

2018

**State of Utah, Plaintiff/Appellee, v. Calvin Paul Steward,
Defendant/Appellant : Brief of Appellant**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff / Appellee,

vs.

CALVIN PAUL STEWART,

Defendant / Appellant.

Case No: 20180847-SC

BRIEF OF RESPONDENT

On Writ of Certiorari to the Utah Court of Appeals

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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff / Petitioner,

vs.

CALVIN PAUL STEWART,

Defendant / Respondent.

BRIEF OF RESPONDENT

Case No: 20180847-SC

INTRODUCTION

The decision of the Utah Court of Appeals is the only logical, and only constitutional, result of the problem this case presented. An indigent defendant was convicted at trial and was not informed of his right to counsel on appeal, nor was he provided the opportunity to have counsel appointed. His pro se attempt to appeal failed due to his inability to perfect the appeal without professional assistance. The court reasonably concluded that the constitutional right to appeal was infringed when the defendant is not informed of the right to counsel. And in terms of Rule 4(f), because the defendant had not been informed of the right to counsel on appeal and not afforded access to appointed counsel, the defendant was deprived of the right to appeal, even where he filed his own notice of appeal and “gained entry” to the appellate process. The right to appeal is more than the right to file notice of appeal.

STATEMENT OF THE ISSUES

This Court granted certiorari review on the following questions:

1. Whether the Utah Court of Appeals erred in concluding that Rule 4(f) of the Utah Rules of Appellate Procedure permits reinstatement of an appeal, based on a convicted defendant's claim (after a trial) that he was not informed of his right to counsel, after the defendant filed a timely pro se appeal.
2. Whether the Utah Court of Appeals erred in reversing the district court's Determination that Stewart failed to meet his burden of demonstrating he was not informed of his right to counsel on appeal.

On certiorari, this Court reviews the decisions of the court of appeals for correctness. *Manning v. State*, 2005 UT 61, ¶ 10, 122 P.3d 628.

STATEMENT OF THE CASE

Factual and Procedural Overview

Calvin Paul Stewart was charged by amended information on October 10, 2001 with multiple felony counts of Securities Fraud, Sale of Unregistered Securities, and Pattern of Unlawful Activity. R.032-36. Stewart was initially represented by private counsel, Richard Mauro, who represented Stewart through a preliminary hearing. R.024, 055, 058. However, before trial Mauro moved to withdraw because Stewart was "presently without funds" and a public defender was appointed. R.120, 146, 151-48. As trial approached, Stewart filed an "Entry of Appearance" for himself. R.171-72. Stewart asked the Court to make a public defender available as standby counsel. R.183. The Utah County Public Defender Association filed opposition to the proposed appointment as standby counsel. R.192-202. Eventually the Court released the public defender and

granted Stewart's request to represent himself pro se at trial. R.210-12. According to the Court minutes, Stewart was "fully advised of his rights to have counsel and of procedural matters." R.211. The Court informed Stewart that he would "be held at the same standard as counsel if he represents himself", and Stewart agreed to proceed pro se. R.212. The Court told Stewart if he "changes his mind and wishes to have counsel represent him at trial he must do so by May 1st." R.212.

Before trial Stewart filed a number of pro se motions, including documents entitled "Mandatory Judicial Notice" of his "Solemn Declaration" (R.219, 221-26), "Notice of Claim of Foreign Sovereign Immunity" (R.312), "Motion to Dismiss for Lack of Jurisdiction" based on sovereign immunity (R.422), "Notice of Felony" (R.471-72), "Notice of Removal of Judge" (R.527), "Notice for Competency and Incompetence, Revocation of Power of Attorney and Firing all Persons below and Demand to cease and desist" (R.533), and "Notice of Withdrawal of Consent to Contract with the Forum Court" (R.558). It seems from the record that these motions were fruitless. At trial Stewart was convicted of all charges and ordered into custody for sentencing. R.570, 625.

Following trial Stewart continued to file unusual pleadings, including "Notice of Mistrial Withdrawal of Consent" (R.634 [see Record Index]), and "Affidavit of Truth" (R.641). At sentencing on August 14, 2003 the trial court sentenced Stewart to prison on all 17 felony counts and ordered each count to run consecutive to each other. R.679-82. The trial court "recommended to the board

of pardons that the defendant serve at least 10 years and that when the defendant is placed on parole that he is not to work in any fiduciary capacity.” R.682.

On September 12, 2003 Stewart filed a timely “Notice of Appeal” (R.689-90) and an “Affidavit of Impecuniosity” (R.692-93) wherein Stewart notified the trial court that “owing to my poverty I am unable to bear the expenses of the appeal for an on behalf of CALVIN PAUL STEWART which I am about to take and that I believe I am entitled of necessity to seek the relief sought by such appeal.” On October 1, 2013 another document titled “Notice of Appeal” was filed, this time signed by Gerrit Timmerman, but its contents actually appears to be a request for transcripts. R.690-91. That was followed up with an Amended Request for Trial Court Transcripts on October 6, 2013, again asking for “the entire transcript of all recorded hearings”. R.705-06 (emphasis in original).

Stewart filed a request for an extension of time to file his docketing statement with the Court of Appeals, and eventually he filed a docketing statement. Following the receipt of the docketing statement, the Court of Appeals issued a sua sponte Motion for Summary Disposition, claiming that the issues raised in the docketing statement did not merit review. The State of Utah responded to the Court of Appeals’ motion by objecting because it believed at least one of the claims should be reviewed on appeal. The Court of Appeals then withdrew its motion and set a briefing schedule, with Stewart’s brief being due May 4, 2004. Stewart did not file a brief and the Court of Appeals dismissed the

appeal on June 2, 2004. The case was remitted to the district court on August 3, 2004.¹

On February 5, 2007 Stewart filed a Motion for Appointment of Counsel to the district court but the Court did not rule on the motion for lack of a notice to submit. On March 30, 2009 Stewart filed a “Motion to Correct Sentence Pursuant to Rule 23(e) UR Crim P” (sic). On April 24, 2009 the court denied that motion.

In June of 2010 Stewart again filed an Affidavit of Impecuniosity along with a Rule 60 “Motion for Relief from Void Judgment” and a request of appointment of counsel. In August of 2010 the court denied the request for counsel and, presumably, the motion for relief. On September 7, 2010 Stewart filed a notice of appeal from that denial along with an Affidavit of Impecuniosity.

Again, the court of appeals found these claims to be without merit and filed its own motion for summary disposition “on the basis that the grounds for relief are so insubstantial as not to merit further consideration.” The court noted that because the claims Stewart raised in his motion “relate to his underlying conviction” his sole remedy was to raise the issue in a post-conviction relief petition. See *State v. Stewart*, 2010 UT App 367 (per curiam).

¹ This information comes from the court of appeal’s file in *State v. Stewart*, Case No. 20030757-CA. Counsel for Stewart obtained a copy of this file from the court archives. A scanned copy of this file was included on the CD with Appellant’s electronic brief to the court of appeals and has been included as an addendum to the electronic brief to this Court as well, though it is not included in the printed brief.

Stewart then petitioned to this Court for a Writ of Certiorari, again requesting a waiver of the filing fees because of his indigence. A subsequent letter from the Supreme Court noted that it “appears that you will not have the assistance of an attorney in preparing papers for filing in this court” and provided a “pro se guide” in hopes that it would be helpful. R.823. Ultimately Stewart’s petition was denied without explanation. R.827.

Stewart’s Motion to Reinstate Direct Appeal

On April 15, 2015 Stewart filed his pro se “Motion to Reinstate Period for Filing Direct Appeal Pursuant to Rule 4(f) URAppP” claiming his hearing impairment was not addressed at trial, that he was not informed of his right to appeal at sentencing, and was not informed of the right to counsel on appeal, along with a “Motion to Appoint Counsel” with and “Affidavit of Impecuniosity”. R.874-80. The State opposed the motion asserting that Stewart’s disabilities “did not surface for at least eight months after the defendant was sentenced” and the Utah Supreme Court “already denied his Appeal”. R.882-84. Stewart filed a pro se reply denying that his hearing disability occurred after trial and sentencing. R.885-87.

On August 12, 2015 the district court appointed the Utah County Public Defender Association to represent Stewart and scheduled oral argument on the motion to reinstate for October 7, 2015. R.911. At that hearing the parties and the court agreed that Stewart’s pro se motion should be amended and set oral argument. R.1180-83. Defendant, now represented by counsel, filed his

amendment to the motion to reinstate his appeal and asked the court to set an evidentiary hearing. R.920-31. Stewart claimed he had been denied his right to appeal because he had the constitutional right to counsel on appeal, but because he was not informed of that right and was not offered appointment of counsel for appeal, his appeal failed for lack of filing a brief. R.928-31.

The State responded to the merits² of the claim by arguing that Stewart's claim failed because it did not fall within the "three circumstances" set out in *Manning*. R.937. The State took the position that Stewart appeal was denied, but only due to his own fault. R.938.

Stewart's reply asserted that the circumstances in *Manning* were not the only ways in which a person could demonstrate they had been denied their right to appeal. R.946-47. Stewart claimed that the denial of his right to appeal, based upon the trial court's failure to inform him of his right to counsel on appeal, was "self-evident based on his constitutional rights both to counsel and to appeal." R.947-48. Stewart cited cases from Kansas which established that principle. R.948-49.

Evidentiary Hearing on Amended Motion to Reinstate (February 10, 2016)

Stewart testified that after being unable to afford his private counsel and disagreeing with his appointed counsel, he ultimately represented himself at trial.

² Most of the State's arguments below focused on challenging the district court's jurisdiction to entertain Stewart's motion to reinstate. The trial court eventually concluded it did have jurisdiction to hear the motion. R.975-77. The question of the trial court's jurisdiction has not been challenged on appeal.

R.1116-19. Stewart recalled that after his appointed counsel was released, the judge informed him that if he did not have a new attorney soon, then he would have to proceed without one. R.1124-25. Stewart understood this to mean that he would have no further right to an attorney. R.1125. At that time, the trial court did not inform him that he had a right to counsel on appeal. R.1119.

After his conviction, Stewart was sentenced to prison and remains incarcerated there. R.1116, 1119. At sentencing the judge did not inform Stewart of his right to appeal. R.1120. The court did not inform Stewart of the right to have an attorney appointed to represent him on appeal. R.1120. If the judge had informed Stewart of his right to an attorney on appeal he would have asked for one because he “knew [that he] was way in over [his] head.” R.1120.

A non-attorney friend, Gerrit Timmerman, drafted the notice of appeal and docketing statement for Stewart, and Stewart signed the docketing statement while in court on another case. R.1120-21. Stewart hoped Timmerman would provide more assistance but recalled:

The last time I talked to him I was in prison. I called him on the phone. He asked me what grounds I wanted, I told him that the main thing I wanted was the thing on the hearing, my hearing problem. Other than that I told him, I don't really know enough about it to make any decisions. He asked me for some money. I told him I didn't have it. That was it.

R.1121-22. At the prison Stewart wrote a letter to the contract attorneys asking for assistance on his appeal but received a response that “they did not do appeals.”

R.1121.

Throughout the intervening years since his appeal was dismissed, Stewart filed multiple petitions and motions without the help of an attorney. He testified, “I kept requesting attorneys and it was kept being denied.” (sic) R.1122.³

District Court’s Ruling (July 18, 2016)

On June 29, 2016 the district court denied Stewart’s Motion to Reinstate Period for Filing Direct Appeal for three reasons: first, the court held that Stewart’s requests to represent himself in his jury trial and during sentencing, coupled with his “choice” to proceed in his appeal *pro se*, amounted to a “constructive waiver” of his right to an attorney on appeal. R.1154. Second, the court held that Stewart was at fault in failing to meet the procedural hurdles of the appellate process, barring him from relief under Rule 4(f). *Id.* And, third, the court held that the significant delays in Stewart’s appeal, combined with a “mere claim” by Stewart that he was not informed of his right to appellate counsel created a dispositive lack of evidence. R.1155-57.

³ See R.737 (Motion for Appointment of Counsel, January 31, 2007); R.771 (Motion for Appointment of Counsel, June 14, 2010); R.776 (Affidavit of Impecuniosity, June 21, 2010 [“I have no valuable assets that can be readily sold to pay the costs of an attorney”]); R.797 (Notice to Submit for Decision on Motion for Appoint of Counsel); R.811-12 (Affidavit of Impecuniosity, September 7, 2010); R.871 (Motion for Appointment of Counsel); R.874 (Motion to Reinstate Period for Filing Direct Appeal Pursuant to Rule 4(f) URAppP, April 5, 2015 [“shall appoint counsel”]); R.877 (Motion for Appointment of Counsel, April 15, 2015); R.878 (Affidavit of Impecuniosity).

Decision of the Utah Court of Appeals

On August 16, 2018 the Utah Court of Appeals issued its opinion in this matter. *State v. Stewart*, 2018 UT App 151, --- P.3d ---. The court of appeals agreed with Stewart that a “defendant is entitled to be informed of his right to counsel on appeal, and this right is inherent in a defendant’s right to appeal.” *Id.* at ¶14. This position is consistent with the 2018 amendment of Rule 22(c)(1) of the Utah Rules of Criminal Procedure, which requires that the sentencing court “advise the defendant of defendant’s right to appeal... and the right to retain counsel or have counsel appointed by the court if indigent.”

The court of appeals also held that the district court erred in denying Stewart’s Motion to Reinstate Time to Appeal because Stewart demonstrated by a preponderance of evidence that he was deprived of the right to appeal because he was not informed of his right to counsel on appeal. *Id.* at ¶20. *See also*, UTAH R. APP. PRO. 4(f).

SUMMARY OF THE ARGUMENT

The constitutional right to appeal includes the right to counsel on appeal. The act of filing notice of appeal does not cure the deprivation of counsel on appeal. When a defendant is deprived of counsel on appeal, his right to appeal is deprived. The State’s reliance on one paragraph in *Rees* flies in the face of the rest of the statutory, rules, and constitutional law regarding the right to counsel. The court of appeals’ interpretation of Rule 4(f) and *Manning* is the correct and only constitutional interpretation.

ARGUMENT

I. The Court of Appeals Correctly Concluded that Rule 4(f) Permits Reinstatement of Stewart's Appeal Because He Was Deprived of a Meaningful First Right of Appeal When He was Not Informed of His Right Counsel on Appeal

At the heart of this review of the court of appeals' decision is the essence of what is required for a meaningful right to appeal and what constitutes a first appeal of right. In concluding that Stewart had been denied such an opportunity to his first right of appeal—though he had filed a pro se notice of appeal—the court of appeals, contrary to the assertions of the State, got it right and correctly applied Rule 4(f) of the Utah Rules of Appellate Procedure and the remedial holding and framework created by this Court in *Manning v. State*, 2005 UT 61, 122 P3d 628.

The scope of Rule 4(f), of *Manning*, and other decisions from state and federal courts establish that the question of reinstatement of an appeal turns on more than the simple act of filing a notice of appeal. It turns on far more fundamental questions, and constitutional protections such as due process, equal protection. It turns on fairness rather than a mechanical act. In this case, Stewart did not choose to proceed pro se on his appeal from 17 felony convictions following a jury trial for which he was sentenced to consecutive terms at the Utah State Prison. Instead, he was unaware and unadvised as to the constitutional protections afforded him to the right to counsel as an indispensable part of the right to appeal.

A. A direct appeal from a criminal conviction is an integral stage of the criminal process where indigent defendants must be afforded the assistance of counsel and advised that they have the right to counsel on appeal

The Sixth Amendment to the United States Constitution provides that in “all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. CONST. AMEND. VI. Moreover, the right to counsel exists at “every stage of a criminal proceeding where substantial rights of a criminal accused might be effected.” *Mempa v. Ray*, 389 US 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). This right has been combined with the due process protections of the Fourteenth Amendment to create a “duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him.” *Powell v. Alabama*, 287 U.S. 45, 73, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Moreover, “the Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal ‘adequate and effective,’ see *Griffin v. Illinois*, 351 U.S. 12, 20 (1956); among those safeguards is the right to counsel, see *Douglas v. California*, 372 U.S. 353 (1963).” *Evitts v. Lucey*, 469 U.S. 387, 392, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

Similarly, Article I, § 12 of the Utah Constitution provides that “In criminal prosecutions the accused shall have the right... to appeal in all cases.” “This shows that the drafters of our constitution considered the right of appeal essential to a fair criminal proceeding. Rights guaranteed by our state constitution are to be carefully protected by the courts. We will not permit them

to be lightly forfeited.” *Stewart*, 2018 UT App 151, ¶11 (quoting *State v. Tuttle*, 713 P.2d 703, 704 (Utah 1985)). This Court, as cited by the court of appeals, has also determined that the Utah Constitution assures that “an accused be provided with the assistance of counsel at every important stage of the proceedings against him.” *Ford v. State*, 2008 UT 66, ¶16, 199 P.3d 892 (quoting *State v. Eichler*, 483 P.2d 887, 889 (Utah 1971)). *See also*, *Stewart*, 2018 UT App 151, ¶12.

