

2016

## State of Utah vs. Benjamin David Rettig : Replacement Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH,

Plaintiff/Appellee,

vs.

BENJAMIN DAVID RETTIG,

Defendant / Appellant.

REPLACEMENT BRIEF OF  
APPELLANT

[Pursuant to 26 February 2016 Order]

Appellate Case No. 20131024-SC  
District Court Case No. 101101668

Oral Argument Requested

Appeal from a final judgment of conviction and sentence for aggravated murder and aggravated kidnapping, entered in the Fourth Judicial District Court, Utah County, American Fork Department, the Honorable Thomas Low presiding.

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Appellant is currently incarcerated at the Central Utah Correctional Facility  
in connection with the case on appeal.

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## INTRODUCTION

Appellant, Benjamin David Rettig (Rettig), hereby presents this replacement brief in response to this Court's 26 February 2016 Order seeking re-briefing of this matter.

## JURISDICTION

Rettig appeals from a conviction and sentence for aggravated murder and aggravated kidnapping, first degree felonies. This Court has appellate jurisdiction over convictions for such crimes. Utah Code § 78A-3-102(3)(i).

## STATEMENT OF ISSUES

### Issue 1:

Whether Utah Code § 77-13-6(2) unconstitutionally bars Rettig from appealing his conviction.

In part, this issue includes the below-listed questions propounded by this Court in its 26 February 2016 Order.

1. Does the "right to appeal in all cases" under article 1 § 12 of the Utah Constitution, as originally understood at the time of the framing and as properly interpreted today, render the plea withdrawal statute, Utah Code § 77-13-6(c) unconstitutional? Of particular relevance to this question, among other things, are the following subsidiary issues:

a. Does the right to appeal under article 1 §12 require that a waiver of that right given as a result of ineffective assistance of counsel be subject to challenge in an appellate proceeding in which the defendant retains the constitutional right to counsel?

b. Is the right to appeal under article 1 § 12 satisfied by a challenge under the Post Conviction Remedies Act, in which there is no right to effective assistance of counsel?

2. What is the impact of the legislature's power to regulate jurisdiction of the courts under article 8 §§ 3 and 5 on the constitutionality of the plea withdrawal statute under article 1 § 12?

3. Has this Court previously resolved the foregoing questions as a matter of stare decisis?

4. If Mr. Rettig establishes that his constitutional right to appeal was denied by the plea withdrawal statute, and that his right to effective assistance of counsel was denied, what is the appropriate procedural remedy?

Standard of Review. "Constitutional issues ... are questions of law that [Utah's appellate courts] review for correctness." *Chen v. Stewart*, 2004 UT 82, ¶ 25, 100 P.3d 1177. "Whether appellate jurisdiction exists is a question of law [this Court reviews] for correctness, giving no deference to the decision below." *Pledger v. Gillespie*, 1999 UT 54, ¶ 16, 982 P.2d 572.

Preservation. This issue was not raised below, but "[t]he general rule that constitutional issues not raised at trial cannot be raised on appeal is excepted to when a person's liberty is at stake." *State v. Breckenridge*, 688 P.2d 440, 443 (Utah 1983). Alternatively, the issue is not subject to the preservation rule given the fact that it pertains to the question of appellate jurisdiction, which is not properly addressed by the district court or, alternatively, the exceptional circumstances exception to the preservation rule should apply

to warrant appellate review of this issue. “[T]he exceptional circumstances exception is ill-defined and applies primarily to rare procedural anomalies.” *State v. Holgate*, 200 UT 74, ¶ 12, 10 P.3d 346. This issue cannot be adequately addressed in any forum absent the exceptional circumstances doctrine. It cannot properly be preserved below because the issue is an appellate jurisdictional question, or a question that a trial court need never answer to fulfill its proper functions. If the questions implicated by this issue are not decided in Rettig’s favor, the Utah right to appeal in all cases and the federal Sixth Amendment right to effective assistance of counsel will remain rights without an effective remedy in Utah.

**Issue 2:**

Whether Rettig’s defense counsel was ineffective in either or both of the following instances:

First, when counsel instructed Rettig to enter a guilty plea to aggravated murder on an accomplice liability theory, where counsel had not adequately informed Rettig of the applicable law, where counsel had not provided Rettig with requested discovery materials before Rettig pled guilty, where counsel did not abide by Rettig’s decision on the plea offer, and where counsel instructed Rettig to mislead the district court during plea entry.

Second, when counsel instructed Rettig to withdraw his Motion to Withdraw Guilty Plea before the district court ruled on the motion, where the motion was based on Rettig’s argument that his prior counsel was ineffective at the time he entered his plea.

Standard of Review. An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law. *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

Preservation. This issue was not specifically preserved below. But, ineffective assistance of counsel may be reviewed for the first time on appeal *See id.*

**Issue 3:**

Whether the district court erred when it accepted Rettig's guilty plea to aggravated murder where the supporting factual basis did not show that Rettig intended to help Bond kill Mortensen.

1. Standard of Review. "[W]hether the trial court strictly complied with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness." *State v. Holland*, 921 P.2d 430, 433 (Utah 1996). The sufficiency of the factual basis of a plea is reviewed under a clearly erroneous standard. *State v. Beckstead*, 2006 UT 42, ¶ 13, 140 P.3d 1288.

2. Preservation. This issue was not raised below, but "[t]he general rule that constitutional issues not raised at trial cannot be raised on appeal is excepted to when a person's liberty is at stake." *State v. Breckenridge*, 688 P.2d 440, 443 (Utah 1983). Alternatively, Rettig requests plain error review. *See State v. Candland*, 2013 UT 55, ¶ 22, 309 P.3d 230.

**CONSTITUTIONAL PROVISIONS & STATUTES**

The following provisions are set forth verbatim in the addendum to this brief:

U.S. Const. Amend. VI.

Utah Const. Art. I § 12.

Utah Const. Art. VIII §§ 3-5.

Utah Code § 77-13-6.

## STATEMENT OF THE CASE

### I. Nature of the Case

Rettig appeals from a final judgment of conviction and sentence for aggravated murder and aggravated kidnapping.

Rettig challenges the constitutionality of Utah Code § 77-13-6(2)(c), which bars *any* challenge to a guilty plea not made prior to sentencing. Challenging his guilty plea, Rettig asserts he received ineffective assistance of counsel and that the district court erred by accepting as sufficient the factual basis supporting his guilty plea.

### II. Proceedings & Disposition

In December 2010, the State charged Rettig with aggravated murder, a capital offense, and a number of felonies. Rettig signed a Statement of Defendant in Support of Guilty Plea in June 2011. R62-55. The State amended its information, and charged Rettig with one count each of aggravated murder and aggravated kidnapping, first degree felonies. R54-53. On June 2, 2011, Rettig entered guilty pleas to those crimes. R410.

On July 15, 2011, Rettig filed an ex parte letter with the district court, asking the court for leave to withdraw his guilty pleas. R115-14. Rettig's original counsel was replaced. R132-31. In December 2011, replacement counsel withdrew Rettig's motion to withdraw his pleas. R142.

Thereafter, the district court gave Rettig concurrent sentences: an indeterminate term of 25 years to life on the aggravated murder charge and an indeterminate term of 15 years to life on the aggravated kidnapping charge. R192-91,411:30. The district court recommended a

fine of \$10,000 on each count and restitution of \$10,671.71 jointly and severally with the co-defendant. *Id.* The district court recommended the privilege of parole for Rettig. *Id.*

In January 2012, Rettig's replacement counsel withdrew. R198-96. Thereafter, on January 17, 2012, replacement counsel filed a Notice of Appeal via fax. R200-199. The original was filed on January 19, 2012. R202-01. Rettig's first appeal failed for untimeliness. R224-22.

Rettig filed a pro se Motion to Reinstate Appeal Rights on April 11, 2013. R247-31. Ultimately, on October 28, 2013, the district court granted the motion. R396-90. Rettig timely filed his new Notice of Appeal, for this appeal, on October 30, 2013. R402-400.

In this Court, Rettig filed a Rule 23B Motion on February 26, 2014. He filed his opening brief on May 5, 2014. The State filed its brief and opposition to Rettig's Rule 23B motion on July 29, 2014. Rettig filed his reply brief on September 3, 2014. Subsequently, on February 26, 2016, this Court entered an order requesting that the parties re-brief the case and address specific questions in addition to any other issues raised.

### III. Statement of Relevant Facts

#### Facts Appearing on the Record

In November 2009, Kay Mortensen was found dead in his home with multiple throat lacerations. R2. In June 2011, Rettig entered pleas of guilty to aggravated murder and aggravated kidnapping. R410. The Statement of Defendant in Support of Guilty Plea (the Statement) reads<sup>1</sup> as follows:

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<sup>1</sup> The State's attorney set forth the Statement orally to the district court, albeit not strictly verbatim. R410:29-31.

On or about November 16, 2009, Martin Bond ("Bond") and I traveled in Bond's vehicle from Vernal, Utah to Kay Mortensen's ("Mortensen") home in Spanish Fork, Utah. The purpose in traveling to Mortensen's home was to steal firearms located in Mortensen's home. Upon arriving at Mortensen's home, Bond indicated he would initially enter the home and then I was to follow him and also enter the home. Bond and I entered the home without being invited and we had a handgun with us. Bond placed zip ties on Mortensen and both of us were wearing ski masks and latex gloves in order to hide our identities. We commanded Mortensen to show us where his firearms were located. Mortensen took us to a bunker located behind his home and we observed several weapons. We took Mortensen from the bunker and back into his home. After re-entering the home, we took Mortensen upstairs to a bathroom. Bond told Mortensen to kneel down in front of the bathtub with his back to us. While Mortensen was kneeling down, I was holding Mortensen at gunpoint with Bond's handgun. Bond withdrew a knife from his person and then placed the knife back in his pocket. At this point, Bond left the bathroom, went downstairs and returned with a black-handled knife approximately 10 to 12 inches in length. Upon returning, I observed Bond take the knife and slice Mortensen's throat. I am not certain how many times Bond cut Mortensen's throat. After cutting his throat, I observed Bond stab Mortensen in the base of his neck with the same knife.

Shortly after Bond cut and stabbed Mortensen, we heard someone knock on the front door. I ran downstairs and hid behind the front door and Bond opened the door. A female and male were at the door asking for Mortensen. (I later discovered that the individuals were Pamela and Roger Mortensen.) I was still holding the handgun when Pamela and Roger entered the home. I informed Pamela and Roger that Mortensen was upstairs and that he was okay. We told them to walk into the sunken living room and we placed zip ties on Pamela's and Roger's hands and feet. At some point, Bond came out of the kitchen with another knife which I believed he was going to use to kill Pamela and Roger. I stepped in front of Bond and told him not kill Pamela and Roger. While Pamela and Roger were tied up in the living room, I remained in the living room with them holding the handgun while Bond removed approximately 25 of Mortensen's weapons (including handguns and rifles) from the bunker and placed them in Bond's vehicle. We also took ammunition from the bunker. After placing the guns and ammunition in Bond's vehicle, we took Roger's driver's license and told him and Pamela that they needed to tell the police that three black men had tied them up and if they told the police a different story, we knew where they lived and we would come back and kill them. We left Mortensen's residence and drove back to Vernal. On our way back to Vernal, we stopped at a rest stop and discarded our gloves in a



dumpster. In Vernal, Bond and I went up a canyon and buried the weapons. Following this, Bond took my hoodie and shoes in order to dispose of them.

R60-59.

Rettig admitted to having a firearm and being present while Bond committed the murder. R410:29-31. Preparing for sentence, Rettig wrote that he participated because he feared for his own life and had been threatened by Bond. R147-46.

With intent to withdraw his guilty plea and replace his counsel, Rettig filed a letter with the district court. R115-13. Rettig complained his attorneys had not asked him for a complete version of the events, had not provided him discovery prior to his plea despite multiple requests, had not received information Rettig gave the attorneys' investigator, and ignored Rettig's protests to the Statement. R115. Rettig further claimed he had felt pressured to admit a false version of events. R114.

Rettig's replacement counsel withdrew Rettig's request to withdraw the guilty plea, explaining that Rettig was really looking for information and that he had resolved the issues. *See* R411:24-25.

Various persons testified at the sentencing hearing on behalf of both Rettig and Mortensen, and others submitted letters on Rettig's behalf. *See generally* R411, R179-48. The prosecution recommended that the sentences run concurrently as part of the plea agreement. R411:20. The plea was offered in part by the prosecution because "Mr. Rettig did agree to assist us in the prosecution of Mr. Bond... We also- we felt very strongly all along that Mr. Bond was actually the one who, who actually committed the murder." R411:21. The district court acknowledged that once Rettig's involvement was discovered "[he] did show complete cooperation" and that Rettig was "taking the responsibility that [he] failed to take two years

ago.” R411:29-30. As noted *supra*, the district court sentenced Rettig to serve time in prison. R411:30.

### Facts to be Developed on Remand Under Rule 23B

Rettig filed with this Court a Rule 23B Motion for Remand on February 26, 2014, supported by affidavit, alleging facts which do not yet appear on the record and will be developed at remand if granted. Decision on the Motion for Remand has been deferred. The following facts, not yet appearing on the record, are necessary to Appellant’s argument.

During the plea negotiation phase, Rettig was represented by three attorneys: Michael Esplin as lead attorney, with Stephen Frazier and Anne Boyle as assisting attorneys. Esplin, Frazier, and Boyle never explained to Rettig Utah’s laws regarding accomplice liability or the element the State would need to prove to convict on an accomplice theory at trial.

When meeting with his attorneys, Rettig met primarily with Frazier and Boyle, with about fifteen total visits between the two of them. Rettig met with Esplin about five times. Most visits were under 30 minutes in duration. Rettig asked all three of his attorneys multiple times during visits for a copy of the discovery that they had received from the State. Rettig was not provided any discovery from his attorneys until after his guilty pleas had been entered.

During Rettig’s third meeting with Esplin, Esplin presented to Rettig an offer received from the State, which was a recommended sentence of Life without the possibility of parole if Rettig would plead guilty to the Aggravated Murder charge. Esplin informed Rettig that was a “bad deal” and that he was confident he would be able to get Rettig a sentence of seven to ten years instead. Rettig asked if a change in venue would help the case.

Esplin said that a change in venue would be fruitless because any venue in Utah would be biased against him. Esplin told Rettig that Rettig would have to serve time in prison. Esplin told Rettig that Rettig was guilty because Rettig was present when Bond killed Mortensen. During a subsequent meeting with Frazier, Rettig was told again that the attorneys were pushing for a seven- to ten-year deal, and reiterated that they believed Rettig was guilty because Rettig was present.

During Rettig's fourth meeting with Esplin, Esplin presented a new offer from the State, which was an agreed sentencing recommendation of 25 years to Life. Esplin seemed happy with the offer. Rettig rejected the offer. Esplin told Rettig that he would speak with the prosecution about the offer, but that Rettig should not be firm to decline the offer. Rettig noticed a change in his attorneys' attitudes toward him and his case after the 25-to-Life offer was made. His attorneys told him that it was the best deal he was going to get.

Rettig's family was called to a meeting with Rettig's attorneys. During that meeting, the attorneys disclosed confidential information regarding Rettig's case to Rettig's family, without Rettig's authorization. Rettig's attorneys asked Rettig's family to convince Rettig to accept the 25-to-Life offer.

Rettig decided to plead guilty because his attorneys told him he was guilty and that the 25-to-Life offer was the best deal he was going to get. Rettig felt pressured by his attorneys and his family to accept the offer.

Rettig's attorneys met with Rettig to discuss the plea deal and the charges to which Rettig would be pleading. They showed Rettig a copy of the factual statement that would be the basis of Rettig's plea. Rettig told his attorneys that the factual statement was untrue and

that he wanted to re-write it. Rettig's attorneys said Rettig could re-write the statement.

Rettig's attorneys met with Rettig about one week prior to his entry of the plea. Rettig gave his attorneys the rewritten factual statement. Rettig's attorneys said they would take the statement to the prosecution to discuss and negotiate the content of the factual statement.

Esplin and Frazier met with Rettig in the holding cell of the courthouse on the date of his entry of plea. They showed Rettig the plea statement. The factual statement had not been changed. Rettig asked his attorneys why the statement had not been changed. Rettig's attorneys told him that the statement had not been discussed or negotiated with the prosecution. They told Rettig that the content of the statement does not matter. They told Rettig that because he was present when Bond killed Mortensen, he was guilty. Rettig expressed concern over the requirement in the plea agreement that Rettig testify against Bond. Rettig's attorneys told Rettig not to worry, that Rettig would not be asked to testify, and that "it's all just legal jargon anyways." Lastly Rettig's attorneys told Rettig that if the judge asks him a question about whether everything had been explained to him, whether he was satisfied with his attorneys, and whether he understood what was going on, that he should say, "Yes."

