

2017

**State of Utah¹ Plaintiff/ Appellee, v. Samuel Aaron Francis,
Defendant/Appellant.**

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Brief of Appellee, *State of Utah v Francis*, No. 20150616 (Utah Court of Appeals, 2017).
https://digitalcommons.law.byu.edu/byu_ca3/3225

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

Case No. 20150616-SC

IN THE
UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellee,

v.

SAMUEL AARON FRANCIS,
Defendant/Appellant.

Replacement Brief of Appellee

Certified interlocutory appeal from denial of a motion to enforce a plea agreement, in the Third Judicial District, Salt Lake County, the Honorable Royal Hansen presiding

KELLY ANN BOOTH
Bautista, Booth, and Parkinson, LC
215 South State Street, Suite 600
Salt Lake City, UT 84111

Counsel for Appellant

JOHN J. NIELSEN (11736)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

CLINT T. HEINER
Deputy Salt Lake District Attorney

Counsel for Appellee

FILED
UTAH APPELLATE COURTS

FEB 10 2017

Case No. 20150616-SC

IN THE
UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellee,

v.

SAMUEL AARON FRANCIS,
Defendant/Appellant.

Replacement Brief of Appellee

Certified interlocutory appeal from denial of a motion to
enforce a plea agreement, in the Third Judicial District, Salt
Lake County, the Honorable Royal Hansen presiding

KELLY ANN BOOTH
Bautista, Booth, and Parkinson, LC
215 South State Street, Suite 600
Salt Lake City, UT 84111

Counsel for Appellant

JOHN J. NIELSEN (11736)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor.
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

CLINT T. HEINER
Deputy Salt Lake District Attorney

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
INTRODUCTION	1
STATEMENT OF THE ISSUE	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	2
STATEMENT OF THE CASE.....	3
A. Summary of facts.....	3
B. Summary of proceedings.	4
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. Francis is not entitled to enforce a plea agreement that the trial court never accepted, and he did not rely on to his detriment.	8
A. There is no constitutional right to enforce a plea agreement pre-plea, and a defendant does not rely on an offer to his detriment if he can be returned to his pre-bargaining position.	8
B. Francis cannot enforce a plea bargain where he never pled guilty, he was returned to his pre-bargaining position, the reliance he asserts is illusory, and the terms were never final at any rate.	17
CONCLUSION.....	24
ADDENDA	
Addendum A: Parties' briefing below, R317-27, 431-44, 447-62	
Addendum B: Trial court ruling, R748	

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Cooper v. United States</i> , 594 F.2d 12 (4th Cir. 1979).....	19
<i>Gov't of Virgin Islands v. Scotland</i> , 614 F.2d 360 (3d Cir. 1980).....	15, 19
<i>Hall v. Al Luebbers</i> , 341 F.3d 706 (8th Cir. 2003)	16
<i>Mabry v. Johnson</i> , 467 U.S. 504 (1984).....	<i>passim</i>
<i>Puckett v. United States</i> , 556 U.S. 129 (2009)	9, 10
<i>Santobello v. New York</i> , 404 U.S. 257 (1971).....	9, 10
<i>Stokes v. Armontrout</i> , 851 F.2d 1085 (8th Cir. 1988)	14
<i>United States v. McGovern</i> , 822 F.2d 739 (8th Cir. 1987)	10, 15
<i>United States v. Papaleo</i> , 853 F.2d 16 (1st Cir. 1988)	11
<i>United States v. Savage</i> , 978 F.2d 1136 (9th Cir. 1992).....	11
<i>United States v. Wells</i> , 211 F.3d 988 (6th Cir. 2000).....	15, 16
<i>United States v. Wessels</i> , 12 F.3d 746 (8th Cir. 1993)	11
<i>Weatherford v. Bursey</i> , 429 U.S. 545 (1977)	9

STATE CASES

<i>Cal Wadsworth Const. v. City of St. George</i> , 898 P.2d 1372 (1995)	24
<i>Caldwell v. State</i> , 747 S.W.2d 99 (Ark. 1988).....	19
<i>Chapman v. State</i> , 426 S.E.2d 9 (Ga. Ct. App. 1992)	15

<i>Cope v. Commonwealth</i> , 645 S.W.2d 703 (Ky. 1983)	19
<i>Custodio v. State</i> , 644 S.E.2d 36 (S.C. 2007)	16
<i>Diggs v. State</i> , 219 S.W.3d 654 (Ark. Ct. App. 2005)	13
<i>Doe v. Dist. Attorney</i> , 564 N.E.2d 588 (Mass. Ct. App. 1991)	16
<i>Evans v. State</i> , 899 So.2d 890 (Miss. Ct. App. 2005)	16
<i>Ex Parte Williams</i> , 637 S.W.2d 943 (Tex. Crim. App. 1982)	12
<i>Ex Parte Yarber</i> , 437 So.2d 1330 (Ala. 1983)	12
<i>Harden v. State</i> , 453 So.2d 550 (Fla. Dist. Ct. App. 1984)	11
<i>Metheny v. State</i> , 589 S.W.2d 943 (Tenn. Crim. App. 1979)	12, 15
<i>Miller III v. State</i> , 1 So.3d 1073 (Ala. Crim. App. 2007)	13
<i>Moody v. State</i> , 716 So.2d 592 (Miss. 1998)	16
<i>Ortiz v. State</i> , 933 S.W.2d 102 (Tex. Crim. App. 1996)	10
<i>People v. Fanger</i> , 748 P.2d 1332 (Colo. App. 1987)	16
<i>Purser v. State</i> , 902 S.W.2d 641 (Tex. Ct. App. 1995)	20
<i>Reed v. Becka</i> , 511 S.E.2d 396 (S.C. Ct. App. 1999)	12
<i>Rios v. State</i> , 974 A.2d 366 (Md. Ct. Spec. App. 2009)	12, 13
<i>State v. Beckes</i> , 300 N.W.2d 871 (Wisc. App. 1980)	15, 16, 19
<i>State v. Bero</i> , 645 P.2d 44 (Utah 1982)	15, 19, 22
<i>State v. Bogart</i> , 788 P.2d 14 (Wash. Ct. App. 1990)	12
<i>State v. Caminitta</i> , 411 So.2d 13 (La. 1982)	19

<i>State v. Casey</i> , 2002 UT 29, 44 P.3d 756	22
<i>State v. Collins</i> , 265 S.E.2d 172	19
<i>State v. Crockett</i> , 877 P.2d 1077 (Nev. 1994)	12
<i>State v. Johnson</i> , 360 S.W.3d 104 (Ark. 2010)	15
<i>State v. Kay</i> , 717 P.2d 1294 (Utah 1986)	11
<i>State v. Lovell</i> , 2011 UT 36, 262 P.3d 803	11
<i>State v. Marlow</i> , 432 S.E.2d 275 (N.C. 1993)	17
<i>State v. Montiel</i> , 2005 UT 48, 122 P.3d 571	10
<i>State v. Moss</i> , 921 P.2d 1021 (Utah App. 1996)	13, 14, 15, 21
<i>State v. Nine Thousand One Hundred Ninety-Nine Dollars</i> , 791 P.2d 213 (Utah App. 1990)	24
<i>State v. O’Leary</i> , 517 A.2d 1174 (N.H. 1986)	20
<i>State v. Patience</i> , 944 P.2d 381 (Utah App. 1997)	9
<i>State v. Pearson</i> , 818 P.2d 581 (Utah App. 1991)	17
<i>State v. Stringham</i> , 2001 UT App 13, 17 P.3d 1153	2, 11, 13, 14, 18
<i>State v. Taylor</i> , 2015 UT 42, 349 P.3d 696	3
<i>State v. Terrazas</i> , 2014 UT App 229, 336 P.3d 594	15
<i>State v. Trepanier</i> , 600 A.2d 1311 (R.I. 1991)	12, 19
<i>State v. Vixamar</i> , 687 So.2d 300 (Fla. Dist. Ct. App. 1997)	11
<i>State v. Willis</i> , 933 P.2d 854 (N.M. 1997)	12
<i>Verdi Energy Grp., Inc. v. Nelson</i> , 2014 UT App 101, 326 P.3d 104	8

STATE STATUTES

Utah Code Ann. § 76-3-402.....	5
Utah Code Ann. § 78A-3-102 (West 2009).....	1

STATE RULES

Utah R. Crim. P. 14	21
---------------------------	----

OTHER AUTHORITIES

5 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, <i>Criminal Procedure</i> (4th ed. Westlaw 2016).....	8, 9, 14
Am.Jur.2d <i>Criminal Law</i> § 653	8

Case No. 20150616-SC

IN THE
UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellee,

v.

SAMUEL AARON FRANCIS,
Defendant/Appellant.

Replacement Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from an interlocutory order denying his motion to enforce a plea agreement. This Court has jurisdiction under Utah Code Ann. § 78A-3-102(3)(b) (West 2009).

INTRODUCTION

A defendant has no constitutional right to be offered a plea bargain. And absent a guilty plea, any offer he does get has no constitutional significance, and the prosecutor may withdraw it at any time even if the defendant has “accepted” the offer. The court of appeals has recognized a narrow exception to this rule where the defendant relies on the offer to his detriment—say, by giving inculcating information or assistance to police in a way that cannot be undone.

In this domestic violence case, defense counsel urged, and the State offered, a plea deal. The Saturday before a Monday trial, the defendant tentatively agreed to plead to a felony and drafted a proposal that she sent to the prosecutor for his approval and signature. Negotiations continued through Monday morning. Before the plea was signed by the parties or presented for the court's acceptance or rejection, the prosecutor withdrew the offer based on a conversation with the victim. Francis claimed detrimental reliance based on what he was willing to waive by pleading guilty and the hypothetical difficulty in getting a witness to appear at a continued trial. The trial court refused to enforce the parties' inchoate agreement.

STATEMENT OF THE ISSUE

Did the trial court correctly rule that the proposed plea bargain was unenforceable?

Standard of Review. The enforceability of a plea agreement is a question of law, reviewed for correctness. *State v. Stringham*, 2001 UT App 13, ¶10, 17 P.3d 1153.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

No constitutional provisions, statutes, or rules are necessary to resolve this case, as it hinges entirely on case law.

STATEMENT OF THE CASE

A. Summary of facts.¹

Bethany C. lived with her boyfriend, Defendant Samuel Francis. R632. One night, Bethany and Francis were sitting on their porch with their mutual friend when Bethany and Francis began arguing. *Id.* During the argument, Francis grabbed Bethany's shoulder, pushed her against a wall, and headbutted her in the face three times. R634, 654-55. When the mutual friend tried to calm things down, Francis told him to "get the fuck out" because he was "going to beat the shit out of" Bethany. R637.