That the right to counsel at trial is a separate right from the right to trial on appeal is highlighted in *Douglas v. People of State of California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). In that case two indigent defendants were given counsel at the trial level, whom they subsequently dismissed. At trial, they were convicted and sought counsel to appeal their convictions. They were denied counsel because the California District Court of Appeals thought that “no good whatever could be served by the appointment of counsel.” *Douglas*, 372 U.S. at 355. The Supreme Court concluded that indigent defendants had the right to counsel on appeal because to hold otherwise would mean that “an unconstitutional line had been drawn between rich and poor” *Id.* at 357. Implicit in *Douglas* is the proposition that the right to counsel at trial and the right to counsel on appeal are separate and distinct rights. This is so because the defendants in *Douglas* had dismissed their trial counsel and proceed at trial *pro se*, yet the Supreme Court did not conclude that this meant they had waived their rights to counsel on appeal also.

Accordingly, the right to the assistance of counsel on appeal must be accorded to every criminal defendant. *Accord State v. Johnson*, 635 P.2d 36, 37 (Utah 1981) (An indigent defendant “has the constitutional right to the appointment of counsel to assist” him on appeal (citing *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963))). *See also Stewart*, 2018 UT App 151, ¶12. Thus, a critical part of the right to appeal is the right to counsel on appeal, particularly for those indigent defendants who are pro se and/or have been convicted at trial by a court or jury, and who wish to appeal.

B. The assistance of counsel is an “integral part” of the right to appeal

Both Utah and federal courts have recognized that “the right to representation is an integral part of the right to appeal.” *Manning v. State*, 2005 UT 61, ¶16. The United States Supreme Court has said, “In bringing an appeal as of right from his conviction, a criminal appellant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake.” *Evitts*, 469 U.S. 387, 396. The Supreme Court has also stated:

The assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the

trial transcript may well be of substantial benefit to the defendant. This advantage may not be denied to a criminal defendant, solely because of his indigency, on the only appeal which the State affords him as a matter of right.

Swenson v. Bosler, 386 U.S. 258, 259, 87 S. Ct. 996, 18 L. Ed. 2d 33 (1967) (per curiam). In addition, see *Stewart*, 2018 UT App 151, ¶12.

Moreover, the entire statutory appellate procedural framework concerning appeals for indigent appellants in Utah is built around the importance of the assistance of counsel during a first appeal of right. For example, Rule 4(f)—a rule at issue here—mandates the appointment of counsel for indigent, unrepresented defendants who seek reinstatement of their right to appeal. In addition, Rule 38A(a)(1) provides that no attorney in a case where the client has the right to competent counsel may withdraw from the appeal unless that withdrawal is granted by court order. And Rule 38A(a)(2) reads in part, “[I]f a party has a right to effective assistance of counsel through the first appeal as of right, an attorney appointed to represent that party on appeal **shall** represent that party throughout the first appeal of right, respond to a petition for writ of certiorari, file a petition for writ of certiorari if appointed counsel determines that such a petition is warranted, and brief and argue the merits if the Supreme Court grants certiorari review” (emphasis added). Finally, Rule 38B(a) mandates that, “In all

appeals where a party is entitled to appointed counsel, only an attorney proficient in appellate practice may be appointed to represent such a party...”⁴

Furthermore, Utah appellate courts have been reluctant to allow the withdrawal of appellate counsel except in rare cases where either the appellant’s actions require that withdrawal be granted, or where counsel’s failure to comply with the appellate rules, require the appointment of new counsel. For example, in *State v. Allgier*, 2015 UT 6, ¶6, 353 P.3d 50, this Court, on a motion to withdraw filed by appointed appellate counsel, examined whether Allgier through repeated and “extreme dilatory, disruptive, and threatening conduct” had forfeited “his right to counsel for the limited remainder of the proceedings on appeal.” In the district court, Allgier pled guilty “which substantially reduced the available issues on appeal.” *Id.* at ¶12. In considering this issue, this Court acknowledged that forfeiture “is a drastic measure” and that “a defendant must engage in extreme conduct involving dilatory or abusive behavior before it may be imposed.” *Id.* at ¶10. This Court recognized the critical role counsel plays in criminal appeals such as, “Without [] attorneys, many defendants would be deprived of significant constitutional rights.” This Court also stated that:

⁴ In fact, to ensure adherence to Rule 38B, a Standing Committee on Appellate Representation has now been created, “To establish a standing Committee to assist the Board of Appellate Court Judges to determine a roster of attorneys eligible for appointment to represent indigent parties on appeal to the Utah Supreme Court and Utah Court of Appeals.” Rule 11-401, Utah Judicial Council Code of Judicial Administration. Additionally, “The Board of Appellate Judges shall create and maintain an appellate roster of attorneys skilled in handling criminal, juvenile delinquency, and abuse, neglect and dependency appeals.” *Id.* at subsection (2).

In this particular case, Mr. Allgier pled guilty, which substantially reduced the available issues on appeal, and he already has received the fundamental benefits of counsel on appeal in the form of a brief submitted by counsel that addresses those challenges. The only remaining stages of appellate review in which counsel would participate are the filing of a reply brief and oral argument. The purpose of a reply brief is to permit a response to contentions raised by an appellee for the first time in its brief in opposition. Consequently, in the absence of any new contentions, attorneys on appeal legitimately may forgo the filing of a reply brief without depriving their clients of the right to counsel. Oral argument is for the benefit of the court. It traditionally conducts argument for cases presented to it, but it retains the discretion to decline arguments already presented in his brief. Thus, the practical scope of any remaining right to counsel on appeal in this particular case is much more limited than at any other phase of the trial or appellate proceedings.

Id. at ¶12. Ultimately, this Court concluded that “Under the unique procedural posture presented by this appeal, where the only step in the proceedings is the filing of a reply brief, Mr. Allgier has forfeited his right to counsel for the remainder of the appellate proceedings” and that if he chose to file a pro se reply brief, he “should also strive to comply with all applicable rules to the extent he is able.” *Id.* at ¶14.

C. A defendant must be aware of his right to counsel in order to exercise it, and knowingly waive it

The court of appeals correctly concluded that “A defendant must be aware of this right [to counsel on appeal] in order to exercise it.” *Stewart*, 2018 UT App 151, ¶19. In support of this conclusion the court of appeals cited to a number of opinions around the country that support this position that the “right to appeal at the expense of the state is mere illusion if the convicted indigent defendant does not know such right exists.” *Id.* at ¶13, n.3 (other citation omitted). In addition,

Rule 22(c)(1) of the Utah Rules of Criminal Procedure has been amended to now require that defendants must not only be advised of their right to appeal and the time to appeal, but also that they have “the right to retain counsel or have counsel appointed by the court if indigent.” This amendment to the rules, contrary to the State’s argument, gives provided an explicit reminder to trial court as to this constitutional requirement that has always existed. The rule did not create the right.

The State argues that at the time of Stewart’s sentencing there was no requirement that he be advised that he had the right to have appellate counsel appointed. Petitioner’s Br. at 24. However, this position completely ignores the fact that, as established above, the right to counsel on appeal for indigent defendants is constitutionally mandated, and that right has been recognized by state and federal courts for decades. *See also Stewart*, 2018 UT App 151, ¶13, n.3. Accordingly, it is only logical and correct that if a right exists, it can’t be properly exercised without knowledge of the existence of that right and proper advisement by the courts, who bear the ultimate responsibility of ensuring that criminal proceedings—including direct appeals—are fundamentally fair.

As set forth above, a direct appeal—which includes the right to counsel—is a critically important part of the criminal proceedings with constitutional implications such as due process and fundamental fairness. Indigent defendants have a right to counsel during the criminal proceedings in the trial courts and on appeal. “Because a defendant’s choice of self-representation often results in

detrimental consequences to the defendant, a trial court must be vigilant to assure that the choice is freely and expressly made ‘with eyes wide open.’” *State v. Bakalov*, 1999 UT 45, ¶15, 979 P.3d 799 (quoting *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975)). Moreover, courts should “indulge every reasonable presumption against waiver of fundamental constitutional rights.” *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). In addition, “In ascertaining whether a [defendant] has knowingly and voluntarily waived the right to the assistance of counsel, the trial court bears a heavy responsibility to adequately protect the rights of the accused.” *State v. Lafferty*, 749 P.2d 1239, 1248 (Utah 1988).

While the above quotes were mostly made in the context of self-representation during the trial stage of a criminal proceeding, the same holds true for self-representation on appeal. For example, the U.S. Supreme Court has rejected a similar argument presented by the State of Michigan that a defendant who entered a no contest plea waived his right to appointed counsel on appeal. The Court noted that because the sentencing court did not inform him of the relevant right (to be appointed appellate counsel) his plea did not constitute a knowing and intelligent waiver. *Halbert v. Michigan*, 545 U.S. 605, 623, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005) (citing *Iowa v. Tovar*, 541 U.S. 77, 81 (“Waiver of the right to counsel, as of constitutional rights in the criminal process generally, must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances” (other citation omitted))).

Here, “the court of appeals correctly concluded that the trial court erroneously concluded that Stewart had constructively waived his right to counsel on appeal “by repeatedly requesting to represent himself at trial and sentencing and then proceeding pro se in his appeal.” *Stewart*, 2018 UT App 151, ¶15. “A defendant does not constructively waive the right to an attorney on appeal by opting to represent himself at the trial level, and the State does not cite any controlling authority to the contrary.” *Id.* at ¶16. The trial court may have stated “that Stewart ‘repeatedly was notified of his right to counsel,’ those notifications occurred at the trial level, with respect to the trial, and there is no evidence the court informed him he was entitled to the assistance of counsel on appeal.” *Id.*

“[W]aiver may not be presumed from a silent record. ‘The record must show, or there must be an allegation and evidence which show that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not a waiver.’ *State v. Hamilton*, 732 P.2d 505, 507 (Utah 1986) (quoting *Carnley v. Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962)). A close examination of the district court record demonstrates that there was a colloquy on the record between the district court and Stewart about the decision to waive counsel “at trial.” R.211. Stewart chose to represent himself at trial. At the conclusion of trial after the jury had convicted Stewart of all 17 counts, the district court took Stewart into custody prior to sentencing. R.1082. There was no discussion on the record where Stewart was informed that he could be represented at sentencing. R.1081-82. Furthermore, while there is no

transcript of the sentencing hearing (though it was requested by Stewart), there is no mention in the sentencing order that Stewart had been informed of his right to counsel on appeal and there is no record of any waiver by Stewart of that right—unlike the minute entry from the hearing on March 18, 2003, which details where Stewart was again advised of his right to counsel at trial and that he knowingly and voluntarily waived that right. R.211, 647-51. These facts, when combined with the supporting evidence presented by Stewart at the hearing on his motion to reinstate, unequivocally support the court of appeals’ conclusion that the district court erred in “determining that Stewart constructively waived this right [to counsel] on appeal.” *Stewart*, 2018 UT App 151, ¶ 16.

D. Rule 4(f) of the Utah Rules of Appellate Procedure provides a procedural framework to protect the constitutional right of appeal by allowing the reinstatement for the filing of a direct appeal for a defendant who was unconstitutionally deprived of the right to appeal

Rule 4(f) of the Utah Rules of Appellate Procedure in relevant part reads: “Upon a showing that a criminal defendant was deprived of the right to appeal the trial court shall reinstate the thirty-day period for filing a direct appeal.” This rule also mandates that counsel “shall” be appointed “if the defendant is not represented and is indigent.” The reason for the mandatory appointment of counsel is that this Court in both *Johnson* and *Manning* recognized that when the question arises whether a defendant was deprived of a fundamental right—a first appeal of right—then there must be an avenue to seek redress of that deprivation with the assistance of counsel as opposed to through post-conviction

relief which is strictly civil in nature and where no right to counsel under Utah law exists. *See Manning*, 2005 UT 61, ¶16 (“By contrast, a *Johnson* motion filed in the underlying criminal case guarantees the right to state-paid counsel in seeking a first appeal.[] This is important because the right to representation is an integral part of the right to appeal *Johnson* sought to protect”).

This rule was promulgated after this Court’s decision in *Manning*.⁵ In *Manning* this Court disavowed the remedy established in *State v. Johnson*, 635 P.2d 36 (Utah 1981), clarified “what constitutes a denial of the constitutional right to appeal,” and “outlined “a new procedure to restore the right to appeal for a defendant who proves, under the framework we provide, that he has not knowingly or voluntarily waived” his right to appeal. *Manning*, ¶11.

Manning held, “A criminal defendant may no longer seek *Johnson* resentencing to restore a denied right to appeal. Rather, we set forth a new procedural mechanism for this purpose, requiring a defendant to file a motion in the trial court for reinstatement of a denied right to appeal under the exceptions outlined above. These exceptions permit defendants to file a motion in their underlying criminal cases in the trial court, thereby qualifying them for assistance of counsel in restoring a denied right to appeal pursuant to article I, section 12 of the Utah Constitution.” *Id.* at ¶42.

⁵ The Advisory Committee Note to this rule indicates it “was adopted to implement the holding and procedure outlined in *Manning*.”

At the heart of the decision in *Manning* was the need to fashion a “procedure for reinstating an unconstitutionally denied criminal appeal.” 2005 UT 61, ¶ 27 (“Since we have no remedy currently in place under the PCRA or our rules of appellate procedure for reinstating an unconstitutionally denied criminal appeal, we must again fashion such a remedy, as we did in *Johnson*”). *See also Stewart*, ¶11. This Court noted that “Virtually all jurisdictions provide some procedural mechanism for restoring a denied right to appeal, and we have a particular interest in doing so because of our constitutional mandate to provide a criminal appeal ‘in all cases.’ UTAH CONST. ART. I, § 12. Further, failure to provide a direct appeal from a criminal case implicates the guarantee of due process under article I, section 7 of the Utah Constitution, *State v. Tuttle*, 713 P.2d 703, 705 n.1 (Utah 1985), when a defendant has ‘been prevented in some meaningful way from proceeding’ with a first appeal of right, *State v. Penman*, 964 P.2d [1157], 1166 [(Wilkins, J., concurring)]”.

In *Manning*, this Court outlined “several possible circumstances that would demonstrate that a defendant ‘ha[d] been unconstitutionally deprived, through no fault of his own, of [the] right to appeal,’ including, among others, situations in which ‘the court or the defendant’s attorney failed to properly advise defendant of the right to appeal.’” *Stewart*, ¶11 (quoting *Manning*, ¶31). This Court recognized, however, that this list of qualified circumstances “is not intended to be exclusive.” *Manning*, n.11.

Moreover, this Court also indicated that an important consideration in whether a defendant has been unconstitutionally deprived is if restoration or reinstatement of a direct appeal “is in the interest of fundamental fairness.”⁶ A defendant “who is unconstitutionally denied his right to appeal”, must have “a means of regaining that right. It follows that there must be a mechanism for distinguishing those defendants who have truly exhausted their remedy of direct appeal from those whose right to appeal has been unconstitutionally denied.” *Manning*, ¶24.

E. Though Stewart, pro se, filed a timely notice of appeal, he was deprived of his first right of appeal in a meaningful way because he was both unaware and unadvised by any court that he had the right to counsel on direct appeal

Stewart was convicted of 17 felonies and was sentenced to consecutive terms in the Utah State Prison. He chose to represent himself at trial and knowingly and voluntarily waived his right to counsel at trial. However, he was not informed that he also had a constitutional right to have counsel appointed on appeal, and he made no knowing or voluntary waiver of the right. Accordingly,

⁶ In *Tuttle*, this Court also acknowledged the “fundamental nature of the right to appellate review of a criminal conviction.” 713 P.2d 703, 705 (Utah 1985). *Tuttle* reconsidered the question of whether defendants who escape from custody are entitled to have their appeals reinstated. Tuttle escaped from the Utah State Prison after the filing of a notice of appeal. While he was free, his appeal was dismissed. However, following Tuttle’s return to prison, this Court “reinstated the appeal by minute order.” *Id.* at 703. This Court also stated, “refusing to reinstate the appeals of escapees necessarily operates to punish only those with meritorious grounds for appeal, for those whose appeals lack merit will obtain no relief under any circumstances. The foregoing suggests that refusing to reinstate appeals of those who escape and are returned to custody raises serious due process and equal protection questions under the Utah Constitution.” *Id.* at 705 (citations omitted).

pro se and with the help of a friend, he filed a notice of appeal and then a docketing statement. However, he failed to file a brief and his appeal was dismissed.⁷

The State contends that it matters not if Stewart was advised of his right to counsel on appeal because he filed a notice of appeal and that is the only thing required to establish there was no deprivation of the right to appeal or any meaningful prevention from proceeding with his appeal. *See State v. Rees*, 2005 UT 69, ¶18, 125 P.3d 874.