After the court proceeding, Rettig had regrets about entering his plea after being pressured and coerced to lie to Judge Low. Rettig informed his counsel that he wanted to withdraw his plea. The next day, Frazier and Esplin met with Rettig. Rettig expressed his concerns regarding the plea process and the pressure to lie to the court. Esplin told Rettig that if he withdrew his plea, he would be given the death penalty. Rettig said he was not concerned with that and wanted to take his chances. Esplin then said that the death penalty

would not be given, but Life without parole would. Esplin was yelling at Rettig. Frazier sat quietly during the meeting. Rettig told them again that he wanted to withdraw his plea and that he wanted his discovery. Rettig then terminated the visit.

A few days later, Boyle met with Rettig and gave him the discovery. Boyle told Rettig to write a letter to Judge Low if he wanted to withdraw his plea. Rettig wrote the letter to Judge Low asking to withdraw his plea, which appears at R115-14. At the next court hearing, Esplin and Frazier asked to withdraw.

Aaron Dodd was appointed as Rettig's new counsel to handle the motion to withdraw his plea. Rettig met with Dodd about three times. Rettig informed Dodd about the allegations in the case. In Dodd's opinion, Rettig was not guilty of aggravated murder. Dodd told Rettig that he could get Rettig's plea withdrawn. At the next court hearing, Rettig was surprised to learn that Aaron Dodd was no longer his attorney, and that he would now be represented by Dana Facemyer.

About a month later, Facemyer visited with Rettig twice in custody. Facemyer said that he felt Rettig was guilty. Facemyer did not explain Utah's accomplice liability laws to Rettig. Facemyer said that if Rettig took the case to trial he would get the death penalty or life with parole. Rettig does not remember ever agreeing to not attempt to withdraw his plea. Rettig was emotionally distraught and confused during this process. No attorney adequately explained accomplice liability and other important issues to him.

If Rettig had been properly advised regarding the law and his concerns with the plea agreement, and had Rettig been provided with the discovery that he had requested from his

attorneys, he would have chosen to reject the State's offer and would have exercised his right to a fair trial.

## SUMMARY OF ARGUMENTS

### Issue 1:

Utah Code § 77-13-6(2) unconstitutionally bars Rettig's challenges to his guilty plea on appeal.

The statute unconstitutionally blocks Rettig's ineffective assistance of counsel claims on appeal because the statute bars not only untimely challenges that otherwise comply with the statute, but also challenges that the plea is illegitimate under the Sixth Amendment. The Sixth Amendment provides a right to effective assistance of counsel, regardless of the plea withdrawal statute's existence or terms. This Court was presented this issue in *Rhinehart*, but did not sufficiently address it. This Court should examine the issue more closely, particularly in light of U.S. Supreme Court opinions in *Frye*, *Lafley*, and *Padilla*. Those cases are examples of either ineffective assistance of counsel going beyond the knowing or voluntary standard Utah has focused on previously or of a federal court invalidating a guilty plea based on the Sixth Amendment.

The statute also violates Utah's right to appeal, which exists in conjunction with the Utah constitutional right to open courts, due process, etc. *Weaver* declares that Utah's constitution grants an unqualified right of appeal. Rights demand enforcement through sufficient process, and state courts should enforce rights secured by the U.S. Constitution. The plea withdrawal statute blocks Rettig's ability to assert his constitutional rights and other rights related to his plea not dependent on the legislature granting a right to withdraw pleas.

*Cockerham* unequivocally declares that claims of ineffective assistance of counsel at plea bargaining should not be barred by the plea bargain agreement itself. Moreover, Rettig's waiver should be construed as an acknowledgment that a guilty plea inherently cuts off certain appeal arguments.

The PCRA is not a substitute for direct appellate review. Moreover, it is conceivable that if the PCRA is held to be a sufficient substitute, a defendant might never be represented by effective counsel either in the original or collateral proceedings.

As to article VIII of the Utah Constitution, the legislature may specify the court of original jurisdiction and the court of appellate jurisdiction and also make provision for moving between the courts of original and appellate jurisdiction. However, as Article VIII emphasizes, there is an appeal in all cases not originating in the Utah Supreme Court. As per *Johnson*, appellate jurisdiction is to review a lower court's decision or judgment and reverse, modify, remand, etc. If Rettig's federal constitutional rights related to his guilty plea were violated in the district court, this Court has jurisdiction to strike or vacate the guilty plea. Further this Court is given constitutional authority to promulgate rules. The legislature is given authority to amend rules. The legislature has inappropriately promulgated a rule as to when defendants may move to withdraw guilty pleas.

This Court has not resolved whether the plea withdrawal statute violates the right to appeal. *Rhinehart* claims that *Merrill* resolved the issue, but the "right to appeal" is mentioned nowhere in *Merrill*. A resolution of one or many constitutional challenges, as in *Merrill*, does not resolve all possible constitutional challenges.



The appropriate remedy here is to vacate or strike the guilty plea as illegitimate because it violated constitutional rights or was based on an insufficient factual basis. Alternatively, Rettig's motion to withdraw his plea should be reinstated.

Issue 2:

Rettig's Sixth Amendment right to effective assistance of counsel was violated in numerous respects, and his guilty plea should be stricken or vacated. (These arguments are based on facts Rettig intends to develop on Rule 23B remand. Rettig's 23B motion is pending.)

Counsel failed to adequately discuss the law of accomplice liability with Rettig, stating to Rettig that his mere presence at Mortensen's murder made him guilty. Mere presence at a crime does not automatically make a person guilty.

Counsel failed to fulfill the obligation of providing Rettig with the discovery information shared by the prosecution. Rettig was unable to evaluate his own case.

Despite Rettig informing counsel he intended to plead guilty, counsel pressured Rettig to plead guilty and unethically disclosed confidential information about the case to Rettig's family so that they could pressure him to plead guilty. Counsel should have supported Rettig's decisions and should not have disclosed confidential information.

Counsel instructed Rettig to admit to a factual statement Rettig had disputed and asked counsel to have altered, to promise to testify against Bond despite having no such intention, and to mislead the district court in the plea colloquy.

Absent the foregoing deficiencies, Rettig would have likely insisted on trial. The deficiencies can be considered on a cumulative basis. Rettig need only show a reasonable

probability that but for counsel's errors, the result would have been different. Indeed, Rettig attempted to withdraw the plea. The cumulative effect of the errors is to undermine confidence in the correctness of the outcome.

As noted, Rettig attempted to withdraw his plea, but replacement counsel withdrew the motion. Rettig asserts that this, too, was ineffective assistance of counsel. Although Rettig contends this Court should strike or vacate his plea as violating the U.S. Constitution, Rettig likely could have prevailed on a motion to withdraw the plea pursuant to Utah's plea withdrawal statute. Many aspects of the previously mentioned claims to ineffective assistance of counsel relate to whether Rettig's plea was knowing and voluntary. There is a reasonable likelihood the motion would have been granted.

### Issue 3:

The district court erred by accepting Rettig's guilty plea because it was based on an insufficient factual basis.

Utah R. Crim. P. 11(e)(4)(B) requires a guilty plea to be accompanied by a sufficient factual basis. Admittedly, Rule 11 is procedural, and for violation of it to be harmful, it must affect substantive rights. *Alexander* suggests that the only substantive right at issue in Rule 11 is the right for a guilty plea to be knowing and voluntary. But, *Alexander* itself acknowledges that pleas must also be intelligent, as explained more completely in *Breckenridge* and also as explained in the advisory committee notes to the federal version of Rule 11, with which Utah intended Rule 11 to comport. The requirement of a sufficient factual basis relates to the right for the plea to be intelligent. *Breckenridge* acknowledges pleas can be knowing, voluntary, and

unintelligent. Moreover, it should be noted that the right to effective assistance of counsel stands regardless of whether there is a statutory right to withdraw a plea.

To be convicted of aggravated murder, a defendant must directly commit the offense or solicit, request, command, encourage, or intentionally aid the intentional or knowing death of another, including incident to acts, schemes, or course of conduct, or criminal episode.

The question of whether the factual basis supported the guilty plea is a constitutional issue exempted from the preservation rule. Alternatively, it is plain error. Plain error requires a showing of obvious, harmful error. The requirement for obviousness can be dispensed with in appropriate cases. The error is harmful if it undermines confidence in the outcome reached below.

The factual basis supporting Rettig's guilty plea did not indicate Rettig acted with the mental state required for conviction of aggravated murder or otherwise solicited, requested, commanded, or encouraged Bond to kill Mortensen. The nearest allegation is that Rettig held Mortensen at gunpoint before Bond returned with a knife and Rettig observed as Bond killed Mortensen. There is no indication Rettig knew Bond was looking for a knife or what Bond intended to do. Indeed, once Rettig understood Bond's intent and capability, Rettig intervened to prevent Bond from killing anybody else. It was error to hold the factual basis as being sufficient.

The insufficiency should have been clear to the district court. Alternatively, the obviousness requirement should be dispensed with to do justice. Had the district court

recognized the insufficiency of the factual basis, there is a reasonable probability it would not have accepted the guilty plea to aggravated murder.

## ARGUMENT

### I. Utah Code § 77-13-6(2) Unconstitutionally Bars Rettig's Appeal.

Rettig hereby addresses the issues suggested by the Court in its order for re-briefing as well as others.

#### A. Utah Code § 77-13-6 unconstitutionally bars Rettig's ability to assert his federal right to effective assistance of counsel.

##### 1. *The right to effective assistance of counsel*

Utah Code § 77-13-6(2) bars “[a]ny challenge to a guilty plea” not made “before sentence is announced” and allows withdrawal only if the plea was unknowing or involuntary. Thus, the statute facially bars challenges not based on assertions that the guilty plea was unknowing or involuntary, including claims that the guilty plea was based on ineffective assistance of counsel in violation of the Sixth Amendment.

The Sixth Amendment reads, in pertinent part, “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” The right to counsel includes the right to effective counsel. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984).

A criminal defendant has a right to effective assistance of counsel when being advised whether to enter a plea. *See Hill v. Lockhart*, 474 U.S. 52 (1985). This Court has previously been presented with the issue that a claim of ineffective assistance of counsel is independent of a claim that a defendant is entitled to withdraw a guilty plea pursuant to Utah Code § 77-13-6(2). *State v. Rhinehart*, 2007 UT 61, ¶ 14, 167 P.3d 1046. However, the issue was not

addressed directly in the Court's opinion. In this case, this Court should examine the issue more closely. The plea withdrawal statute provides an avenue to vindicate certain constitutional rights. But, constitutional rights can invalidate a guilty plea (or the overall conviction) regardless of whether the plea withdrawal statute exists. If a defendant claims ineffective assistance of counsel, the question is not whether he is entitled to withdraw his plea under a state statute or whether the state allows any pleas to be withdrawn. The question is whether the defendant's rights were violated.

In the years since *Rhinehart*, the right to effective counsel during plea bargaining has been re-emphasized and even extended by the U.S. Supreme Court's decisions in *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding as ineffective assistance failure to inform defendant of collateral risk of deportation), *Missouri v. Frye*, 123 S.Ct. 1399 (2012), and *Lafler v. Cooper*, 132 S.Ct. 1376 (2012).<sup>2</sup>

In *Lafler*, the defendant asserted that counsel ineffectively advised him to reject a plea offer. *Lafler*, 132 S.Ct. at 1383. Despite the state court holding the plea offer rejection knowing and voluntary, the Supreme Court stated that "[a]n inquiry into whether the rejection of the plea is knowing and voluntary ... is not the correct means by which to address a claim of ineffective assistance of counsel. *Id.* at 1390.<sup>3</sup>

In *Frye*, defense counsel did not inform the defendant of a plea offer, and the defendant pled guilty after the offer had expired and without a new offer. *Frye*, 123 S.Ct. at

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<sup>2</sup> See *Frye*, 123 S.Ct. at 1413 (referencing "our newly created constitutional field of plea-bargaining law") (Scalia, J., dissenting).

<sup>3</sup> This statement suggests that the knowing and voluntary standard of Utah's plea withdrawal statute does not account for defendants' Sixth Amendment rights and in fact blocks assertion of those rights by barring *any* challenge not timely and not related to knowledge or voluntariness.

1404. Analyzing its own opinion in *Padilla*, the Court stated that it had “rejected the argument ... that a knowing and voluntary plea supersedes errors by defense counsel.” *Id.* at 1406. The Court then proceeded to explain that despite the ability of plea colloquies to provide states protection from claims that a plea was based on inadequate counsel, “*Hill* and *Padilla* both illustrate that ... there may be instances when claims of ineffective assistance can arise after the conviction is entered.” *Id.* Moreover, the Court stated that in some situations in which an effective assistance claim arises, “the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene in any event.” *Id.* at 1407. The Court acknowledged as logical and somewhat persuasive Missouri’s arguments that “it is unfair to subject [Missouri] to the consequences of defense counsel’s inadequacies,” even when the defendant retains the rights to a fair trial or subsequent guilty plea. *Id.* However, the Court emphasized, without criticism, the prevalence of plea bargaining and insisted that “criminal defendants require effective counsel during plea negotiations. ‘Anything less ... might deny a defendant “effective representation by counsel at the only stage when legal aid and advice would help him.”’” *Id.* at 1407-08 (citation omitted).

2. *Utah law unconstitutionally hamstrings Rettig from pursuing a claim of ineffective assistance of counsel on appeal.*

In light of the clarification provided by *Padilla*, *Frye*, and *Lafler* and their precedents, this Court should reconsider its *Rhinehart* ruling that § 77-13-6 is a constitutional and jurisdictional bar to an appellant’s claims of ineffective assistance of counsel.

Rettig asserts that he entered a guilty plea as a result of ineffective assistance of counsel. But, *Rhinehart* cuts off Rettig's ability to assert this claim on appeal. *Rhinehart* justifies this result in the following terms:

The ineffectiveness of a defendant's counsel may take many forms and result in relieving a criminal defendant of an undesirable result. The ineffectiveness of counsel that contributes to a flawed guilty plea, however, can spare a defendant the consequences of her plea only if the defendant makes out the same case required of every defendant who seeks to withdraw a plea; that the plea was not knowing and voluntary.

*Rhinehart*, 2007 UT 61, ¶ 14. The crux of *Rhinehart*'s reasoning, in essence, is that the only ineffective assistance that matters in the plea context is the ineffectiveness that renders a plea unknowing or involuntary. This conclusion is flatly refuted by *Padilla*, *Frye*, and *Lafler*. Ineffectiveness need not render a plea unknowing or involuntary. In *Lafler*, the ineffective assistance led to a knowing and voluntary decision to go to trial. In *Frye*, the defendant knowingly and voluntarily pled guilty after a plea offer, of which counsel had not informed him, had expired.

The practical effect of § 77-13-6(2) is to bar a defendant who pleads guilty to a crime from vindicating his right to assistance of counsel. The statute unconstitutionally insulates guilty plea convictions from appellate challenge. The legislature is free to determine whether and on what terms defendants may withdraw guilty pleas. But, the legislature's requirements for guilty plea withdrawal should not be used to determine whether defendants may vindicate rights, such as the right to effective assistance of counsel, that exist independent of whether guilty plea withdrawal is permitted. Nor should the time limit to move to withdraw a plea be permitted to bar *any* challenge to the plea.



Perhaps this Court has no jurisdiction to allow Rettig to withdraw his guilty plea under Utah's guilty plea withdrawal statute, but even so, this court should order Rettig's plea stricken or vacated— if it cannot be withdrawn. If Rettig establishes that he received ineffective assistance of counsel, this Court is obligated to recognize that Rettig's plea is illegitimate under the U.S. Constitution, regardless of whether Utah's plea withdrawal statute recognizes the existence of constitutional rights not connected to whether a guilty plea was knowing or voluntary.

B. The right to appeal in all cases under article I § 12 of the Utah Constitution renders Utah's plea withdrawal statute unconstitutional.

“In criminal prosecutions the accused shall have ... the right to appeal in all cases. Utah Const. Art. I § 12; *see also* Utah Code § 77-18a-1 (“A defendant may, as a matter of right, appeal from: (a) a final judgment of conviction, whether by verdict or plea.”).