After the friend left, Francis grabbed a butcher knife from the kitchen, held it to Bethany's throat, and threatened to kill her. R638. He then put the knife down and "full-on attacked" her, beating her head "into the ground," hitting it with a glass, choking her, and again threatening to kill her. R638-40.

When the victim tried to call a friend for a ride, Francis threw her phone. R660-62. He then grabbed a security camera that recorded the incident and threw it to the ground in an attempt to break it. R641.

¹ Because this case is on interlocutory review, the State relies on the preliminary hearing, reciting the facts in the light most favorable to the magistrate's bindover ruling. *See, e.g., State v. Taylor*, 2015 UT 42, ¶2 n.2, 349 P.3d 696 (holding that on interlocutory review, appellate courts "recount the facts as alleged and in a light most favorable to the ruling below.").

B. Summary of proceedings.

The State charged Francis with five counts, all domestic violence related: three counts of aggravated assault, third degree felonies; one count of obstruction of justice for breaking the camera; and one count of damage to a communication device. R84-86. The matter was set for jury trial on Monday, June 15, 2015. R310-12.

During a pretrial conference on Friday June 12, defense counsel asked the prosecutor for a final plea offer. R318. The prosecutor replied that Francis could plead to a third degree felony without any agreement on sentencing. *Id.* Defense counsel replied that she would convey the offer, but Francis was unlikely to accept it. *Id.*

On Saturday June 13, defense counsel asked the prosecutor over the phone if he would agree to a misdemeanor based on an alleged discovery issue; the prosecutor declined, and insisted on a felony. R320. After speaking with Francis, defense counsel emailed the prosecutor later that day, stating that he accepted the offer "to plead to the 3rd degree felony, Obstruction of Justice-DV, with 24 month probation recommended, stay silent at sentencing on jail, substance abuse eval and complete recommended treatment, and restitution." R437. Defense counsel said she would "plan on doing that Monday morning [the 15th]" – the first day of

trial—and that she would “draft the plea paperwork and send it to [the prosecutor] for [his] approval.” *Id.*

At 8:04 p.m. on Sunday the 14th, defense counsel emailed a proposed statement in advance of plea and told the prosecutor to let her “know if [he saw] any edits that need to be made.” R443.

At 7:25 a.m. on Monday the 15th, the prosecutor emailed back, asking for two changes to the document, one substantive (agreement to a one-step reduction in offense level, likely after successful completion of probation under Utah Code Ann. § 76-3-402), one stylistic (remove the victim’s name). *Id.* Before going to court, the prosecutor then spoke with the victim on the phone, who apparently disapproved of the resolution. R432.

The prosecutor rescinded the offer less than an hour later shortly before the parties appeared in court. *Id.* When the trial court took the bench a few minutes later, defense counsel stated that she was “not ready to proceed to trial” because she had anticipated a resolution that day, and stated that she “would like to file a Motion to Enforce the Plea Agreement” as well as another “Motion in Limine.” R311, 321. The court requested that the parties “meet and confer about settlement” and an “exhibit in

question”—likely referring to the motion in limine regarding an alleged discovery violation.² R311.

About forty-five minutes later, Francis rejected the State’s plea offer—presumably a different one—and requested to continue the trial. *Id.* The court granted the continuance and set a hearing date to allow the parties time to brief the plea bargain and discovery issues. *Id.*

Francis filed two motions: (1) a motion to enforce the proposed plea agreement and (2) a motion to dismiss the case under *State v. Tiedemann* because by the time police learned of and collected video footage from Francis’s surveillance cameras, it was recorded over. R317-27, R330-46.

The trial court denied both motions after extensive argument. R691-752. Regarding the plea agreement, the court ruled that the State could “rescind the offer” at any time before the court accepts the plea. R748. Francis timely sought interlocutory review only on the plea issue, which the court of appeals granted. R471-569, 588-89. The court of appeals then certified the case to this Court. *See* Appellate Docket, order of October 28, 2016.

² Francis has not provided a copy of the transcript of this hearing, so the State takes its summary from the court minutes.

SUMMARY OF ARGUMENT

Analogizing to contract law, Francis argues that he is entitled to enforce the prosecutor's initial plea offer because the State made a "non-conditional, definite, and complete" offer; he unconditionally accepted it; and he relied on it to his detriment. While some contract analogies are helpful in plea agreement cases, the acceptance-by-the-offeree analogy is not. For guilty pleas, only court acceptance of the guilty plea itself makes the plea agreement enforceable between the "contracting" parties. The United States Supreme Court has recognized this, holding that it is only the guilty plea—not the plea offer—that has constitutional significance. As the trial court correctly recognized, because Francis never pled guilty, his enforcement claim fails at the outset.

Pre-plea agreements can be enforceable where a defendant relies to his detriment on a prosecutor's offer. But the reliance necessary to support pre-plea enforcement arises only where the defendant's performance materially undermines the fairness of a trial should the State back out of the plea deal; for example, where a defendant inculcates himself in a way that cannot be undone.

That did not happen here. Instead, plea negotiations simply failed—as they often do—and Francis was placed back in the position he was in

before negotiations began. Nothing that happened during the plea negotiations will make his trial unfair.

ARGUMENT

I.

Francis is not entitled to enforce a plea agreement that the trial court never accepted, and he did not rely on to his detriment.

Francis argues that the prosecutor “breach[ed]” a “plea agreement” when he withdrew his offer after Francis accepted it and relied on it. Aplt.Br. 9. But because Francis had yet to enter a plea, there was no enforceable agreement for the prosecutor to breach. And Francis did not detrimentally rely on the State’s offer in the only legally relevant way—the offer did not require him to do anything and he did not do anything that would have irreparably and materially damaged his position at trial.

A. There is no constitutional right to enforce a plea agreement pre-plea, and a defendant does not rely on an offer to his detriment if he can be returned to his pre-bargaining position.

In the guilty plea context, contract analogies are helpful as far as they go. For example, as in the civil context, *Verdi Energy Grp., Inc. v. Nelson*, 2014 UT App 101, ¶14, 326 P.3d 104, the burden of proving both the existence of a contract and a breach of that contract is on the proponent—here, Francis. 21 Am.Jur.2d *Criminal Law* § 653 (Westlaw 2014); 5 Wayne R.

LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 21.1(d), 521-22 (3d ed. 2007).

And though there is “no constitutional right to plea bargain,” *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977), if a prosecutor chooses to offer one, and a defendant accepts it by pleading guilty, the parties “essentially” have an enforceable contract. *Puckett v. United States*, 556 U.S. 129, 137 (2009); see generally *Santobello v. New York*, 404 U.S. 257, 262 (1971) (applying contract principles to plea bargains). Thus, when a defendant pleads guilty, the prosecutor’s promise made to induce that plea “must be fulfilled.” *Santobello*, 404 U.S. at 262. And when either party breaches the contract, the non-breaching party is entitled to relief. See *id.* at 262-63 (leaving remedy determination to state courts); see, e.g., *State v. Patience*, 944 P.2d 381, 387 (Utah App. 1997) (permitting State to withdraw from agreement where defendant has breached).

But the contract analogy has “limits” because though plea agreements are “like contracts,” they “are *not* contracts.” *Id.* at 387 (citing *United States v. Olesen*, 920 F.2d 538, 541 (8th Cir. 1990) (second emphasis added)). In the usual civil case, an offer, acceptance, and exchange of promises can be sufficient to create a binding contract. But criminal plea agreements are different. “A plea bargain standing alone is without constitutional

significance; in itself it is a mere executory agreement.” *Mabry v. Johnson*, 467 U.S. 504, 507 (1984), *disapproved of on other grounds by Puckett*, 556 U.S. at 138 n.1; *see also Executory*, Black’s Law Dictionary 611 (8th ed. 2004) (“Taking full effect at a future time”; “To be performed at a future time; yet to be completed.”). This is so because plea agreements are “not simply a contract between two parties”; rather, they “implicate[] the integrity of the criminal justice system and require[] courts to exercise judicial authority.” *United States v. McGovern*, 822 F.2d 739, 743 (8th Cir. 1987).

Unless and “until embodied in the judgment of a court,” a plea agreement “does not deprive an accused of liberty or any other constitutionally protected interest,” because the “Due Process clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty.” *Mabry*, 467 U.S. at 507, 511. And “trial courts are not required to accept plea agreements.” *State v. Montiel*, 2005 UT 48, ¶13, 122 P.3d 571 (citing Utah R. Crim. P. 11(e)); *see also Santobello*, 404 U.S. at 262 (recognizing that there is “no absolute right to have a guilty plea accepted” and that a “court may reject a plea in exercise of sound judicial discretion”); *see also Ortiz v. State*, 933 S.W.2d 102, 104 (Tex. Crim. App. 1996) (holding no binding contract where “trial judge never accepted the plea agreement”). Therefore, a “defendant’s acceptance of a

prosecutor's proposed plea bargain creates no constitutional right to have the bargain specifically enforced," *State v. Vixamar*, 687 So.2d 300, 301 (Fla. Dist. Ct. App. 1997) (citing *Mabry*, 467 U.S. at 507-08), and by necessary extension, no enforceable contract.

For this reason, defendants cannot enforce an agreement where no plea is entered, let alone one that has never "submitted to the trial court for approval." *Stringham*, 2001 UT App 13, ¶¶5, 10, 13-15; *State v. Kay*, 717 P.2d 1294, 1304-06 (Utah 1986) (plurality opinion) (opining that defendant was not entitled to enforce plea agreement unless the prosecutor agreed to it before it was presented to the court), *overruling on other grounds recognized by State v. Lovell*, 2011 UT 36, ¶¶48-61, 262 P.3d 803.