1. The court of appeals correctly concluded the Rees does not apply to Stewart

In making the argument that because Stewart filed a pro se notice of appeal, he, therefore, was not prevented in some meaningful way from proceeding with his appeal, the State relies on a single, short paragraph in this Court's opinion in *State v. Rees*, 2005 UT 69. Paragraph 18 in *Rees* reads: "We construe the act of 'proceeding' with an appeal to encompass filing a notice of appeal, not more. Defendants who gain entry to appellate courts and have their appeals concluded either by a ruling on the merits or involuntary dismissal have exhausted their remedy of direct appeal []."

The court of appeals found this language from *Rees* inapplicable to Stewart because *Rees* "did not contemplate a situation in which a defendant was denied

⁷ Case No. 20030757-CA. Stewart's brief was due on May 4, 2004 and his appeal was dismissed on June 2, 2004. On the same day the briefing schedule was set by the court of appeals and mailed to Stewart at the Utah State Prison, the court received a change of address from Stewart indicating he was housed at the Central Utah Correctional Facility in Gunnison.

the right of appeal by being denied the right to counsel. Indeed, in *Rees*, the defendant was represented by counsel, but alleged that his counsel was ineffective. The court in *Rees* did not address whether the right to appeal includes the right to be represented by counsel, or specifically whether a defendant must be informed of the right to counsel on appeal.” *Stewart*, 2018 UT App 151, n.1 (citing *Rees*, ¶9).

The court of appeals correctly concluded that the facts here are completely different than in *Rees*, where *Rees* was represented by counsel on appeal and the merits of that appeal were reached (2001 UT App 27). *Rees*, ¶¶2-4. Subsequently, *Rees* sought reinstatement of his direct appeal through a Rule 65B post-conviction motion. *Id.* at ¶5. *Rees* alleged “generally that he did not receive a meaningful appeal because some of the records had not been filed with the court of appeals” and he implicitly “suggested” that his “attorney had been ineffective” in perfecting his original appeal. *Id.*

Rees could not allege that he was deprived of his first right of appeal when the merits were reached on appeal and he had appellate counsel. Moreover, *Rees*, this Court concluded had an adequate remedy at law for his ineffectiveness claim under the Postconviction Remedies Act and Rule 65C of the Utah Rules of Civil Procedure. *Rees*, ¶¶16, 20 (“Based upon the foregoing, we hold that Mr. *Rees*’s claim does not implicate an unconstitutional denial of his right to appeal and that despite the unfavorable outcome of his appeal, he has exhausted his

right to appeal and is therefore required to prosecute his claim of ineffective assistance of counsel under the PCRA and rule 65C”).

2. Paragraph 18 of Rees is in conflict with the remedy set forth in Rule 4(f), with Manning, with other more relevant language in Rees, and with the decisions from the United States Supreme Court and should be disavowed by this Court

The plain language of Rule 4(f) indicates that reinstatement of the time to appeal—reinstatement of the right to a direct appeal—is available upon “a showing that a criminal defendant was deprived of the right to appeal.”

In *Manning*, this Court outlined “several possible circumstances that would demonstrate that a defendant ‘ha[d] been unconstitutionally deprived, through no fault of his own, of [the] right to appeal,’ including, among others, situations in which ‘the court or the defendant’s attorney failed to properly advise defendant of the right to appeal.’” *Stewart*, ¶11 (quoting *Manning*, ¶31). This Court recognized, however, that this list of qualified circumstances “is not intended to be exclusive.” *Manning*, n.11. Moreover, this Court in *Manning* also indicated that an important consideration in whether a defendant has been unconstitutionally deprived is if restoration or reinstatement of a direct appeal “is in the interest of fundamental fairness.”⁸ A defendant “who is unconstitutionally

⁸ In *Tuttle*, this Court also acknowledged the “fundamental nature of the right to appellate review of a criminal conviction.” 713 P.2d 703, 705 (Utah 1985). *Tuttle* reconsidered the question of whether defendants who escape from custody are entitled to have their appeals reinstated. Tuttle escaped from the Utah State Prison after the filing of a notice of appeal. While he was free, his appeal was dismissed. However, following Tuttle’s return to prison, this Court “reinstated the appeal by minute order.” *Id.* at 703. This Court also stated, “refusing to

denied his right to appeal”, must have “a means of regaining that right. It follows that there must be a mechanism for distinguishing those defendants who have truly exhausted their remedy of direct appeal from those whose right to appeal has been unconstitutionally denied.” *Manning*, ¶24.

And in *Rees*, this Court reiterated from *Manning* that a “different status” attaches “to those defendants who have been unconstitutionally denied their right to appeal. We have interpreted a ‘denial’ to have constitutional implications when a defendant has ‘been prevented in some meaningful way from proceeding with [his] appeal[.]’” *Rees*, ¶17, *see Manning*, ¶24. Moreover, the court further emphasized that “meaningful” equates to “the type of conduct or circumstance that deprived a defendant of access to the appellate process.” *Id.* at ¶19.

Paragraph 18 of *Rees*, construes “the act of ‘proceeding’ with an appeal to encompass filing a notice of appeal, not more.” This narrow definition of proceeding⁹ is contrary to the larger purpose of Rule 4(f) which makes the emphasis on deprivation of the right to appeal—or as *Manning* (and *Rees*) make

reinstate the appeals of escapees necessarily operates to punish only those with meritorious grounds for appeal, for those whose appeals lack merit will obtain no relief under any circumstances. The foregoing suggests that refusing to reinstate appeals of those who escape and are returned to custody raises serious due process and equal protection questions under the Utah Constitution.” *Id.* at 705 (citations omitted).

⁹ As opposed to the following: “Proceedings: The steps or measures taken in the course of an action, including all that are taken” (Black’s Law Dictionary (2nd Edition Online)). Proceeding: (legal definition): “a particular step or series of steps in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations” (Merriam-Webster Dictionary (Online)).

clear—on the unconstitutional denial of the right to appeal when a defendant has been prevented in some meaningful way from exercising that right to appeal. This is especially true where the United States Supreme Court has now classified the filing of a notice of appeal as a “purely ministerial task” and a “simple, nonsubstantive act.” *Garza v. Idaho*, 2019 U.S. Lexis 1596, __ S.Ct. __ (February 27, 2019). The Supreme Court has also said, “In bringing an appeal as of right from his conviction, a criminal appellant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake.” *Evitts*, 469 U.S. 387, 396.

Finally, *Penson v. Ohio*, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d (1988), is a decision from the United States Supreme Court that is controlling here. Appointed appellate counsel for Penson (who was indigent and imprisoned for a term of 18-28 years) sought to withdraw as counsel because he believed the appeal to be “meritless.” *Id.* at 78. The following ensued:

A week later, the Court of Appeals entered an order allowing appellate counsel to withdraw and granting petitioner 30 days in which to file an appellate brief *pro se*. The order further specified that the court would thereafter “independently review the record thoroughly to determine whether any error exists requiring reversal or modification of the sentence” Thus, counsel was permitted to withdraw before the court reviewed the record on nothing more than

"a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief." Moreover, although granting petitioner several extensions of time to file a brief, the court denied petitioner's request for the appointment of a new attorney. No merits brief was filed on petitioner's behalf.

In due course, and without the assistance of any advocacy for petitioner, the Court of Appeals made its own examination of the record to determine whether petitioner received "a fair trial and whether any grave or prejudicial errors occurred therein." As an initial matter, the court noted that counsel's certification that the appeal was meritless was "highly questionable." In reviewing the record and the briefs filed by counsel on behalf of petitioner's codefendants, the court found "several arguable claims. Indeed, the court concluded that plain error had been committed in the jury instructions concerning one count.

Id. at 78-79 (citations to the lower court's opinion omitted). The Ohio Court of Appeals reversed on one count and affirmed the other on the other counts. The Ohio Supreme Court refused to hear the matter. *Id.* at 79.

The United States Supreme Court granted certiorari and reversed. The Court emphasized the constitutional guarantee a criminal appellant has to be represented on a first appeal of right. *Id.* The Court addressed the interplay between its prior decisions in *Douglas* and *Anders*. However, more important is the recognition that "the right to be represented is among the most fundamental of rights"; and that "it is through counsel that all other rights of the accused are protected: 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.'" *Id.* at 84-85 (other citations omitted).

So, while Stewart may have filed a notice of appeal pro se, he was deprived of—unconstitutionally denied—his first appeal of right because he was denied the right to counsel and the right to meaningful access to the appellate process.

The focus of the court of appeals’ opinion was exactly right. The issue here is not whether the ministerial act of filing a notice of appeal was filed, pro se, by Stewart. The issue as to reinstatement is whether he was constitutionally deprived of his right to appeal by being denied the right to counsel because the trial court failed to advise and inform him that he had the right to be represented at this critical stage of the criminal proceedings. This Court in *State v. Collins*, 2014 UT 61, ¶31, 342 P.3d 789, stated, “Our use of the term ‘deprived’ [in *Manning*] was crucial because the word encompasses a narrow range of situations where a defendant would have appealed, but had that right ‘taken away’ or was ‘[k]ept from the possession, enjoyment, or use’ of that right” (quoting Webster’s Third International Dictionary 606 (202) (defining “deprive as 1 *obs*: to take away . . . 3: to keep from the possession, enjoyment, or use of something”)). Stewart had his right to appeal “taken away” or he was “kept” from the use of that right because he was denied access to appellate counsel due to the failure of the district court to inform him of that right to counsel.

Under Rule 4(f), this Court’s decisions, and decisions from the United States Supreme Court, it is clear that indigent defendants who are not advised and do not waive their right to appellate counsel, are denied their first right of appeal

because the assistance of counsel is fundamental to exercising that right to appeal.

II. The Court of Appeals Correctly Determined that Stewart Met His Burden of Demonstrating by a Preponderance of Evidence that He was Not Informed of His Right to Counsel on Appeal

The second issue the Court granted review over is whether the court of appeals erred in reversing the district court's determination that Stewart failed to meet his burden of demonstrating he was not informed of his right to counsel on appeal. The State's position depends upon this Court construing the court of appeals decision in ways not supported by the language of the decision itself and upon this Court construing the district court's ruling in ways not supported by the language of the ruling itself. In order for the State's complaint to be valid, this Court will have to find that the court of appeals made a credibility determination when it explicitly said it was not doing that. In order for the State's complaint to be valid, this Court will have to find the district court based its conclusion on factual findings and credibility determinations when it explicitly said it was basing its conclusion on legal rules. Instead of twisting the decisions of these two courts beyond recognition, this Court should read the rulings for what they say and conclude that the court of appeals rejection of the district court's ruling was a legal, not a factual one.

A. The court of appeals did not make its own factual findings, it corrected the district court's legal errors

The State claims the court of appeals "improperly substitut[ed] its weighing of the evidence for the trial court's." Petitioner's Brief at 26. The State *interprets*

the court of appeals' holding as requiring "that the trial court had to (1) find that Stewart's testimony was credible because it was uncontradicted, and (2) conclude that Stewart's testimony alone met his burden of proof." Petitioner's Brief at 27 (citing *Stewart*, ¶22). This interpretation of the court of appeals' decision is incorrect. It misconstrues what the court of appeals actually held and ignores the district court's own ruling which led directly to the language used by the court of appeals.

The State's brief does not actually quote much the court of appeals or the district court's rulings. Instead the State describes "in essence" what the court of appeals' opinion says. Petitioner's Brief at 27. The State characterizes the court of appeals as having replaced the district court's factual findings with its own, but nothing even close to that happened. So rather than rely on the State's interpretation of the court of appeals' reading of the district court's findings and conclusions, it is useful to consider the exact language of the two courts below. First, from the district court's ruling:

Stewart has not supplied a transcript nor a copy of a transcript of his sentencing hearing. A *mere claim* by Mr. Stewart, 11 years after sentencing, that he is quite sure the sentencing judge did not inform of his right to the appointment of appellate counsel is simply *insufficient*. The *lack of evidence* is critical in the estimation of this Court and is dispositive. This Court needs 'facts in the record or determined through additional evidentiary hearings, that he has been unconstitutionally deprived, through no fault of his own, of his right to appeal.' *Manning*, 2005 UT 61, ¶ 31. A 'preponderance of the evidence' standard cannot simply be ignored or glossed over by this Court. UTAH R. APP. PRO. 4(f).

R.1156 (emphasis added). Nowhere in the its ruling does the district court even hint at whether it considered Stewart’s testimony to be credible. The State wants this Court to presume that the trial court, by using the terms “mere claim” and “insufficient”, was signaling that it did not find Stewart’s testimony credible. But to do so would be to do exactly what the State says an appellate court cannot do, to make a factual finding where none was made below, to replace the district court’s factual findings (or in this instance a lack of finding) with its own.

The district court characterizing the testimony as a “mere claim” and “insufficient” does not imply that the district court believed Stewart was lying. Rather, characterizing this testimony that way was directed at criticizing memory-based testimony itself as being inadequate to prove anything that could/should be proved by reference to the court record. The court began with the incorrect legal presumption that such testimony was “simply insufficient” to prove what Stewart was told at sentencing. This is made clear where the district court criticized Stewart’s claim as “lack[ing] evidence” because he was unable to supply a transcript of the sentencing hearing.

Although it is unclear what the court thought Stewart’s testimony at the evidentiary hearing was, it is clear that it believed it did not constitute “facts... determined through additional evidentiary hearings”, as required under *Manning*. R.1156. The language of the district court’s ruling makes its meaning and intentions clear, it was not even hinting at a credibility problem. It was finding as a matter of law, that anything short of a transcript of the sentencing

hearing would be insufficient to support Stewart's claim that he was not informed of the right to counsel. The court began with the assumption that the preponderance of evidence standard could not be satisfied with mere testimonial claims about what was said at that hearing.

It is in light of the district court's specific ruling, in light of the district court's peculiar take on the capacity of memory-based testimony to prove a relevant fact, that the court of appeals language must be viewed. The court of appeals was directly addressing the idea that the district court was claiming, as matter of law, a *prima facie* case could not be met based solely on Stewart's testimony.

Although the district court has discretion to weigh the importance and the credibility of the evidence, it characterized Stewart's testimony as a 'mere claim' and stated that the 'lack of evidence' did not meet the preponderance standard of proof. We disagree. Stewart's uncontroverted testimony was evidence that he was not informed of his right to appellate counsel. Stewart bore the burden of proof and offered his testimony as evidence. No other evidence was offered, either by Stewart or by the State, and the court did not make findings that Stewart's testimony was incredible or unreliable. This means that the only evidence presented tended to prove that Stewart was not informed of the right to counsel on appeal, thus making it 'more likely than not' that Stewart was not so informed. Because the State offered no evidence to the contrary and because the court did not find that the evidence presented was incredible or unreliable, the court clearly erred in determining Stewart did not demonstrate by a preponderance of the evidence that he was not informed of his right to counsel on appeal.

Stewart, ¶22. The court of appeals' language is clear, it is not interfering with the district court's discretion to weigh and make credibility determinations of the evidence, it is not re-weighing any evidence. It is only preventing the district

court from applying an incorrect presumption, from mischaracterizing sworn testimony, which had not been impeached or contradicted, as “simply insufficient.” It was only overruling the district court conclusion as a matter of law that this kind of evidence constituted a “lack of evidence.” The State wants to twist the court of appeals’ language into something it is not. But viewed on its own terms, without the State’s distillation into its ‘essence,’ the court of appeals is not making its own factual findings or credibility determination, it is making a legal conclusion about the competency of memory-based testimony and the preponderance of evidence standard.

The State’s citation to “binding precedent” is of no use to its claim because the district court’s ruling had nothing to do with factual findings. Petitioner’s Brief at 27. For example, the first case it relies upon is *Mower v. McCarthy*, 245 P.2d 224, 226 (Utah 1952). It appears the State wants to argue that *Mowers* was binding on the court of appeals to “‘assume that the trier of facts found them in accord with its decision,’ and ‘affirm the decision if from the evidence it would be reasonable to find facts to support it.’” Petitioner’s Brief at 27. But what the State’s citation to *Mower* ignores the language of the trial court’s ruling in this case. This is not a case like *Mower* where the lower court made no findings of fact on the record but came to a legal conclusion that was necessarily based upon implicit factual findings.

