

25 Now, the reason that she is eligible for benefits

1 is because they've been determined to be medically
2 appropriate. The -- in this -- there's two different points
3 in this. One, the formula of comparing Oxycontin to methadone
4 is based on the false premise that methadone would have
5 been --

6 THE COURT: Mr. Dellapiana, we're going to have
7 to step this up a little.

8 MR. DELLAPIANA: Want me to go faster?

9 THE COURT: Boy that would be great. Yeah, I've
10 got a huge calendar to do (inaudible) and we could have tried
11 this case quicker than I'm trying to sentence.

12 MR. DELLAPIANA: I doubt it, judge.

13 THE COURT: I've got to tell you, to describe
14 Ms. Martinez as sanction resistant would be a monumental
15 understatement. Let's focus just for a moment, there is some
16 deceit in all this that apparently Ms. Martinez wants to
17 acknowledge out of one side of her mouth but then not out of
18 the other.

19 The basis, frankly, for the restitution, Mr.
20 Dellapiana, is the statement of Dr. Dall who is, after all,
21 the person who writes the prescription, that had he known
22 that the defendant was gainfully employed under an alias or
23 was receiving an average of 360 Oxycontin pills per month he
24 would not have prescribed Oxycontin for the defendant.

25 Now it seems to me to be fairly elementary that

1 while she has a statutory right to have payment by workers
2 compensation funds for prescription benefits that does not
3 ipso facto mean she has the right to be deceitful, to provide
4 false information, to obtain medicine that she otherwise
5 would not have obtained had she not engaged in her fraudulent
6 misrepresentative activity.

7 So, the legal basis for the restitution is that
8 she should not have, would not have received Oxycontin at all
9 had she been forthright and had she been not engaging in her
10 fraudulent activities. The doctor tells me through the
11 (inaudible) investigator that he would not have made the
12 prescription at all. It is awfully disingenuous at this
13 point for her now to stand on the not withstanding the fact
14 that I'm deceitful and dishonest pay for it anyway. That's
15 not going to happen.

16 So you might be able to have the Court of Appeals
17 do that but I'm not going to do the overhead expense. This is
18 not on her time. I just want the dollar figure for her. The
19 out of pocket cost to workers compensation fund.

20 I've got to tell you this is so clear to me that
21 that's the right thing to do. There is a factual basis for
22 that. The doctor said he would not have prescribed the
23 medication had he known all the circumstances. She hid it.
24 The person who's being disingenuous and dishonest doesn't get
25 now to ram it all down our throats. Okay?

1 MR. DELLAPIANA: Okay, judge, but I need to
2 state for the record a couple of details.

3 THE COURT: Okay.

4 MR. DELLAPIANA: Including statements from Dr.
5 Dall. One of them is about methadone. The state is
6 calculating this number based on the assumption of methadone
7 which is a very low cost drug would have been prescribed.
8 And in the presentence report the presentence investigator
9 assumes that when Ms. Martinez said that she couldn't use
10 methadone that she was lying to him. And the only reason she
11 said that is because methadone has a lower street value and
12 she wanted to get something more expensive.

13 Here's what Dr. Joel Dall says. This is in a note
14 that's attached to the Workers Compensation Fund letter dated
15 May the 16th of this year wherein he says we started her on
16 methadone. She had a severe skin rash.

17 THE COURT: Let's not offset the methadone.
18 Let's just have her pay for the medication she never should
19 have obtained but for her lying, conniving, cheating
20 conduct. If you don't want to have an offset for what it
21 would have cost for methadone that's fine with me.

22 Doctor Dall says he never would have given the
23 prescription had he known the truth. Okay. So let's just
24 find out what was the dollar figure that Workers Compensation
25 paid for the Oxycontin. And I'm told that that is -- isn't

1 that the 14,000 dollar figure? I was wanting to deduct what
2 they would have been willing to prescribe. You told me not
3 to do that, so that's okay. Let's not do that.