The vast majority of courts to address the question follow this general rule. *See United States v. Papaleo*, 853 F.2d 16, 19 (1st Cir. 1988) ("[E]ven if Papaleo had accepted the government's plea agreement offer, such an act, alone, would not have created a *constitutional* right to have that bargain enforced" given trial court discretion to reject plea bargain); *United States v. Wessels*, 12 F.3d 746, 752-53 (8th Cir. 1993) (same); *United States v. Savage*, 978 F.2d 1136, 1137-38 (9th Cir. 1992) ("[N]either the defendant nor the government is bound by a plea agreement until it is approved by the court."); *Harden v. State*, 453 So.2d 550, 550 (Fla. Dist. Ct. App. 1984) ("Until

formal acceptance has occurred, the plea binds no one: not the defendant . . . , the prosecutor, . . . , or the court.”) (citing cases); *State v. Crockett*, 877 P.2d 1077, 1079 (Nev. 1994) (same); *State v. Willis*, 933 P.2d 854, 858 (N.M. 1997) (same); *State v. Trepanier*, 600 A.2d 1311, 1315 (R.I. 1991) (“We believe that either the state or a defendant may withdraw from [a plea] agreement unless and until that defendant’s plea is actually entered. Prior to that time such an agreement should not be enforceable against either party.”); *Reed v. Becka*, 511 S.E.2d 396, 402 (S.C. Ct. App. 1999). (“A majority of courts addressing” this issue “have concluded that neither a defendant nor the government is bound by a plea offer until it is approved by the court.”) (citing cases); *Metheny v. State*, 589 S.W.2d 943, 945-46 (Tenn. Crim. App. 1979) (refusing to enforce plea agreement before plea accepted by court and holding no “irremediable prejudice” to the defendant); *Ex parte Williams*, 637 S.W.2d 943, 947 (Tex. Crim. App. 1982) (“The ‘contract’ does not become operative until the court announces it will be bound by the plea bargain agreement.”); *State v. Bogart*, 788 P.2d 14, 15-16 (Wash. Ct. App. 1990) (same).³

³ To the State’s knowledge, only two states—Alabama and Maryland—enforce pre-plea agreements without irreparable detrimental reliance. *See, e.g., Ex parte Yarber*, 437 So.2d 1330, 1336 (Ala. 1983) (compelling State to re-make pre-plea offer, though not requiring trial court to accept it); *Rios v. State*, 974 A.2d 366, 374-76 (Md. Ct. Spec. App. 2009)

This is true even where, as here, the State rescinded an “accepted” offer after consulting with the crime victim. *See Miller III v. State*, 1 So.3d 1073, 1076-77 (Ala. Crim. App. 2007) (refusing to enforce agreement where defendant initially accepted State’s offer but the State “soon thereafter” rescinded after speaking with the victim); *Diggs v. State*, 219 S.W.3d 654, 658-60 (Ark. Ct. App. 2005) (refusing to enforce signed agreement between parties not presented to court where prosecutor withdrew offer after consulting victim).

The court of appeals has recognized a narrow exception to this general rule for cases in which the defendant (1) acts in reliance on the agreement and (2) his actions “would substantially affect a retrial.” *State v. Moss*, 921 P.2d 1021, 1027 (Utah App. 1996); *Stringham*, 2001 UT App 13, ¶15 (“From the record before us, we find no evidence that defendants took any action in reliance on the tentative plea agreement, and therefore, they

(holding plea agreement enforceable before acceptance by court). But their reasoning is unpersuasive. Most glaringly, they go against the United States Supreme Court’s holding in *Mabry* that unaccepted pleas have no constitutional significance. *Mabry*, 467 U.S. at 507, 511. They also appear to be attempts to enforce the very thing that *Mabry* refused – best practices on prosecutor’s offices. *Id.* This would violate the separation of powers. Further, the Maryland court’s reasoning is arguably self-contradictory, because the court held the pre-plea offer enforceable even while recognizing that “An ‘offer that requires a third party’s approval before it becomes effective is no offer at all.” *Rios*, 974 A.2d at 374.

suffered no prejudice by the trial court's unwillingness to compel the State to honor the agreement.") (citing *Moss*); see also Wayne R. LaFare et al., 5 *Criminal Procedure* § 21.2(f) (4th ed. Westlaw 2016) ("The prevailing doctrine is that 'the State may withdraw from a plea bargain agreement at any time prior to, but not after, the actual entry of the guilty plea by the defendant or other action by him constituting detrimental reliance upon the agreement.'") (citations omitted).

In other words, if, relying on the plea offer, a defendant somehow inculcates himself in a way that cannot be undone, then he may force the State to live up to what it promised, even though the promise has yet to mature into a plea that a court has accepted. See *Stringham*, 2001 UT App 13, ¶15 (holding no prejudice where defendant took no "action in reliance on the tentative plea agreement" and that reliance had to "'substantially affect retrial'") (quoting *Moss*, 921 P.2d at 1027).

But situations meeting such an exception are rare. *Stokes v. Armontrout*, 851 F.2d 1085, 1090 (8th Cir. 1988) ("Detrimental reliance is difficult to demonstrate in a plea bargain context."). So long as the defendant can be "placed in the same position as he or she was prior to the guilty plea, there is no undue prejudice to the defendant" when the government withdraws a plea offer after the defendant has accepted the

offer but before a court has accepted the plea. *Moss*, 921 P.2d at 1027 (citations omitted); *State v. Bero*, 645 P.2d 44, 47 (Utah 1982); *see also Gov't of Virgin Islands v. Scotland*, 614 F.2d 360 (3d Cir. 1980) (refusing to compel plea agreement where defendant was "in the same position as if he had not been offered a plea"); *United States v. McGovern*, 822 F.2d 739, 744-46 (8th Cir. 1987) (similar); *Metheny*, 589 S.W.2d at 945-46 (holding no "irremediable prejudice" to the defendant by placing him in pre-negotiation position).

Indeed, this is true even if a trial court initially accepts a plea. *Moss*, 921 P.2d at 1027-28. And mere disappointment in the loss of the bargain does not suffice. *Chapman v. State*, 426 S.E.2d 9, 11 (Ga. Ct. App. 1992) (holding disappointment insufficient to constitute detrimental reliance); *State v. Beckes*, 300 N.W.2d 871, 874 (Wisc. App. 1980) ("[T]he due process clauses of the state and federal constitutions do not protect a defendant against shattered expectations.").

Cases holding detrimental reliance generally involve cooperation agreements in which the defendant takes some action—such as tendering a confession, paying restitution, or aiding in a police sting operation—in order to earn a particular resolution. *See generally State v. Terrazas*, 2014 UT App 229, 336 P.3d 594 (discussing cooperation agreements); *State v. Johnson*, 360 S.W.3d 104, 109-11 (Ark. 2010) (same); *see, e.g., United States v. Wells*, 211

F.3d 988 (6th Cir. 2000) (remanding for hearing on potential reliance where defendant arguably complied with cooperation agreement terms); *People v. Fanger*, 748 P.2d 1332, 1333 (Colo. App. 1987) (finding detrimental reliance where defendant gave incriminating statement and agreed to testify against his brother in exchange for plea deal); *Doe v. Dist. Attorney*, 564 N.E.2d 588, 590-91 (Mass. Ct. App. 1991) (remanding for hearing on reliance where defendants agreed to participate in undercover operations); *Moody v. State*, 716 So.2d 592, 595 (Miss. 1998) (citing cases holding detrimental reliance where defendants resigned from work position, tendered confession, or performed undercover activity to secure pleas); *Custodio v. State*, 644 S.E.2d 36, 39 (S.C. 2007) (explaining that defendant may rely to his detriment on offer by “provid[ing] beneficial information to law enforcement”); *Beckes*, 300 N.W.2d at 873 (citing cases explaining that defendant may rely to his detriment where he pays restitution or acts as an informer).

But even then, if the evidence that a defendant gives is not used in later proceedings, he cannot be said to have relied to his detriment. *See e.g., Hall v. Al Luebbers*, 341 F.3d 706, 715-16 (8th Cir. 2003) (no detrimental reliance where defendant took polygraph but government did not seek to admit it at trial); *Evans v. State*, 899 So.2d 890, 894-95 (Miss. Ct. App. 2005) (holding no detrimental reliance where defendant gave confession that was

not admitted at later trial); *State v. Marlow*, 432 S.E.2d 275, 280-81 (N.C. 1993) (holding no detrimental reliance from defendant taking polygraph at State's request prior to plea bargain revocation where the State did not intend to use results in later proceedings). And the proposed plea itself cannot later prejudice the defendant because it is inadmissible at trial. *State v. Pearson*, 818 P.2d 581, 582-83 (Utah App. 1991) (holding under rule 410, Utah Rules of Evidence, that plea negotiations are inadmissible by either party at trial).

B. Francis cannot enforce a plea bargain where he never pled guilty, he was returned to his pre-bargaining position, the reliance he asserts is illusory, and the terms were never final at any rate.

Francis argues that he is entitled to enforce the proposed plea below because the prosecutor made an "unconditional and definite" offer which he "unequivocal[ly]" accepted and relied on to his detriment. Appt.Br. 16-18. The trial court properly denied him relief. Even if the prosecutor had made a definite offer that Francis had unequivocally accepted, there was no enforceable plea agreement because the trial court had not accepted his plea. The reliance that Francis argues is not the kind that would justify enforcing a plea agreement on a plea that the court had yet to accept. And there was no definite offer or unequivocal acceptance at any rate—the precise agreement terms were still under negotiation.

Even if the parties had reached a “meeting of the minds”—a point which the State disputes below—there would still be no valid agreement because, as explained, “the tentative plea agreement was neither presented to nor accepted by the trial court.” *Stringham*, 2001 UT App 13, ¶15; *see also Mabry*, 467 U.S. at 507 (“A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement.”). As Francis acknowledges, all of the cases he relies on—including *Patience*—involved “enforcement of plea terms after a defendant has already entered, and the trial court accepted, a plea from the defendant.” Aplt.Br. 13. But as shown, without a plea, there is no agreement to enforce. *Stringham*, 2001 UT App 13, ¶15 (refusing to enforce “tentative plea agreement” that “was neither presented to nor accepted by the trial court.”).

It is true—as Francis points out, Aplt.Br. 14—that the trial court in *Stringham* would have rejected the plea agreement because it did not address restitution. *Id.* But that fact did not determine the outcome; it merely further supported the court’s holding. *Id.* Thus, contrary to Francis’s argument, Aplt.Br. 14, the absence of evidence on whether the trial court was willing to accept the plea does not make the agreement on the unentered plea enforceable. It is merely a non-dispositive factual distinction between this case and *Stringham*. The dispositive fact—that the

court had yet to accept the plea before the prosecutor revoked the offer—is the same in both cases.

Francis also relies on *State v. Bero* for the proposition that “a constitutional right to enforcement of plea agreements may arise before a contract is reached because of reasonably formed expectations of the defendant.” Aplt.Br. 15. But this statement in *Bero* was pure dicta, as *Bero* was not entitled to enforcement of his plea. *Bero*, 645 P.2d at 46-47. And that dicta—and the Fourth Circuit case it cited in support—have been overruled by the United States Supreme Court in *Mabry*, 467 U.S. at 506-07 & n.2.⁴

⁴ *Bero* cited *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979) for the hypothetical proposition that pre-plea agreements could be enforceable. 645 P.2d at 47. *Cooper* was never very influential—almost every court that cited to it did so only to reject its reasoning. See, e.g., *Scotland*, 614 F.2d at 364 (rejecting the “*Cooper* rule”); *Caldwell v. State*, 747 S.W.2d 99, 151-52 (Ark. 1988) (declining to follow *Cooper*); *Cope v. Commonwealth*, 645 S.W.2d 703, 704 (Ky. 1983) (“Additionally, we would join those jurisdictions which have repudiated *Cooper*.”) (citing cases); *State v. Caminitta*, 411 So.2d 13, 16 (La. 1982) (“*Cooper* is the only case in any jurisdiction to so hold and we reject its rationale.”); *State v. Collins*, 265 S.E.2d 172, 176 (N.C. 1980) (“We reject the holding in *Cooper* and elect to follow the decisions in other jurisdictions” that the “State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea”) (citing cases); *Beckes*, 300 N.W.2d at 873 (“We do not find the fourth circuit’s reasoning [in *Cooper*] persuasive.”); cf. *Trepanier*, 600 A.2d at 1315 (“We are persuaded by the opinions of those courts that have held that no enforceable agreement has been made until the plea is entered.”).