The district court’s conclusion, that Stewart failed to meet his burden of proof, is not based on some undisclosed but necessary factual findings, it was

explicitly based on erroneous legal rules. For the district court, regardless of the credibility of Stewart's testimony, without other evidence, and specifically without a transcript of the sentencing hearing, he could not establish by a preponderance what occurred at sentencing. So, *Mowers'* requirement that appellate courts presume the trier of fact made factual findings that support the legal conclusions is inapplicable because the district court's conclusion was not based on facts, it was based on the judge's incorrect understanding of competent evidence.

The State's citation to this Court's alternative reasoning in *Ruiz* fails too. There the Court reversed the court of appeals because the basis of the trial court's decision was apparent on the record, but even if it wasn't remand, rather than reversal was appropriate. Petitioner's Brief at 29. One thing is similar between *Ruiz* and this case, the reason for the district court's decision was apparent on the record. But the obvious reason in *Ruiz* was a factual matter, a point the district court has ultimate discretion over, and thus if there had been ambiguities in justification they must be clarified by the district court. The reason for the district court's ruling in this case was legal, a matter the district court is afforded no discretion. And because there is no ambiguity in the record, because we know the judge found Stewart failed to meet his burden because memory-based testimony (as opposed to a transcript) was legally insufficient, there is no need to remand.

And citation to *State v. Ruiz*, 2012 UT 29, ¶24, 282 P.3d 998 for the proposition that remand is required where the factual findings are ambiguous

fails for the same reason. There is no ambiguity in the facts below and no reason to have to wonder what factual basis the district court used to conclude Stewart failed to meet his burden. Facts were not the basis of the court's decision; a legal error was. The State is wrong when it claims the court of appeals was obligated to remand for findings when it stated the district court did not make findings about Stewart's credibility. Petitioner's Brief at 29. It was wrong because the district court's ruling was clearly not made on the basis of the facts or an implied or ambiguous credibility determination.

The court of appeals was not addressing a factual controversy, it was correcting a legal error. The district court's conclusion, that Stewart had failed to prove his claim by a preponderance of the evidence, was not based on the district court's weighing of the evidence, not based upon a credibility determination. The district court's conclusion was a legal one based on the incorrect premise that, in order for Stewart to prove his claim, his own testimony was legally insufficient. The court concluded, regardless of Stewart's credibility or lack thereof, without proof in the form of a transcript of the sentencing hearing, Stewart could not prove that the sentencing court did not inform him of his right to counsel on appeal.

This Court should reject the State's alteration of the court of appeals' decision and reject its claim that the court of appeals replaced the district courts' factual findings with its own. The language of the district court's ruling makes it clear that it did not care what Stewart's testimony was or how credible he was,

without a transcript Stewart could not prove by a preponderance that he was not informed of his right to counsel on appeal. Because this was a legal error, the court of appeals correction of that error did not interfere with the district court's discretion. This Court should affirm the court of appeals and refute the State's attempts to reframe the issue by reframing the ruling and decision below.

B. Stewart's evidence satisfied the preponderance of the evidence

After concluding that the district court had incorrectly characterized Stewart's sworn and uncontradicted testimony as a "mere claim", the court of appeals turned to the question of what was required to prove Stewart's deprivation claim by a preponderance of the evidence. The court noted what evidence was presented, which was Stewart's testimony that he was not informed and his recollection of the notes he took regarding the sentencing hearing. *Stewart*, ¶21. The court noted that "[n]o other evidence was offered, either by Stewart or by the State..." *Stewart*, ¶22.

This evidence was then applied to the definition of the preponderance of the evidence standard. For the court of appeals, because Stewart's testimony that he was not informed was the only evidence about whether such a warning occurred, and because that evidence "tended to prove that Stewart was not informed of his right to counsel on appeal" it was "'more likely than not' that Stewart was not so informed." *Stewart*, ¶22.

This is logical, and uncontroversial. There is no presumption to apply to the circumstances. There is not a presumption that the sentencing judge did

inform Stewart of his right to appellate counsel, and thus no presumption that Stewart had to overcome. Rather, when the hearing began, the district court started from a neutral position, now knowing whether the court did or did not provide the information. At the end of the hearing, the needle was pushed off center by Stewart's testimony toward the conclusion that it was more likely that the information was not provided. That testimony, because it was admissible and uncontradicted in the slightest, carried Stewart's burden. The court of appeals simple, elegant resolution of this question is the one this Court should adopt itself.

III. The Deprivation of a Fundamental Right is Not Subject to Harmless Error Standard of Review

In *State v. Collins*, 2014 UT 61, ¶20, 342 P.3d 789, this Court reversed the court of appeals for failing to review Collins' claim for reinstatement under a harmless error analysis because "[b]oth *Manning* and rule 4(f) of the Utah Rules of Appellate Procedure require that a defendant show that he has been 'deprived' of the right to appeal which implicitly requires the defendant to show that he would have appealed had he been properly informed." Moreover, Collins had not shown an exception to the general rule that all errors are reviewed for harmlessness. *Id.*

In *Collins*, a jury found him guilty of murder and aggravated robbery. He and his counsel discussed appealable issues after the verdict. Collins was sentenced to consecutive prison terms. At sentencing, the district court failed to comply with rule 22(c)(1), Utah Rules of Criminal Procedure, by not informing

him of his right to appeal within 30 days. However, Collins' counsel again advised him of his right to appeal after sentencing. No appeal was taken. Two years later Collins, pro se, sent a letter to the district court about his lack of appeal. The district court appointed new counsel and a Rule 4(f) motion was filed. *Collins*, 2014 UT 61, ¶¶4-7. After the denial of that motion by the district court, the court of appeals reversed but failed to require that the claim for reinstatement be subject to a harmless error analysis. The issue as to "harm" was whether Collins would have timely appealed had he been informed by the district court that an appeal must be filed within 30 days. This Court remanded the matter to the district court for that determination.

This Court concluded that there were no structural errors in Collins' case. Structural errors are not subject to harmless error review. *Id.* at ¶45. "[S]tructural error is reserved for a 'very limited class of cases' in which a constitutional error so undermines the fairness of the proceedings that prejudice must be presumed." *Id.* (citations omitted). Collins argued that *Penson v. Ohio*, see supra, applied to his case. However, this Court found *Penson* to be distinguishable:

There a defendant requested that his attorney file an appeal. The attorney did so but also sought withdrawal from the case because he believed the appeal was meritless. The appeals court allowed counsel to withdraw but then rejected defendant's motion to have new counsel appointed. Instead, the court conducted its own review of the record and ultimately affirmed all but one of the defendant's

convictions. The Supreme Court concluded that it was "inappropriate to apply either the prejudice requirement of *Strickland* or . . . harmless-error analysis" because the defendant was "entirely without the assistance of counsel on appeal." *Collins*, ¶49 (citing *Penon*, 488 U.S. at 77-78).

Stewart asserts that unlike *Collins*, the United States Supreme Court's pronouncement in *Penon* is indistinguishable from his case where the failure of the district court to inform Stewart of his right to counsel on appeal rendered him "entirely without counsel on appeal."

IV. Stewart's only remedy for redress of the loss of his first right of appeal, due to the denial of his right to appellate counsel, is reinstatement of his first right of appeal

Of central focus to this Court's decisions in *Manning* and *Rees*, and earlier in *Johnson*, is the question of remedy for the denial or deprivation of the right to a direct appeal.

In 1981, *Johnson* created a remedy—a procedural mechanism—where criminal defendants could seek restoration of their right to appeal, when that right was lost due to no fault of their own. That mechanism was a motion for re-sentencing in the underlying criminal matter, which would reset the time period to appeal and guaranteed those defendants the right to counsel. *Johnson*, 635 P.2d 36, 38 (Utah 1981), *Manning*, ¶16.

In 2005, this Court recognized that "the evolution of statutory law and procedural rules since *Johnson* has foreclosed the usefulness of [that] remedy" created in 1981. *Manning*, ¶14. At the heart of the decision in *Manning* was the

need to fashion a “procedure for reinstating an unconstitutionally denied criminal appeal.” *Manning*, ¶27 (“Since we have no remedy currently in place under the PCRA or our rules of appellate procedure for reinstating an unconstitutionally denied criminal appeal, we must again fashion such a remedy, as we did in *Johnson*”). *See also Stewart*, ¶ 11. The procedure set forth in *Manning*, of course, became rule 4(f).

However, in *Manning*, this Court ultimately denied her reinstatement of her right to appeal. Manning had entered a plea with the assistance of counsel, and filed a pro se notice of appeal 57 days after sentencing. By entering a plea, she waived the right to appeal her conviction with no attempt to withdraw her plea. *Manning*, ¶37. Accordingly, the only remaining right to appeal was in regards to her sentence. *Id.* Manning received a favorable sentence and voiced no interest in appealing it. *Id.* at ¶40. Though the district court failed to comply with rule 22(c) of the Utah Rules of Criminal Procedure as to advising Manning of the right and requirements concerning an appeal of her sentence, Manning had another remedy available to her besides reinstatement. She could file a motion to correct an illegal sentence under rule 22(e) at any time. *Id.* at ¶41.

Similarly, in *Rees*, this Court concluded that reinstatement was not appropriate because Rees was represented by counsel on appeal and the merits of that appeal were reached (2001 UT App 27). *Rees*, 2001 UT 69, ¶2-3. This Court denied Rees the right to a second direct appeal, concluding that he had a remedy for his claim of appellate ineffectiveness under the Postconviction Remedies Act

(now UTAH CODE §78B-9-106, rule 65C of the Utah Rules of Civil Procedure). *Id.* at ¶16.

However, Stewart has no other remedy available to him for the denial of his right to appellate counsel as a necessary part of his right to a direct appeal. Challenging the sentence, like in *Manning*, gets him nowhere because it is his convictions (by a jury) that he seeks to have reviewed. Nor is he eligible for relief under the PCRA. Even assuming he could get beyond the time bar of the PCRA and rule 65C, he is not eligible for relief under any ground that “could have been but was not raised at trial or on appeal,” or any ground that “may still be raised on direct appeal”; and because he was not given access to appellate counsel he has no issues of ineffectiveness of counsel, which could be raised, unlike Rees. See UTAH CODE § 78B-9-106.

What Stewart has is the denial of the right to counsel as a necessary part of his right to an appeal and access to the appellate process. Fundamental fairness requires there be a remedy for that unconstitutional deprivation. A motion to reinstate his appeal (time to appeal) under 4(f) was the only remedy available to him.¹⁰

¹⁰ In the alternative, this Court—like it did in *Tuttle*—could reinstate his original appeal (20030757-CA) through application of Rule 23A in combination with Rule 2 of the Utah Rules of Appellate Procedure by finding that Stewart’s pro se failure to file appellant’s brief was the result of excusable neglect and that any timeliness requirement for reinstatement be suspended. See *Tuttle*, 703 P.2d 705 (discussed *infra*).

CONCLUSION AND SPECIFIC RELIEF SOUGHT

Because the Stewart was unconstitutionally deprived of his right to appeal, by being denied information and access to counsel on appeal, this Court should affirm the decision of the Utah Court of Appeals. Because Stewart's testimony satisfied the preponderance of evidence standard, this Court should affirm the decision of the Utah Court of Appeals.

RESPECTFULLY SUBMITTED this 6th day of March, 2019.

/s/ Douglas Thompson
Appointed Appellate Counsel

CERTIFICATE OF COMPLIANCE WITH RULE 24(a)(11)

I certify that this brief complies with the following requirements of Rule 24(a)(11) of the Utah Rules of Appellate Procedure:

- A. The total word count of this brief is 13,529. It was prepared in Microsoft Word.
- B. Neither this brief, nor its addendum, contains any non-public information as described in Rule 21(g).

/s/ Douglas Thompson

CERTIFICATE OF MAILING

I certify that I emailed a copy of the foregoing brief and mailed two paper copies, postage prepaid, to the Utah State Attorney General, Appeals Division, criminalappeals@agutah.gov, P.O. Box 140854, Salt Lake City, Utah 84114-0854 on this 6th day of March, 2019.

/s/ Douglas Thompson

ADDENDA

Addendum A – *State v. Stewart*, 2018 UT App 151

Addendum B – *Manning v. State*, 2005 UT 61, 122 P.3d 628

Addendum C – *State v. Rees*, 2005 UT 69, 125 P.3d 874

Addendum D – *State v. Stewart*, Case No. 20030757-CA case file (digital only)

Addendum A – *State v. Stewart*, 2018 UT App 151

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,

v.

CALVIN PAUL STEWART,
Appellant.

Opinion

No. 20160611-CA

Filed August 16, 2018

Fourth District Court, Provo Department
The Honorable Lynn W. Davis
No. 011403597

Douglas J. Thompson, Margaret P. Lindsay, and
Leah Jordana Aston, Attorneys for Appellant
Sean D. Reyes and Jeffrey D. Mann, Attorneys
for Appellee

JUDGE KATE A. TOOMEY authored this Opinion, in which
JUDGES JILL M. POHLMAN and RYAN M. HARRIS concurred.

TOOMEY, Judge:

¶1 Calvin Paul Stewart was convicted in 2003 of seventeen second and third degree felonies. Twelve years later, he filed a motion to reinstate the period for filing a direct appeal, which the court denied. He appeals the denial of that motion, arguing that a criminal defendant's right to appeal requires that the defendant be informed of the right to counsel on appeal. We agree and therefore reverse.

BACKGROUND

¶2 In 2001, the State charged Stewart with multiple securities violations, including securities fraud and the sale of unregistered securities. He was initially represented by private counsel, but counsel later withdrew because Stewart could not afford to pay him. The court appointed Stewart a public defender, but ultimately Stewart decided to represent himself at trial. Stewart was convicted and sentenced to prison on seventeen counts, with each sentence to run consecutively.

¶3 With the help of a non-attorney friend, Stewart filed a notice of appeal and a docketing statement, and this court set a briefing schedule. Stewart expected his friend to help file a brief, but the friend declined to do so when Stewart could not pay him. Stewart failed to file a brief by the deadline, and this court dismissed his appeal.

¶4 Over the next decade, Stewart filed various motions for relief, including a motion to appoint counsel, a motion to correct his sentence, and a motion for relief from what he characterized as a void judgment. The district court denied each of these motions. On one occasion, he appealed one of these rulings, and this court affirmed the district court's decision. *See State v. Stewart*, 2010 UT App 367U (per curiam).

¶5 In 2015, Stewart filed a pro se "Motion to Reinstate Period for Filing Direct Appeal" under rule 4(f) of the Utah Rules of Appellate Procedure, which is the motion at issue in this appeal. Stewart also filed a related motion to appoint counsel. The court appointed a public defender to represent Stewart and, after counsel filed an amended motion to reinstate Stewart's direct appeal, the court held an evidentiary hearing in early 2016.

¶6 At the hearing, Stewart testified that when the court released the appointed public defender as his 2003 trial was

approaching, the judge informed him that he would have to find new counsel by a specific date or proceed without representation. Stewart understood this to mean that if he chose not to have appointed counsel at trial, he could not have appointed counsel on appeal. Stewart testified that the court did not inform him of the right to counsel on appeal during his trial or at his sentencing hearing, and that had he known, he would have requested counsel to assist with his appeal.

¶7 Stewart's counsel argued that Stewart was deprived of his right to appeal under rule 4 of the Utah Rules of Appellate Procedure. Counsel argued that even though Stewart filed a notice of appeal, he was never informed of his constitutional right to counsel on appeal, and without the help of counsel, he was unable to file a brief to perfect his appeal. Counsel argued that, because Stewart did not know and was not informed he was entitled to appellate counsel, the time period for Stewart to file an appeal should be reinstated.

¶8 The district court denied Stewart's motion for three reasons. First, Stewart's "requests to represent himself in his 2003 jury trial and sentencing" and "his choice to proceed in his appeal pro se" constituted a "constructive waiver of his right to an attorney on appeal." Second, Stewart's motion failed on the merits because his own failure to respond to the briefing deadline caused his appeal to be dismissed. Third, Stewart's "mere claim" that he was not informed of his right to counsel did not meet the threshold burden of proof in showing he had been deprived of the right to appeal. Stewart appeals.