There is little drafting history regarding the right to appeal. But, other provisions correlate to allow appeal of Rettig's Sixth Amendment claim of ineffective assistance of counsel claim: “No person shall be deprived of life, liberty, or property, without due process of law.” *Id.* art. I § 7. Also, “[a]ll courts shall be open, and every person, for an injury done to him ... shall have remedy by due course of law, which shall be administered without ... unnecessary delay. *Id.* art. I § 11. And, “Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the case.” *Id.* art. VIII, § 5

In a case decided when the Utah Constitution was young, this Court declared “the provisions of our state Constitution ... gave the petitioners here an *unqualified* right of appeal

regardless of the plea entered in the city court.” *Weaver v. Kimball*, 202 P. 9, 10 (Utah 1921) (emphasis added).

Utah’s plea withdrawal statute, in violation of Utah’s constitution, blocks Rettig’s ability to assert his Sixth Amendment right to effective assistance of counsel and any other right afforded him by federal or state constitutions, statutes, and rules of procedure.

It is axiomatic that every right demands enforcement through sufficient process. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 430 (1986) (O’Conner, J., concurring in part and dissenting in part) (“If there is one fundamental requisite of due process, it is that an individual is entitled to an opportunity to be heard.”); *Fay v. Noisa*, 372 U.S. 391, 427 (1963) (stating that due process “comprehends not only the right to be heard but also a number of explicit procedural rights,” that “due process denied in the proceedings leading to conviction is not restored just because the state court declines to adjudicate the claimed denial on the merits, and that “forfeiture of remedies does not legitimize the unconstitutional conduct by which [a defendant’s] conviction was procured”); *Ex Parte Young*, 209 U.S. 123, 176 (1908) (“We must assume ... that the state courts will enforce every right secured by the Constitution.”).

In Utah, a defendant may withdraw a guilty plea. Utah Code § 77-13-6(2). As creator of this statutory right, the legislature has set the conditions for exercise of this right, stating that only unknowing or involuntary guilty pleas may be withdrawn. *Id.* Undoubtedly, those conditions balance the interests of finality and certain constitutional rights. The problem arises where the statute bars *any* challenge to a guilty plea and where courts hold that they

cannot adjudicate any challenge related to the guilty plea that is either untimely, unrelated to whether the plea was knowing/voluntary, or both.

The terms of the statutorily created right to withdraw a guilty plea are now being used to determine whether courts have jurisdiction to vindicate other rights that exist independently of state statute. If Utah had no plea withdrawal statute, criminal defendants would still be able to complain that they were denied effective assistance of counsel or that their guilty pleas were unknowing, involuntary, and/or *unintelligent*.<sup>4</sup>

Utah's plea withdrawal statute is barring appeals that would be valid in the absence of the plea withdrawal statute and case law holding it to be jurisdictional. This implicates not only the right to appeal, but the closely connected rights to due process and open courts. The right to effective assistance of counsel demands enforcement through sufficient process. State courts must enforce rights secured by the U.S. Constitution. Utah defendants are guaranteed not only access to Utah courts to assert their rights (including federal rights) but also that remedies should be administered without unnecessary delay.

The U.S. Constitution guarantees effective assistance of counsel at the plea bargaining stage. The U.S. Constitution requires pleas to be knowing, voluntary, and intelligent. The Utah Constitution guarantees a right to appeal. The Utah Constitution guarantees due process and open courts to assert constitutional and other rights, whether granted by federal or state constitutions or laws. A plea withdrawal statute should not be interpreted to bar the exercise or vindication of *constitutional* rights or the vindication of independently existing rights it did not create.

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<sup>4</sup> The federal right that guilty pleas need be intelligent is discussed in Part III, *infra*.

Even if Rettig does not qualify for withdrawal of his plea under the withdrawal statute, he is entitled to argue that the ultimate conviction was unconstitutional. This Court should consider the merits of Rettig's claims. On the merits, Rettig's guilty plea should be stricken or vacated, even if not "withdrawn" in accordance with the plea withdrawal statute.

1. *Does the right to appeal under article 1 § 12 require that a waiver of that right given as a result of ineffective assistance of counsel be subject to challenge in an appellate proceeding in which the defendant retains the constitutional right to counsel?*

Yes.

[A] claim of ineffective assistance of counsel in connection with the negotiation of a plea agreement cannot be barred by the agreement itself. It is altogether inconceivable to hold such a waiver enforceable when it would deprive a defendant of the opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation.

*United States v. Cockerham*, 237 F.3d 1179, 1184 (10th Cir. 2001) (internal quotations omitted) (holding that a waiver of a right to collaterally attack a guilty plea cannot be effective where the collateral attack is based on ineffective assistance of counsel at the plea negotiation phase).

If the waiver is given as a result of ineffective assistance of counsel,<sup>5</sup> it is invalid under the federal constitution, and both the state and federal constitutions require that the defendant be given due process to request a remedy.

Rettig signed the Statement in support of his guilty pleas. R62-55. The Statement indicated, "[b]y pleading guilty, I understand my right to appeal is limited. I understand that I

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<sup>5</sup> There is an inherent problem with an attorney advising a client not only to plead guilty, but *additionally* to waive some of the appeal rights that have not been obliterated by the logical implications of a guilty plea. Moreover, advising a client to waive an ineffective assistance of counsel claim for appeal would pose a conflict for the potentially ineffective counsel.

am giving up my right to appeal my conviction if I plead guilty. I understand that if I wish to appeal my sentence, I must file a notice of appeal within 30 days after my sentence is entered.” R58. The next paragraph stated, “I know and understand that by pleading guilty, I am waiving and giving up all the statutory and constitutional rights explained above.” *Id.*

Rettig’s signed statement regarding his appellate rights should be interpreted as reflecting an understanding that under Utah law, appeal options are limited after a guilty plea has been entered, rather than a voluntary waiver of Rettig’s constitutional appeal rights after entry of a guilty plea. Even if the signed statement is an explicit waiver of appeal rights, it cannot be effective against an appeal based on a claim of ineffective assistance of counsel at the plea bargaining phase.

2. *Is the right to appeal under article I § 12 satisfied by a challenge under the Post Conviction Remedies Act, in which there is no right to effective assistance of counsel?*

“A petition for post-conviction relief, or habeas corpus, collaterally attacks a conviction and/or a sentence. It is not a substitute for direct appellate review.” *Gardner v. Holden*, 888 P.2d 608, 613 (Utah 1994). It is a civil, district court procedure where an indigent defendant generally begins the process unrepresented and has no right to counsel. Utah Code § 78B-9-109.

Moreover, the right to appeal is tied to vindication of other rights, such as the Sixth Amendment right to effective assistance of counsel. If a defendant is denied ineffective assistance of counsel at the plea bargaining stage and barred from asserting as much on direct appeal, he must resort to the PCRA, which guarantees no counsel. Ultimately, under a system that forces defendants to claim ineffective assistance of counsel under the PCRA, a defendant denied effective assistance of counsel might never receive or vindicate his right to

effective assistance of counsel. As discussed *supra*, even a defendant entering a guilty plea is guaranteed the right of effective assistance of counsel.

- C. The legislature's power to regulate jurisdiction of the courts under article VIII §§ 3 and 5 does not legitimize the plea withdrawal statute's attempt to block any challenge to a guilty plea, and the plea withdrawal statute's deadline to bring a motion to withdraw a plea infringes on this Court's power under article VIII § 4.

Section 3 of article VIII grants this Court appellate jurisdiction. Section 5 of article VIII unambiguously states that there is an appeal of right in *all* cases from a “court of original jurisdiction to a court with appellate jurisdiction”. “Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the case.” Utah Const. art. VIII, § 5. “The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state ...” *Id.* art. VIII, § 4. With a two-thirds vote, the “Legislature may *amend* the Rules of Procedure.” *Id.* (emphasis added).<sup>6</sup>

“Appellate jurisdiction is the jurisdiction to review the decision or judgment of an inferior tribunal, upon the record made in that tribunal, and to affirm, reverse or modify such decision; judgment, or decree.” *State v. Johnson*, 114 P.2d 1034, 1037 (Utah 1941). “There being no constitutional inhibitions, the legislature may define and prescribe the forum in which actions may or must be commenced, and the procedure necessary to pass from one court to another. *Id.* at 1039 (performing analysis on the question of whether a prosecution should have been initiated in district or city court).

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<sup>6</sup> The plea withdrawal statute passed with two-thirds vote.

The plea withdrawal statute blocks “any challenge to a guilty plea not made within the time period specified” and further provides that only unknowing and involuntary guilty pleas may be withdrawn. Utah Code § 77-13-6(2). Under this statute, a defendant cannot assert on appeal that his Sixth Amendment right to effective assistance of counsel was violated. *State v. Rhinehart*, 2007 UT 61, ¶ 14, 167 P.3d 1046.

As explained in *Johnson*, a court with appellate jurisdiction is to review the decision or judgment of the lower tribunal and affirm, reverse, modify, etc. This means that all litigants are entitled to have a higher court review the decision of a lower court and to have the higher court fix mistakes made by the lower court. As further explained in *Johnson*, the legislature’s role is to specify the court of original jurisdiction (within constitutional bounds) and provide rules for how to get from the court of original jurisdiction to the court of appellate jurisdiction. The legislature should not be able to specify what portions of the proceedings below may be reviewed. The right of appeal is unqualified. *Weaver v. Kimball*, 202 P. 9, 10 (Utah 1921)

Thus, the legislature is not entitled to bar any challenge to a guilty plea as it has attempted to do in the plea withdrawal statute. A defendant is entitled to appeal and have a higher court review the decision. If the appellant asserts that he should be allowed to withdraw his plea, the appellate court should review whether the statutorily-created right to withdraw a plea may be invoked or whether it is too late to withdraw or whether the district court erred in refusing leave to withdraw. If the appellant asserts his plea violated rights granted by the federal constitution, the appellate court should review whether that is true and strike the plea as unconstitutional if the court finds a violation.



Section 4, article VIII, grants this Court authority to adopt the rules of procedure to be used in this state. For example, U.R.C.P. 59 sets the deadline to move for a new trial in certain cases. Utah's plea withdrawal statute specifies that a motion to withdraw a plea must be made before sentence is announced. This is a deadline similar to other procedural deadlines. However, it has been promulgated by the legislature instead of this Court. The legislature has exceeded its bounds. The legislature may only amend rules. Here, it has promulgated a rule.

Sections 3-5 of article VIII of the Utah Constitution do not justify the legislature's use of the plea withdrawal statute to block the ability of this Court to review whether the lower court honored a defendant's rights, whether they be statutory or constitutional.

D. This Court has not resolved the foregoing questions as a matter of stare decisis.

As an initial matter, it should be noted that a court may depart from precedent if it was erroneous or conditions have changed. *State v. Menzies*, 889 P.2d 393, 399 (Utah 1994). Presumably, changing conditions include U.S. Supreme Court opinions cutting against a state court's precedents.<sup>7</sup>

A number of Utah cases address various versions of the plea withdrawal statute. But as to analysis of whether the current version violates the right to appeal or is justified by the legislature's regulatory power, case law is sparse.

In *State v. Merrill*, 2005 UT 34, ¶¶ 21-47, 114 P.3d 585, this Court addressed a number of constitutional challenges to "imposition of" a "finite period to bring a motion to

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<sup>7</sup> To the extent any precedent blocks the relief sought herein, Rettig requests that this Court overrule that precedent as erroneous from the beginning or now operating under new federal case law.

withdraw a guilty plea.” This Court ruled that the plea withdrawal statute does not violate constitutional provisions regarding open courts, separation of powers, due process, equal protection, or uniform application of laws. *Id.* This Court did not directly address the right to appeal or grapple with whether a state plea withdrawal statute can affect a Sixth Amendment challenge to the legitimacy of a conviction.

In *State v. Rhinehart*, 2007 UT 61, ¶ 11, 167 P.3d 1046, the defendant asserted that she was unconstitutionally deprived of her right to appeal. In response, this Court invoked *Merrill*, stating that the statute was “constitutional.” *Id.* ¶ 12. However, the phrase “right to appeal” is found nowhere in the *Merrill* opinion. The *Rhinehart* defendant raised the right to appeal, but this Court did not meaningfully address the assertion thereof.

E. If Mr. Rettig prevails on his arguments regarding the constitutionality of the plea withdrawal statute, ineffective assistance of counsel, etc., this Court should vacate the guilty plea as inappropriately entered or accepted.

In *Lafler*, the U.S. Supreme Court required that the defendant be placed in the same procedural position he had occupied before his rights were infringed upon. *Lafler v. Cooper*, 132 S.Ct. 1376, 1391 (2012). The Court went so far as to order that Michigan re-offer the plea bargain to the defendant, acknowledging that whether doing so affected the convictions and sentence depended on the trial court’s exercise of its legal discretion with regard to plea bargains. *Id.*

Rettig’s conviction is illegitimate because his guilty plea is based upon ineffective assistance of counsel and was entered in violation of the constitutional requirement that guilty pleas be knowing, voluntary, and intelligent. The plea withdrawal statute blocks his ability to vindicate his rights in either direct violation of the constitutional rights themselves

or in violation of Utah's right to appeal, which is designed to provide a method to assert those rights, and others.

This Court should allow Rettig to develop the record below on his ineffective assistance claim and strike or vacate the guilty plea if ineffective assistance is established. This would place Rettig in the position in which he stood before he entered an unconstitutional guilty plea. Alternatively, this Court should reinstate Rettig's original motion to withdraw his guilty plea, which was withdrawn by replacement counsel, and allow Rettig to proceed forward based on the granting or denial of that motion. As a second alternative, this Court should acknowledge that the guilty plea was based on an insufficient factual basis and strike the guilty plea and allow Rettig to proceed forward from there.

**II. Rettig received ineffective assistance of counsel at the plea bargaining stage and when replacement counsel withdrew Rettig's motion to withdraw his guilty plea.<sup>8</sup>**

The Sixth Amendment to the U.S. Constitution states, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." Counsel must be effective. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). Without effective counsel, we cannot have faith in the reliability of the adversarial system and its outcome. *Lafferty v. State*, 2007 UT 73, ¶ 11, 175 P.3d 530. To show ineffective assistance of counsel, the appellant must demonstrate (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

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<sup>8</sup> The arguments in this Part are based largely on facts alleged, but not on the record. Rule 23B remand is necessary to develop facts on the record. Rettig's 23B motion is unresolved.

Performance was deficient when counsel's actions "fell below an objective standard of reasonableness under prevailing professional norms." *Lafferty*, 2007 UT 73, ¶ 12 (internal citations omitted). Prejudice is established by showing a reasonable probability of a different outcome if the deficiency were corrected. *Id.* at ¶ 13. Reasonable probability is not a more-likely-than-not standard, but merely a "probability sufficient to undermine confidence in the outcome." *Id.* In the context of a guilty-plea conviction, it is unnecessary to demonstrate reasonable probability of success at trial. Prejudice is demonstrated if there is a reasonable probability that the defendant would have insisted on trial, instead of pleading guilty, absent counsel's deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Rettig's counsel was deficient as set forth in the following subparts of this Part.

A. Counsel did not adequately discuss with Rettig the law of accomplice liability.

"After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case[.]"

American Bar Association Criminal Justice Standards Defense Function Standard 4-5.1(a); Utah R. Prof. Cond. 1.4(b). Counsel must not intentionally mislead the client about the law. *See* ABA Criminal Justice Standards Defense Function Standard 4-5.1(b).

Courts have found counsel to be deficient where counsel's advice regarding the law is either mistaken or intentionally misstated. *See, e.g., United States v. Mooney*, 497 F.3d 397 (4th Cir. 2007) (holding as ineffective assistance where defendant pled guilty based on counsel's mistaken representation that there was no defense of justification); *see also Garcia v. State*, 237 P.3d 716 (N.M. 2010).

This Court has found counsel ineffective where

... it is unclear from the record before us whether [counsel] carefully analyzed the law and the facts and laid out the options for [defendant] prior to [defendant's] initial guilty plea hearing or whether he simply encouraged [defendant] to plead guilty to capital homicide on the basis of his own judgment that [defendant] was guilty of capital homicide.

*State v. Holland*, 921 P.2d 430, 436 (Utah 1996).

In this case, Rettig alleges that neither Esplin, Frazier, Boyle, nor Facemyer explained to him Utah's law of accomplice liability under Utah Code § 76-2-202. Counsel told Rettig his mere presence while Bond killed Mortensen made Rettig guilty of aggravated murder. Counsel did not lay out the law and the facts before Rettig and allow him to make a decision. Counsel encouraged Rettig to plead guilty to aggravated murder on the basis of their own judgment that Rettig was guilty of aggravated murder.