Francis also argues that he relied on the offer to his detriment in four ways: (1) by “specifically for[going] the investigation and assertion of claims regarding alleged *Brady* and *Tiedemann* violations”; (2) by forgoing “his trial rights” because the State requested that the trial proceed with counsel allegedly unprepared; (3) “at least one witness” — the mutual friend — “who appeared at the trial on June 15 would be, according to Francis, unlikely to appear at any subsequent trial”; and (4) he must “pay the expert he retained in this case additional monies.” Aplt.Br. 17-18. This purported reliance is not the kind that would justify enforcing an agreement on a plea that the court has yet to accept. That is, Francis has not shown that the plea negotiations irreversibly damaged his ability to defend himself.

Francis did not “forgo” his *Brady*/*Tiedemann* claims — they were fully briefed, argued, and decided against him. (R330-46, 353-430, 690-723).

He was not forced to go to trial unprepared — as Francis admits, the trial court granted his motion for a continuance. Aplt.Br. 18, *see also* R310-11. And plea negotiations that began one business day before trial was

But regardless of how influential *Cooper* was while it was good law in the Fourth Circuit, it was overturned by *Mabry*. *See Mabry*, 467 U.S. at 506-07 & n.2 (citing *Cooper* as reason for granting certiorari review and holding, contrary to *Cooper*, that a “plea bargain standing alone is without constitutional significance”); *see also State v. O’Leary*, 517 A.2d 1174, 1176-77 (N.H. 1986) (recognizing that *Mabry* overruled *Cooper*); *Purser v. State*, 902 S.W.2d 641, 648 n.4 (Tex. Ct. App. 1995) (same, citing cases).

scheduled to begin could not have caused his counsel to be unprepared to go to trial one business day later. If counsel was unprepared, the plea negotiations were not at fault.

As to the possible non-appearance of a witness at a hypothetical later trial, it is not the witness's choice whether to appear—if summoned, he must come or face contempt. Utah R. Crim. P. 14(a)(7) ("Failure to obey a subpoena without reasonable excuse may be deemed a contempt of the court responsible for its issuance."). And the witness was responsive to subpoena, because he appeared at the scheduled trial. Plea negotiations could not have caused Francis to relinquish access to such a witness.

And Francis does not explain why he is "required to pay the expert he retained in this case additional monies." Aplt.Br. 18. It is certainly not because the expert was paid to testify, because there was no trial. Calling off a witness before they testified would seem at very least not cost additional money, and may save money. Thus, it is not clear how the plea offer could have caused whatever additional expenses that Francis will allegedly incur. Because Francis could be restored to his pre-offer position, he has not shown detrimental reliance. *See Moss*, 921 P.2d at 1027 (holding that where "the defendant is simply placed in the same position as he or she was prior to the guilty plea, there is no undue prejudice to the defendant.")

(citations omitted). As explained, a plea offer may be withdrawn or rejected at any time before a plea is entered.

Francis further argues that the “State must abide by the terms of its agreement, despite the displeasure of the victim.” Apl’t.Br. 19. But the “displeasure of the victim” is the very sort of thing that trial courts are required to take into account when deciding whether to accept plea resolutions. *See State v. Casey*, 2002 UT 29, ¶¶23-39, 44 P.3d 756 (discussing victim’s rights under Utah constitution and statutes, and explaining that the victim was properly heard “at a time when he could have persuaded the court to reject the proposed plea”). This only further illustrates that any preliminary agreement with the prosecutor would not have bound the trial court.

And more fundamentally, the record shows that the parties never reached a “meeting of the minds.” *Bero*, 645 P.2d at 46 (holding no enforceable agreement where “there had been no meeting of the minds between counsel”). Francis’s recitation of the proceedings below makes it appear as if the prosecutor made a single offer, which he accepted on its face. *Id.* at 16. But the record shows more extensive negotiation:

* Defense counsel requested a final offer on June 12, three days before trial. The **prosecutor offered a felony plea without any sentencing agreement.** Defense counsel

said she would convey the offer, but Francis was unlikely to accept it. R318.

- * On the 13th, **defense counsel asked for a misdemeanor** based on an alleged discovery issue, and **the prosecutor refused, insisting on a felony.** R320.
- * Later that day, **defense counsel said that Francis agreed to plead to the obstruction of justice count** as a felony, with various terms and conditions, including a 24-month probation period, substance abuse evaluation and treatment, restitution, and for someone—presumably the prosecutor—to **stay silent at sentencing on jail.** R437.
- * In the late evening of the 14th, defense counsel sent a statement in advance of plea—not in the record—asking the prosecutor to let her know of **“any edits that need to be made.”** R443.
- * On the morning of the 15th, the prosecutor responded, saying that he would **only agree to a one-step reduction in offense level,** likely following successful completion of probation. R443.
- * Before the parties signed the statement in advance of plea and presented it to the court for acceptance, the **prosecutor revoked the offer.** R432.

Thus, the prosecutor had not made an “unconditional and definite offer” and Francis had not accepted any of the offers the prosecutor made. Rather, at the time the prosecutor revoked the offer he had made, the parties were still negotiating—and consequently had not reached agreement on—the level of offense, the prosecutor’s duties at sentencing, and what level of reduction Francis would be entitled to if he successfully completed probation. Francis hardly accepted the prosecutor’s offers unconditionally;

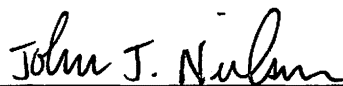
rather, he made a series of counteroffers that nullified each successive offer. See generally *Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372, 1377 (1995) ("An offeree's proposal of different terms from those of the offer constitutes a counteroffer, and no contract arises unless the original offeror accepts it unconditionally."). And he did not accept the prosecutor's latest offer before it was revoked. Because there was no "meeting of the minds" on the precise terms of the plea deal, no agreement was ever reached, even under a pure civil contract analogy. See, e.g., *State v. Nine Thousand One Hundred Ninety-Nine Dollars*, 791 P.2d 213, 216 (Utah App. 1990) ("However, if the parties to the agreement never reached a 'meeting of the minds,' there is no 'agreement' to be fulfilled.").

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on February 10, 2017.

SEAN D. REYES
Utah Attorney General



JOHN J. NIELSEN
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on February 10, 2017, two copies of the Brief of Appellee were ☒ mailed ☐ hand-delivered to:

Kelly Ann Booth
Bautista, Booth, and Parkinson, LC
215 South State Street, Suite 600
Salt Lake City, UT 84111

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

Melina Fryer

Addenda

Addendum A

KELLY ANN BOOTH (10910)
kellyann@boothlegal.com
THE JUDGE BUILDING
8 EAST BROADWAY, SUITE 700
SALT LAKE CITY, UTAH 84111-2225
(801) 364-6666 PHONE
(801) 618-3835 FACSIMILE

Attorney for Defendant

IN THE UTAH DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT
SALT LAKE DEPARTMENT

STATE OF UTAH,

Plaintiff,

-v-

SAMUEL AARON FRANCIS,

Defendant.

**MOTION TO ENFORCE
PLEA AGREEMENT**

Case № 131908488

The Honorable Royal Hansen

COMES NOW Defendant, SAMUEL AARON FRANCIS, and moves the court for an Order to enforce the plea agreement that was in place on June 13, 2015. This Motion is based on the following:

STATEMENT OF FACTS

1. The State has charged Francis by Amended Information with five charges: three counts of third degree felony aggravated assault (DV), one count of third degree felony obstruction of justice, and one count of class B misdemeanor interruption of a communication device.

2. Francis was scheduled to have a three-day trial from June 15 through June 17, 2015.
3. On Friday, June 12, 2015, a final pre-trial conference was held in this matter. During that conference, the Court directed the parties to meet and confer regarding jury instructions, voir dire, and any outstanding evidentiary issues.
4. Later that Friday afternoon, Mr. Heiner on behalf of the State and Ms. Booth for Francis conducted a telephone conference at approximately 2:30pm.
5. During that phone call, Booth said to Heiner, "One thing we did not do was put the final plea offer in this case on the record this morning at the final pretrial conference. We will probably need to do that Monday morning. What is the final plea offer from the State in this case? I don't think we have talked about that in some months since it appeared we were headed for trial."
6. Heiner responded, "the offer is the same offer that has been out there for some time: Aaron can plead to a third degree felony, 402 reduction after successful completion of probation, 24 months supervised probation, no agreement for recommendation of no jail at sentencing."
7. Booth then responded, "so the 3F would be to the agg assault?"
8. Heiner then replied, "no, I am ok if he pleads to either the obstruction or the agg assault, but no agreement for jail recs."
9. Booth indicated she would relay the offer to her client, but that he would likely decline it because of the felony.

10. Heiner did not at any time during the discussion on June 12 indicate that the offer was no a final offer, or that it contingent on upon notice to the victim. In fact, Heiner and Booth have had several conversations regarding plea resolutions in this matter, and counsel for the alleged victim was involved in those discussions.
11. Booth and Heiner then discussed the remaining evidentiary issues and completed the phone call.
12. Because the State's offer was different than any other offers that had been extended in the case, and because the State's offer to plead to the obstruction charge with a dismissal of the aggravated assault charges, Booth contacted her client to relay and discuss the new offer.
13. On Saturday, June 13, 2015, Booth emailed Heiner upon discovering an evidentiary issue, and requested Heiner contact her at his earliest convenience.
14. Heiner called Booth shortly thereafter, and the two discussed the evidentiary issue (that is the subject of the Tiedemann motion filed herewith). Heiner said he would call Booth back shortly.
15. Heiner then forwarded an email to Booth with an attachment that contained new evidence in the case, and then Heiner called Booth within minutes of forwarding the email, at approximately 3:00pm.
16. Heiner and Booth discussed the evidentiary issue, and Booth indicated to Heiner that she would likely need to file a Tiedemann motion and/or motion in limine.

Exasperated at the 11th hour discovery issue, Booth said to Heiner, "Are we really going to try this case? Why don't we just resolve it?" And then Booth proposed that since there was a late discovery issue, that the State agree to resolve the case with a Class A misdemeanor plea offer.