ISSUE AND STANDARD OF REVIEW

¶9 Stewart contends the district court erred by denying his motion to reinstate the time to file a direct appeal. We review the court's legal conclusion that Stewart was not deprived of his

right to appeal for correctness and its underlying factual findings for clear error. *State v. Kabor*, 2013 UT App 12, ¶ 8, 295 P.3d 193.

ANALYSIS

I. Stewart Was Deprived of the Meaningful Right to Appeal.

¶10 Stewart's only contention on appeal is that the district court erred in failing to reinstate the time to file his direct appeal under rule 4(f) of the Utah Rules of Appellate Procedure. Stewart argues that, under the Utah and United States constitutions, a criminal defendant must be informed both that he has a right to appeal his conviction and that he has the right to counsel on appeal. He argues that, because he was not advised of his right to counsel on appeal, he was effectively deprived of his right to appeal.¹

1. The State argues that Stewart was not deprived of his right to appeal, because he filed a notice of appeal. The State cites *State v. Rees*, 2005 UT 69, 125 P.3d 874, which states that "the act of 'proceeding' with an appeal encompass[es] filing a notice of appeal, not more." *Id.* ¶ 18; *see also Manning v. State*, 2005 UT 61, ¶ 31, 122 P.3d 628 (outlining some of the circumstances in which a defendant can prove "that he has been unconstitutionally deprived, through no fault of his own, of [the] right to appeal"). Because Stewart filed a notice of appeal, the State argues he was therefore not "prevented in some meaningful way from proceeding" with his appeal. *See Rees*, 2005 UT 69, ¶ 17 (quotation simplified); *accord State v. Collins*, 2014 UT 61, ¶ 42, 342 P.3d 789. But *Rees* is inapplicable here because *Rees* did not contemplate a situation in which a defendant was denied the right to appeal by being denied the right to counsel. Indeed, in
(continued...)

A. A Defendant's Right to Appeal Includes Being Informed of the Right to Counsel on Appeal.

¶11 The Utah Constitution guarantees the right to appeal in all criminal prosecutions. Utah Const. art. I, § 12. "This shows that the drafters of our constitution considered the right of appeal essential to a fair criminal proceeding. Rights guaranteed by our state constitution are to be carefully protected by the courts. We will not permit them to be lightly forfeited." *State v. Tuttle*, 713 P.2d 703, 704 (Utah 1985). To protect this right, rule 4(f) allows a court to reinstate the thirty-day period for filing a direct appeal for a defendant who "was deprived of the right to appeal." Utah R. App. P. 4(f). *Manning v. State*, 2005 UT 61, 122 P.3d 628, which led to the promulgation of rule 4(f),² explains that a defendant has been denied the right to appeal when he "has been prevented in some meaningful way from proceeding with a first appeal of right." *Id.* ¶ 26 (quotation simplified); *see id.* ¶ 24 (explaining that when a defendant is "unconstitutionally denied his [or her] right to appeal" there must be a "means of regaining that right"). *Manning* outlines several possible circumstances that would demonstrate that a defendant "ha[d] been unconstitutionally deprived, through no fault of his own, of [the] right to appeal," including, among

(...continued)

Rees, the defendant was represented by counsel, but alleged that his counsel was ineffective. *See* 2005 UT 69, ¶ 9. The court in *Rees* did not address whether the right to appeal includes the right to be represented by counsel, or specifically whether a defendant must be informed of the right to counsel on appeal.

2. The Advisory Committee Note to rule 4 of the Utah Rules of Appellate Procedure explains that "[p]aragraph (f) was adopted to implement the holding and procedure outlined in *Manning v. State*, 2005 UT 61, 122 P.3d 628."

others, situations in which “the court or the defendant’s attorney failed to properly advise defendant of the right to appeal.” *Id.* ¶ 31.

¶12 The Utah Constitution also requires that an accused “be provided with the assistance of counsel at every important stage of the proceedings against him.” *Ford v. State*, 2008 UT 66, ¶ 16, 199 P.3d 892 (quotation simplified). And our supreme court has recognized that the assistance of counsel is crucial to an appeal. *See Manning*, 2005 UT 61, ¶ 16 (“[T]he right to representation is an integral part of the right to appeal . . .”). As the Supreme Court of the United States has stated,

The assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript may well be of substantial benefit to the defendant. This advantage may not be denied to a criminal defendant, solely because of his indigency, on the only appeal which the State affords him as a matter of right.

Swenson v. Bosler, 386 U.S. 258, 259 (1967) (per curiam); *see also Douglas v. California*, 372 U.S. 353, 356–58 (1963) (holding that the right to the assistance of counsel guaranteed by the Sixth Amendment extends through appeal).

¶13 A defendant must be aware of this right in order to exercise it. At the trial level, a defendant may only “knowingly and voluntarily” waive the right to counsel. *See State v. Graham*, 2012 UT App 332, ¶ 19, 291 P.3d 243 (“Because a defendant’s choice of self-representation often results in detrimental consequences to the defendant, a trial court must be vigilant to assure that the choice is freely and expressly made with eyes

open.” (quotation simplified)). Though a defendant may be informed of his right to counsel at the trial level, we cannot assume that he is aware that he is also entitled to the assistance of counsel on appeal unless he has been informed. If an indigent defendant is not made aware of the right to counsel, he “has been prevented in some meaningful way from proceeding with a first appeal of right.” See *Manning*, 2005 UT 61, ¶ 26 (quotation simplified). As other courts have recognized, “[t]he right to appeal at the expense of the state is mere illusion if the convicted indigent defendant does not know such right exists.” *United States ex rel. Smith v. McMann*, 417 F.2d 648, 654 (2d Cir. 1969); see *id.* (“We think the only practical, logical and fair interpretation to be given to *Douglas v. California*[, 372 U.S. 353 (1963),] is that it imposes upon the state a duty to warn every person convicted of [a] crime of his right to appeal and his right to prosecute his appeal without expense to him by counsel appointed by the state.”); see also *United States v. Aloï*, 9 F.3d 438, 444 (6th Cir. 1993) (reiterating the constitutional requirement to be advised of appellate rights, including the right to counsel on appeal).³

3. See also *United States ex rel. Singleton v. Woods*, 440 F.2d 835, 836 (7th Cir. 1971) (determining that the failure to advise an indigent defendant of his right to court-appointed counsel on appeal violated the Equal Protection Clause of the Fourteenth Amendment and the Sixth Amendment right to counsel); *Nichols v. Wainwright*, 243 So. 2d 430, 431 (Fla. Dist. Ct. App. 1971) (requiring that an indigent defendant, who has indicated the desire to appeal, be informed of the right to counsel on appeal); *Cochran v. State*, 315 S.E.2d 653, 654 (Ga. 1984) (requiring a defendant to be “made aware of his right to counsel on appeal and the dangers of proceeding without counsel”); *State v. Allen*, 239 A.2d 675, 677 (N.J. Super. Ct. Law Div. 1968) (concluding that “both the Fourteenth and Sixth Amendments require one to be advised of his state-created right of appeal in addition to the
(continued...)”).

¶14 We therefore conclude that a defendant is entitled to be informed of his right to counsel on appeal, and this right is inherent in a defendant's right to an appeal.⁴

B. The District Court Erred By Denying Stewart's Motion to Reinstatement the Time for Direct Appeal.

¶15 The district court gave three reasons for denying Stewart's motion to reinstate the time period to file a direct appeal. First, it determined it need not reach the issue of whether the right to appeal requires a defendant to be notified of the right to counsel on appeal, because Stewart knowingly or constructively waived his right to counsel on appeal by repeatedly requesting to represent himself at trial and sentencing and then proceeding pro se in his appeal.

¶16 A defendant does not constructively waive the right to an attorney on appeal by opting to represent himself at the trial level, and the State does not cite any controlling authority to the contrary. Moreover, Stewart's "choice" to proceed pro se on

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right to counsel on an appeal"); cf. *Sibley v. State*, 775 So. 2d 235, 241–43 (Ala. Crim. App. 1996) (requiring waiver of the constitutional right to counsel on appeal to be knowing and intelligent); *Casner v. State*, 155 P.3d 1202, 1206–07 (Kan. Ct. App. 2007) (determining the defendant was not fully informed of his rights on appeal when he was told he could appeal but was not informed he had the right to an attorney on appeal).

4. Rule 22(c)(1) of the Utah Rules of Criminal Procedure was amended effective May 1, 2018, to require the sentencing court to "advise the defendant of defendant's right to appeal . . . and the right to retain counsel or have counsel appointed by the court if indigent."

appeal did not constitute a waiver of his right to counsel on appeal. We agree with Stewart that to effectively “choose” to represent himself instead of requesting counsel requires knowledge that he is entitled to have counsel appointed. Though the court stated that Stewart “repeatedly was notified of his right to counsel,” those notifications occurred at the trial level, with respect to the trial, and there is no evidence the court informed him he was entitled to the assistance of counsel on appeal. *See infra* ¶ 22. We therefore conclude the court erred in determining that Stewart constructively waived this right on appeal.

¶17 Second, the court stated that Stewart’s motion failed under *Manning*. *Manning* allows a court to “reinstate the time frame for filing a direct appeal where the defendant can prove . . . that he has been unconstitutionally deprived, *through no fault of his own*, of [the] right to appeal.” *Manning v. State*, 2005 UT 61, ¶ 31, 122 P.3d 628 (emphasis added). In this case, the district court determined that “due to a clear pattern of conduct in this case, Stewart [had] created, in his own actions, his own fault in failing to meet the briefing deadline set forth by the Court of Appeal[s],” and so Stewart’s appeal “was ultimately dismissed . . . due to Stewart’s own failure to respond.”

¶18 But we have determined that failure to inform a defendant of the right to counsel on appeal does not “properly advise” the defendant, and thereby unconstitutionally deprives the defendant, of the right to appeal. *See id.*; *see also supra* ¶ 14. Through no fault of his own, Stewart was not informed of the right to counsel and was, in that respect, effectively deprived of the right to appeal. Although Stewart filed a pro se notice of appeal and docketing statement, he cannot be faulted for not perfecting his appeal by filing a timely brief where he was unaware of his right to be assisted by counsel on appeal. *See Swenson v. Bosler*, 386 U.S. 258, 259 (1967) (“The assistance of appellate counsel in preparing and submitting a brief to the appellate court . . . may well be of substantial benefit to the

defendant. This advantage may not be denied to a criminal defendant, solely because of his indigency”). Stewart testified that he would have requested counsel if he had been properly informed, and the State noted counsel would have been appointed had he requested it. Stewart thus missed the deadline for filing his appellate brief because he was not assigned appellate counsel who would have helped him navigate the procedural requirements of an appeal and who would have prepared and submitted a brief on his behalf. We therefore disagree with the district court that Stewart created “his own fault” by missing the briefing deadline set by this court.

¶19 Third, the district court stated there was insufficient evidence that Stewart had not been deprived of the right to appeal. Specifically, the court ruled that a “mere claim by Mr. Stewart, 11 years after sentencing, that he is quite sure the sentencing judge did not inform [him] of his right to the appointment of appellate counsel is simply insufficient” to meet the preponderance-of-the-evidence standard required by rule 4(f) of the Utah Rules of Appellate Procedure.

¶20 We give deference to the court’s factual findings and will “not overturn them unless they are clearly erroneous.” *State v. Kabor*, 2013 UT App 12, ¶ 8, 295 P.3d 193. Rule 4(f) of the Utah Rules of Appellate Procedure requires a district court to “enter an order reinstating the time for appeal” if it “finds by a preponderance of the evidence that the defendant has demonstrated that the defendant was deprived of the right to appeal.” Under this standard, “the court needs only to balance the evidence, using discretion to weigh its importance and credibility, and decide whether the [defendant] has more likely than not” been deprived of the right to appeal. *See State v. Archuleta*, 812 P.2d 80, 82–83 (Utah Ct. App. 1991) (outlining the preponderance-of-the-evidence standard of proof in the context of a probation violation).

¶21 Here, Stewart testified the district court did not “inform [him] about [his] right to have an attorney represent [him] on appeal,” and that he would have asked for one to be appointed had he been informed of that right. Admittedly, his testimony was self-serving and not detailed. Stewart stated he could not “remember a whole lot of exactly what [the trial judge] asked [him],” and he did not have a “full memory of everything” that was said to him from the bench. He testified that he wrote down “certain things [he] wanted to remember” in a notebook and that whether the court informed him of his right to an attorney on appeal was “a fact that [he would] remember”: the court did not. There are no transcripts from the sentencing hearing,⁵ and the State offered no evidence suggesting Stewart was informed of his right to appellate counsel.

¶22 Although the district court has discretion to weigh the importance and the credibility of the evidence, it characterized Stewart’s testimony as a “mere claim” and stated the “lack of evidence” did not meet the preponderance standard of proof. We disagree. Stewart’s uncontroverted testimony was evidence that he was not informed of his right to appellate counsel. Stewart bore the burden of proof and offered his testimony as evidence. No other evidence was offered, either by Stewart or by the State, and the court did not make findings that Stewart’s testimony was incredible or unreliable.⁶ This means that the only

5. Though Stewart filed a pro se motion requesting “the entire transcript of all recorded hearings,” only the transcripts from the two-day jury trial were provided, and the recording of the sentencing hearing is no longer available.

6. The court stated that “[a] mere claim by Mr. Stewart, 11 years after sentencing, that he is quite sure the sentencing judge did not inform [him] of his right to the appointment of appellate counsel is simply insufficient” to meet the preponderance-of-the-
(continued...)

evidence presented tended to prove that Stewart was not informed of the right to counsel on appeal, thus making it “more likely than not” that Stewart was not so informed. Because the State offered no evidence to the contrary and because the court did not find that the evidence presented was incredible or unreliable, the court clearly erred in determining Stewart did not demonstrate by a preponderance of the evidence that he was not informed of the right to counsel on appeal.

¶23 Because the three reasons for the court’s determining that Stewart was not deprived of his right to appeal are flawed, we conclude it erred in making this determination. Thus, we reverse its decision.

CONCLUSION

¶24 We conclude that a defendant is unconstitutionally deprived of his right to appeal if he is not informed that he has the right to the assistance of counsel on appeal. We also conclude Stewart did not constructively waive his right to counsel on appeal, did not create his own fault by missing the briefing deadline, and provided sufficient evidence to meet the preponderance standard under rule 4(f) of the Utah Rules of Appellate Procedure. We therefore reverse the district court’s decision and remand for the court to reinstate the period for Stewart to file a direct appeal.

(...continued)

evidence standard, and that this “lack of evidence” was critical and dispositive. The court’s statement suggests Stewart needed to provide more evidence to meet the preponderance standard, not that the court found Stewart’s testimony to be incredible or unreliable.

Addendum B – *Manning v. State*, 2005 UT 61, 122 P.3d 628

*This opinion is subject to revision before final
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Carolyn Roberts Manning,
Petitioner,

No. 20040453

v.

F I L E D

State of Utah,
Respondent.

September 23, 2005

Third District, Salt Lake
The Honorable Judith S. Atherton
No. 020907138

Attorneys: Mark L. Shurtleff, Att'y Gen., Laura Dupaix,
Asst. Att'y Gen., Salt Lake City, for petitioner
Joan C. Watt, Salt Lake City, for respondent

On Certiorari to the Utah Court of Appeals

DURHAM, Chief Justice:

¶1 In this case, the petitioner seeks review of the court of appeals' decision that (1) a criminal defendant claiming denial of the right to appeal must file a separate civil action for relief pursuant to rule 65C of the Utah Rules of Civil Procedure and the Post-Conviction Remedies Act, and (2) the State is not required to prove a knowing and voluntary waiver of the right to appeal before a court may determine that the right to appeal has not been unconstitutionally denied. We conclude that, in light of revisions to the Utah Rules of Civil Procedure, a criminal defendant claiming denial of the right to appeal must file a motion in the trial court for reinstatement of a denied right to appeal under the exceptions outlined in this case, rather than under rule 65C and the Post-Conviction Remedies Act. We further hold that criminal defendants who fail to file a notice of appeal within the required time period are presumed to have knowingly and voluntarily waived this right and thus have

the burden to prove otherwise by establishing that one of the exceptions defined in this case applies.

BACKGROUND

¶2 On July 12, 2001, pursuant to a plea agreement in which additional charges against her were dropped, the petitioner, Carolyn Manning, pled guilty to one count of failure to render a proper tax return, a third degree felony; one count of unlawful dealing of property by a fiduciary, a second degree felony; and one count of third degree felony theft.