Mere presence, does not make a person culpable of a crime committed by someone else. To be found guilty of a crime physically committed by someone else, the State is required to prove beyond a reasonable doubt that the defendant acted with the same mental state required for the offense and either solicited, requested, commanded, encouraged, or intentionally aided the other person to commit the offense. Utah Code § 76-2-202. Furthermore, intentionally aiding a person to commit one offense does not make a defendant culpable for all offenses committed by that person during the same course of events. The State must make a separate showing with respect to each crime that the defendant had a culpable mental state with respect to, and intentionally aided in the commission of the crime.

Rettig being present and intentionally aiding in a robbery should not make him guilty of a murder committed by another person during the robbery. Rettig maintained from the beginning that he did not know that Bond was going to kill Mortensen. After Bond had killed Mortensen, Rettig prevented the further deaths of Roger and Pamela Mortensen. Evidence was sufficient to suggest that Rettig did not “solicit[], request[], command[], encourage[], or intentionally aid” Bond to kill Mortensen, as would be required for Rettig to be found guilty of the murder of Mortensen. *See* Utah Code § 76-2-202.<sup>9</sup>

Counsel below should have correctly advised Rettig about what the State was required to prove to convict Rettig of Aggravated Murder. Failing to do so falls below an objective standard of reasonableness under prevailing professional norms. *See Strickland*. Rettig would not have pled guilty to aggravated murder, but would have insisted on a trial had he been properly instructed on the law of accomplice liability.

B. Counsel rendered ineffective assistance by failing to provide Rettig with discovery materials from the State.

A defense attorney has an ethical duty to keep his client informed regarding the representation, including a duty to “promptly comply with reasonable requests for information.” Utah R. Prof. Cond. 1.4(a)(3), (4). “[I]f the client requests a full copy of the file or certain reports or information, unless otherwise restricted, it must be provided to the client, unless exceptional circumstances apply.” Utah State Bar Ethics Advisory Opinion Committee, Op. No. 06-04, December 8, 2006, ¶ 15. When making a determination whether to accept or reject a plea offer, a defendant should be in possession of facts pertinent to such

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<sup>9</sup> For a further discussion on the application of the law of accomplice liability to the facts at issue in this case, see Part III, *infra*, dealing with the sufficiency of the factual basis used to support the entry of the guilty plea to the charge of aggravated murder.

a decision, including evidence the State intends to use against the Defendant should the matter go to trial. When a client asks for a copy of any discovery, generally his attorney cannot refuse.

In this matter, Rettig requested copies of the discovery from his attorneys several times prior to his entry of guilty pleas. Copies were not forthcoming. It was only after he told his attorneys of his intent to withdraw his pleas that a copy of his discovery was provided to him. Rettig was not fully in possession of the facts of his case when he entered his pleas, due to his attorneys' failure to provide the requested portions of his file. This failure falls below the attorney's ethical obligations and objective standards of reasonableness, and undermines our confidence that Rettig would have entered the same plea had he been informed of the evidence against him.

- C. Counsel rendered ineffective assistance by pressuring Rettig to plead guilty through the unethical involvement of Rettig's family rather than abiding Rettig's decision to reject the plea offer.

An attorney is bound by his client's decision with respect to the entry of a plea. Utah R. Prof. Cond. 1.2(a); *Williams v. Jones*, 571 F.3d 1086 (10th Cir. 2009) (holding counsel ineffective in pressuring defendant to reject a plea offer rather than abide by the client's decision with respect to what plea to enter). Furthermore, an attorney owes a duty of confidentiality to the client and must "not reveal information relating to the representation of a client unless the client gives informed consent," the disclosure is necessary to fulfill the client's objectives, or as otherwise permitted by the Rules of Professional Conduct. Utah R. Prof. Cond. 1.6(a).

Rettig informed his counsel that he was rejecting the State's proposed plea agreement wherein Rettig would plead guilty to aggravated murder and aggravated kidnapping in exchange for a 25-to-Life agreed sentence. Rettig's counsel did not inform the prosecution of Rettig's rejection, did not seek a more favorable plea agreement, and did not set the matter for trial. Instead, counsel violated Rettig's trust and called Rettig's family into a meeting where confidential information related to the representation was freely shared with Rettig's family members without Rettig's consent. The purpose of the meeting was to enlist the help of Rettig's family to exert pressure on Rettig to accept the plea offer.

Counsel may have felt that Rettig was making a mistake in rejecting the state's offer. The mistake was Rettig's to make. His attorney's duty was to support Rettig's decision and, if the matter was ultimately set for trial, give Rettig the best trial he could give him. Counsel, by fighting Rettig's choice and recruiting Rettig's family to pressure Rettig, stripped Rettig of this important choice. Had counsel fulfilled their proper role of advising and supporting Rettig in his choice of plea, Rettig's rejection of the plea offer would have been communicated to the State, and the matter would either have been set for trial or resulted in a more favorable plea agreement.

- D. Counsel rendered ineffective assistance by instructing Rettig to admit to a factual statement he believed to be untrue, state his agreement to a promise to testify to which he did not agree, and mislead the court regarding whether he understood his rights and plea, and whether he was satisfied with his attorneys.

An attorney owes a duty of candor to the court. Utah R. Prof. Cond. 3.3. The attorney must not offer a false statement of material fact or fail to correct a false statement of material fact. *Id.* 3.3(a)(1). It is unethical for an attorney to request or permit his client to



lie to the court. *Id.* 3.3(a)(3). Counsel may be ineffective for making such misrepresentations where it concerns the factual basis for entry of a guilty plea. *United States v. DeSimone*, 736, F.Supp.2d 477 (D.R.I. 2010) (Counsel was ineffective where defendant insisted the factual statement was untrue, but counsel instructed defendant to accept the recitation, and where counsel led defendant to understand that lying to the court was necessary to get his plea accepted.).

In the instant matter, not only did counsel below instruct Rettig to admit to a factual statement which Rettig told them was untrue, they did so over Rettig's request that the Statement be changed. Furthermore, counsel instructed Rettig to accept a plea condition (testifying against Bond) to which they knew Rettig did not agree, and likely would not honor, even after Rettig expressed dissatisfaction with the condition. When discussing the written factual statement to support the proposed plea, Rettig told his attorneys that it was untrue. Rettig could not, in good faith, tell the judge that the factual statement contained a report of what had happened on the date of the alleged offenses. Rettig offered changes to the factual statement so that it would reflect the truth as Rettig saw it. Rettig's counsel told him that they would take Rettig's offered changes and discuss them with the prosecutor. Instead, they made no effort to have Rettig's changes incorporated into the plea statement. When it came time for Rettig to enter his plea, the statement remained as it had been. No changes were discussed with the prosecutor or incorporated. The consequence of this inaction was that counsel offered a factual basis containing significant untruths, and the district court accepted it. At the very least, counsel knew that Rettig did not believe the facts

he admitted to and neither prevented Rettig from entering those admissions nor corrected the district court's belief that Rettig was entering an honest admission.<sup>10</sup>

The plea statement included a provision that Rettig must testify truthfully against Bond if called to do so. In the moments immediately preceding the entry of the plea hearing, Rettig was looking over the plea statement and found the agreement to testify. He expressed concern and wanted that agreement taken out. His attorneys, instead of informing the prosecution or the judge that Rettig would not agree to such a provision, told Rettig that "it's all just legal jargon" and that Rettig would never be called upon to testify. Counsel engaged in three-way misrepresentations: counsel misrepresented to Rettig his duties under the plea agreement and misrepresented to the prosecutor and the judge whether Rettig agreed to the provisions of the plea statement.

Finally, Rettig's attorneys instructed him how to respond to the district court's colloquy with him. They instructed him to answer affirmatively when asked whether he understood his rights. They instructed him to express satisfaction with his attorney's advice and assistance. They instructed him to say that he did not have any questions. They instructed him to say that he understood the plea that he was entering. They did not instruct him to answer honestly and truthfully the questions the court would ask of him. Rettig, following the instructions of his attorneys, went through the motions of answering the court's colloquy, giving all the correct answers for his plea to be accepted, despite the extreme reservations he felt and had expressed to his attorneys.

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<sup>10</sup> Even if the factual basis contained in the plea statement was completely true, it was insufficient to support a conviction for aggravated murder. *See* Part III, *infra*.

Had Rettig's concerns regarding the plea statement's factual basis and testimony provision been adequately addressed or acknowledged, Rettig likely would not have pled guilty but would have insisted upon trial. The failure of trial counsel to negotiate changes to the plea statement was a primary reason Rettig gave for his desire to withdraw his plea. R115. Furthermore, had counsel instructed Rettig to honestly answer the district court's questions, Rettig would likely have expressed his concerns with the plea he was entering, which may have resulted in the court refusing to take Rettig's guilty plea. We cannot have confidence that the outcome would have been the same absent counsel's errors.

E. There is a reasonable probability that absent counsel's deficiencies, Rettig would not have pled guilty and would have insisted on trial.

It is not necessary that any single deficiency of counsel satisfy the *Strickland* prejudice prong if the cumulative effect of trial counsel's deficiencies is such that we cannot have confidence in the outcome. *See Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors [plural, all errors considered together], the result of the proceeding would have been different."); *see also Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995) (stating, "We do not hesitate to conclude that there is a reasonable probability that, absent the deficiencies, the outcome of the trial might well have been different," and holding that analysis of individual prejudicial effect of each deficiency is unnecessary); *cf. United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

Rettig was severely prejudiced by the combined effect of counsel's deficient conduct. After Rettig's plea was entered, Rettig attempted to correct what he felt was a miscarriage of

justice by withdrawing his guilty plea and correcting the misrepresentations that had been made to the district court. R115-14. Rettig wrote as follows:

I feel as I have been inadequately represented by my current legal counsel. I feel I was pressured into agreeing to the plea agreement set forth by the prosecution. I also feel it was wrong of my attorney's [sic] to tell me to claim false events in open court as fact. But more importantly, I am ashamed of myself for doing so, knowing it was the wrong thing to do.

R114. Rettig's reasons for wanting to withdraw his plea reflect some of the same reasons his counsel's conduct was deficient as argued herein— namely, his attorneys failed to adequately discuss the case with Rettig, his attorneys did not provide Rettig with the State's evidence against him, his attorneys failed to have the factual basis changed to reflect what Rettig believed to be truth, and Rettig was pressured into accepting a plea offer he did not want to accept. R115-14.

Each of counsel's errors combines with the others to undermine confidence in the correctness of the outcome. Rettig's attorneys did not explain the law of accomplice liability, that the State would be required to prove that Rettig intentionally aided, solicited, or commanded the murder of Kay Mortensen in order to convict Rettig of aggravated murder. Rettig's story is that he did not know Bond would kill Kay Mortensen until it was too late to do anything about it, and that he stepped in to intervene before Bond could kill more people. Rettig's attorneys did not turn over the portions of Rettig's file containing the State's discovery until after the plea was entered, making it impossible for Rettig to evaluate the strength of the State's case against him. Rettig in fact rejected the State's plea offer, though that rejection was never communicated to the State. Instead Rettig's family was brought into the case without Rettig's consent in order to pressure Rettig into accepting the plea offer.

Rettig's counsel even went so far as to insist that Rettig admit as a fact a statement which Rettig had told them was untrue, and to answer the district court's colloquy in a very specific way, regardless of whether Rettig's answers were truthful. Had Rettig's attorneys behaved differently, there is a reasonable probability Rettig would not have entered a guilty plea, but would have insisted upon trial.

- F. Rettig's counsel was ineffective in withdrawing Rettig's motion to withdraw his plea without Rettig's consent where there was evidence that the plea was unknowing and involuntary.

The ineffectiveness alleged in this Part, *supra*, all have some effect on the knowingness and voluntariness of Rettig's plea. The plea cannot be said to be a knowing plea if Rettig was not properly advised of the elements the State would be required to show in order to prove that Rettig was guilty of aggravated murder. One cannot know what one is pleading to unless one understands the elements of the offense.

Rettig's plea was not a knowing plea where Rettig was not granted access to the discovery provided by the State and contained in his counsel's file. Rettig was not fully aware of the evidence the State had against Rettig and could not evaluate the strength of the State's case. Rettig thus could not make an informed decision whether to accept or reject the State's plea offer. Rettig's plea was thus not a knowing plea.

Rettig's plea was not voluntary where his counsel never communicated to the State Rettig's rejection of the plea offer, and instead enlisted the assistance of Rettig's family to pressure Rettig into accepting the State's offer. Rettig's choice was to plead not guilty. His attorneys refused to allow Rettig to make that choice. Rettig's plea was thus not voluntary.

In this matter, after Rettig had filed his own written motion with the district court attempting to withdraw his plea (R115-14), conflict counsel was appointed (R132). Instead of pursuing Rettig's goal of withdrawing his plea, conflict counsel withdrew Rettig's motion. R411:24-25. Had conflict counsel pursued the motion, one of two things would have happened: 1) the motion would have been granted, in which case Rettig's objective of preserving his right to a trial would have been fulfilled; or 2) the motion would have been denied in which case Rettig would have proceeded to sentencing. There is no tactical basis for conflict counsel's decision to not pursue Rettig's stated objectives. There is a reasonable likelihood that the motion to withdraw Rettig's plea would have been successful and a different outcome would have resulted.

**III. The district court erred when it accepted Rettig's guilty plea to aggravated murder where the factual basis of the plea did not support Rettig's conviction for aggravated murder as party or as accomplice.<sup>11</sup>**

**A. Factual Basis Required**

A trial court may not accept a guilty plea unless it finds that "a factual basis [exists] for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant ..." Utah R. Crim. P. 11(e)(4)(B). The requirement of a finding of a sufficient factual basis is a requirement of Due Process. *See State v. Breckenridge*, 688 P.2d 440, 443-44 (Utah 1983).

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<sup>11</sup> This Court may lack jurisdiction to consider the error asserted in this Part if Utah Code § 77-13-6(2)(c) survives Rettig's constitutional challenge. This is an example of why the statute is unconstitutional. The statute bars *all* challenges to a guilty plea save those timely *and* related to knowledge and voluntariness. A motion to withdraw a plea based on whether the plea was intelligent or whether the defendant received effective assistance of counsel cannot be granted (or its denial reversed on appeal).

Admittedly, court rules “prescribe the method by which individuals enforce their rights,” are “*procedural* in nature, and cannot create or modify substantive rights.” *State v. Alexander*, 2012 UT 27, ¶ 40, 279 P.3d 371. Further, variances from rule 11 not affecting substantial rights are to be disregarded. Utah R. Crim. P. 11(l). However, expounding on rule 11(l), this Court has suggested that *the* substantial right implicated by rule 11 is the right of defendants to knowingly and voluntarily make their pleas. *Alexander*, ¶ 43. That suggestion is problematic. The right for a defendant’s plea to be knowing and voluntary is a constitutional right. *Id.* ¶ 16. The ability to withdraw an unknowing and/or involuntary plea is a right granted by the Utah Legislature. *See id.* ¶ 41. These two rights are not identical, even if the latter is designed to enforce the former. Presumably, even a state lacking a plea withdrawal statute must answer as to whether the guilty plea was knowing and voluntary (and entered with effective assistance of counsel) under the U.S. constitution.

Moreover, the constitutional right in question is the right for a guilty plea to be voluntary, knowing, and *intelligent*. *Id.* ¶ 16. The requirement in rule 11(e)(4)(B) for a sufficient factual basis is specifically designed to ensure that the guilty plea is intelligent in addition to being knowing and voluntary.<sup>12</sup> Interestingly, Utah’s plea withdrawal statute does not allow a plea to be withdrawn because it was unintelligent. Technically, the legislature may decide

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<sup>12</sup> By design, Rule 11 conforms to its federal counterpart, which ensures pleas were intelligent. *See* Utah R. Crim. P. 11 Advisory Committee Notes (stating that “[t]he addition of a requirement for a finding of a factual basis in section (e)(4)(B) tracks federal rule 11(f), and is in accordance with prior case law. E.g. *State v. Breckenridge*, 688 P.2d 440 (Utah 1983)”); Fed. R. Crim. P. 11 Notes of Advisory Committee on Rule— 1966 Amendment (stating that the factual basis requirement “protect[s] a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge”); *see also Breckenridge*, 688 P.2d at 444 n.2 (acknowledging that instances of unintelligent, voluntary, and knowing pleas must be guarded against, even if rare).

whether to allow plea withdrawal and for what reasons, but the federal constitution imposes requirements on pleas that cannot be circumvented. Utah's plea withdrawal statute does not leave room for a constitutional challenge to a plea, but operates to bar *any* challenge to a guilty plea that does not comply with the statute's terms, including those challenges based on federal constitutional rights.