17. Heiner declined, stating his reasons for not wanting to extend that offer, and said, "Aaron [Francis] can plead to the third degree obstruction or assault, and earn a misdemeanor, but I am not going to agree to a misdemeanor." Booth then said she would get back to Heiner about the issues they had discussed.
18. Booth then discussed the evidentiary issues and plea offer with Francis, and at 4:30pm, Booth emailed Heiner and indicated that Francis had accepted the State's offer, and that Booth would email the Statement of Defendant in Advance of Plea to Heiner for his approval.
19. Booth then emailed the Statement of Defendant to Heiner, and sent him a text message conforming the same and indicating that Booth would meet with Francis at 8am Monday morning to review the Statement and prepare to enter the plea at 8:15am when the Judge took the bench.
20. Heiner emailed Booth Monday morning at 7:25am with minor edits to the Statement of Defendant.
21. When Booth walked into the courtroom Monday morning just before 8:15am, Heiner walked up to Booth and said, "No go, Bethany won't sign off on the obstruction, it has to be aggravated assault."

22. Booth inquired about what Heiner was talking about, and indicated that at no time had Heiner ever told Booth that the offer was not final, and that it was contingent upon any acceptance or approval by the alleged victim.

23. Heiner said, "sorry, I just can't do it." at which point Booth indicated she didn't have any files and was not prepared to go forward with trial in light of the fact that they had a plea deal.

24. Unbeknownst to Booth, Heiner contacted the alleged victim on Saturday to inform her that Francis had accepted a plea offer, but was not able to reach her until Monday morning by phone.

25. Booth knew at the time Heiner extended the new plea offer on Friday, June 12, that the victim had no legal right to preclude the plea offer from being made or prevent the Court from accepting the plea offer.

ARGUMENT

- I. The State breached its agreement with Francis and now the Court must compel the Government to honor the resolution.

"In interpreting a plea agreement, we rely on general principles of contract law, *United States v. Cachucha*, 484 F.3d 1266, 1270 (10th Cir. 2007), and therefore look to the express language in the agreement to identify both the nature of the government's promise and the defendant's reasonable understanding of this promise at the time of the entry of the

guilty plea" *VanDam*, 493 F.3d at 1199. We construe any ambiguities against the government as the drafter of the agreement. *Cachucha*, 484 F.3d at 1270."¹

And in *Santobello v. New York*, the Supreme Court recognized the importance for a prosecutor to act fairly when negotiating and securing deals with an accused.² And in *United States v. Greene*, the Tenth Circuit reiterated that, "Where a plea is predicated in any significant degree on a promise or agreement, such promise or agreement must be fulfilled to maintain the integrity of the plea."³ The Tenth Circuit then further held, "General principles of contract law govern the prosecution's obligations under a plea agreement."⁴ To determine whether a breach has occurred, courts apply a two-step process: (1) "we examine the nature of the government's promise;" and (2) "we evaluate this promise in light of the defendant's reasonable understanding of the promise..."⁵ The defendant need only prove the underlying facts establishing the breach by a preponderance of the evidence.⁶

In applying the two-part test for determining whether the State is breaching the June 13 plea agreement, the Court can examine the nature of the State's agreement for

¹ *United States v. Rodriguez-Rivera*, 518 F.3d 1208, 1212-13 (10th Cir. 2008).

² *Santobello v. New York*, 404 U.S. 257 (1971).

³ *United States v. Greene*, No. 06-5063 (FED10) 08/16/2007 (Citing, *United States v. Greenwood*, 812 F.2d 632, 637 (10th Cir. 1987) (quoting *United States v. Reardon*, 787 F.2d 512, 516 (10th Cir. 1986)). See also, *United States v. Werner*, 317 F.3d 1168, 1170 (10th Cir. 2003); *United States v. Brye*, 146 F.3d 1207, 1209 (10th Cir. 1998) (citing *Santobello*, 404 U.S. at 262).

⁴ *Ibid.*

⁵ *Werner*, 317 F.3d at 1171; *Brye*, 146 F.3d at 1210 (citing *United States v. Rockwell Int'l Corp.*, 124 F.3d 1194, 1199 (10th Cir. 1997).

⁶ *Id.*

Francis to plead to a felony obstruction of justice charge, and then evaluate that agreement in light of Francis' understanding of the plea agreement, including his reasonable reliance thereon.

In this case, the State, for the first time in the case on June 12, 2015, offered to dismiss the aggravated assault charges in exchange for Francis' plea to obstruction of justice as a domestic violence offense, third degree felony. The State's offer was unequivocal. And Francis' acceptance of that offer on June 13, 2015 was also unequivocal. And, Francis relied on that agreement with the State when he ceased trial preparation, called off his witnesses, and forfeited his retainer to the expert witness in this case. Yet, the State breached that agreement on Monday by erroneously stating that the plea agreement was somehow voided because the alleged victim did not assent.

Francis agreed to waive his constitutional rights in exchange for the State dismissing the felony aggravated assault charges and the interference with a communication device charge. Francis has strong trial defenses, but agreed to waive those defenses and his rights for purpose of avoiding the possibility of being convicted for an aggravated assault, which significantly limit his future educational and employment opportunities. The State's offer, as relayed by Heiner, was not conditional, and in fact was made as a statement of the final offer for the parties to put on the record. That fact demonstrates that the State's offer was not conditional, and that Francis' reliance was reasonable.

Relying upon this agreement and other representations of the State, Francis forewent pursuing his trial defenses in light of the plea agreement. Because it was clear during the June 12 and 13 conversations that the offer was made and not conditional, the plea

agreement was now enforceable. In the subsequent communications, including the email sent by Heiner Monday morning at 7:25am containing edits to the Statement of Defendant memorializing the plea agreement, all indicators were that the plea would be entered imminently.

Applying the general principles of contract law to the agreement between the State and Francis, both parties will benefit from their bargained-for agreement with the government's registering a conviction, procuring the probation conditions and treatment of Francis, and closing one more matter on the State's caseload. Francis is entitled to the benefit of his agreement with the State.

Further, the plea agreement is not void or voidable because the victim does not like the resolution. Utah's victim's rights statutes do not allow for an alleged victim to void a plea agreement.⁷ In fact, the provisions of Utah's victim's rights statutes explicitly state that the rights of victims shall not be construed to provide a legal basis for interference with a plea.⁸

CONCLUSION

WHEREFORE, SAMUEL AARON FRANCIS, having the reasonable understanding that in exchange for his plea as charged to Count Four of the Amended Information, a third degree felony to obstruction of justice (DV), his case will be resolved in a manner favorable to both parties, respectfully moves the court to enforce said agreement, and

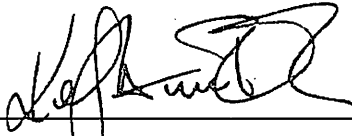
⁷ Utah Code Ann. §§ 77-37-1, et seq., and 77-38-1, et seq.

⁸ Utah Code Ann. §77-38-12.

require that the State honor the resolution that Francis negotiated with Heiner, and
accepted prior to trial.

RESPECTFULLY SUBMITTED this 25th day of June, 2015.

LAW OFFICES OF
KELLY ANN  BOOTH
PLLC



Kelly Ann Booth
Attorney for Aaron Francis

KELLY ANN BOOTH (10910)
kellyann@boothlegal.com
THE JUDGE BUILDING
8 EAST BROADWAY, SUITE 700
SALT LAKE CITY, UTAH 84111-2225
(801) 364-6666 PHONE
(801) 618-3835 FACSIMILE

Attorney for Defendant

IN THE UTAH DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT
SALT LAKE DEPARTMENT

STATE OF UTAH,

Plaintiff,

-v-

SAMUEL AARON FRANCIS,

Defendant.

ORDER

Case № 131908488

The Honorable Royal Hansen

THIS COURT, HAVING CONSIDERED the Defendant's Motion, and based on relevant law
and good cause appearing, hereby ORDERS:

- The Defendant's Motion is GRANTED. Defendant's case should resolve as the parties agreed.

DATED this ____ day of June, 2015.

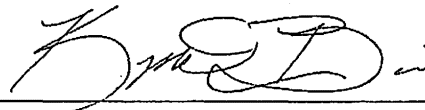
The Honorable Royal Hansen
Third Judicial District Court Judge

CERTIFICATE *of* SERVICE

This is to certify that on the 25th day of June, 2015, a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following:

Salt Lake District Attorney
Justice Division Broadway
111 E Broadway Suite 400
Salt Lake City, Utah 84111

- ☐ Hand Delivery
- ☐ U.S. Mail
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ e-filing



SIM GILL, Bar No. 6389
District Attorney for Salt Lake County
Clint Heiner, Bar No. 11209
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (385) 468-7600
Email: cheiner@slco.org

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. SAMUEL AARON FRANCIS, Defendant.	STATE'S RESPONSE TO DEFENDANT'S MOTION TO ENFORCE THE PLEA AGREEMENT Case No. 131908488 Honorable ROYAL HANSEN
--	---

The State by and through counsel, Clint Heiner, moves this Court to deny Defendant's Motion to Enforce the Plea Agreement.

STATEMENT OF FACTS

Between June 12 and 13, 2015, the State and Counsel for Defense engaged in plea negotiation discussions. Those discussions concluded with a statement by Defense Counsel that "Aaron can not accept any felony because he has a no felony policy at work." So, when on June 13, 2015, Counsel for Defendant sent the State an email tentatively accepting a felony offer (Attachment A), the State was surprised. Counsel for the State then emailed the Victim and asked her for her number. On June 14, 2015, the State received another email from Counsel for Defense with an attached proposed plea for review (Attachment B). On June 14, 2015, the

State received a returned email from the Victim with her phone number; however, the state did not call her until the following morning, because of the late hour. On the morning of June 15, 2015, the State looked at the tentative plea and sent an email to Defense Counsel (Attachment C). The State then called and spoke with the Victim. After discussing the tentative plea with the Victim, the State rescinded its offer to Defendant in Court at about 8:15 am when Counsel for Defense appeared. The tentative plea agreement was never finalized. Counsel for Defense had not made the changes proposed by the State. Counsel for Defense had not reviewed the plea with Defendant and neither party had signed the plea. Furthermore, the plea was never presented to nor accepted by the trial court.

LAW AND ARGUMENT

In this case, Defendant relies upon contract law principles to seek specific performance of the tentative plea agreement. However, although principles of contract law provide a useful framework involving plea agreements they cannot be blindly incorporated into the criminal law area of plea bargaining. See Patience, 944 P.2d 381, 387 (quoting United States v. Ocanas, 628 F.2d 353, 358 (5th Cir. 1980)). Furthermore, Defendant attempts to apply the wrong legal standards to the issue at hand. Defense references cases where an agreement has been finalized and the court has entered and accepted the plea. The case most directly on point is State v. Stringham, 2001 UT App 13 (2001). In Stringham, before trial, defendants' counsel and the State discussed a potential plea agreement. The plea agreement, however, was never finalized between the parties, nor was it submitted to the trial court for approval. Defendant filed a motion to enforce the proposed plea agreement, which was denied. In Stringham, the Court of Appeals, recognized the Utah Supreme Court's holding in State v. Kay, stating "plea agreements are

binding on the parties and the court once the plea is entered and accepted.” State v. Kay, 717 P.2d 1294, 1304 (Utah 1986).