4 MR. DELLAPIANA: The state can give you a
5 figure. I need to make a record and I'm not finished.

6 THE COURT: Okay. Let me just tell you again I'm
7 not going to have the sentence include not her paying back
8 that which was essentially stolen.

9 MR. DELLAPIANA: The first two times.

10 THE COURT: Right. And she stole the
11 prescription by misrepresenting her status. I'm willing to
12 offset that -- offset what the state would have paid had they
13 known the truth. If it's a different drug than the one that
14 was given, that's okay. So it's 14,647. Isn't that what Dr.
15 Dall's telling me he never would have prescribed had he known
16 the truth?

17 MR. DELLAPIANA: I think even the state will say
18 that that's not the number.

19 THE COURT: Okay. The presentence report tells
20 me (inaudible) 14,607 was for a single prescription drug
21 Oxycontin (inaudible).

22 MR. DELLAPIANA: All right. Can I continue for a
23 minute?

24 THE COURT: Sure.

25 MR. DELLAPIANA: And, Judge, I know I'm here

1 every Monday. I know it's a long calendar but this is kind
2 of an important issue and I don't have much more to add,
3 but --

4 THE COURT: Okay.

5 MR. DELLAPIANA: I think I need to.

6 These are the reasons -- continue on the reasons
7 why restitution is not appropriate. At least not in the
8 amount that they're suggesting. Our position is Oxycontin was
9 the prescribed medication by the doctor based on his analysis
10 of Ms. Martinez' needs. Again quoting from his letter that's
11 attached to the document submitted by the Workers
12 Compensation Fund in which referring -- responding to the
13 Workers Compensation Fund adjuster's indication that they're
14 trying to deny payment for the Oxycontin.

15 He says it's because they do not -- they do not
16 feel that it is necessary treatment but, quote, she does not
17 dispute -- this is Larana, the Workers Compensation Fund
18 adjuster. She does not dispute the fact that the patient
19 needs treatment and that our only treatments available having
20 exhausted physical therapy, surgery, four failed back
21 surgeries, injection therapy, et cetera, is medications.

22 And so, this is a doctor's view of based on his
23 medical expertise that Ms. Martinez needs medication.

24 THE COURT: Too bad she wasn't honest enough to
25 the get the best prescription medication he could have given,

1 don't you think? Are you disputing he's telling me through
2 AP&P he would not have prescribed the Oxycontin had he known
3 the truth?

4 MR. DELLAPIANA: Judge, the way I read that is
5 that in 20/20, or in hindsight at least he's saying, gee,
6 that's a lot of Oxycontin. Maybe I was prescribing too much.

7 Certainly doesn't deny prescribing it and he's not
8 saying he would not have prescribed it. He certainly was
9 prescribing it based on his monthly meetings with Ms.
10 Martinez.

11 The final issue, Judge, is in relation to the
12 statute that requires the court take into consideration Ms.
13 Martinez' ability to pay in determining whether or not
14 restitution is appropriate at all, or whether it should be
15 complete or partial or nominal. Her financial resources are
16 described in the presentence report. She was -- she's on
17 permanent disability monthly payments. She has -- she
18 contributes to the care of her pregnant daughter. She is
19 paying restitution for the federal case. And has --

20 THE COURT: She's paying a hundred dollars a
21 month, is that right?

22 MR. DELLAPIANA: She -- her payments are a
23 hundred dollars a month.

24 THE COURT: And when will that end?

25 MR. DELLAPIANA: April.

1 THE COURT: April.

2 MR. DELLAPIANA: April of 2001.

3 THE COURT: Okay.

4 MR. DELLAPIANA: And she has -- I'm not sure
5 how much but it's extremely limited funds. \$1,040 a month she
6 receives from Workers Compensation Fund of Utah. And has
7 monthly expenses for of course utilities, food, rent,
8 restitution I already mentioned, and what she contributes.