B. Aggravated Murder

Pursuant to Utah Code § 76-2-202, a defendant may only be convicted of a crime if, “acting with the mental state required for the commission of an offense [he] directly commits the offense, [or] solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense[.]” To be guilty of aggravated murder, a person must “intentionally or knowingly cause[] the death of another under any of [an enumerated list of circumstances, including] incident to an act, scheme, or course of conduct, or criminal episode during which the actor committed or attempted to commit aggravated robbery, robbery, ... aggravated burglary, burglary, aggravated kidnapping, or kidnapping[.]” Utah Code § 76-5-202(1)(d).

C. Plain Error

The question of whether the factual basis supported the guilty plea to aggravated murder (and thus whether Rettig's plea was intelligent) is a constitutional issue exempted from the preservation rule because Rettig's liberty is at stake. Alternatively, Rettig requests that the issue be reviewed on plain error. To obtain relief under the plain error doctrine, the appellant is required to show that “(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful ... .” *State v. Dunn*, 850 P.2d 1201, 1208 (Utah



1993). “[I]n appropriate cases we can exercise our discretion to dispense with the requirement of obviousness so that justice can be done, as when an error not readily apparent to the court or counsel proves harmful in retrospect.” *State v. Eldredge*, 773 P.2d 29, 35 n.8 (Utah 1989). The error is harmful if it is a sufficient basis to undermine confidence in the outcome reached below. *State v. Knight*, 734 P.2d 913, 919-20 (Utah 1987).

D. Insufficient Factual Basis & Unintelligent Plea

The factual basis for Rettig’s guilty plea to aggravated murder, as set forth in the plea statement was as follows:

[Incident to a scheme to commit robbery of several firearms from Mortensen,] Bond told Mortensen to kneel down in front of the bathtub with his back to us. While Mortensen was kneeling down, I was holding Mortensen at gunpoint with Bond’s handgun. Bond withdrew a knife from his person and then placed the knife back in his pocket. At this point, Bond left the bathroom, went downstairs and returned with a black-handled knife approximately 10 to 12 inches in length. Upon returning, *I observed Bond take the knife and slice Mortensen’s throat*. I am not certain how many times Bond cut Mortensen’s throat. After cutting his throat, I observed Bond stab Mortensen in the base of his neck with the same knife.

R60 (emphasis added). The factual basis given orally by the State was essentially identical. R410:29-30.

The factual basis used to support the entry of a guilty plea to aggravated murder did not indicate that Rettig acted with the mental state required for a conviction. The factual basis clearly indicates that Rettig did not personally cause the death of Mortensen. The factual basis also does not indicate that Rettig solicited, requested, commanded, or encouraged Bond to cause the death of Kay Mortensen. For Rettig to be criminally liable for the death of Kay Mortensen, the factual basis must clearly demonstrate (1) that Rettig

intended Kay Mortensen to die or knew that Kay Mortensen would die; and (2) that Rettig intentionally aided Bond to cause the death of Kay Mortensen.

The only allegation that may remotely point to Rettig's mental state is the allegation that Rettig held Mortensen at gunpoint in the bathroom while Bond went downstairs. There is no indication that Rettig knew Bond was retrieving a knife or knew what Bond intended to do with the knife. It is stated that Rettig "observed" Bond kill Mortensen— not "assisted," "helped," or "aided," but "observed." Being a witness to a crime does not make Rettig a participant in that crime, even if Rettig participated in other crimes.

Rettig's reaction to Bond's threatened killing of Roger and Pam Mortensen further negates the elements of knowledge or intent. After Rettig had "observed" what Bond had done to Kay Mortensen, once he fully understood of what Bond was capable, and finally had knowledge or belief of what Bond intended to do, Rettig intervened to prevent Bond from killing anyone else. R60-61;410:30-31. It is clear from the factual basis submitted that, although Rettig participated in burglary, robbery, and kidnapping, he lacked the mental state required for commission of aggravated murder. He did not intend Mortensen to die and did not know that Bond was going to kill Mortensen until it was too late.

By accepting the factual basis in this case as sufficient for aggravated murder and by accepting the guilty plea, the district court violated both rule 11 and Rettig's right to enter an intelligent plea.

The insufficiency of the factual basis should have been clear to the district court. At the very least, dispensing with the obviousness requirement is necessary so that justice may be done and Rettig's conviction for aggravated murder may be undone. Had the district

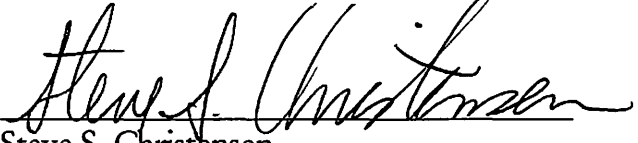
court recognized the insufficiency of the factual basis, there is a reasonable probability that it would not have accepted Rettig's guilty plea to the charge of aggravated murder.

### CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Rettig requests that he be permitted to develop the factual basis for his claim for ineffective assistance of counsel and that his guilty plea be stricken or vacated upon his establishing he received ineffective assistance of counsel. Or, if ineffective assistance of counsel is limited to replacement counsel withdrawing Rettig motion to withdraw plea, the Court should reinstate Rettig's original motion to withdraw his plea. Alternatively, the Court should strike or vacate the guilty plea because it was based on an insufficient factual basis.

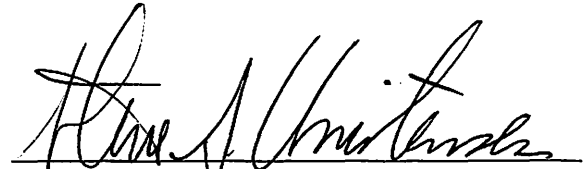
Respectfully submitted this 6th day of April, 2016.

CHRISTENSEN LAW

  
Steve S. Christensen  
*Attorney for Appellant*

### CERTIFICATE OF COMPLIANCE WITH RULE 24(F)(1)

I hereby certify that this brief complies with the requirements of Rule 24(f)(1)(A) of the Utah Rules of Appellate Procedure. This is an appellant's brief which must be less than 14,000 words. I have used the word processor to count the amount of words in this brief, excluding words in the table of contents, table of authorities, and the addendum. The total number of words in this brief is 13,718.



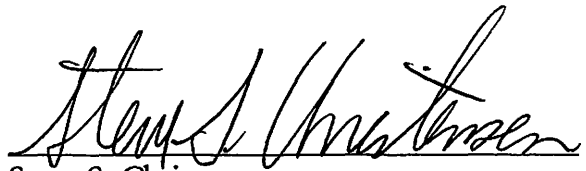
Steve S. Christensen

*Attorney for Appellant*

### CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing  
**REPLACEMENT BRIEF OF APPELLANT** to be sent via first class U.S. Mail, postage prepaid,  
on the 6th day of April, 2016, to:

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## ADDENDUM

## **U.S. CONSTITUTION, AMENDMENT VI**

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

## UTAH CONSTITUTION, ARTICLE I, SECTION 12

### [RIGHTS OF ACCUSED PERSONS.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

## **UTAH CONSTITUTION, ARTICLE VIII, SECTIONS 3–5**

### **Article VIII, Section 3. [Jurisdiction of Supreme Court.]**

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause.

### **Article VIII, Section 4. [Rulemaking power of Supreme Court—Judges pro tempore—Regulation of practice of law.]**

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. Except as otherwise provided by this constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

### **Article VIII, Section 5. [Jurisdiction of district court and other courts—Right of appeal.]**

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts,



both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

**UTAH CODE, SECTION 77-13-6. WITHDRAWAL OF PLEA.**

- (1) A plea of not guilty may be withdrawn at any time prior to conviction.
- (2)
  - (a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.
  - (b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.
  - (c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78B, Chapter 9, Postconviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

4TH DISTRICT CT - AF  
UTAH COUNTY, STATE OF UTAH

FILED

DEC 13 2011

4th DISTRICT  
STATE OF UTAH  
UTAH COUNTY

STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCING  
: SENTENCE, JUDGMENT, COMMITMENT  
:   
vs. : Case No: 101101668 FS  
BENJAMIN DAVID RETTIG, : Judge: THOMAS LOW  
Defendant. : Date: December 13, 2011

PRESENT

Clerk: rosew  
Prosecutor: TAYLOR, TIMOTHY L  
Defendant  
Defendant's Attorney(s): FACEMYER, DANA M

DEFENDANT INFORMATION

Date of birth: November 9, 1987  
Audio  
Tape Number: 2 Tape Count: 2:55

CHARGES

1. AGGRAVATED MURDER - 1st Degree Felony  
Plea: Guilty - Disposition: 06/02/2011 Guilty
2. AGGRAVATED KIDNAPING - 1st Degree Felony  
Plea: Guilty - Disposition: 06/02/2011 Guilty

HEARING

This matter comes before the court for Sentencing. The defendant appears in custody. The parties address the case before the court. Family of the defendant and family of the victim address the court. The defendant addresses the court.

The defendant is sentenced.

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED MURDER a 1st Degree Felony, the defendant is sentenced to an indeterminate term from 25 to Life years in the Utah State Prison.

Based on the defendant's conviction of AGGRAVATED KIDNAPING a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than fifteen years and which may be life in the Utah State Prison.

To the UTAH County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Case No: 101101668 Date: Dec 13, 2011

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SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

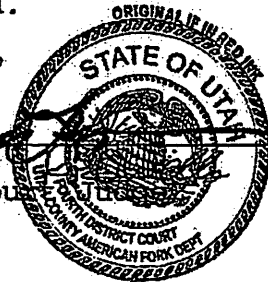
The sentence is to run concurrently on each count.

SENTENCE RECOMMENDATION NOTE

The court recommends a fine of \$10000.00 on count 1 and a fine of \$10000.00 on count 2. The court also recommends restitution in the amount of \$10671.71 for Crime Victims Reparations. Restitution is to be joint and several. Parole is recommended.

Date: December 13, 2011

  
THOMAS LOW  
District Court



FILED

JUN 02 2011

4TH DISTRICT  
STATE OF UTAH  
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,  Plaintiff,  vs.  BENJAMIN DAVID RETTIG,  Defendant.	STATEMENT OF DEFENDANT IN SUPPORT OF GUILTY PLEA OR NO CONTEST AND CERTIFICATE OF COUNSEL  Case No. 101101668  Judge Thomas Low
---	--

I, Benjamin David Rettig, hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights:

Notification of Charges

Crime & Statutory Provisions

Degree Min/Max Punishment,  
Fine + 90% surcharge

Criminal Homicide, Aggravated Murder  
U.C.A. §76-5-202

F1

Maximum penalty is death, life without the possibility of parole or an indeterminate prison term of not less than 25 years which may be for life. Fine of \$20,000. \$10,000

Aggravated Kidnaping  
U.C.A. §76-5-302

F1

Maximum penalty is life without parole or ~~not less than 6, 10 or 15 years to life~~ 15 years to life. Fine of \$20,000. \$10,000

TAMP  
SF  
TLT  
BDR

TLT  
BDR

TLT  
BDR

### Explanatory Note

When properly filled out, the following Statement of Defendant in Support of Guilty Plea contains all the requirements of Rule 11(e), Utah Rules of Criminal Procedure. If the District Court chooses to rely on this statement for purposes of strict compliance with Rule 11, it must make the fact known on the record by referring to the statement on the record asking defendant if he or she read, understood and acknowledged the contents of the statement. If the defendant cannot read or understand English, the Court should ascertain on the record that the statement has been read or translated to the defendant. Although this form is for a guilty or no contest plea, it may be adapted for *Alford* pleas.

☐ Enhanceable Second Offense. (Only if checked.)

I know that if I am convicted in the future of this same crime, the second conviction will be a [Class \_\_\_\_ Misdemeanor or \_\_\_\_ Degree Felony.] The maximum penalty for that crime is \_\_\_\_\_.

I hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights:

#### Elements of Offense

I have received a copy of the (Amended) Information against me. I have read it, or had it read to me, and I understand the nature and the elements of crime(s) to which I am pleading guilty.

The elements of the crime(s) to which I am pleading guilty are:

#### Count 1: Criminal Homicide, Aggravated Murder

- 1) On or about November 16, 2009, in Utah County, Utah, I intentionally or knowingly caused the death of another or intentionally aided another person to intentionally or knowingly cause the death of another and,
- 2) the homicide was committed incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit aggravated robbery, robbery, aggravated burglary, burglary, aggravated kidnaping, or kidnaping;
- 3) the homicide was committed for pecuniary gain;
- 4) ~~the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death~~ *AMKE BAR TLT*

#### Count 2: Aggravated Kidnaping

- 1) On or about November 16, 2009, in Utah County Utah, during the course of committing unlawful detention or kidnaping, I did:
- 2) possess, use, or threaten to use a dangerous weapon as defined in Utah Code Section 76-1-601; or
- 3) act with intent:

- (a) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony;
- (b) to hinder or delay the discovery of or reporting of a felony;
- (c) to inflict bodily injury on or to terrorize the victim or another.

#### Admitted Facts

I understand that by pleading guilty, I am admitting that I committed the foregoing crime(s). (Or, if I am pleading no contest, I am not contesting that I committed the foregoing crimes.) I stipulate and agree (or, if I am pleading no contest, I do not dispute or contest) that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the Court to accept my guilty (or no contest) plea(s) and prove the elements of the crime(s) to which I am pleading guilty (or no contest):

*On or about November 16, 2009, Martin Bond ("Bond") and I traveled in Bond's vehicle from Vernal, Utah to Kay Mortensen's ("Mortensen") home in Spanish Fork, Utah. The purpose in traveling to Mortensen's home was to steal firearms located in Mortensen's home. Upon arriving at Mortensen's home, Bond indicated he would initially enter the home and then I was to follow him and also enter the home. Bond and I entered the home without being invited and we had a handgun with us. Bond placed zip ties on Mortensen and both of us were wearing ski masks and latex gloves in order to hide our identities. We commanded Mortensen to show us where his firearms were located. Mortensen took us to a bunker located behind his home and we observed several weapons. We took Mortensen from the bunker and back into his home. After re-entering the home, we took Mortensen upstairs to a bathroom. Bond told Mortensen to kneel down in front of the bathtub with his back to us. While Mortensen was kneeling down, I was holding Mortensen at gunpoint with Bond's handgun. Bond withdrew a knife from his person and then placed the knife back in his pocket. At this point, Bond left the bathroom, went downstairs and returned with a black-handled knife approximately 10 to 12 inches in length. Upon returning, I observed Bond take the knife and slice Mortensen's throat. I am not certain how many times Bond cut Mortensen's throat. After cutting his throat, I observed Bond stab Mortensen in the base of his neck with the same knife.*

*Shortly after Bond cut and stabbed Mortensen, we heard someone knock on the front door. I ran downstairs and hid behind the front door and Bond opened the door. A female and male were at the door asking for Mortensen. (I later discovered that the individuals were Pamela and Roger Mortensen.) I was still holding the handgun when Pamela and Roger entered the home. I informed Pamela and Roger that Mortensen was upstairs and that he was okay. We told them to walk into the sunken living room and we placed zip ties on Pamela's and Roger's hands and feet. At some point, Bond came out of the kitchen with another knife which I believed he was going to use to kill Pamela and Roger. I stepped in front of Bond and told him not kill Pamela and Roger. While Pamela and Roger were tied up in the living room, I remained in the living room with them holding the handgun while Bond removed approximately 25 of Mortensen's weapons (including handguns and rifles) from the bunker and placed them in Bond's vehicle. We also took ammunition from the bunker. After placing the guns and ammunition in Bond's vehicle, we took Roger's driver's license and told him and*

*Pamela that they needed to tell the police that three black men had tied them up and if they told the police a different story, we knew where they lived and we would come back and kill them. We left Mortensen's residence and drove back to Vernal. On our way back to Vernal, we stopped at a rest stop and discarded our gloves in a dumpster. In Vernal, Bond and I went up a canyon and buried the weapons. Following this, Bond took my hoodie and shoes in order to dispose of them.*

#### **Waiver of Constitutional Rights**

I am entering this/these plea(s) agreement voluntarily. I understand that I have the following rights under the constitutions of Utah and the United States. I also understand that if I plead guilty (or no contest) I will give up all the following rights:

**Counsel.** 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 understand that I might later, if the judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I have not waived my right to counsel.