¶3 Manning's written plea agreement explicitly waived various rights otherwise accorded to criminal defendants, expressed understanding that her unconditional guilty plea would "not preserv[e] any issue for appeal relative to the Court's rulings on pre-trial motions or based upon statutory or constitutional challenges," and acknowledged that "by pleading guilty/no contest I am waiving my rights to file an appeal." The plea agreement also acknowledged the thirty-day time limit set by Utah Code section 77-13-6(2)(a) for moving to withdraw a guilty plea and recognized that the court would grant such a motion only upon "a showing of good cause."

¶4 At Manning's plea hearing, the court reviewed her "right to appeal a conviction" should she proceed to trial and ensured that Manning understood that, by contrast, her "right to appeal these pleas of guilty is very limited." After a thorough colloquy in which the court determined that Manning was "fully competent" to participate in the proceedings, that her attorney had "taken the time to extend himself to adequately and properly serve [her], and [that she was] satisfied with his service," and that Manning understood both the charges and the consequences of her guilty pleas and was entering her guilty plea "of [her] own free will," the court accepted her pleas and informed her that she could move to withdraw them within thirty days.¹

¶5 Manning was sentenced on September 27, 2001. Fifty-seven days later, while in custody, Manning filed a pro se notice of appeal. The district court dismissed this notice of appeal as untimely under rule 4(a) of the Utah Rules of Appellate Procedure.

¹ At the time, State v. Ostler, 2001 UT 68, ¶ 11, 31 P.3d 528, which held that the thirty-day time period for withdrawing a guilty plea runs not from the entry of the plea, but from "the date of final disposition of the case at the district court had not yet issued."

¶6 On July 31, 2002, Manning petitioned the district court for an extraordinary writ that would "allow[] her to be [re]sentenced nunc pro tunc[,] thereby extending the time in which to file a notice of appeal, pursuant to rule 65B(b) and/or 65C of the Utah Rules of Civil Procedure." As the basis for this request, Manning claimed that her attorney "did not inform her that she could file a notice of appeal within 30 days of entry of judgment," and that, as a result, her "right to appeal under Article I, section 12 of the Utah Constitution [had] been violated."

¶7 After a hearing on September 27, 2002, the district court denied Manning's petition, finding that Manning "was represented by very competent counsel," "was informed by the court of her limited right to appeal," and had "not established that she was unconstitutionally denied her right to appeal." The court concluded that Manning had been sufficiently notified of her limited right to appeal, but had "failed to timely exercise [that] right" and was "therefore bound by her own failure to exercise her right to appeal."

¶8 Manning challenged the district court's denial of her petition in the court of appeals, arguing that her failure to timely appeal did not constitute a knowing and voluntarily waiver of her right to appeal. Manning v. State, 2004 UT App 87, ¶ 23, 89 P.3d 196. Affirming the district court, the court of appeals ventured "to clarify the correct procedural approach" in cases "where resentencing to resurrect the right to appeal is the objective." Id. ¶ 12. It concluded that the proper procedure was to apply for relief under rule 65C, which it considered the successor to rule 65B(i) of the Utah Rules of Civil Procedure, pursuant to which we had previously directed defendants claiming denial of the right to appeal to file their petitions. Id. ¶¶ 10, 13 (citing State v. Johnson, 635 P.2d 36, 38 (Utah 1981)). The court also concluded that Manning was not eligible for relief under Johnson, rejecting her argument that the State bore the burden of proving that her failure to timely appeal constituted a "knowing and voluntary waiver" of the right to appeal. Id. at ¶¶ 23, 25. Rather, the court held that a defendant who claims that her right to appeal has been unconstitutionally "denied" must show that her failure to exercise that right was the result of interference that "originate[d] in the criminal justice system" and was not simply the result of missing the deadline for bringing an appeal. Id. ¶ 25.

¶9 We granted certiorari to consider (1) whether a criminal defendant who seeks resentencing to revive the right to

appeal pursuant to State v. Johnson, 635 P.2d 36 (Utah 1981), must file a separate civil action pursuant to rule 65C rather than requesting relief from the sentencing court in the underlying criminal case and (2) whether a defendant's request for resentencing must be granted unless the record demonstrates that the defendant knowingly and voluntarily waived her right to appeal, and, if so, whether Manning knowingly and voluntarily waived her right to appeal in this case.

STANDARD OF REVIEW

¶10 On certiorari, we review the decision of the court of appeals for correctness, without deference to its conclusions of law. In re A.T., 2001 UT 82, ¶ 5, 34 P.3d 228. The underlying issue of the district court's denial of Manning's petition for postconviction relief is a legal issue reviewed for correctness. Myers v. State, 2004 UT 31, ¶ 9, 94 P.3d 211.

ANALYSIS

¶11 The first issue presented on certiorari requires us to address whether the procedure previously laid out by this court in State v. Johnson, 635 P.2d 36 (Utah 1981), to restore a denied right to appeal continues to be available. We conclude that, in light of the intervening revisions to rule 65B of the Utah Rules of Civil Procedure, the promulgation of rule 65C, and the 1996 enactment of the Post-Conviction Remedies Act, Utah Code Ann. § 78-35a-101 (2002), the Johnson remedy is no longer able to serve the purpose for which it was designed. We begin our analysis by discussing the nature of the Johnson remedy, concluding that it was essentially a hybrid of both coram nobis and postconviction proceeding remedies. We also explain the evolution of Utah statutory law and procedural rules and why they render the Johnson remedy no longer functional. We then clarify what constitutes a denial of the constitutional right to appeal and outline a new procedure to restore the right to appeal for a defendant who proves, under the framework we provide, that he has not knowingly or voluntarily waived it. We then apply this new framework to the circumstances of this case.

I. PROCEDURAL HISTORY

A. The Johnson Remedy

¶12 In Johnson, we held that a criminal defendant who reasonably relied on his attorney's assurance that an appeal would be timely filed was unconstitutionally denied his right to appeal his conviction. State v. Johnson, 635 P.2d 36, 38 (Utah

1981). We then established a procedural mechanism to restore this right in Johnson's case and in future situations in which a defendant was prevented from bringing a timely appeal through no fault of his own. We directed defendants to file a motion for resentencing in the trial court so that the thirty-day time period for bringing an appeal set forth in rule 4(a) of the Utah Rules of Appellate Procedure would begin to run anew. Id. at 38.

¶13 Manning urges us to retain the Johnson remedy because it allows filing for relief in the underlying criminal case, thus preserving the right to state-paid counsel in seeking an appeal. She argues that the changes to the Utah Rules of Civil Procedure have no impact on the remedy's availability because the remedy is based on the common law writ of error coram nobis² and may continue to function as such. In adopting the remedy in Johnson, however, we described "[t]he postconviction hearing procedure [under the Utah Rules of Civil Procedure as] a successor to the common-law writ of error coram nobis," and directed defendants to seek relief under rule 65B(i). Id. The State accordingly argues that since the Johnson remedy originally proceeded under rule 65B(i), it must now be sought under rule 65C, which it considers the successor to former rule 65B(i), and the Post-Conviction Remedies Act (PCRA), Utah Code sections 78-35a-101 to -110 (2002).

¶14 Based on our analysis of Johnson and the Rules of Civil Procedure, we conclude that neither party is entirely accurate in its assessment of Johnson's analytic sources. Rather, as discussed below, the Johnson remedy was a hybrid of both coram nobis and postconviction procedure principles, judicially fashioned to preserve the constitutional right to appeal in criminal cases. As we also discuss below, the evolution of statutory law and procedural rules since Johnson has foreclosed the usefulness of this remedy.

1. Johnson's Coram Nobis Foundation

¶15 We first examine the relationship between the common law writ of error coram nobis and the Johnson remedy. In Johnson, we examined other jurisdictions that had, by narrowly expanding the common law writ of error coram nobis, permitted "'resentenc[ing] nunc pro tunc upon the previous finding of

² "A writ of error coram nobis is a common-law writ of ancient origin devised by the judiciary, which constitutes a remedy for setting aside a judgment which for a valid reason should never have been rendered." 24 C.J.S. Crim. L. § 1610 (2004).

guilt'" as a mechanism for restoring the time frame for filing an appeal where the right to appeal had been denied. 635 P.2d at 38 (quoting People v. Callaway, 247 N.E.2d 127, 130 (N.Y. 1969)). Under Utah common law, coram nobis had been available to "vacate a judgment of conviction on the basis of facts which, without defendant's fault, did not appear on the face of the record and as to which defendant was without other remedy." Id. We followed other courts in relying on coram nobis as a basis for considering "extra-record facts" to establish the denial of the right to appeal and vacate a judgment, after which the defendant would be resentenced to establish a new appeal time frame. Id.

¶16 Coram nobis principles were thus essential to the Johnson remedy. Consistent with the United States Supreme Court's coram nobis rulings in "right to appeal" criminal cases, which direct that petitions be filed in the underlying criminal case, James v. United States, 459 U.S. 1044, 1046 (1982); United States v. Morgan, 346 U.S. 502, 506 n.4 (1954), motions for Johnson resentencing are filed in the underlying criminal case rather than as separate civil proceedings, as would be required if the remedy were based solely on rule 65B or its successor postconviction procedures. This is an important element of the Johnson remedy, partly for judicial economy in reviewing the record, but mostly because an attorney's assistance is not guaranteed to indigent defendants in postconviction civil proceedings. By contrast, a Johnson motion filed in the underlying criminal case guarantees defendants the right to state-paid counsel in seeking a first appeal. See Utah Code Ann. § 77-32-301(5)(2002). This is important because the right to representation is an integral part of the right to appeal Johnson sought to protect.

¶17 The State argues that former rules 65B(i) and 65B(b) permitted the court to provide a pro bono attorney to an indigent petitioner in civil postconviction proceedings, as does the current PCRA section 78-35a-109(1). While the State is correct on this point, the Johnson remedy was fashioned not just to permit, but to guarantee, assistance of counsel in seeking a first appeal of right in the underlying criminal case, in accordance with coram nobis relief. See Beal v. Turner, 454 P.2d 624, 627 (Utah 1969).

¶18 The Johnson remedy also incorporates coram nobis principles by placing the burden of proof establishing denial of the right to appeal on the defendant. State v. Montoya, 825 P.2d 676, 679 (Utah Ct. App. 1991). Manning incorrectly argues that coram nobis and the Johnson remedy shift this burden to the State; she asks us to require the State to prove a defendant's

knowing and voluntary waiver of the right to appeal before a court may deny petitions seeking to restore an appeal time frame. However, coram nobis proceedings, whether styled as criminal or civil, place on the defendant the burden of proving “by a preponderance of evidence facts which will entitle him to relief.” Sullivan v. Turner, 448 P.2d 907, 910 (Utah 1968); see also United States v. Butler, 295 F. Supp. 2d 816, 818 (S.D. Ohio 2003). Likewise, the Johnson remedy requires petitioners, not the State, to produce findings in the record or conduct a hearing establishing the unconstitutional denial of the right to appeal. Montoya, 825 P.2d at 679.³ This is necessary to prevent abuse by those seeking to circumvent the timeliness requirements for appeals. Id.

¶19 Therefore, notwithstanding our direction in Johnson that defendants claiming denial of their right to appeal apply for relief under rule 65B(i) Utah Rules of Civil Procedure, the Johnson remedy itself relied on coram nobis principles unavailable solely through rule 65B(i).⁴

2. Johnson’s Postconviction Procedure Foundation

¶20 As previously discussed, in adopting coram nobis-type relief in Johnson, we found “[t]he postconviction hearing procedure” to be a successor to pleading the writ of coram nobis and directed defendants to seek relief under rule 65B(i). 635 P.2d at 38. This was so because the 1977 version of rule 65B abolished pleading “special forms of writs” in favor of “actions under these Rules.” Utah R. Civ. P. 65B(a) (1977) (amended by 65B(b)(1)(1992)).

¶21 Additionally, rule 65B was well-suited as a procedural avenue for seeking Johnson relief because it authorized the court

³ Montoya suggested that a claim of being “denied effective assistance of counsel” at trial establishes a denial of a constitutional right that warranted seeking Johnson resentencing to resurrect an appeal. 825 P.2d at 679. Under the former rule 65B, claims of ineffective assistance of counsel could indeed be raised; now, as discussed below, rule 65C and the PCRA are the proper means to seek relief for such claims except in the limited situations defined by this case.

⁴ Manning additionally points out that Johnson-type relief is permitted to be filed by motion rather than by complaint, as required by rule 65B(i) and its successors, and argues that it is therefore coram nobis and not postconviction relief. We do not find this distinction determinative.

to take action when there had been "a substantial denial of . . . rights under the Constitution of the United States or of the State of Utah,"⁵ Utah R. Civ. P. 65B(i)(1)(1977) (amended by 65B(b)(1) (1992)), including the constitutional right to appeal. Upon finding such a denial, rule 65B(i) authorized a court to enter as a remedy an appropriate order, such as an order for Johnson resentencing.⁶ Id. 65B(i)(8).

¶22 Therefore, both the mechanism for filing a claim in the criminal case and the remedy via a resentencing order were available under the 1977 version of rule 65B(i), and even the extensive 1991 amendments to rule 65B did not interfere with this.⁷ However, in 1996, the Legislature enacted the PCRA and this court subsequently substantially revised rule 65B, wherein former rule 65B(i) (or, after 1991, rule 65B(b)) became, in revised and expanded form, rule 65C. As we explain below, these changes affected the relief available under Johnson and the former rules.

¶23 For one thing, a defendant may no longer file a petition pursuant to rule 65B(b) in "instances governed by Rule 65C." Utah R. Civ. P. 65B(b)(1). In addition, the specific grounds for which extraordinary relief may be sought under rule 65B are now enumerated in subsection (a) of that rule, and the broad language permitting proceedings resulting from the "substantial denial of rights," constitutional or otherwise, no longer exists. Id. 65B(b)(11).

¶24 Such language also does not appear in rule 65C, which now "govern[s] proceedings in all petitions for post-conviction relief filed under [the PCRA]." Id. 65C(a). The PCRA proclaims

⁵ "Any person imprisoned . . . under a commitment of any court . . . who asserts that in any proceedings which resulted in his commitment there was a substantial denial of his rights under the Constitution of the United States or the State of Utah, or both, may institute a proceeding under this Rule." Utah R. Civ. P. 65B(i)(1977)(amended by 65B(b)(1) (1992)).

⁶ The court was permitted to "enter an appropriate order . . . as the court may deem just and proper" if relief was warranted. Utah R. Civ. P. 65B(i)(8)(amended by 65B(b)(11)(1992)).

⁷ Under the 1991 version of rule 65B(b)(1) and (11), a defendant was permitted to institute a proceeding "result[ing] from a substantial denial of rights" and courts were allowed to "enter an appropriate order" for relief. Utah R. Civ. P. 65B (1992) (amended 1996).

itself as a remedy "for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2)." Utah Code Ann. § 78-35a-102(1) (2002). Subsection (2) does not expressly address the situation where a defendant has failed, for whatever reason, to timely file a direct criminal appeal.⁸ Id. § 78-35a-102(2). Currently, rule 65C and the PCRA do not permit motions for Johnson relief for defendants who have not filed a direct appeal because their right to appeal has been unconstitutionally denied. While a defendant who simply fails to file an appeal within the time limits required by rule 4(a) of the Utah Rules of Appellate Procedure would reasonably be considered to have exhausted any remedies he might have obtained thereby for purposes of the PCRA, the same is not true for a defendant who is unconstitutionally denied his right to appeal. See State v. Penman, 964 P.2d 1157, 1166 (Utah Ct. App. 1988) (Wilkins, J., concurring) (the "denial" of the right to appeal consists of a defendant having "been prevented in some meaningful way from proceeding with [his or her] appeal[]"). Such a defendant must have a means of regaining that right. It follows that there must be a mechanism for distinguishing those defendants who have truly exhausted their remedy of direct appeal from those whose right to appeal has been unconstitutionally denied.

¶25 Therefore, the unintended result of the transformation of rule 65B(i) since this court issued its decision in Johnson is that a defendant who has been unconstitutionally denied a direct criminal appeal may no longer seek Johnson relief under either rule 65B or rule 65C and the PCRA. Because of this, and because the Johnson remedy also independently relied on coram nobis principles, we deem it inappropriate to continue to rely on the Johnson remedy, and conclude that the restoration of a denied direct appeal through resentencing to establish a new appeal time frame is no longer feasible. Instead, we direct defendants who claim denial of their right to appeal to follow the procedure set forth below.

⁸ Rather, it allows defendants to file postconviction relief petitions under rule 65B if they do "not challenge a conviction or sentence," if they are "motions to correct a sentence pursuant to rule 22(e)," or if they are petitions regarding the "actions taken by the Board of Pardons and Parole." Utah Code Ann. § 78-35a-102(2) (1996).