9 THE COURT: I read that. That's in the
10 presentence report, isn't it?

11 MR. DELLAPIANA: It is.

12 THE COURT: Okay.

13 MR. DELLAPIANA: And that's -- that's all I
14 have to say about restitution, Your Honor.

15 THE COURT: Okay. Mr. Harms.

16 MR. HARMS: I ask you to follow the
17 recommendations of the presentence report, Your Honor. The
18 reason I feel jail's appropriate, this was a continuing
19 course of conduct by which Ms. Martinez defrauded the state.
20 While she may have been entitled to certain benefits had she
21 been honest with the Workers Compensation Fund those benefits
22 would have been reduced because she would have been employed.

23 Second of all, she obtained significant quantities
24 of a schedule two narcotic while she was working. If she was
25 in such pain that she needed that narcotic she wouldn't have

1 been able to work and virtually she's able to work she
2 shouldn't have used that much narcotic.

3 With regard to the other reason I think jail
4 time's appropriate despite the fact that through discovery
5 Ms. Martinez was aware of everything in this presentence
6 report including the level of Oxycontin previously obtained
7 by her and the fact that Dr. Dall said he wouldn't have
8 prescribed that had he known she was working, she has since
9 pleading continued to try to obtain Oxycontin (inaudible).

10 I think that her course of conduct shows no
11 remorse and in fact (inaudible). I'd ask for the 120 days in
12 jail.

13 With regard to the restitution, Your Honor, the
14 total amount paid by Workers Compensation Fund during the
15 time period when she was gainfully employed for Oxycontin
16 alone is \$16,152.41. The 14,000 dollar figure is the offset.
17 The actual amount of Oxycontin again is \$16,152.41.

18 With regard to terms and conditions of probation,
19 Your Honor, in addition to those specified in the AP&P
20 presentence report it's my request that she be prohibited
21 from any contact with any members of the Sundowners
22 organization or their associates or anyone (inaudible) state
23 or federal prosecution, a list to be provided to her
24 probation officer. That she be prohibited from obtaining any
25 prescription medication from any doctor without an express

1 written prior approval of her probation officer, and that she
2 be prohibited while on probation from obtaining prescriptions
3 for Oxycontin, that she be prohibited from approaching Dr.
4 Dall who clearly is not without fault in this matter and can
5 not use Dr. Dall for (inaudible) during the time of
6 probation.

7 There's a significant list of other doctor's who
8 are well qualified. I don't think we need to revisit this
9 issue.

10 Finally, Your Honor, it would be my request that
11 the court order restitution be paid in the amount of \$400 a
12 month. She will be entitled to continue to receive her
13 thousand dollars from Workers Compensation Fund through the
14 State of Utah. That money will not be prohibited from coming
15 to her by this conviction. However, out of one side of her
16 mouth she says don't send me to jail. I can't be punished
17 because my daughter is pregnant and I need to contribute to
18 her financial benefit.

19 On the other hand she says I'm too poor to pay for
20 restitution. I think the court can see through that and
21 impose the restitution amount that is fair. She's currently
22 married. She has money coming in from that source. I think
23 this has to be paid and the restitution (inaudible) while on
24 probation. \$300 a month will allow that to happen.

25 Finally, Your Honor, I'm somewhat offended that

1 the defense in this case has sought to seek advisory opinions
2 regarding sentencing from those outside of the realm of the
3 courtroom. Mr. McConkie wants to be judge and (inaudible).
4 I'd ask the court to impose sentence.

5 THE COURT: Just so I understand your figures
6 Mr. Harms, the difference between the Oxycontin and some
7 other prescription whether it's methadone or whatever she
8 might have used had the deceit not been involved you said
9 14,000, but then you jump that up to 17,000. Is there any
10 overhead expense?

11 MR. HARMS: No, Your Honor. What I did is added
12 through my discovery -- while Mr. Dellapiana was speaking I
13 went through and added all the prescriptions filled by Dr.
14 Dall during this time period, only the time period she was
15 working, for schedule two narcotics. Those amounts equal a
16 total of 16,152.41.