I certify I have read this statement and that I understand the nature and elements of the charges and crimes to which I am pleading guilty. I also understand my rights in this case and the consequences of my guilty plea.

If I have not waived my right to counsel, my attorneys are Michael Esplin, Stephen Frazier and Ann Boyle. My attorneys and I have fully discussed this statement, my rights and the consequences of my guilty plea.

**Jury Trial.** I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty.

**Confrontation and cross-examination of witnesses.** I know that if I were to have a jury trial, a) I would have the right to see and observe the witnesses who testified against me and b) my attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses in open court who testified against me.

**Right to compel witnesses.** I know that if I were to have a jury trial, I could call witnesses if I chose to and I would be able to obtain subpoenas requiring the attendance and testimony of those witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

**Right to testify and privilege against self-incrimination.** I know that if I were to have a trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, no one could make me testify or make me give evidence against myself. I also know that if I chose not to testify, the jury would be told that they could not hold my refusal to testify against me.



**Presumption of innocence and burden of proof.** I know that if I do not plead guilty, I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty," and my case will be set for a trial. At a trial, the State would have the burden of proving each element of the charge(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

I understand that if I plead guilty, I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

**Appeal.** I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. By pleading guilty, I understand my right to appeal is limited. I understand that I am giving up my right to appeal my conviction if I plead guilty. I understand that if I wish to appeal my sentence, I must file notice of appeal within 30 days after my sentence is entered.

*I know and understand that by pleading guilty, I am waiving and giving up all the statutory and constitutional rights as explained above.*

#### Consequences of Entering a Guilty Plea

**Potential penalties.** I know the maximum sentence that may be imposed for each crime to which I am pleading guilty. I know that by pleading guilty to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

I understand that if I am not a United States citizen, my plea(s) today may, or even will, subject me to deportation under the United States immigration laws and regulations, or otherwise adversely affect my immigration status, which may include permanently barring my re-entry into the United States. I understand that if I have questions about the effect of my plea on my immigration status, I should consult with an immigration attorney.

I know that in addition to a fine, a ninety percent (90%) surcharge will be imposed together with a security fee of \$33.00 for each offense to which I have plead guilty. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

**Consecutive/concurrent prison terms.** I know that if there is more than one crime involved, the sentences may be imposed one after another (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty, my guilty plea(s) now may

result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the court to impose consecutive sentences unless the court finds and states on the record that consecutive sentences would be inappropriate.

**Plea Agreement.** My guilty plea is the result of a plea bargain between myself and the prosecuting attorney. All the promises, duties, and provisions of the plea bargain are fully contained in this plea agreement, including those explained below:

*In exchange for my guilty pleas, the State of Utah agrees not to seek the death penalty in this case. In addition, the State of Utah will recommend to the Court that I receive a penalty of not less than 25 years to life with the possibility of parole. The State of Utah will also recommend to the Court that the charges of Aggravated Murder and Aggravated Kidnaping run concurrently with each other. Finally, if I receive a subpoena to testify against Martin Bond, I agree to appear and testify truthfully.*

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

#### **Defendant's Certification of Voluntariness**

I am entering this plea of my own free will and choice. No force, threats, of unlawful influence of any kind have been made to get me to plead guilty (or no contest). No promises except those contained in this plea agreement have been made to me.

I have read this statement, or I have had it read to me by an attorney, and I understand its contents and adopt each plea agreement in it as my own. I know that I am free to change or delete anything contained in this plea agreement, but I do not wish to make any changes because all of the statements are correct.

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

I am 23 years of age. I have attended school through the 6<sup>th</sup> grade. 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 I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgment.

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

I understand that if I want to withdraw my guilty pleas(s), I can file a written motion to withdraw my plea(s) before sentence is announced. I understand that for a plea in abeyance, a motion to withdraw from the plea agreement must be made within 30 days of pleading guilty or no contest. I will only be allowed to withdraw my plea if I show that it was not knowingly and

voluntarily made. I understand that any challenge to my plea(s) made after sentencing must be pursued under the Post-Conviction Remedies Act in Title 78, Chapter 35a, and Rule 65C of the Utah Rules of Civil Procedure.

Dated this 1 day of June, 2011.

  
DEFENDANT


**Certificate of Defense Attorney**

I certify that I am the attorney for Benjamin David Rettig, the defendant above, and that I know he/she has read the plea agreement or that I have read it to him/her; 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.

  
ATTORNEY FOR DEFENDANT  
Bar No. 1007

**Certificate of Prosecuting Attorney**

I certify that I am the attorney for the State of Utah in the case against Benjamin David Rettig, the defendant. I have reviewed this plea agreement 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 this 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 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.

  
DEPUTY UTAH COUNTY ATTORNEY  
Bar No. 8001

**ORDER**

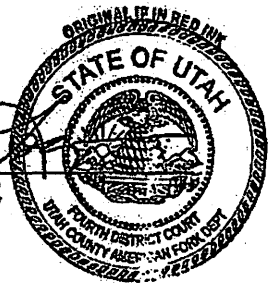
Based on the facts set forth in the foregoing plea agreement and the certification of the defendant and counsel, and based on any oral representations in court, the Court witnesses the signatures and finds that the defendant's guilty (or no contest) plea(s) is/are freely, knowingly,

and voluntarily made.

IT IS HEREBY ORDERED that the defendant's guilty (or no contest) plea(s) to the crime(s) set forth in the plea agreement be accepted and entered.

Dated this 2 day of June, 2011.

  
DISTRICT COURT JUDGE



1 CASE NO. 101101668  
2 DEPT. AMERICAN FORK - #2

ORIGINAL

3  
4 IN THE FOURTH DISTRICT COURT IN AND  
5 FOR UTAH COUNTY, STATE OF UTAH

6 -----ooOoo-----

7 THE STATE OF UTAH, )  
8 Plaintiff, )  
9 vs. )  
10 BENJAMIN DAVID RETTIG, )  
11 Defendant. )  
12

TRANSCRIPT  
OF  
ENTRY OF PLEA

13  
14 BEFORE THE HONORABLE THOMAS LOW  
15 DISTRICT COURT JUDGE

16 THURSDAY, JUNE 2, 2011  
17 9:00 A.M.

FILED  
UTAH APPELLATE COURTS

18 APPEARANCES:

19 For the Plaintiff: TIMOTHY TAYLOR, ESQ.  
20 JOHN NIELSEN, ESQ.

21 For the Defendant: MICHAEL ESPLIN, ESQ.  
22 STEPHEN FRAZIER, ESQ.

23  
24  
25 Transcribed by: Mary Beth Cook, CSR, RPR

JAN 13 2014

2013/0243e

FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY  
2011 OCT 27 P 1:53

RECEIVED  
FEDERAL BUREAU OF INVESTIGATION  
U.S. DEPARTMENT OF JUSTICE

APR 1 1964

30131034-26

FOURTH DISTRICT COURT - AMERICAN FORK  
UTAH COUNTY, STATE OF UTAH

THURSDAY, JUNE 2, 2011  
9:00 A.M.

PROCEEDINGS

THE COURT: We'll call the case of State of Utah versus Benjamin Rettig. This is case 101101668. If counsel will please state their appearances for the record.

MR. ESPLIN: Mike Esplin for the defendant.

MR. FRAZIER: Stephen Frazier (inaudible).

THE COURT: And Mr. Rettig is here as well?

MR. ESPLIN: Yes.

THE COURT: The State.

MR. TAYLOR: Tim Taylor on behalf of the State.

MR. NIELSEN: John Nielsen for the State.

THE COURT: All right, thank you. The Court's been notified that the defendant intends to change his plea today; is that correct, Mr. Esplin?

MR. ESPLIN: That's correct, Your Honor (inaudible).

THE COURT: Would you like to proceed from the podium?

MR. ESPLIN: Yes.

THE COURT: Who is going to state the nature of the

enters your plea today?

THE DEFENDANT: Yes, sir.

THE COURT: We'll go through that in more detail in a moment.

Is that the State's understanding of the agreement, Mr. Taylor?

MR. TAYLOR: Yes, it is, Judge.

THE COURT: Can I just ask you, Mr. Taylor, has the victim's family been consulted regarding this disposition?

MR. TAYLOR: Yes, Judge. The victim's widow is here, Darla Mortensen, and we have also some other extended family. We have talked with them. We have talked about this resolution, and they have been (inaudible).

THE COURT: Do you know if any of them desire to speak today in regards -- not to any proposed sentence necessarily today but just in regards to the proposed plea agreement? All right, thank you.

Mr. Rettig, we're going to talk to you now for some moments here. If I could have the clerk administer an oath to you. Can we just free his right hand just for the administration of the oath? If you'd like, it could be resecured after the oath has been administered.

Can you raise your right hand, please.

///

///

2

4

agreement? Would you like to or would you like Mr. Taylor to?

MR. ESPLIN: Sure, Your Honor. It's our understanding that the State is going to file an Amended Information -- we've received a copy of that -- which will result in the dismissal of Counts 3 and 4 to the Information and will allege Count 1, criminal homicide aggravated murder, and Count 2, aggravated kidnapping, both first-degree felonies, one a capital felony, one a first-degree felony.

In addition to that, the agreement would be stated with the plea statement which has been prepared in this case that the State would also recommend in return for the defendant's pleas of guilty to those two amended charges would recommend that they would not seek the death penalty in this case and would recommend that the defendant receive a penalty of not less than 25 years to life with the possibility of parole. It also recommend that the charge of aggravated murder and aggravated kidnapping run concurrently with each other. And that's the basis of the agreement.

THE COURT: All right, thank you.

Mr. Rettig, is that your understanding of the agreement?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand the consequences of your plea today if you do accept that offer and the Court

Whereupon,

BENJAMIN RETTIG,

was administered the following oath by the court clerk.

THE CLERK: You do solemnly swear that the testimony you give you're about to give in this case now pending before the court will be the truth, the whole truth, and nothing but the truth so help you God.

THE DEFENDANT: Yes.

THE COURT: Thank you. Mr. Rettig, just to make sure you're aware, the purpose of the hearing today is for you to enter a guilty plea -- or guilty pleas to two of the State's four charges against you. In order to do this, it's necessary that I confirm that you understand everything that's happening and all the consequences of your pleas today. If you do not understand something, please just let me know, and I will endeavor to make sure that you can understand it. If you ever need a delay or a chance to talk to your counsel at any time, you can do so there at the podium or we can take a recess and you can talk in private.

Can I just ask how old you are?

THE DEFENDANT: I'm 23.

THE COURT: And how far did you go in school?

THE DEFENDANT: Finished the 11<sup>th</sup> grade.

MR. ESPLIN: He does have a GED.

THE COURT: How long have you had that GED?

1 THE DEFENDANT: Since the 11<sup>th</sup> grade.  
2 THE COURT: And you can read and write the English  
3 language?  
4 THE DEFENDANT: Yes, sir.  
5 THE COURT: Have you taken any alcohol or drugs in  
6 the last 48 hours?  
7 THE DEFENDANT: No, sir.  
8 THE COURT: Any other medicine that could affect  
9 your ability to understand what you are doing today?  
10 THE DEFENDANT: No, sir.  
11 THE COURT: Do you currently have any mental,  
12 emotional or physical problems or issues that could interfere  
13 with your ability to understand what is happening here today?  
14 THE DEFENDANT: No.  
15 THE COURT: Has anyone forced, threatened or  
16 coerced you in any way into entering these pleas that are  
17 proposed today?  
18 THE DEFENDANT: No.  
19 THE COURT: Has anyone made any promises to you in  
20 connection with your guilty pleas other than those that  
21 Mr. Esplin has already stated on the record?  
22 THE DEFENDANT: No.  
23 THE COURT: Are you, in fact, intending to enter  
24 these pleas of your own free will and choice?  
25 THE DEFENDANT: Yes, sir.

6

1 MR. TAYLOR: Judge, Count 1, the aggravated murder,  
2 obviously is Kay Mortensen. Count 2, the aggravated  
3 kidnapping, applies to Roger and Pamela Mortensen.  
4 THE COURT: So both Roger and Pamela Mortensen have  
5 been included in Count 2, I guess, and Count 3 which would  
6 relate to another one is being dismissed. That is also  
7 classified as a first-degree felony. The minimum penalty  
8 that attaches to this offense is presumed to be a prison term  
9 of not less than 15 years and which may be for life.  
10 However, if the Court finds that a lesser term is  
11 in the interest of justice and if I state the reasons for  
12 that finding on the record, then I could impose a term of  
13 imprisonment of not less than ten years and which may be for  
14 life and of not less than six years which may be for life.  
15 (Off-the-record bench conference.)  
16 THE COURT: Mr. Rettig, your counsel has requested  
17 a brief recess to look at the potential penalties for  
18 aggravated kidnapping. We'll do that and reconvene as soon  
19 as we're ready.  
20 (Whereupon, a recess was taken.)  
21 MR. ESPLIN: We believe that the Court is correct  
22 on that being the statute, and we have modified the statement  
23 of events to allege maximum penalty is life without parole or  
24 15 years to life. I've explained that to the defendant, and  
25 I've explained that the Court can in this case (inaudible)

8

1 THE COURT: Have you had an opportunity to clearly  
2 discuss this plea agreement with your attorneys?  
3 THE DEFENDANT: I have.  
4 THE COURT: And you understand the terms of that  
5 agreement?  
6 THE DEFENDANT: Yes.  
7 THE COURT: In Count 1 of the Information, you have  
8 been charged -- and I understand even in the Amended  
9 Information you will be charged with aggravated murder which  
10 is classified as a noncapital first-degree felony under the  
11 laws of the state of Utah because a notice of intent to seek  
12 the death penalty has not yet been filed. The minimum  
13 penalty that applies to this offense is an indeterminate  
14 prison term of not less than 25 years and which may be for  
15 life and the maximum penalty is life in prison without  
16 parole.  
17 Do you understand that these are the possible  
18 penalties that attach to the offense of aggravated murder as  
19 currently charged against you?  
20 THE DEFENDANT: Yes, sir.  
21 THE COURT: Count 2 of the Information alleges that  
22 you have committed the offense of aggravated kidnapping. I'm  
23 informed, and when we hear the factual basis in a few  
24 moments, that that relates to Roger and Pamela -- I'm sorry.  
25 The one count addresses both; is that correct, Mr. Taylor?

1 appropriate six or ten years.  
2 THE COURT: Thank you. And you've initialed that  
3 change on that document, Mr. Rettig?  
4 THE DEFENDANT: I have.  
5 THE COURT: Do you understand then the penalties  
6 for the offense of aggravated kidnapping? Should I go over  
7 those again, Mr. Esplin, or do you think that he --  
8 MR. ESPLIN: I think he understands. Do you  
9 understand?  
10 THE DEFENDANT: I do.  
11 THE COURT: The presumption is 15 to life, but it  
12 could be higher, could be lower.  
13 I understand that the State has agreed to recommend  
14 a sentence of 25 years to life in exchange for your guilty  
15 plea to aggravated murder. It also agrees to recommend that  
16 the sentence on the aggravated kidnapping charge should run  
17 current with your sentence for aggravated murder.  
18 Finally, I understand that you agree that if you  
19 are subpoenaed to testify in a proceeding against Martin Bond  
20 that you would appear and testify truthfully in that  
21 proceeding.  
22 Is this your understanding of the plea agreement?  
23 THE DEFENDANT: Yes, sir.  
24 THE COURT: In addition to those penalties we've  
25 discussed, you may also be ordered to pay a fine of up to

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1 \$10,000 for each offense, a 90 percent surcharge and a \$33  
2 court security fee. I also may order you to pay restitution  
3 to the victims of your crime; do you understand that?  
4 THE DEFENDANT: Yes, sir.  
5 THE COURT: I want to go through the elements of  
6 the offenses with you now. The elements of the offense of  
7 aggravated murder as has been charged against you in the  
8 information are as follows: That, first, on or about  
9 November 16<sup>th</sup>, 2009, in Utah County, Utah, you caused the  
10 death of Kay Mortensen and, second, that you did so  
11 intentionally or knowingly and, third, that the homicide was  
12 committed incident to an act, scheme, course of conduct or  
13 criminal episode during which you committed or attempted to  
14 commit aggravated robbery, robbery, aggravated burglary or  
15 burglary, aggravated kidnapping or kidnapping. Here I guess  
16 the applicable other offense would be aggravated kidnapping.  
17 The homicide -- it's also alleged that the homicide  
18 may have been or was committed for pecuniary gain --  
19 pecuniary is just another word for monetary; that there was  
20 some sort of financial motive for it -- or that the homicide  
21 was committed in an especially heinous, atrocious, cruel or  
22 exceptionally depraved manner, any of which must be  
23 demonstrated by physical torture, serious physical abuse or  
24 serious bodily injury to the victim before death.  
25 Do you understand that these are the elements of

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1 the offense of aggravated murder as it has been charged  
2 against you?  
3 MR. ESPLIN: Your Honor, we would indicate that  
4 Mr. Rettig would be charged under the intentionally aiding  
5 another person to commit homicide. His involvement is as an  
6 accessory here, and he understands that as an accessory he is  
7 liable as if he were (inaudible).  
8 THE COURT: I didn't see a reference to 76-2-202 or  
9 the party liability statute in the statement.  
10 MR. ESPLIN: That's come -- that's in the factual  
11 statement. He was not the actual one that killed. Also, I  
12 don't know that Section 4 (inaudible) for the death penalty  
13 or capital homicide, but I think the State is really going  
14 under the No. 2 and No. 3 there.  
15 MR. TAYLOR: If it were to go to trial, we would  
16 try to use any one of those categories, but I think  
17 Mr. Esplin is right that that's kind of (inaudible). I think  
18 our factual basis, you know, mostly adheres to 2 and 3. In  
19 our statement of defendant's plea under the element of the  
20 offense, we do include intentionally aiding another person,  
21 so either he did it or he intentionally aided another person,  
22 and so we did include that in our statement.  
23 THE COURT: In the facts?  
24 MR. TAYLOR: If you look on page 2.  
25 THE COURT: Under No. 1?