B. New Remedy for Restoring a Denied Criminal Appeal

¶26 Although we have determined that the remedy laid out in Johnson, which requires resentencing to restore a denied appeal, is no longer available, we conclude that we must provide a readily accessible and procedurally simple method by which persons improperly denied their right to appeal can promptly exercise this right. Virtually all jurisdictions provide some procedural mechanism for restoring a denied right to appeal, and we have a particular interest in doing so because of our constitutional mandate to provide a criminal appeal "in all cases." Utah Const. art. I, § 12. Further, failure to provide a direct appeal from a criminal case implicates the guarantee of due process under article I, section 7 of the Utah Constitution, State v. Tuttle, 713 P.2d 703, 705 n.1 (Utah 1985), when a defendant has "been prevented in some meaningful way from proceeding" with a first appeal of right, Penman, 964 P.2d at 1166.

¶27 Since we have no remedy currently in place under the PCRA or our rules of appellate procedure for reinstating an unconstitutionally denied criminal appeal, we must again fashion such a remedy, as we did in Johnson. A survey of procedures used in other jurisdictions reveals that many provide a mechanism through their postconviction remedy acts or rules of criminal or appellate procedure.⁹ Others have established court rules that assert jurisdiction over "appeals by leave" at the court's discretion, People v. Goecke, 547 N.W.2d 338, 341 (Mich. Ct. App. 1996), or grant a new appeal time frame through habeas corpus petitions for out-of-time appeals, see, e.g., Odneal v. State, 161 S.W.3d 692, 694 (Tex. Crim. App. 2005); Bowman v. Washington, 605 S.E.2d 585, 589 (Va. 2004).

⁹ For example, New York replaced its Callaway holding, on which we relied in Johnson, 635 P.2d at 38, with a rule of criminal procedure. See N.Y. Crim. Proc. Law § 460.30 (McKinney 1970) (extending the time for taking an appeal, "upon the improper conduct of a public servant or improper conduct, death, or disability of the defendant's attorney, or (b) inability of the defendant and his attorney to have communicated, in person or by mail, concerning whether an appeal should be taken, prior to the expiration of the time within which to take an appeal due to defendant's incarceration in an institution and through no lack of due diligence or fault of the attorney or defendant"); see also Esters v. State, 894 So. 2d 755, 757 (Ala. Crim. App. 2003); State v. Rosales, 66 P.3d 1263, 1267 (Ariz. Ct. App. 2003); Garrison v. State, 711 A.2d 170, 175 (Md. 1998); State v. Meers, 671 N.W.2d 234, 236 (Neb. 2003).

¶28 While some jurisdictions continue the practice of resentencing as a means of reinstating the time period for filing an appeal, *see, e.g., Jakoski v. State*, 32 P.3d 672, 678 (Idaho Ct. App. 2001); *State ex. rel. Hahn v. Stubblefield*, 996 S.W.2d 103 (Mo. Ct. App. 1999); *State v. Tweed*, 59 P.3d 1105, 1109 (Mont. 2002), others have found that such resentencing “tends to create more problems than it resolves,” *Boyd v. State*, 282 A.2d 169, 171 (Me. 1971). We agree that resentencing is no longer a preferred remedy. For one thing, our rules “governing amended judgments” generally disfavor “enlarg[ing] the time for appeal” by means of a “nunc pro tunc entry” which does not “chang[e] the substance or character of the judgment.” *State v. Garner*, 2005 UT 6, ¶ 11, 106 P.3d 729. As the *Johnson* remedy was ultimately designed to restore a denied right to appeal, we find it appropriate to focus not on resentencing but on a more direct mechanism to reinstate this right.

¶29 Having reviewed the differing procedural solutions among jurisdictions, we conclude that Kansas’s approach is the most useful. In Kansas, where “the filing of a timely notice of appeal is [also] jurisdictional,” *State v. Ortiz*, 640 P.2d 1255, 1257 (Kan. 1982), the courts have developed a procedure, in the interest of “fundamental fairness,” that provides for narrow exceptions to the thirty-day jurisdictional rule that may open the door to a new appeal time frame. *Id.* at 1258.

¶30 The *Ortiz* jurisdictional exceptions permit a defendant to claim denial of the right to appeal in the trial court and to establish the facts in support of this claimed denial by hearing if necessary. Once the denial is established, *Ortiz* authorizes courts to reinstate the appeal time frame, similar to the operation of our *Johnson* remedy.¹⁰ While we do not adopt Kansas’s specific procedures and relief (which are broader and more complex than those we espouse), we view its approach of

¹⁰ *See, e.g., State v. Dreiling*, 54 P.3d 475, 490 (Kan. 2002) (appeal was reinstated when defendant’s attorney promised to file an appeal but failed to do so); *State v. Parker*, 934 P.2d 987, 991 (Kan. Ct. App. 1997) (*Ortiz* exceptions could not be used to grant an appeal where “one does not exist by law”); *State v. Thomas*, 900 P.2d 874, 876 (Kan. Ct. App. 1995) (the rule was “developed in the interest of fundamental fairness” and therefore a defendant does not qualify for the exception if that interest would not be “substantially further[ed]”); *State v. Cook*, 741 P.2d 379, 381 (Kan. Ct. App. 1987) (defendant did not qualify for the exceptions when the record revealed no evidence to support the claim, and an evidentiary hearing was not required).

establishing narrow exceptions by case law as serving the interest of fundamental fairness and as an appropriate mechanism to provide the relief granted in Johnson. The Maine Supreme Court helpfully notes that restoring a right to appeal by direct petition is appropriate because "[i]f the District Court has the power to set aside the judgment and resentence, it certainly would have the power to grant the right of appeal since it accomplishes the results intended.'" Boyd, 282 A.2d at 172 (quoting Everett v. United States, 303 F. Supp. 1170 (C.D. Cal. 1969)); see also Thompson v. Commonwealth, 736 S.W.2d 319, 322 (Ky. 1987).

¶31 Accordingly, we hold that, upon a defendant's motion, the trial or sentencing court may reinstate the time frame for filing a direct appeal where the defendant can prove, based on facts in the record or determined through additional evidentiary hearings, that he has been unconstitutionally deprived, through no fault of his own, of his right to appeal. Such circumstances would include: (1) the defendant asked his or her attorney to file an appeal but the attorney, after agreeing to file, failed to do so, see Johnson, 635 P.2d 36; (2) the defendant diligently but futilely attempted to appeal within the statutory time frame without fault on defendant's part, see id.; or (3) the court or the defendant's attorney failed to properly advise defendant of the right to appeal, see State v. Hallett, 856 P.2d 1060, 1061 (Utah 1993).¹¹

¶32 Our resolution of this issue allows us to address the second question before us on certiorari—namely, whether a defendant's request for resentencing must be granted unless the record demonstrates that the defendant knowingly and voluntarily waived her right to appeal. We clarify that the State does not bear this burden of proof. Rather, in a criminal case where a defendant has failed to appeal within the required thirty-day time period, the defendant bears the burden of proving she has not knowingly or voluntarily waived the right to appeal. As was required by the Johnson remedy, the defendant must demonstrate by a "preponderance of evidence" that she qualifies for any of the exceptions listed above. See Sullivan, 448 P.2d at 910. Only if she succeeds in doing so will a court determine that she has been unconstitutionally denied this right. In such a case, the trial or sentencing court is directed to reinstate the appeal time frame if doing so is in the interest of fundamental fairness.

¹¹ We have distilled this list of exceptions from our case law and a survey of those relied on in other jurisdictions. We note that this list is not intended to be exclusive.

The defendant must then file a notice of appeal within thirty days of the date the trial court issues its order.

¶33 We expressly state that the procedure set forth here is not available to "a defendant properly informed of his appellate rights" who simply "let[s] the matter rest, and then claim[s] that he did not waive his right to appeal." Ortiz, 640 P.2d at 1258. Thus, in the vast majority of cases where a defendant fails to comply with the rule 4(a) thirty-day requirement for filing a timely appeal, or with the rule 4(e) provision for requesting an extension of the time to appeal "upon a showing of excusable neglect or good cause," the defendant will be held to have waived his right to appeal and the claim will properly be dismissed. State v. Bowers, 2002 UT 100, ¶ 5, 57 P.3d 1065; State v. Palmer, 777 P.2d 521, 522 (Utah 1989).

II. MANNING'S CLAIM OF BEING DENIED AN APPEAL UNDER THE NEW MANNING EXCEPTIONS

¶34 We now turn to Manning's claim that she was deprived of her constitutional right to appeal. In resolving this issue, we must first consider the nature of Manning's appeal rights and then analyze them under the framework just established.¹²

¶35 A defendant who knowingly and voluntarily waives his right to appeal has not been unconstitutionally denied that right. State v. Mortensen, 73 P. 562, 566 (Utah 1903) (stating that provisions in article I, section 12 of the Utah Constitution are for the accused's benefit, and can be waived). While "courts generally indulge every reasonable presumption against waiver" of constitutional rights, Bruner v. Carver, 920 P.2d 1153, 1155 (Utah 1996), a defendant found to have expressly waived them, by, for example, entering a knowing and voluntary guilty plea where the plea agreement expressly indicates such a waiver, no longer enjoys the benefit of these constitutional protections.¹³

¹² For the sake of expediency, we do not require Manning to file a new motion in the trial court under our new framework, nor do we remand for an additional evidentiary hearing, as we believe the record contains sufficient evidence to resolve Manning's claim.

¹³ See, e.g., State v. Anderson, 929 P.2d 1107, 1110 (Utah 1996) (right to appear and defend in person waived); State v. Butterfield, 784 P.2d 153, 157 (Utah 1989) (right to public trial waived); State v. Jamison, 767 P.2d 134, 138 (Utah 1989) (right to jury trial waived) (abrogated on other grounds); State v. Wilson,
(continued...)

¶36 Manning cites Weaver v. Kimball, 202 P. 9, 10 (Utah 1921), for the proposition that defendants who enter guilty pleas remain entitled to the article I, section 12 right to appeal. It is true that a defendant does not waive the right to appeal simply by entering a guilty plea. Id. However, it is well established that this right will be considered waived where the defendant enters a knowing and voluntary guilty plea pursuant to a plea agreement that expressly waives the right to appeal and is entered in accordance with the procedural safeguards of rule 11 of the Utah Rules of Criminal Procedure. State v. Corwell, 2005 UT 28, ¶ 21, 114 P.3d 569. Any challenge to such a plea agreement, or to the waivers contained therein, may only be undertaken following a timely motion for withdrawal of the guilty plea. State v. Reyes, 2002 UT 13, ¶ 3, 40 P.3d 630.

¶37 Manning waived the right to appeal her conviction by entering a knowing and voluntary guilty plea pursuant to a plea agreement that expressly indicated she would waive her right to appeal. Manning could only contest this waiver by first filing a timely motion to withdraw her guilty pleas and then establishing that her pleas were not knowing and voluntary. Id. She was correctly informed at her plea hearing that she had thirty days to file a motion to withdraw her guilty pleas. Despite our decision in State v. Ostler, which was issued after Manning's plea hearing and which clarified that the thirty-day time frame for withdrawal of guilty pleas begins on the date of "final disposition," 2001 UT 68, ¶ 11, 31 P.3d 528, Manning has never sought to withdraw her guilty pleas and admits she was not prejudiced by this alleged failure to inform her at the time of sentencing that she could withdraw her guilty pleas thirty days from that date. Manning, 2004 UT App 87 ¶ 29 n.9. Since she could not appeal her conviction or the knowing and voluntary nature of her guilty plea, any remaining rights to appeal were necessarily limited to appealing her sentence.

¶38 We analyze Manning's remaining right to appeal her sentence under the previously defined exceptions. The first

¹³ (...continued)
563 P.2d 792, 793 (Utah 1977)(right to counsel waived); State v. Long, 506 P.2d 1269, 1270 (Utah 1973) (privilege against self-incrimination waived); State v. Brocksmitth, 888 P.2d 703, 706 (Utah Ct. App. 1994)(right to appeal waived by unconditional plea agreement, foreclosing inquiry into loss of speedy trial rights without withdrawal of guilty pleas); Duran v. Cook, 788 P.2d 1038, 1039 (Utah Ct. App. 1990) (right against being placed in double jeopardy may be waived by a plea agreement).

exception applies when the defendant has asked her attorney to file an appeal and, after agreeing to do so, the attorney fails to file the appeal. The record clearly indicates that this exception does not apply here. Manning met with her attorney "three to four times after sentencing was imposed," and "at no time did she ask for him to pursue an appeal." Manning's attorney "first learned about an appeal after it was filed" fifty-seven days after sentencing. Prior to this, her attorney did not know of Manning's desire to pursue an appeal, never agreed to file an appeal, and thus did not fail to file Manning's appeal.

¶39 The second exception applies when the defendant has diligently but futilely attempted to appeal within the statutory time frame without fault on the defendant's part. This exception also does not apply here. Manning's untimely pro se attempt to appeal was filed fifty-seven days after sentencing. The record reveals no evidence that Manning made any attempt to pursue her appeal within the statutory thirty-day time frame or that any attempts were prevented or rendered futile without fault on her part. Nor has Manning suggested any facts that would indicate any interference that would have prevented her from filing her appeal in a timely manner.

¶40 The third exception applies where the court and the defendant's attorney have failed to provide the defendant with notice of the right to appeal. Manning had knowledge of her constitutional right to appeal. Before entering her guilty plea, Manning was advised by both the court and her attorney of her right to appeal in accordance with rule 11(e). As described above, Manning repeatedly acknowledged in her plea affidavit and during the plea colloquy that her attorney had informed her that her right to appeal was limited. We further conclude that Manning's attorney had no duty to further discuss with Manning her limited appeal rights after sentencing, considering her favorable sentence, the knowing and voluntary nature of her guilty plea, and Manning's express waiver in the plea agreement of "some or all appeal rights." Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000) (rejecting a "bright-line rule that counsel must always consult with the defendant regarding an appeal."). Manning has not suggested that she did not understand that she did in fact have a right to appeal her sentence, nor that she had any interest in challenging her sentence on appeal. Indeed, given the fact that Manning received a favorable sentence as a result of her guilty plea, it seems unlikely that she would have any such interest. We therefore conclude that Manning's attorney sufficiently informed Manning of her right to appeal.

¶41 Rule 22(c) of the Utah Rules of Criminal Procedure, however, requires the court to notify the defendant after sentencing of the right to appeal and the time limits for filing such an appeal.¹⁴ Utah R. Crim. P. 22(c). There is no indication in the record that the court complied with rule 22(c) at the sentencing hearing. Again, however, the only appeal left to Manning at that time was in regard to her sentence, and, as just mentioned, Manning does not claim her right to appeal her sentence has been denied. While the court's failure to comply with rule 22(c) may well qualify for the third exception where a defendant has claimed that his right to appeal his sentence has been denied, Manning has made no such claim. We further note that rule 22(e) permits a motion to correct a sentence at any time.¹⁵ Thus, should Manning wish to have her sentence reviewed, relief remains available to her under that provision. As the exceptions set forth above have been established in the interest of fundamental fairness, and we do not believe these interests are in any way furthered by granting a new appeal time frame here, we deny Manning's request to reinstate the time frame for bringing an appeal.

CONCLUSION

¶42 A criminal defendant may no longer seek Johnson resentencing to restore a denied right to appeal. Rather, we set forth a new procedural mechanism for this purpose, requiring a defendant to file a motion in the trial court for reinstatement of a denied right to appeal under the exceptions outlined above. These exceptions permit defendants to file a motion in their underlying criminal cases in the trial court, thereby qualifying them for assistance of counsel in restoring a denied right to appeal pursuant to article I, section 12 of the Utah Constitution. While defendants who fail to meet statutory

¹⁴ Rule 22(c) of the Utah Rules of Criminal Procedure states that

upon a verdict or plea of guilty . . . the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

¹⁵ Rule 22(e) states: "The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time." Utah R. Crim P. 22(e).

timeliness requirements for bringing an appeal are generally presumed to have waived their right to appeal, defendants may prove they have not knowingly or voluntarily waived their constitutional rights to appeal by establishing that they have been unconstitutionally deprived, through no fault of their own, of their right to appeal. The right to appeal may then be restored if it is in the interest of fundamental fairness to do so. The defendant in this case has failed to demonstrate a constitutional denial of her right to appeal that justifies restoration of the appeal time frame under this new procedure.

¶43 Associate Chief Justice Wilkins, Justice Durrant, Justice Parrish, and Justice Nehring concur in Chief Justice Durham's opinion.