Here, both counsel for the State and Defense discussed a tentative plea agreement. However, that plea was never finalized; through email communications between Counsel for the State and Defense: (1) Defendant had yet to make final confirmation of the plea, (2) Defendant had not reviewed the plea, and (3) the plea itself had not been finalized and edits still had to be made. Even assuming that the plea was finalized, the State rescinded the offer before it was accepted and entered on the record. Until the plea agreement was entered and accepted by the Court, the State is not bound by the offer. The State can rescind the offer up to the point the Court accepts and enters the plea on the record, so long as defendant took no action that would cause prejudice. (Stringham at 1157, citing State v. Moss, 921 P.2d 1021, 1027 (Utah Ct. app. 1996). Defendant cannot show prejudice. “[A] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest.” (Stringham quoting Mabry v. Johnson, 467 U.S. 504 at 507 (1984)). The State presented ready for trial on June 15, 2015. This case has been pending for nearly 2 years, Defendant has waived his speedy trial rights a number of occasions and did so again on June 15, 2015. Any prejudice to this point is speculative and Defendant cannot show any real prejudice.

Furthermore, the Stringham Court noted, “[i]n addition to being an executory agreement, the decision whether to accept or reject a plea agreement lies within the discretion of the trial court.” (quoting State v. Mane, 783 P.2d 61, 66 (Utah Ct. App. 1989)). Furthermore, “even where ‘the government and the defendant reach a plea agreement, the court is not required to accept it.” (Stringham quoting, United States v. Hernandez, 948 F.2d 316, 325 (7th Cir. 1991)).

Rule 35 of the Utah Rules of Criminal Procedure states, "[a]t the time of entry of plea, the prosecutor shall represent to the court, either in writing or on the record, that the victim has been contacted and an explanation of the plea bargain has been provided to the victim...prior to the court's acceptance of the plea." U.R.C.P. 35

Here, even if the State and Defendant would have moved forward with the plea, the Court by rule could have rejected it. Prior to the State rescinding the offer, the Victim had not been contacted and the State had not explained the plea bargain to her. Defendant could not guarantee that the Court would accept and enter the plea of record and should have been prepared to go to trial.

CONCLUSION

The tentative plea offer was not final. Even if the plea was final; the State could rescind the offer where Defendant suffered no actual prejudice. Therefore, there is no plea to enforce. Furthermore, the tentative plea agreement was neither presented to nor accepted by the trial court. Accordingly Defendant's motion should be denied.

DATED this 30 June 2015.

SIM GILL
District Attorney

/s/ _____
Clint Heiner
Deputy District Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing STATE'S MOTION TO PRECLUDE EXPERT TESTIMONY, was sent to the following:

Kelly Ann Booth Attorney for Defendant 8 East Broadway, Suite 700 Salt Lake City, Utah 84111 kellyann@boothlegal.com	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Messenger/Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> email <input checked="" type="checkbox"/> eFile

DATED this 30 June 2015.

/s/ Clint Heiner USB P#11905

Attachment A

Clint Heiner

From: Kelly Ann Booth <kellyann@boothlegal.com>
Sent: Saturday, June 13, 2015 4:31 PM
To: Clint Heiner
Subject: Re: Samuel Aaron Francis

Clint: I am waiting on final confirmation from Aaron, but he is accepting the plea offer you made yesterday for him to plead to the 3rd degree felony, Obstruction of Justice-DV, with 24 month probation recommend, stay silent at sentencing on jail, substance abuse eval and complete recommended treatment, and restitution.

Because of the new information we learned yesterday and today, and the new offer to plead to obstruction, my assessment is that if we can't prevail on a teidemann motion/motion in limine/motion to continue based on the new information we learned yesterday and today, and we have to go forward to trial without the video, the better option is to plead to the new offer.

let's plan on doing that Monday morning, and I'll draft the plea paperwork and send it to you for your approval. see you Monday. Kelly Ann

Kelly Ann Booth, Esq.
The Judge Building
8 East Broadway, Suite 700
Salt Lake City, Utah 84111
(801) 364.6666 Telephone
(801) 618.3835 Facsimile

PRIVILEGE STATEMENT - The information contained in this electronic mail message is confidential information intended only for the use of the individual or entity named above, and may be privileged. If the reader of this message is not the intended recipient, the employee, or the agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (801-364-6666), and delete the original message. Thank you.

Any communication or offer of settlement contained in this electronic mail message is subject to Rule 408 of the Utah Rules of Evidence and Rule 68 of the Utah Rules of Civil Procedure and is subject to the limitations thereof.

Sent from my iPhone

> On Jun 13, 2015, at 2:52 PM, Clint Heiner <CHeiner@slco.org> wrote:

>

>

>

> Clint Heiner

> Deputy District Attorney

> Office of the Salt Lake County District Attorney

> 111 East Broadway, Suite 400<x-apple-data-detectors://4/0> Salt Lake

> City, UT 84111<x-apple-data-detectors://4/0>

>

> 801-363-7900<tel:801-363-7900>

> 801-366-4176<tel:801-366-4176> (fax)

>
> CONFIDENTIAL: This electronic message - along with any/all attachments
> - is confidential. This message is intended only for the use of the
> addressee. If you are not the intended recipient or the person
> responsible to deliver it to the intended recipient, you may not use,
> disseminate, distribute or copy this communication. If you have
> received this message in error, please immediately notify the sender
> by reply electronic mail and delete the original message. Thank you
>
>
> Begin forwarded message:
>
> From: "Clint Heiner" <CHeiner@slco.org<mailto:CHeiner@slco.org>>
> To: "'Kelly Ann Booth"
> <kellyann@boothlegal.com<mailto:kellyann@boothlegal.com>>
> Cc: "Clint Heiner" <CHeiner@slco.org<mailto:CHeiner@slco.org>>
> Subject: FW: Samuel Aaron Francis
>
> Here is the most up-to-date police report
>
> 52 pages. I attached a copy of the report and the CAD Call
>
> <13-140510.pdf>
> <CAD call 13-140510.pdf>

Attachment B

Clint Heiner

From: Kelly Ann Booth <kellyann@boothlegal.com>
Sent: Sunday, June 14, 2015 8:04 PM
To: Clint Heiner
Cc: Krystal Bain; Justin Knell
Subject: Re: Samuel Aaron Francis
Attachments: SIAP_Francis_20150615.pdf

Clint: Here is the Statement of Defendant in Advance of Plea for the obstruction charge. I included all the terms you indicated on Friday, so it should be good to go. I will be at court in the morning at 8am to review it with Aaron, so we will be ready to go to enter the plea when Judge Hansen takes the bench at 8:15. Let me know if you see any edits that need to be made, otherwise, see you in the morning. Thanks, Kelly Ann

From: Kelly Ann Booth
Sent: Saturday, June 13, 2015 4:31 PM
To: Clint Heiner
Subject: Re: Samuel Aaron Francis

Clint: I am waiting on final confirmation from Aaron, but he is accepting the plea offer you made yesterday for him to plead to the 3rd degree felony, Obstruction of Justice-DV, with 24 month probation recommend, stay silent at sentencing on jail, substance abuse eval and complete recommended treatment, and restitution.

Because of the new information we learned yesterday and today, and the new offer to plead to obstruction, my assessment is that if we can't prevail on a teidemann motion/motion in limine/motion to continue based on the new information we learned yesterday and today, and we have to go forward to trial without the video, the better option is to plead to the new offer.

let's plan on doing that Monday morning, and I'll draft the plea paperwork and send it to you for your approval. see you Monday. Kelly Ann

Kelly Ann Booth, Esq.
The Judge Building
8 East Broadway, Suite 700
Salt Lake City, Utah 84111
(801) 364.6666 Telephone
(801) 618.3835 Facsimile

PRIVILEGE STATEMENT - The information contained in this electronic mail message is confidential information intended only for the use of the individual or entity named above, and may be privileged. If the reader of this message is not the intended recipient, the employee, or the agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (801-364-6666), and delete the original message. Thank you.

Any communication or offer of settlement contained in this electronic mail message is subject to Rule 408 of the Utah Rules of Evidence and Rule 68 of the Utah Rules of Civil Procedure and is subject to the limitations thereof.

Sent from my iPhone

> On Jun 13, 2015, at 2:52 PM, Clint Heiner <CHeiner@slco.org> wrote:

>
>
>

> Clint Heiner

> Deputy District Attorney

> Office of the Salt Lake County District Attorney

> 111 East Broadway, Suite 400<x-apple-data-detectors://4/0> Salt Lake

> City, UT 84111<x-apple-data-detectors://4/0>

>

> 801-363-7900<tel:801-363-7900>

> 801-366-4176<tel:801-366-4176> (fax)

>

> CONFIDENTIAL: This electronic message - along with any/all attachments

> - is confidential. This message is intended only for the use of the

> addressee. If you are not the intended recipient or the person

> responsible to deliver it to the intended recipient, you may not use,

> disseminate, distribute or copy this communication. If you have

> received this message in error, please immediately notify the sender

> by reply electronic mail and delete the original message. Thank you

>

>

> Begin forwarded message:

>

> From: "Clint Heiner" <CHeiner@slco.org<mailto:CHeiner@slco.org>>

> To: "'Kelly Ann Booth'"

> <kellyann@boothlegal.com<mailto:kellyann@boothlegal.com>>

> Cc: "Clint Heiner" <CHeiner@slco.org<mailto:CHeiner@slco.org>>

> Subject: FW: Samuel Aaron Francis

>

> Here is the most up-to-date police report

>

> 52 pages. I attached a copy of the report and the CAD Call

>

> <13-140510.pdf>

> <CAD.call 13-140510.pdf>

Attachment C

Clint Heiner

From: Clint Heiner
Sent: Monday, June 15, 2015 7:25 AM
To: 'Kelly Ann Booth'
Subject: RE: Samuel Aaron Francis

It is only a 1 step reduction. Also, take alleged victim out of statement .