1 MR. ESPLIN: It's there.  
2 THE COURT: And it's an alternate there?  
3 MR. TAYLOR: Yes, Your Honor.  
4 THE COURT: As far as the admission in the  
5 agreement then today, are we agreeing that the defendant is  
6 only admitting to 2 and 3 or to the incident to attempt to  
7 commit aggravated kidnapping and pecuniary gain? Is that  
8 what the State is doing today? I thought the factual basis  
9 would support all three, and that's in the elements that you  
10 have provided to me, so I'm mentioning all three.  
11 Just for the record, Mr. Esplin, when you were  
12 referring to 2 and 3, you're referring to how they're  
13 numbered on the statement of events and not how they're  
14 numbered by statute.  
15 MR. ESPLIN: No, the statute (inaudible).  
16 MR. TAYLOR: Our argument is that it's not  
17 necessarily with regards to subs 2, 3 and 4 that he's  
18 admitting all of those because those are in 4.  
19 THE COURT: Right, and I understand --  
20 MR. TAYLOR: So it would just be showing that he  
21 did it in conjunction with Mark Bond in this way or in this  
22 other way, and so that would be -- that's our argument. So  
23 we're not saying he necessarily did it, but that would be  
24 part of what we're proving so that he's not admitting the  
25 elements with regards (inaudible) 4.

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1 THE COURT: I understand if you went to trial you'd  
2 want to have all three theories go to a jury, but this is an  
3 agreement, and so I anticipated -- and I guess I should have  
4 confirmed that earlier -- but I anticipated that there was an  
5 agreement to those three aggravating factors even though they  
6 are "or" under the statute. You only need one of them.  
7 MR. ESPLIN: It's probably academic except it  
8 concerns us about the sentencing situation although  
9 (inaudible) sentence (inaudible) affect (inaudible).  
10 THE COURT: It may. I want to make sure we have an  
11 agreement as to the element even though the statute is "or."  
12 By now we ought to have an agreement to the elements that  
13 we're pleading to. Do you need more time?  
14 MR. TAYLOR: Judge, I think that what we'll do is  
15 that we'd be fine with regards to the elements if Mr. Rettig  
16 admits to subparagraph 2 and 3 which show the elements  
17 (inaudible).  
18 THE COURT: Is that your agreement, Mr. Esplin?  
19 MR. ESPLIN: Yes, I think that's sufficient to  
20 support the plea.  
21 THE COURT: Any of the three are sufficient to  
22 support the plea. You have the original document in front of  
23 you, Mr. Esplin; is that right?  
24 MR. ESPLIN: They're going to file an Amended  
25 information.

13

1 THE COURT: I mean the statement of events.  
2 MR. ESPLIN: Yes, I do, Your Honor.  
3 THE COURT: If you could make a notation there  
4 then.  
5 MR. ESPLIN: I'll just strike 4 then.  
6 THE COURT: And if you could initial that and have  
7 Mr. Rettig initial that and allow Mr. Taylor to initial that.  
8 I'm not sure, Mr. Taylor, if this level of minutiae  
9 or details was discussed with the victim's family.  
10 MR. TAYLOR: It was not, Judge. We talked more  
11 generally with regards to the elements, not particularly with  
12 regards to going through every statutory (inaudible) as to  
13 what theory we would proceed.  
14 THE COURT: Which enhancements would be used.  
15 want to make sure since that's at least for me a change in  
16 what I've seen in the documents here that there's still no  
17 desire on the part of the victims to make a statement today  
18 regarding the plea agreement.  
19 (Pause in proceedings.)  
20 MR. TAYLOR: Just for the record I spoke with Daria  
21 Mortensen and explained to her the amendment taking place on  
22 that, and we're ready to go forward and proceed.  
23 THE COURT: If I might just comment. I understand  
24 that in some ways this element is a difficult one even under  
25 these facts to establish because I don't know what evidence

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1 intentionally and knowingly Mr. Mortensen's death incident to  
2 those two aggravating factors; that those are the elements of  
3 aggravated murder as it has been charged against you?  
4 THE DEFENDANT: Yes, sir.  
5 THE COURT: The elements of the offense of  
6 aggravated kidnapping as it has been charged against you in  
7 the Information are as follows: First, that on or about  
8 November 16, 2009, in Utah County, Utah, during the course of  
9 committing unlawful detention or kidnapping, you did either,  
10 second, possess, use or threaten to use a dangerous weapon as  
11 defined in Utah Code Section 76-1-601 or, third, act with  
12 intent to facilitate the commission, attempted commission or  
13 flight after commission or attempted commission of a felony,  
14 hinder or delay the discovery or reporting of a felony or, c,  
15 inflict bodily injury on or to terrorize a victim or another.  
16 Same question there, Mr. Esplin. Is there an  
17 agreement as to which of those aggravating factors or all of  
18 them would apply?  
19 MR. ESPLIN: I think they would all apply, Your  
20 Honor.  
21 THE COURT: It's your understanding then,  
22 Mr. Rettig, that you're admitting to all three of those  
23 aggravating factors today; is that right?  
24 THE DEFENDANT: Yes, sir.  
25 THE COURT: Do you understand those elements of

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1 the State has regarding how long Mr. Mortensen lived. You  
2 need to also understand that it's probably the element with  
3 the most emotional impact and the most relevance to the  
4 victim's family as it relates to suffering of someone who was  
5 dying. So I understand the difficulties today. I also  
6 understand the legal issues that the attorneys are involved  
7 in, and it's a complicated one, and if you need more time,  
8 I'm happy to give it, but you're ready to proceed?  
9 MR. TAYLOR: We're ready to proceed, Judge. Thank  
10 you.  
11 THE COURT: All right, thank you. Let me just go  
12 through that one more time with you.  
13 Mr. Rettig, as far as the Court is concerned then,  
14 the reason this is an aggravated murder is because the  
15 homicide was committed incident to one act, scheme, course of  
16 conduct or criminal episode during which you committed or  
17 attempted to commit aggravated kidnapping, and the homicide  
18 was committed for pecuniary gain. So instead of being "or"  
19 there, we're considering that you're admitting to both of  
20 those aggravating factors; is that your understanding as  
21 well?  
22 THE DEFENDANT: Yes, sir.  
23 THE COURT: Do you understand that these elements  
24 as we've gone through them this morning with the break that  
25 this happened on or about November 16, 2009; that you caused

1 aggravated kidnapping as I've explained that to you?  
2 THE DEFENDANT: I do.  
3 THE COURT: Regarding the assistance of your  
4 counsel now, I'm going to ask you first of all, I've asked  
5 you before, but you have had a chance to discuss the entering  
6 of your plea with your attorneys today?  
7 THE DEFENDANT: I have.  
8 THE COURT: And previously to today?  
9 THE DEFENDANT: I have.  
10 THE COURT: You had an adequate opportunity to  
11 spend time with them so they could answer all of your  
12 questions?  
13 THE DEFENDANT: Yes, sir.  
14 THE COURT: Have your attorneys answered all of  
15 your questions?  
16 THE DEFENDANT: Yes, sir.  
17 THE COURT: Are you fully satisfied with the  
18 counsel and representation and advice that they've given to  
19 you in this case?  
20 THE DEFENDANT: Yes, sir.  
21 THE COURT: My understanding is that the attorneys  
22 have been Stephen Frazier, Ann Boyle and Mike Esplin?  
23 THE DEFENDANT: Yes, sir.  
24 THE COURT: Do you need any additional time to  
25 confer with them?

17

1 THE DEFENDANT: No, sir.  
2 THE COURT: Now, regarding the plea statement,  
3 you've had a chance to read that plea document there in front  
4 of you?  
5 THE DEFENDANT: I have.  
6 THE COURT: You've read it entirely paragraph by  
7 paragraph?  
8 THE DEFENDANT: Yes, sir.  
9 THE COURT: Did you have anyone read it to you, or  
10 did you read it yourself?  
11 MR. ESPLIN: Both. He read it himself. We left a  
12 copy, and he's had a copy for several weeks.  
13 THE DEFENDANT: I've read it multiple times.  
14 MR. ESPLIN: We've also discussed it in detail with  
15 him (inaudible).  
16 THE COURT: You've reviewed that document yourself  
17 then when you've had it over the last couple of weeks the  
18 elements of aggravated murder and the elements of aggravated  
19 kidnapping as we've discussed them today?  
20 THE DEFENDANT: I have.  
21 THE COURT: You've also had a chance to review for  
22 those last couple of weeks the possible penalties that would  
23 attach?  
24 THE DEFENDANT: Yes, sir.  
25 THE COURT: Have you been made aware of the

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1 with him and (inaudible) investigation prior to having plea  
2 discussions.  
3 THE COURT: So you've uncovered additional evidence  
4 that he's been able to review?  
5 MR. ESPLIN: Yes.  
6 THE COURT: All right. Do you believe, Mr. Esplin,  
7 that there's a factual basis for these two pleas?  
8 MR. ESPLIN: I do.  
9 THE COURT: And do you believe, Mr. Esplin, that  
10 your client understands the contents of the plea agreement  
11 and the consequences of his pleas today as well as the  
12 constitutional rights that would be waived?  
13 MR. ESPLIN: Yes.  
14 THE COURT: Mr. Rettig, I'm still going to go over  
15 with you just one last time. This will be the last time that  
16 you will have those rights explained to you. You've read  
17 them. You've had your attorneys explain them to you, and now  
18 this will be the last one that will occur before your plea is  
19 entered. Please listen carefully to what I tell you and to  
20 my questions and be sure to let me know if there's anything  
21 that you do not understand. If you need to talk to your  
22 attorney again, you may do so in private or there at the  
23 podium.  
24 You have the right to plead not guilty in this case  
25 and to have the case tried through a speedy and public trial

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1 evidence the State would present against you in this case if  
2 it went to trial?  
3 THE DEFENDANT: I have.  
4 THE COURT: Based upon the evidence the State would  
5 introduce at trial, do you believe that there's a substantial  
6 chance that if the jury believed the State's evidence you  
7 would be found guilty of both aggravated murder and  
8 aggravated kidnapping?  
9 THE DEFENDANT: Yes, sir.  
10 THE COURT: Have your attorneys reviewed with you  
11 the rights which are set forth in the plea statement, those  
12 constitutional rights to a trial?  
13 THE DEFENDANT: They have.  
14 THE COURT: Do you need any more time to talk to  
15 them about those rights?  
16 THE DEFENDANT: No, sir.  
17 THE COURT: I'll ask you again, I'm sure you have,  
18 Mr. Esplin, but have you reviewed the evidence in this case  
19 with Mr. Rettig?  
20 MR. ESPLIN: Yes, on several occasions, Your Honor.  
21 we have discussed the evidence and the implication of the  
22 evidence.  
23 THE COURT: So he's aware of your at least  
24 interpretation of that evidence?  
25 MR. ESPLIN: We've also had our investigator meet

1 before an impartial jury and an unbiased jury; do you  
2 understand this right?  
3 MR. ESPLIN: One matter. We had a preliminary  
4 hearing, explained it to the defendant, and he has not waived  
5 that as yet. We have explained that there's a preliminary  
6 hearing set in this matter and that he has a right to  
7 preliminary hearing, and he needs to waive that before the  
8 Court.  
9 THE COURT: We can do that first. Mr. Rettig, you  
10 do have the right to a preliminary hearing as well. One is  
11 currently set for July in which the Court would make an  
12 independent determination based on the evidence provided by  
13 the State as to whether or not there is probable cause to  
14 warrant your continued prosecution on this case, in other  
15 words, whether or not there's probable cause to warrant  
16 continuing towards trial. If you waive that right, then we  
17 will find that there is probable cause, which will be a very  
18 short finding because we will soon hereafter find that  
19 there's beyond a reasonable doubt or that you have admitted  
20 these offenses, but you'd also waive your right to a  
21 determination of probable cause by this court. Is it your  
22 desire to waive that right to preliminary hearing in this  
23 case?  
24 THE DEFENDANT: Yes, sir.  
25 THE COURT: And the State consents to that waiver?

1 MR. TAYLOR: Yes, sir, we do.  
 2 MR. NIELSEN: Just prior to the Court's going over  
 3 this is we noticed one thing on the elements of aggravated  
 4 kidnapping. The first one that the Court would note in the  
 5 course of committing unlawful detention or kidnapping that  
 6 obviously should include the elements of kidnapping as well  
 7 since they were delineated in the statement. That's under  
 8 76-5-301, An actor commits kidnapping if the actor  
 9 intentionally or knowingly, without authority of law, and  
 10 against the will of the victim; (a) detains or restrains the  
 11 victim for any substantial period of time; (b) detains or  
 12 restrains the victim in circumstances exposing the victim to  
 13 risk of bodily injury. We believe those would be the ones  
 14 that apply in this case.  
 15 MR. ESPLIN: We have discussed those elements with  
 16 the defendant as part of our (inaudible).  
 17 THE COURT: Mr. Rettig, did you hear that  
 18 delineation of the elements of kidnapping?  
 19 THE DEFENDANT: Yes, sir.  
 20 THE COURT: And you understand the elements would  
 21 need to be proven against you on that count?  
 22 THE DEFENDANT: Yes, sir.  
 23 THE COURT: Thank you, Mr. Nielsen.  
 24 Back to your right to a speedy and public jury  
 25 trial before an impartial and unbiased jury, do you

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1 presumption of innocence and that you would have no  
 2 obligation to prove your innocence because you are presumed  
 3 to be innocent; do you understand that right?  
 4 THE DEFENDANT: Yes, sir.  
 5 THE COURT: Do you understand that if a trial were  
 6 held the State would have to prove each of the elements of  
 7 the offenses of aggravated murder and aggravated kidnapping  
 8 beyond a reasonable doubt before you could be found guilty of  
 9 these offenses?  
 10 THE DEFENDANT: Yes, sir.  
 11 THE COURT: If a trial were held before a jury, the  
 12 verdict would have to be unanimous, meaning that each juror  
 13 would have to find you guilty beyond a reasonable doubt  
 14 before you could be convicted; do you understand this?  
 15 THE DEFENDANT: I do.  
 16 THE COURT: Do you understand that by pleading  
 17 guilty you give up the presumption of innocence, and you will  
 18 be admitting to the crimes of aggravated murder and  
 19 aggravated kidnapping?  
 20 THE DEFENDANT: Yes, sir.  
 21 THE COURT: You have an absolute right to remain  
 22 silent, and you cannot be compelled to incriminate yourself  
 23 or to provide evidence against yourself. An incriminating  
 24 statement is a statement which would tend to connect you with  
 25 the commission of the crimes. Do you understand that you