17 The 14,377 figure in the presentence report is the
18 offset for not prescribing Oxycontin but prescribing
19 methadone. It gets to the 17 thousand through investigation
20 costs incurred by the (inaudible).

21 THE COURT: Let me say this about the
22 restitution. There are on occasion times that there is --
23 restitution often becomes recoupment in that there are
24 restitution investigation prosecution costs, whether there's
25 court ordered exams or whatever it is. It seems to me that

1 the issue of Ms. Martinez' lack of ability to pay that really
2 mutes that out. I'm not going to order any investigative or
3 overhead costs in this case. I think there are clearly cases
4 where that is appropriate. This is not one of them.

5 Indeed it is -- given her disability and limited
6 income I think at this point we're really talking about
7 theoretical amounts. In any event this is a civil standard
8 in terms of amounts of restitution, not a criminal standard.
9 I think it's clear to me that the state to a civil standard
10 has shown their entitlement to be approximately \$16,000 but
11 given her disability and lack of ability to pay during the
12 period of probation I'm going to order a portion of that as
13 part of sentence in this case.

14 Before I pronounce sentence, Mr. Dellapiana, one
15 final question regarding the suggestion of the state
16 regarding no contact orders. I presume that you're familiar
17 with the names that are on the list that he'll provide me.
18 Do you have any objection to any of that?

19 MR. DELLAPIANA: Well, just as an extensive
20 potential list are these friends?

21 (Whereupon, a short discussion was held off the
22 record.)

23 MR. DELLAPIANA: Her husband and her son.

24 THE COURT: They belong to the Sundowners?

25 MS. MARTINEZ: Not my son, no. My husband does.

1 My deceased husband and my husband both are members.

2 MR. HARMS: It would not be our position that
3 there's no contact (inaudible) relatives.

4 THE COURT: Okay. Mr. Dellapiana, any legal
5 reason why sentence should not be imposed?

6 MR. DELLAPIANA: Not that I'm aware of, Your
7 Honor.

8 THE COURT: Okay. It will be the judgment of the
9 court in this matter that on each of these two felony
10 matters, the second degree felony and the third degree
11 felony, Ms. Martinez, that you be ordered committed to the
12 Utah State Prison for an indeterminate term as provided by
13 law on the second degree felony of not less than one or more
14 than 15 years. On the third degree felony for not more than
15 five years.

16 I'm ordering that the prison sentences run
17 consecutive to each other. However, at this time I will stay
18 the execution of the prison sentences and place you on
19 supervised probation to Adult Probation and Parole. And Mr.
20 Dellapiana and Mr. Harms I'm going to order a two year not a
21 three year probation on each of the two felony counts, but
22 order that probationary periods run consecutive to each other
23 so that the total period of probation for Ms. Martinez is a
24 48 month period of time.

25 As a condition of probation I'm ordering that she

1 pay the sum of \$100 per month as and for restitution for the
2 Workers Compensation Fund of Utah commencing with the month
3 of April of 2001 and continue throughout the period of your
4 probation with Adult Probation and Parole.

5 I'm also ordering as a condition of probation that
6 you serve 60 days in the Salt Lake County jail. I'll order
7 your forthwith commitment for that. And you're further
8 ordered to pay a fine in the amount of \$400 inclusive, not
9 exclusive, of the restitution, together with the 100 dollar
10 attorney fee recoupment and that is to be paid with the
11 restitution figures through Adult Probation and Parole.

12 You are to abide by all of the terms and
13 conditions of supervised probation including no association
14 with members of the Sundowners Club other than your husband,
15 of course, or immediate family member. You are not to use any
16 alcoholic beverage, illicit drugs while on probation and Ms.
17 Martinez you are to have written approval of and disclosure
18 of any prescription medication that you may take. That would
19 need to be disclosed to and approved by your probation
20 officer.

21 You'll need to submit your person, place of
22 residence, any property in your control to a reasonable
23 search by a probation officer, submit to random drug testing
24 as requested by your probation officer. You are to obtain a
25 substance evaluation administered under the direction of AP&P

1 and comply with any and all treatment measures recommended by
2 Adult Probation and Parole.