-----Original Message-----

From: Kelly Ann Booth [mailto:kellyann@boothlegal.com]
Sent: Sunday, June 14, 2015 8:04 PM
To: Clint Heiner
Cc: Krystal Bain; Justin Knell
Subject: Re: Samuel Aaron Francis

Clint: Here is the Statement of Defendant in Advance of Plea for the obstruction charge. I included all the terms you indicated on Friday, so it should be good to go. I will be at court in the morning at 8am to review it with Aaron, so we will be ready to go to enter the plea when Judge Hansen takes the bench at 8:15. Let me know if you see any edits that need to be made, otherwise, see you in the morning. Thanks, Kelly Ann

From: Kelly Ann Booth
Sent: Saturday, June 13, 2015 4:31 PM
To: Clint Heiner
Subject: Re: Samuel Aaron Francis

Clint: I am waiting on final confirmation from Aaron, but he is accepting the plea offer you made yesterday for him to plead to the 3rd degree felony, Obstruction of Justice-DV, with 24 month probation recommend, stay silent at sentencing on jail, substance abuse eval and complete recommended treatment, and restitution.

Because of the new information we learned yesterday and today, and the new offer to plead to obstruction, my assessment is that if we can't prevail on a teidemann motion/motion in limine/motion to continue based on the new information we learned yesterday and today, and we have to go forward to trial without the video, the better option is to plead to the new offer.

let's plan on doing that Monday morning, and I'll draft the plea paperwork and send it to you for your approval. see you Monday. Kelly Ann

Kelly Ann Booth, Esq.
The Judge Building
8 East Broadway, Suite 700
Salt Lake City, Utah 84111
(801) 364.6666 Telephone
(801) 618.3835 Facsimile

PRIVILEGE STATEMENT - The information contained in this electronic mail message is confidential information intended only for the use of the individual or entity named above, and may be privileged. If the reader of this message is not the intended recipient, the employee, or the agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received

this communication in error, please immediately notify us by telephone (801-364-6666), and delete the original message. Thank you.

Any communication or offer of settlement contained in this electronic mail message is subject to Rule 408 of the Utah Rules of Evidence and Rule 68 of the Utah Rules of Civil Procedure and is subject to the limitations thereof.

Sent from my iPhone

> On Jun 13, 2015, at 2:52 PM, Clint Heiner <CHeiner@slco.org> wrote:

>
>
>

> Clint Heiner
> Deputy District Attorney
> Office of the Salt Lake County District Attorney
> 111 East Broadway, Suite 400<x-apple-data-detectors://4/0> Salt Lake
> City, UT 84111<x-apple-data-detectors://4/0>

>

> 801-363-7900<tel:801-363-7900>
> 801-366-4176<tel:801-366-4176> (fax)

>

> CONFIDENTIAL: This electronic message - along with any/all attachments
> - is confidential. This message is intended only for the use of the
> addressee. If you are not the intended recipient or the person
> responsible to deliver it to the intended recipient, you may not use,
> disseminate, distribute or copy this communication. If you have
> received this message in error, please immediately notify the sender
> by reply electronic mail and delete the original message. Thank you

>
>

> Begin forwarded message:

>

> From: "Clint Heiner" <CHeiner@slco.org<mailto:CHeiner@slco.org>>
> To: "'Kelly Ann Booth'"
> <kellyann@boothlegal.com<mailto:kellyann@boothlegal.com>>
> Cc: "Clint Heiner" <CHeiner@slco.org<mailto:CHeiner@slco.org>>
> Subject: FW: Samuel Aaron Francis

>

> Here is the most up-to-date police report

>

> 52 pages. I attached a copy of the report and the CAD Call

>

> <13-140510.pdf>
> <CAD call 13-140510.pdf>

KELLY ANN BOOTH (10910)
kellyann@boothlegal.com
THE JUDGE BUILDING
8 EAST BROADWAY, SUITE 700
SALT LAKE CITY, UTAH 84111-2225
(801) 364-6666 PHONE
(801) 618-3835 FACSIMILE
Attorney for Defendant

IN THE UTAH DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT
SALT LAKE DEPARTMENT

STATE OF UTAH,

Plaintiff,

-v-

SAMUEL AARON FRANCIS,

Defendant.

MEMORANDUM FURTHER
SUPPORTING DEFENDANT'S
MOTION TO ENFORCE
PLEA AGREEMENT

Case № 131908488

The Honorable Royal Hansen

COMES NOW Defendant, SAMUEL AARON FRANCIS, and files this *Memorandum Further Supporting Defendant's Motion to Enforce Plea Agreement*.

RESPONSE TO STATE'S STATEMENT OF FACTS

1. "Between June 12 and 13, 2015, the State and Counsel for Defense engaged in plea negotiation discussions. Those discussions concluded with a statement by Defense Counsel that "Aaron can not (sic) accept any felony because he has a no felony policy at work."

- a. *Response:* The State and Francis did not "engage in plea negotiation discussions." Francis told the State that they had failed to place the final plea offer on the record at the final pre-trial that morning, and needed to do that at trial Monday morning. Francis then inquired what the State's final offer was, and the State extended a new offer that included dismissal of all the Aggravated Assault felony charges. Francis's counsel did reply that she did not believe Aaron would accept the offer because he has a no felony policy at work; however, Francis' counsel clearly indicated to the State that, since there was a new offer that included dismissal of the Aggravated Assault charges, she was ethically obligated to convey the offer to Francis and would get back to the State with his answer. The State did not indicate at any time that the offer was tentative, or subject to approval by anyone. That was the State's final stated plea offer, the one that the parties "should have" put the record in open court as the final plea offer to Francis for him to accept or reject.

2. "So, when on June 13, 2015, Counsel for Defendant sent the State an email tentatively accepting a felony offer (Attachemnt (sic) A), the State was surprised."

- a. *Response:* While Francis does not dispute that the State was surprised, the email accepting the offer was not tentative. It read in relevant part, "he is accepting the plea offer you made yesterday for him to plead to the 3rd degree felony, Obstruction of Justice-DV, with 24 month probation

recommend, stay silent at sentencing on jail, substance abuse eval and complete recommended treatment, and restitution...let's plan on doing that Monday morning, and I'll draft the plea paperwork and send it to you for your approval."¹ Despite ample opportunity to hit "reply" to Francis' email, at no time did the State respond to Francis and indicate that he needed to get approval from anyone, or that he had not notified the alleged victim in this case. In fact, when the State did reply to the subsequent email from Francis containing the Statement of Defendant in Advance of Plea, the State's only response was to make minor edits to the document.

3. "Counsel for the State then emailed the Victim and asked her for her number."

- a. Response: The State could have emailed Francis if it had concerns that the plea offer had not been discussed with the alleged victim. It was clear from Francis' email that the offer was accepted and that Francis was anticipating entering the plea on Monday morning. It was also clear from Francis' acceptance email that the basis for the acceptance of the plea was to avoid asserting and litigating certain defenses and evidentiary issues that had been brought to light on June 13, and that Francis was actually foregoing his defenses and claims in order to take advantage of the new

¹ Email from Booth to Heiner dated June 13, 2015 at 4:31pm (a copy of which is attached hereto as Exhibit A).

plea offer. These facts demonstrate there was likely a duty at that point for the State to inform Francis that it viewed the offer as "tentative," if it did, in fact, view it as such at that point.

4. "On June 14, 2015, the State received another email from Counsel for Defense with an attached proposed plea for review (Attachement (sic) B)."

a. *Response:* The attached Statement in Advance of Plea outlined all the terms of the plea agreement, as offered by the State and accepted by Francis. Despite confirmation in that email that the plea was accepted by Francis, and an actual document created in performance of the agreement, the State still did not respond to that email and indicate that the plea offer was "tentative" or conditional.

5. "On June 14, 2015, the State received a returned email from the Victim with her phone number; however, the state (sic) did not call her until the following morning, because of the late hour."

a. *Response:* None.

6. "On the morning of June 15, 2015, the State looked at the tentative plea and sent an email to Defense Counsel (Attachemnt (sic) C)."

a. *Response:* The State's email made minor edits to the plea agreement, and again did not indicate in any way that the plea was "tentative" or that the parties may not enter the plea that morning.

7. "The State then called and spoke with the Victim. After discussing the tentative plea with the Victim, the State rescinded its offer to Defendant in Court at about 8:15am when Counsel for Defense appeared."

a. *Response:* Other than disputing that the plea was "tentative", no further response.

8. "The tentative plea agreement was never finalized. Counsel for Defense had not made the changes proposed by the State."

a. *Response:* Counsel did make the changes by interlineation to the Agreement since they were minor edits, and not substantive changes. The plea agreement was finalized on June 13 when Francis accepted the State's unequivocal offer, and relied on that agreement when he forewent investigation and assertion of evidentiary claims and defenses, as well as his trial rights.

9. "Counsel for Defense had not reviewed the plea with Defendant and neither party had signed the plea. Furthermore, the plea was never presented to nor accepted by the trial court."

a. *Response:* Counsel had absolutely reviewed the plea agreement with Francis, and the State is correct that no one had signed the agreement yet, because the State unilaterally breached the agreement and rescinded its plea. The plea was presented to the Court, but it has not yet been accepted.

ARGUMENT

*Disposition of charges after plea discussions is not only an essential part of the process, but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases... This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.*²

- I. US and Utah caselaw indicates that the Court should apply contract law principles in determining where there was an enforceable agreement between the State and Francis.

"Many courts, including the Utah Supreme Court and the United States Supreme Court, have referred to plea agreements as contract and have applied principles from contract law to plea agreements."³ The Utah Supreme Court has articulated specifically,

[t]he nature of plea bargains requires the exchange of consideration, allowing the parties involved to reach a mutually desirable agreement. A plea bargain is a contractual relationship in which consideration is passed.⁴

The State correctly quoted the Court of Appeals in *Patience* when it stated,

"[h]owever, although principles of contract law provide a useful framework involving plea agreements they cannot be blindly incorporated into the criminal law area of plea

² *Santobello v. New York*, 404 U.S. 257, 262 (1971).

³ *State v. Patience*, 944 P.2d 381, 386 (Utah Ct.App.1997) (citing *Santobello v. New York*, 404 U.S. 257, 262 (1971)).

⁴ *State v. West*, 765 P.2d 891, 895-96 (Utah 1988)(internal citations and quotations omitted).

bargaining.”⁵ Yet it failed to include the immediately following sentences in that paragraph which make clear that the application of contract law principles should be more broadly applied in the plea bargain context, not more narrowly as the State suggests. *Patience* goes on to hold,

In applying contract law principles to plea agreements, courts must keep in mind that the defendant’s underlying contract right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law. As a result, the application of contract law principles to plea agreements may require tempering in some instances. For example, in interpreting plea agreements or determining their validity, court may in certain circumstances hold the government to a higher standard than the defendant.⁶

The central holding in *Patience* was that the State could not rely on strict application of contract law principles to deny the defendant her due process rights or invalid her plea agreement in its entirety. The State in that case was seeking to set aside her entire plea and require the defendant to face trial on the charges anew where she was seeking specific performance under the agreement. This holding stands for the opposition proposition than the State suggests, and further undermines its argument to invalidate its plea agreement.

⁵ State’s Response to Defendant’s Motion to Enforce The Plea Agreement at 2.