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1 understand that right?  
 2 THE DEFENDANT: I do.  
 3 THE COURT: Although you have the right to be tried  
 4 by a jury, you may also have a judge decide your case instead  
 5 of a jury if the prosecution and the judge agree to that. If  
 6 a judge were to decide your case, the judge would also have  
 7 to be an impartial and unbiased court or judge; do you  
 8 understand that right as well?  
 9 THE DEFENDANT: I do.  
 10 THE COURT: You understand that if you have a trial  
 11 you have a right to be represented by an attorney throughout  
 12 those proceedings, and if you cannot afford one, one would be  
 13 appointed to represent you. You've been appointed the  
 14 assistance of Mr. Espin, Ms. Boyle and Mr. Frazier, and they  
 15 continue to be your attorneys through today; is that correct?  
 16 THE DEFENDANT: Yes, sir.  
 17 THE COURT: If you do not plead guilty, you are  
 18 presumed to be innocent until the State proves that you are  
 19 guilty of aggravated murder and aggravated kidnapping. If  
 20 you choose to fight or contest these charges against you, you  
 21 need only plead not guilty and your case will go to trial;  
 22 you understand that?  
 23 THE DEFENDANT: I do.  
 24 THE COURT: You understand that if a trial were  
 25 held the State would have the burden of overcoming the

1 have an absolute right to remain silent and that you cannot  
 2 be made to incriminate yourself?  
 3 THE DEFENDANT: I do.  
 4 THE COURT: In addition, if you choose to remain  
 5 silent, your silence cannot be used against you at trial, and  
 6 the jurors will be told that they could not hold your  
 7 decision not to testify against you; do you understand this?  
 8 THE DEFENDANT: Yes, sir.  
 9 THE COURT: Do you understand that a plea of guilty  
 10 is an admission of all the facts which would be necessary to  
 11 establish your guilt at trial?  
 12 THE DEFENDANT: Yes, sir.  
 13 THE COURT: Because a plea of guilty admits all  
 14 facts necessary to establish guilt, it is an incriminating  
 15 statement. Do you understand that by entering a plea of  
 16 guilty you give up your right to remain silent?  
 17 THE DEFENDANT: Yes, sir.  
 18 THE COURT: Although you have a right to remain  
 19 silent, if you were to have a trial you would have a right to  
 20 testify in your own behalf if you wished to do so; do you  
 21 understand that right?  
 22 THE DEFENDANT: Yes, sir.  
 23 THE COURT: If you were to have a trial, you would  
 24 have a right to confront and cross-examine any witnesses  
 25 which may testify against you. This means that your

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1 attorneys would be able to ask each witness questions while  
2 the witness is in open court and in your presence and under  
3 oath. Do you understand that you have this right?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: You also have a right to present  
6 evidence and to compel witnesses to appear in court to  
7 testify for you. This means that you would be entitled to  
8 obtain subpoenas requiring the attendance and testimony of  
9 those witnesses, and that if you could not afford to pay for  
10 the witnesses to appear the State would pay those costs for  
11 you. Do you understand that you have this right?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: If a judge or a jury were to find you  
14 guilty, you would have a right to appeal your conviction to  
15 the Utah Supreme Court. In addition, you would have the  
16 right to have an attorney assist you in that appeal. If you  
17 could not afford the cost of the appeal, the State would then  
18 pay those costs for you. However, when you enter a plea of  
19 guilty, you admit your own guilt. Having admitted your guilt  
20 in this court, you cannot contest your own statement of guilt  
21 on appeal; do you understand this?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Finally, do you understand that by  
24 entering a plea of guilty you give up all of the rights which  
25 we have just discussed as well as the rights set forth in the

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1 THE COURT: Are you on probation or parole at this  
2 time?

3 THE DEFENDANT: No, I'm not.

4 THE COURT: And the crime was not committed while  
5 you were on probation or parole?

6 THE DEFENDANT: (No audible response.)

7 THE COURT: I will now go over briefly with you the  
8 right to request a withdrawal of your guilty pleas.

9 Ordinarily after a person pleads guilty but later desires to  
10 withdraw his guilty plea, he must file a written motion to  
11 withdraw the plea before sentence is announced. A guilty  
12 plea may only be withdrawn with permission from the Court and  
13 only then by a showing that the plea was not knowingly and  
14 voluntarily made, in other words, such a motion may be  
15 denied. Do you understand this?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Up to this point, Mr. Rettig, is there  
18 anything that you do not understand about this proceeding or  
19 about the pleas that you will be entering in this case?

20 THE DEFENDANT: No, sir.

21 THE COURT: Is there anything that you would like  
22 to ask me or your attorneys before I accept your plea to  
23 aggravated murder?

24 THE DEFENDANT: No, sir.

25 THE COURT: I'm going to ask the prosecutor to tell

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1 plea statement?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: I'll now discuss briefly with you the  
4 consequences of entering a guilty plea. Do you understand  
5 that by pleading guilty to aggravated murder and aggravated  
6 kidnapping you will be subjecting yourself to serving  
7 mandatory penalties for these crimes?

8 THE DEFENDANT: I do.

9 THE COURT: Your sentence will include a prison  
10 term and may also include a fine; do you understand this?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: In addition to the fine, a 90 percent  
13 surcharge may be or will be imposed, and you may also be  
14 ordered to make restitution for your crime; do you understand  
15 that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Because you'll be pleading to two  
18 offenses, the sentences that will be imposed for each crime  
19 may run concurrently or consecutively, that is, one after the  
20 other, and concurrently is at the same time or  
21 simultaneously. It is within the Court's discretion to  
22 decide whether it's a concurrent or consecutive sentence  
23 regardless of any plea agreement that you have entered into  
24 with the State; do you understand this?

25 THE DEFENDANT: Yes, sir.

1 you and me what happened in this case. I understand that  
2 that is already documented on the statement in front of you,  
3 and you've had a chance to review that and read that, but  
4 I'll ask him to state that for the court record. I want you  
5 to listen carefully because when the prosecutor is through  
6 I'm going to ask you if everything that he said is true. If  
7 there's anything the prosecutor says that you believe is not  
8 true or accurate, I will want you to tell me about that,  
9 okay?

10 THE DEFENDANT: Okay.

11 THE COURT: Mr. Taylor.

12 MR. TAYLOR: Judge, on or about November 16th,  
13 2009, Martin Bond and Benjamin Rettig traveled in Bond's  
14 vehicle from Vernal, Utah, to Kay Mortensen's home in Spanish  
15 Fork, Utah. The purpose in traveling to Mortensen's home was  
16 to steal firearms located in Mortensen's home. Upon arriving  
17 at Mortensen's home, Bond indicated he would initially enter  
18 the home and then Rettig was to follow him and also enter the  
19 home.

20 Bond and Rettig entered the home without being  
21 invited and had a handgun with them. Bond placed zip ties on  
22 Mortensen, and both of them were wearing ski masks and latex  
23 gloves in order to hide their identities. They commanded  
24 Mortensen to show them where his firearms were located.  
25 Mortensen took them to a bunker located behind his home, and

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1 they observed several weapons. They took Mortensen from the  
2 bunker and back into his home.

3 After reentering the home, they took Mortensen  
4 upstairs to a bathroom. Bond told Mortensen to kneel down in  
5 front of the bathtub with his back to them. While Mortensen  
6 was kneeling down, Rettig was holding Mortensen at gunpoint  
7 with Bond's handgun. Bond withdrew a knife from his person  
8 and placed the knife back into his pocket. At this point  
9 Bond left the bathroom, went downstairs and returned with a  
10 black-handled knife approximately 10 to 12 inches in length.

11 Upon returning, Rettig observed Bond take the knife  
12 and slice Mortensen's throat. It is not certain how many  
13 times Bond cut Mortensen's throat. After cutting his throat,  
14 he observed Bond stab Mortensen in the base of his neck with  
15 the same knife.

16 Shortly after Bond cut and stabbed Mortensen, they  
17 heard someone knock on the front door. Rettig ran  
18 downstairs, hid behind the front door and Bond opened the  
19 door. A female and male were at the door asking for  
20 Mortensen. They later discovered these individuals were  
21 Pamela and Roger Mortensen. Rettig was still holding the gun  
22 when Pamela and Roger entered the home. They informed Pamela  
23 and Roger that Mortensen was upstairs - excuse me. Rettig  
24 informed Pamela and Roger that Mortensen was upstairs and  
25 that he was okay. They told Pam and Roger to walk into the

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1 said a true and accurate description of what occurred in this  
2 case?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: You have already signed that document,  
5 the statement of events?

6 MR. ESPLIN: He has, Your Honor. For the record  
7 let me ask, is that your signature?

8 THE DEFENDANT: Yes, sir.

9 MR. ESPLIN: May I approach, Your Honor.

10 THE COURT: Yes, thank you. I heard your attorney  
11 ask you this, and I have a document in front of me. On  
12 page 7 dated June 1<sup>st</sup>, which is yesterday, 2011, there's a  
13 signature above the inscription defendant, looks like a Ben  
14 Rettig. Is that your signature there?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Mr. Rettig, do you feel that it is in  
17 your best interest to enter a guilty plea in this case on  
18 these two counts rather than go to trial?

19 THE DEFENDANT: I do.

20 THE COURT: You have previously entered pleas of  
21 not guilty - a plea of not guilty to the offense of  
22 aggravated murder and a plea of not guilty to the offense of  
23 aggravated kidnapping. I'm sorry, you have not. What plea  
24 do you now enter to Count 1 of the Information criminal  
25 homicide, aggravated murder, a noncapital first-degree

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1 sunken living room, and they placed zip ties on Pamela and  
2 Roger's hands and feet.

3 At some point Bond came out of the kitchen with  
4 another knife which Rettig believed he was going to use to  
5 kill Pamela and Roger. Rettig stepped in front of Bond and  
6 told him not to kill them. While Pamela and Roger were tied  
7 up in the living room, Rettig remained in the living room  
8 with them holding the handgun while Bond removed  
9 approximately 25 of Mortensen's weapons, including handguns  
10 and rifles, from the bunker and placed them in Bond's  
11 vehicle. They also - Rettig also helped take some  
12 ammunition from the bunker and place it in Bond's vehicle.

13 After they placed the guns and ammunition in Bond's  
14 vehicle, they took Roger Mortensen's driver's license and  
15 told him and Pam that they needed to tell the police that  
16 three black men had tied them up, and if they told the police  
17 a different story they knew where they lived, and they would  
18 come back and kill them.

19 They left Mortensen's residence, drove back to  
20 Vernal. On the way back to Vernal, they stopped at a rest  
21 stop and discarded some gloves in a dumpster. In Vernal Bond  
22 and Rettig went up the canyon and buried the weapons.  
23 Following this, Bond took the hoodie and shoes from Rettig in  
24 order to dispose of them.

25 THE COURT: Mr. Rettig, is what the prosecutor just

1 felony?

2 THE DEFENDANT: Guilty.

3 THE COURT: I'll go count by count. Based on  
4 Mr. Rettig's answers to the questions posed to him, the Court  
5 finds that he has read, signed and fully understands the  
6 contents of the plea statement. Based upon the plea  
7 statement and the Court's discussions with and observations  
8 of Mr. Rettig, the Court finds that he has entered a plea of  
9 guilty to aggravated murder knowingly and voluntarily and  
10 with full knowledge of his rights. The Court also finds that  
11 Mr. Rettig understands the nature and elements of the offense  
12 of aggravated murder and the relationship between the facts  
13 in this case and the elements of that offense.

14 Finally, the Court finds that the State's proffered  
15 evidence, if believed, is sufficient to form a factual basis  
16 for Mr. Rettig's plea of guilty. Based upon the foregoing,  
17 the Court accepts the defendant's plea of guilty to  
18 aggravated murder.

19 Mr. Rettig, what plea do you now enter to Count 2  
20 of the Information, aggravated kidnapping which relates to  
21 Roger and Pamela Mortensen, a first-degree felony?

22 THE DEFENDANT: Guilty.

23 THE COURT: Based upon Mr. Rettig's answers to the  
24 questions posed to him, the plea statement and the Court's  
25 discussions with and observations of Mr. Rettig, the Court

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1 finds that he fully understands the contents of the plea  
2 statement and that he has entered his plea of guilty to  
3 aggravated kidnapping knowingly and voluntarily and with full  
4 knowledge of his rights. The Court also finds that  
5 Mr. Rettig understands the nature and elements of the offense  
6 of aggravated kidnapping and the relationship between the  
7 facts in this case and the elements of that offense.  
8 Finally, the Court finds that the State's proffered  
9 evidence, if believed, is sufficient to form a factual basis  
10 for Mr. Rettig's plea of guilty. Based upon the foregoing,  
11 the Court accepts the defendant's plea of guilty to  
12 aggravated kidnapping.  
13 Does the State have a motion regarding Counts 3 and  
14 4?  
15 MR. TAYLOR: State moves to dismiss those counts,  
16 Judge.  
17 THE COURT: There's no objection I assume to that,  
18 Mr. Esplin?  
19 MR. ESPLIN: Yes. We have agreed that the State  
20 will provide an Amended Information.  
21 MR. TAYLOR: We'll file an Amended Information  
22 (inaudible).  
23 THE COURT: The Court will dismiss Counts 3 and 4  
24 on the motion of the State and anticipate the filing of an  
25 Amended Information in this case.

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1 THE DEFENDANT: No, sir.  
2 THE COURT: Is there anything else that I have  
3 omitted or need to handle today, Mr. Esplin?  
4 MR. ESPLIN: No, Your Honor.  
5 THE COURT: Anything else I need to do today,  
6 Mr. Taylor?  
7 MR. TAYLOR: No, Judge. Thank you.  
8 THE COURT: I'd like to thank the attorneys for  
9 their hard work in this case. I know this is just the tip of  
10 the iceberg what we've seen and done here today and that many  
11 hours have been spent previous to this. It's a weighty case  
12 for all involved. It's a weighty case for the victims and a  
13 weighty case for you as well, Mr. Rettig. Thank you,  
14 Mr. Esplin and Mr. Frazier and, thank you, Mr. Taylor and  
15 Mr. Nielsen. We'll be in recess.  
16 (Whereupon, the proceedings concluded at  
17 9:52 a.m.)  
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1 Mr. Rettig, pursuant to Rule 22 of the Utah Rules  
2 of Criminal Procedure, the Court must set a time for  
3 sentencing which cannot be less than two days nor more than  
4 45 days after the entry of the pleas unless the Court, with  
5 your concurrence, orders otherwise.  
6 What is the party's request?  
7 MR. ESPLIN: We'd request the matter be set I  
8 believe it's on the 19<sup>th</sup> of July, Your Honor, which is  
9 actually two days, I think, past the 45 days. The defendant  
10 will waive the time (inaudible) two days.  
11 THE COURT: Is that your desire, Mr. Rettig, to  
12 waive your right to be sentenced in less than 45 days?  
13 THE DEFENDANT: Yes, sir.  
14 THE COURT: We'll set sentencing then in this case  
15 for July 19<sup>th</sup> at 2:30 p.m.  
16 Mr. Rettig, an agent from Adult Probation and  
17 Parole will be contacting you at the jail and interviewing  
18 you and providing you with paperwork to fill out regarding  
19 your life and your experiences and your criminal history and  
20 other items. We'll order that you cooperate with him in  
21 preparation of that presentence report. He'll also be  
22 compiling information from the State and from the defense and  
23 from the victims in this case to provide a complete sentence  
24 to the Court for sentencing on July 19<sup>th</sup>.  
25 Do you have any questions about that process?

1 TRANSCRIBER'S CERTIFICATE  
2 STATE OF UTAH )  
3 ) ss:  
4 COUNTY OF IRON )  
5 I, MARY BETH COOK, A CERTIFIED COURT TRANSCRIBER  
6 STATE OF UTAH, DO HEREBY CERTIFY THAT THE FOREGOING  
7 ELECTRONICALLY RECORDED PROCEEDINGS WERE TRANSC  
8 FROM AN AUDIO AND/OR VIDEO RECORDING FURNISHED BY  
9 DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTA  
10 THAT THE FOREGOING PAGES REPRESENT THE CC  
11 TRANSCRIPT OF THE PROCEEDINGS TO THE BEST OF MY AB  
12 WERE HELD ON THURSDAY, JUNE 2, 2011, AND THAT SAID TR  
13 CONTAINS ALL OF THE AUDIBLE TESTIMONY, OBJECTIONS O  
14 AND RULINGS OF THE COURT.  
15 I FURTHER CERTIFY THAT I AM NOT A RELATIVE OR  
16 EMPLOYEE OF ANY OF THE PARTIES OR COUNSEL INVOLVEI  
17 ACTION, NOR A PERSON FINANCIALLY INTERESTED IN THE A  
18  
19 DATED: OCTOBER 10, 2011.  
20  
21   
22 Mary Beth Cook, CSR, RPR  
23  
24  
25