3 The State of Utah will prepare and present to your
4 probation officer and Mr. Dellapiana a list of persons with
5 whom you are to have no contact and I'll be happy to review
6 that if necessary. Happy is an over statement. Willing to
7 review that, Mr. Dellapiana.

8 Obviously, Ms. Martinez, I'm not -- would not
9 allow AP&P to impinge upon bona fide family relations and
10 those kind of things.

11 I wonder if at some point, you know, the
12 Sundowners activity, the -- all the stuff that's brought
13 enough heartache to your life, I wonder why it is that you
14 hang on to that. I ask that rhetorically and would just say
15 to you that while you're on probation not only do you have to
16 be in compliance with the law, but frankly the element of
17 perception, and you're not to associate with people who are
18 using drugs, the place where drugs are being used, and
19 euphemistically lets call that the club house as if that has
20 not historically been and if it is not a place of criminal
21 activity.

22 It's not a good thing for a person on probation to
23 take that kind of position. I think it's way past time that
24 you be mature and appropriate in all of your activities in
25 your life particularly now while you're on a supervised

1 probation.

2 I have a little concern with invading your
3 doctor/patient relationship with Dr. Dall. I would just add
4 editorially that I'm not so sure that was a marriage made in
5 heaven either, and if I had a medical practitioner that was
6 so cavalier in how he or she was prescribing medication I may
7 want to be involved with someone who was a little -- was way
8 more careful with my own health related issues.

9 Those are choices that you can make and I think at
10 this point it would be improper for me to or not necessary
11 for me to say that, but I will say this. If you decide to
12 deal with Dr. Dall and you know your medical (inaudible)
13 that's okay. But let me underscore for you that taking any
14 prescribed medication without first having that disclosed by
15 and to Adult Probation and Parole, any kind of end run to try
16 to compel Workmen's Compensation Fund to pay for medication
17 because you requested can provide the information that's
18 going to violate your probation.

19 It would just seem to me that you ought to just
20 close the chapter in this -- close this unfortunate chapter.
21 I would personally not touch Oxy -- whatever that is, if it
22 were free. And given the history that's had with you -- and
23 I would not deal with Dr. Dall. I would -- there are
24 certainly other better ways that you can receive pain
25 medication that is right, is less harmful, is not going to

1 look bad, is not going to be in any way linked to drug usage
2 by the Sundowners Club House.

3 Does that make sense at all to you? Again, I'm
4 not enjoining you from -- you can do whatever, get whatever
5 medical help you believe is in your best interest. Just
6 comply with probation at the same time. To the degree you
7 use Dr. Dall, to the degree that you (inaudible) these old
8 issues I think you're just inviting problems in your
9 probation.

10 Any questions you have, Ms. Martinez, or Mr.
11 Dellapiana? Okay. Order your forthwith commitment.

12 Mr. Harms, let me give this back to you. Thank
13 you, sir. Thank you. Nice job.

14 (Whereupon, court was held in recess at 10:11.)

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1 STATE OF UTAH)

2 : ss

3 COUNTY OF SALT LAKE)

4

5 I, PAMELA C. SMITH, Certified Shorthand Reporter,
6 Registered Merit Reporter and Notary Public within and for
7 the County of Salt Lake, State of Utah, do hereby certify:

8 That I was NOT present at the foregoing court
9 proceedings;.

10 That the foregoing record was preserved by
11 videotape;.

12 That thereafter, I stenographically recorded the
13 requested portion of the video and translated the same using
14 computer-aided transcription, followed by a proofreading
15 against the video.

16 That the foregoing pages contain to the best of my
17 ability a full, true and correct transcript of the same.

18 In witness whereof, I have subscribed my name and
19 affixed my seal this 2nd day of March, 2001.

20

21 Pamela C. Smith
22 PAMELA C. SMITH, C.S.R., R.P.R.
23 Notary Public

24

25

My Commission Expires:

26