⁶ *State v. Patience*, 944 P.2d 381, 387 (Utah Ct.App.1997) (internal citations and quotations omitted).

The Court's holding in *Patience* is premised upon the Utah line of cases interpreting the United States Supreme Court's holdings regarding plea agreements in *Santobello*⁷ and *Mabry*.⁸ Accordingly, "[a] defendant may also be entitled to enforcement of his or her plea agreement on the basis of a reasonably formed expectation,"⁹ including specific performance.¹⁰

Thus, the Court should apply contract law principles broadly to the facts of this plea agreement, and find that the State made a definite plea offer, that was unequivocally accepted by Francis, and he relied upon that agreement (consideration) in foregoing some defenses and evidentiary claims.

A. The State's plea offer was not "tentative," it was definite in its terms and communicated without caveat or condition.

The State's definite, final plea offer was extended to Francis on June 12, when Heiner told Booth, "Aaron can plead to a third degree felony, 402 reduction after successful completion of probation, 24 months supervised probation, no agreement for recommendation of no jail at sentencing." The State does not directly dispute that fact, but rather alleges that the State and Francis engaged in "plea negotiation discussions." Yet that is simply incorrect. The State's offer was a specific response to Francis'

⁷ *Santobello v. New York*, 404 U.S. 257 (1971).

⁸ *Mabry v. Johnson*, 467 U.S. 504 (1984).

⁹ *State v. Nine Thousand One Hundred Ninety-One Dollars*, 791 P.2d 213 (Utah Ct.App.1990).

¹⁰ *State v. Smit*, 2004 UT App 222.

statement that the parties had failed to place on the record the final offer in this case, to meet the requirements of *Missouri v. Frye*. That the State provided its last plea offer in the case is evidence that the parties were not engaged in plea negotiations.

The plea offer from the State was clear, unconditional, specific, and complete in its terms. The State does not dispute that the offer, as stated by Francis in his memorandum, was made. Francis' counsel clearly indicated to the State that, since there was a new offer that included dismissal of the Aggravated Assault charges, she was ethically obligated to convey the offer to Francis and would get back to the State with his answer.

In fact, Francis did respond to the State not more than 24 hours later, with a clear acceptance of the offer. Francis' counsel said, "he is accepting the plea offer you made yesterday for him to plead to the 3rd degree felony, Obstruction of Justice-DV, with 24 month probation recommend, stay silent at sentencing on jail, substance abuse eval and complete recommended treatment, and restitution."¹¹

Accordingly, because the State's plea offer was unconditional and definite, and Francis' acceptance was unequivocal, the Court must enforce the agreement if it determines there was consideration or reliance upon the agreement by Francis; prejudicial.

B. Francis relied upon the plea agreement and was prejudiced by the State's improper rescission.

¹¹ Email from Booth to Heiner dated June 13, 2015 at 4:31pm (a copy of which is attached hereto as Exhibit B).

The State's argument that it can rescind its offer up to the point the Court accepts and enters the plea on the record is incorrect, and not based on Utah or Federal Court authority. In fact, under Utah law, "[a] defendant may also be entitled to enforcement of his or her plea agreement on the basis of a reasonably formed expectation,"¹² including specific performance.¹³ And, "courts will generally only allow the State to unilaterally rescind a plea agreement by showing that facts analogous to those warranting a mistrial exist or by showing that the defendant has breached the agreement."¹⁴

In this case, Francis specifically forewent the investigation and assertion of claims regarding alleged *Brady* and *Teidemann* violations. Francis also forewent his trial rights inasmuch as he presented himself on the day of trial without the benefit of counsel whom could provide effective assistance; Francis' counsel did not have any files or trial materials necessary to present a trial defense because the State induced Francis and his counsel to stop their trial preparations, call off witnesses, and forego claims and defenses relating to evidentiary issues discovered on June 13.

The prejudiced is further demonstrated by the State's objection to Francis' request to continue trial in light of the State's breached plea agreement. The State specifically sought to have Francis go forward without the benefit of effective assistance

¹² *State v. Nine Thousand One Hundred Ninety-One Dollars*, 791 P.2d 213 (Utah Ct.App.1990).

¹³ *State v. Bero*, 645 P.2d 44, 47 (Utah 1984).

¹⁴ *Patience*, 944 P.2d at 387 (internal quotations and citations omitted).

of counsel caused by the inducement of the State to enter the plea agreement. That the Court did not grant the State's request does not alleviate the prejudice suffered by Francis.

Moreover, at least one witness who appeared at the trial on June 15 is likely to fail to appear at any subsequent trial in this matter. Robert Packer stated to Francis' counsel in the hallway on the morning of trial that he "did not want to be here" and did not think he was "going to come back." The prejudice to Francis is clear. The witness appeared on the day of trial for which, but for the State's actions, would have gone forward and the witness could have testified. Further, Francis is now in a position where he is required to pay the expert he retained in this case additional monies because of the State's actions; Dr. Beall was called off when the plea agreement was reached on June 13. And, again, the State prejudiced Francis by insisting on going forward to trial that morning.

Had the Court had the benefit of the briefing on June 15, and a fair appraisal of the facts regarding the plea agreement and subsequent breach, the Court would have enforced the agreement, finding that Francis would be prejudiced by going forward after reliance on the State's agreement.

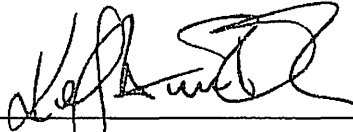
CONCLUSION

WHEREFORE, SAMUEL AARON FRANCIS, having the reasonable understanding that in exchange for his plea as charged to Count Four of the Amended Information, a third degree felony to obstruction of justice (DV), his case will be resolved in a manner

favorable to both parties, respectfully moves the court to enforce said agreement, and require that the State honor the resolution that Francis negotiated with Heiner, and accepted prior to trial.

RESPECTFULLY SUBMITTED this 7th day of July, 2015.

LAW OFFICES OF
KELLY ANN  BOOTH
PLLC



Kelly Ann Booth
Attorney for Aaron Francis

EXHIBIT A

Kelly Ann Booth

From: Kelly Ann Booth
Sent: Saturday, June 13, 2015 4:31 PM
To: Clint Heiner
Subject: Re: Samuel Aaron Francis

Clint: I am waiting on final confirmation from Aaron, but he is accepting the plea offer you made yesterday for him to plead to the 3rd degree felony, Obstruction of Justice-DV, with 24 month probation recommend, stay silent at sentencing on jail, substance abuse eval and complete recommended treatment, and restitution.

Because of the new information we learned yesterday and today, and the new offer to plead to obstruction, my assessment is that if we can't prevail on a teidemann motion/motion in limine/motion to continue based on the new information we learned yesterday and today, and we have to go forward to trial without the video, the better option is to plead to the new offer.

let's plan on doing that Monday morning, and I'll draft the plea paperwork and send it to you for your approval. see you Monday. Kelly Ann

Kelly Ann Booth, Esq.
The Judge Building
8 East Broadway, Suite 700
Salt Lake City, Utah 84111
(801) 364.6666 Telephone
(801) 618.3835 Facsimile

PRIVILEGE STATEMENT - The information contained in this electronic mail message is confidential information intended only for the use of the individual or entity named above, and may be privileged. If the reader of this message is not the intended recipient, the employee, or the agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (801-364-6666), and delete the original message. Thank you.

Any communication or offer of settlement contained in this electronic mail message is subject to Rule 408 of the Utah Rules of Evidence and Rule 68 of the Utah Rules of Civil Procedure and is subject to the limitations thereof.

Sent from my iPhone

> On Jun 13, 2015, at 2:52 PM, Clint Heiner <CHeiner@slco.org> wrote:
>
>
>
> Clint Heiner
> Deputy District Attorney
> Office of the Salt Lake County District Attorney
> 111 East Broadway, Suite 400<x-apple-data-detectors://4/0> Salt Lake
> City, UT 84111<x-apple-data-detectors://4/0>
>
> 801-363-7900<tel:801-363-7900>
> 801-366-4176<tel:801-366-4176> (fax)
>
> CONFIDENTIAL: This electronic message - along with any/all attachments

> - is confidential. This message is intended only for the use of the
> addressee. If you are not the intended recipient or the person
> responsible to deliver it to the intended recipient, you may not use,
> disseminate, distribute or copy this communication. If you have
> received this message in error, please immediately notify the sender
> by reply electronic mail and delete the original message. Thank you
>
>

> Begin forwarded message:

>
> From: "Clint Heiner" <CHeiner@slco.org<<mailto:CHeiner@slco.org>>>
> To: "Kelly Ann Booth"
> <kellyann@boothlegal.com<<mailto:kellyann@boothlegal.com>>>
> Cc: "Clint Heiner" <CHeiner@slco.org<<mailto:CHeiner@slco.org>>>
> Subject: FW: Samuel Aaron Francis
>

> Here is the most up-to-date police report
>

> 52 pages. I attached a copy of the report and the CAD Call
>

> <13-140510.pdf>

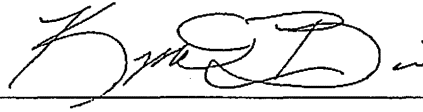
> <CAD call 13-140510.pdf>

CERTIFICATE *of* SERVICE

This is to certify that on the 7th day of July, 2015, a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following:

Salt Lake District Attorney
Justice Division Broadway
111 E Broadway Suite 400
Salt Lake City, Utah 84111

- ☐ Hand Delivery
- ☐ U.S. Mail
- ☐ Overnight Mail
- ☐ Facsimile
- ☒ e-filing



Addendum B

1 tempering goes in favor of the State. It says the tempering goes
2 in favor of the defendant.

3 THE COURT: Okay. Thank you.

4 MS. BOOTH: Thank you, Judge.

5 THE COURT: I appreciate your help. Let's see, Counsel,
6 with regard to the motion to enforce the plea agreement, the
7 Court's not in a position to grant that motion, and in fact
8 rejects it, finding that the plea had not been accepted by the
9 Court in this circumstance.

10 The plea had not been entered of record. The victim
11 had not been consulted with regard to a potential plea, and the
12 Tiedemann motion had not been heard at that juncture, that as I
13 look at the State has the ability to rescind an offer before it's
14 accepted and enter a record. Here it was not accepted by the
15 Court or entered of record, either one.

16 The plea agreement -- the State's not bound by that
17 until there is an acceptance. The State can rescind the offer up
18 and to the point that the Court accepts the offer and enters the
19 plea of record, neither of which took place here. Based upon
20 that, the Court's not able to enforce the plea agreement, and so
21 I think we're in the position of getting this matter -- are we
22 ready for trial? Is that what you're telling me, Counsel, on the
23 case and going forward?

24 MR. HEINER: Yes, Judge. I believe we have a pre-trial
25 in front of Judge Shaughnessy the week prior to trial. I don't