Addendum C – *State v. Rees*, 2005 UT 69, 125 P.3d 874

*This opinion is subject to revision before final
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

State of Utah,
Plaintiff and Petitioner,

No. 20030208

v.

F I L E D

Troy Rees,
Defendant and Respondent.

November 4, 2005

Second District, Ogden
The Honorable Parley R. Baldwin
No. 991900480

Attorneys: Mark L. Shurtleff, Att'y Gen., Erin Riley,
Asst. Att'y Gen., Salt Lake City, for plaintiff
H. Don Sharp, Ogden, for defendant

On Certiorari to the Utah Court of Appeals

NEHRING, Justice:

¶1 We granted certiorari to review the procedure and remedy selected by the court of appeals to provide a defendant who claimed that he had been denied a meaningful appeal due to the ineffectiveness of his counsel. We hold that the post-conviction procedure and remedy extended to Mr. Rees by the court of appeals were not available to him and therefore reverse.

BACKGROUND

¶2 Troy Rees was convicted of possession of marijuana with intent to distribute. He appealed to the court of appeals, challenging the trial court's ruling on his motion to suppress evidence together with his conviction. The court of appeals affirmed Mr. Rees's conviction on three grounds. First, the court stated that the record before it was incomplete because it was missing the preliminary hearing transcript, the suppression hearing transcript, and the affidavit in support of the search warrant. Because the issues presented were "highly fact

sensitive," the court of appeals concluded that a complete record was "essential." The court of appeals affirmed Mr. Rees's conviction, relying on the principle that "[i]n the absence of an adequate record on appeal, we cannot address the issues raised and presume the correctness of the disposition made by the trial court." State v. Rawlings, 829 P.2d 150, 152-53 (Utah Ct. App. 1992).

¶3 The court of appeals further determined that Mr. Rees failed to adequately marshal the evidence in support of the trial court's finding that he possessed marijuana with intent to distribute. Owing to this insufficiency, the court of appeals affirmed this finding. Finally, the court of appeals ruled that Mr. Rees failed to provide an adequate record to support his contention that the trial court erred when it allowed the State to refile its information after dismissing the case against Mr. Rees without prejudice when witnesses for the State failed to appear at two preliminary hearings. The court of appeals again presumed the correctness of the trial court's ruling in absence of an adequate record to the contrary. State v. Rees, 2001 UT App 27U ("Rees I").

¶4 After receiving the court of appeals' decision, Mr. Rees's counsel contacted the court clerk to find out what had happened to the missing portions of the record. The court clerk discovered that although Mr. Rees's counsel had in fact requested all the relevant proceedings, the missing transcripts had been placed on a different shelf than the rest of the record and had not been filed with the court of appeals.

¶5 After learning of this mistake, Mr. Rees, through the same counsel who had represented him throughout the trial and appeal, filed a petition for post-conviction relief with the trial court under rule 65B(b) of the Utah Rules of Civil Procedure. In his petition, Mr. Rees asked that his sentence be reentered so that he could refile his appeal. Mr. Rees did not articulate a clear reason why he believed to be entitled to this relief, but rather indicated generally that he did not receive a meaningful appeal because some of the records had not been filed with the court of appeals. In his petition, he suggested, without explicitly stating it, that his attorney had been ineffective in supervising aspects of Mr. Rees's appeal. The trial court dismissed Mr. Rees's petition and imposed the original sentence, finding that the case had already been adjudicated in the court of appeals.

¶6 Mr. Rees appealed this dismissal to the court of appeals. The court of appeals reversed the trial court's

dismissal of Mr. Rees's petition, and remanded the matter for further consideration. In its opinion, the court of appeals treated Mr. Rees's petition as a writ of error coram nobis¹ predicated on a claim for relief based on ineffective assistance of counsel. State v. Rees, 2003 UT App 4, ¶ 8, 63 P.3d 120 ("Rees II"). The court of appeals determined that because Mr. Rees had not yet had the opportunity to argue his ineffective assistance of counsel claim, he was entitled to post-conviction relief in the trial court. The court of appeals remanded the case, instructing the trial court to determine whether Mr. Rees was entitled to coram nobis relief and to "grant [his] petition and reenter his sentence nunc-pro-tunc" if he prevailed. Id. ¶ 15.

¶7 The State petitioned this court for a writ of certiorari. We granted the State's request for certiorari review to take up the questions of whether the court of appeals erred in (1) treating the petition as a writ of error coram nobis; (2) reversing the trial court's dismissal of the petition for extraordinary relief; and (3) inviting the trial court to reenter Mr. Rees's sentence nunc pro tunc, should it find that the defendant was deprived of his constitutional right to a meaningful appeal because of his reliance on ineffective counsel.

¶8 On certiorari, we review the decision of the court of appeals, not that of the trial court, giving no deference to the court of appeals' conclusions of law. State v. Geukgeuzian, 2004 UT 16, ¶ 7, 86 P.3d 742. We reverse on these issues.

ANALYSIS

¶9 We confront here the question of whether the writ of error coram nobis is available to provide a remedy to a defendant who claims that his appeal was defectively prosecuted because his appellate counsel was ineffective. The court of appeals held that it was and remanded the matter to the trial court for the

¹ "Coram nobis" is a Latin term meaning "the error before us." A writ of error coram nobis is an ancient common law writ that exists to "correct fundamental errors which render a criminal proceeding irregular and invalid." Cardall v. United States, 599 F. Supp. 912, 914-15 (D. Utah 1984). We have held that the writ of error coram nobis can be "used by a sentencing court to modify or vacate a judgment of conviction on the basis of the facts which, without defendant's fault, did not appear on the face of the record and as to which the defendant was without other remedy." State v. Johnson, 635 P.2d 36, 38 (Utah 1981), superseded by Manning v. State, 2005 UT 61, 122 P.3d 628.

purpose of ascertaining whether Mr. Rees was denied his right to appeal because of his counsel's ineffectiveness. If the trial court found for Mr. Rees on his ineffective assistance claim, the court of appeals instructed it to resentence Mr. Rees nunc pro tunc.

¶10 In reaching this result, the court of appeals rejected the State's contention that if Mr. Rees was entitled to relief, he must pursue it under the provisions of Utah's Post-Conviction Remedies Act, Utah Code Ann. § 78-35a-102 (Supp. 2004) ("PCRA"), and rule 65C of the Utah Rules of Civil Procedure, which sets out the procedures that complement the substantive provisions of the PCRA.

¶11 The court of appeals justified fashioning coram nobis relief for Mr. Rees by linking it to the procedure grounded in the writ that we announced in State v. Johnson, 635 P.2d 36 (Utah 1981). The court of appeals was drawn to Johnson because Johnson provided defendants who have been denied a right to appeal a mechanism to revive their right. Under the Johnson procedure, an eligible defendant could seek resentencing in the trial court nunc pro tunc. This procedure would entitle a defendant to the benefit of appointed counsel, and, were it determined that he had been denied his constitutionally guaranteed right of appeal, a recommencement of the thirty-day period to file his notice of appeal. By making this connection, the court of appeals suggested that the circumstances surrounding its affirmance of the trial court in his prior appeal, circumstances that possibly amounted to a denial of his "right to a meaningful appeal," Rees II, 2003 UT App 4, ¶ 16, 63 P.3d 120, constituted the legal equivalent of the denial of his right to appeal that led us to create the Johnson remedy. The validity of the court of appeals' belief that these two situations were factually and legally comparable is the inquiry upon which our holding hinges.

¶12 The court of appeals went on to reason that the enactment after Johnson of rule 65C of the Utah Rules of Civil Procedure governing petitions for extraordinary relief did not erode the utility of Johnson's coram nobis based procedure because we had "at least obliquely" reaffirmed the coram nobis relief it announced. Id. ¶ 5 n.2.

¶13 Regardless of whether we professed our prior allegiance to Johnson directly or obliquely, we unequivocally discarded the Johnson procedure in Manning v. State, 2005 UT 61, 122 P.3d 628. In its place, we erected a sturdier, less contrived framework for a defendant who has been unconstitutionally denied his right to appeal to refresh his opportunity to perfect his appeal. We

noted in Manning that we could not simply do away with the Johnson remedy because were we to do so we would have “no remedy currently in place under the PCRA or our rules of appellate procedure for reinstating an unconstitutionally denied criminal appeal.” Id. ¶ 27.

¶14 Of course, an indication that no remedy exists in statute or rule to make real the promise afforded by a constitutional right gives rise to questions of what tool should be deployed to protect that right. Although formally abolished by rule in 1977,² extraordinary writs embody the procedure traditionally used to protect such a right. In Manning we filled the void created by the demise of the Johnson post-conviction hearing procedure with a procedure crafted in no small measure of parts taken from the writ of error coram nobis, most prominently its guarantee of appointed counsel. Id. ¶ 16. Although not styled as an extraordinary writ, the Manning procedure accomplishes the same objective.

¶15 One way, then, to ascertain whether some fashion of coram nobis relief was due Mr. Rees even after our rejection of the Johnson post-conviction procedure is to explore whether Mr. Rees had no other remedy available to him. The answer to this question turns on whether an affirmance of conviction attributable to the ineffective assistance of counsel may constitute a denial of the right to appeal. We conclude that it does not. We will explain how we reach this conclusion shortly, but we first state why it matters.

¶16 If the PCRA provides Mr. Rees an adequate remedy at law, he is not entitled to secure extraordinary relief but must instead pursue his PCRA remedy. PCRA section 78-35a-102(1) provides that the PCRA “establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal,” subject to certain exceptions not germane to this case. The PCRA, then, preempts access to other forms of extraordinary relief, including the remedy afforded by coram nobis, by defendants who satisfy the conditions of section 78-35a-102(1). Mr. Rees is such a defendant and therefore must seek his remedy under the PCRA.

² The 1977 version of rule 65B abolished pleading “special forms of writs” and replaced them with “action under these Rules.” Utah R. Civ. P. 65B(a) (1977) (amended by 65B(b) (1) (1992)).

¶17 We surmised in Manning that "a defendant who simply fails to file an appeal within the time limits required by rule 4(a) of the Utah Rules of Appellate Procedure would reasonably be considered to have exhausted any remedies he might have obtained thereby for purposes of the PCRA." Manning, 2005 UT 61, ¶ 24. These defendants have not been denied their right to appeal, but have rather been deemed to have waived it. A different legal status attaches to them than to those defendants who have been unconstitutionally denied their right to appeal. We have interpreted a "denial" to have constitutional implications when a defendant has "been prevented in some meaningful way from proceeding with [his] appeal[]." Id.

¶18 We construe the act of "proceeding" with an appeal to encompass filing a notice of appeal, not more. Defendants who gain entry to appellate courts and have their appeals concluded either by a ruling on the merits or involuntary dismissal have exhausted their remedy of direct appeal and are thereby drawn into the ambit of the PCRA.

¶19 We find it telling that the court of appeals described the claim for which it found coram nobis relief appropriate the denial of Mr. Rees's "right to a meaningful appeal because of the ineffective assistance of his appellate counsel." Rees II, 2003 UT App 4, ¶ 16 (emphasis added). This characterization of the circumstances that would merit the intercession of coram nobis is substantially different than our description of the essence of an unconstitutional denial of the right to appeal. Both employ the word "meaningful." As we used the term in Manning, "meaningful" modifies the type of conduct or circumstance that deprived a defendant of access to the appellate process. As used by the court of appeals here, "meaningful" modifies "appeal" and strongly indicates that coram nobis is available to provide an additional direct appeal to a defendant whose appeal has resulted in an unfavorable outcome that can be traced to the ineffective assistance of appellate counsel. This interpretation creates a scenario that plausibly could be claimed in every unsuccessful post-conviction appeal and carry with it the prospect of having the seldom-used writ of coram nobis swallow the PCRA.

CONCLUSION

¶20 Based on the foregoing, we hold that Mr. Rees's claim does not implicate an unconstitutional denial of his right to appeal and that despite the unfavorable outcome of his appeal, he has exhausted his right to appeal and is therefore required to prosecute his claim of ineffective assistance of counsel under the PCRA and rule 65C.

¶21 Chief Justice Durham, Associate Chief Justice Wilkins, Justice Durrant, and Justice Parrish concur in Justice Nehring's opinion.

Addendum D – *State v. Stewart*, Case No. 20030757-CA case file (digital only)

ORIGINAL

FILED
Utah Court of Appeals

SEP 18 2003

Paulette Stagg
Clerk of the Court

FILED IN
FOURTH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

03 SEP 12 PM 1:56

W

Calvin-Paul :Stewart, Inmate #35197
Uinta 3 - 106B
c/o Utah State Prison
P.O. Box 250
Draper, Utah 84020

**FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH¹**

STATE OF UTAH ("this state"),

Plaintiff,

vs

CALVIN PAUL STEWART (a trust),

Defendant.

NOTICE OF APPEAL

20030757-CA

Criminal No. 0011403597

011403597

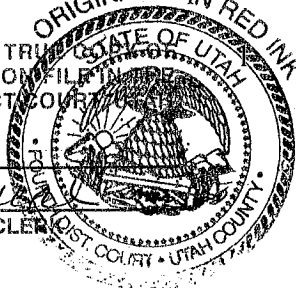
Magistrate/Judge: SCHOFIELD

COMES NOW, Agent, Calvin-Paul :Stewart, for and on behalf of defendant trust,
CALVIN PAUL STEWART, having previously entered a special appearance pursuant §1330,
Title 28, United States Code, with a §1604 claim to immunity from the courts of the United

¹The instant captioned Court is a nisi prius court not a court of the state of Utah. Aforesaid Court is a court of general jurisdiction locally applicable and confined to "this state," a foreign state as provided pursuant 4 USCS §112(a) & (b). Such a "State of the United States" or pursuant 28 USCS 1332(c) and U.C.A. 11-13-3(8) and U.C.A. 61-1-13(25) which, for all intents and purposes, is a District of Columbia "state" court from which Calvin-Paul :Stewart is immune pursuant 28 USCS 1604 with attendant exceptions of 28 USCS 1605 to 28 USCS 1607.

I CERTIFY THAT THIS IS A TRUE
AN ORIGINAL DOCUMENT ON FILED IN
FOURTH JUDICIAL DISTRICT COURT
COUNTY, STATE OF UTAH.
DATE: 9/16/03

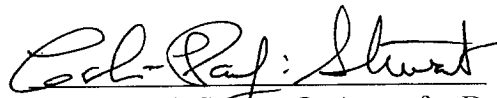
DEPUTY COURT CLERK



appearance pursuant §1330, Title 28, United States Code, with a §1604 claim to immunity from the courts of the United States and of the States, and does so now appear without waiving any Rights, Privileges and/or Immunities by prescription and acquisition of sovereignty recognized by the Supreme Law of the Land, binding upon the instant Court through the Treaty of Peace, done at Paris, the third day of September in the year of our Lord, one thousand seven hundred and eighty-three. Agent for defendant, in sovereign capacity, and of necessity having entered impecunious pursuant U. R. Crim. P. 26, September 12, 2003, a NOTICE OF APPEAL from the order of judgment entered Aug 14, 2003 by the Honorable ANTHONY W. SCHOFIELD, does now enter DECLARATION OF DOMICIL .

I, Calvin-Paul :Stewart, under penalty of perjury do solemnly swear the attached DECLARATION OF DOMICIL is entered in good faith , true and correct and not meant to mislead.

SUBMITTED this 12th day of September, 2003.

A handwritten signature in cursive script that reads "Calvin-Paul :Stewart". The signature is written in dark ink and is positioned above the printed name.

Calvin-Paul :Stewart©, Agent for Defendant
CALVIN PAUL STEWART™

Attachment: DECLARATION OF DOMICIL of Calvin-Paul :Stewart©

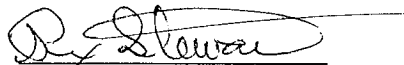
PROOF OF SERVICE

I, the undersigned, do HEREBY CERTIFY that I caused true and correct copies of
NOTICE OF APPEAL served upon by either hand delivery or United States mail, postage
prepaid, in an envelope addressed to the following:

Clerk of the Court
Fourth Judicial District
Utah County, State of Utah

Kay Bryson #0473
Utah County Attorney
100 East Center, Suite 2100
Provo, UT 84606

Dated this 12th day of September, 2003.

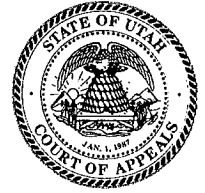


Server

Norman H. Jackson
Presiding Judge
Judith M. Billings
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Judge

Utah Court of Appeals

450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230
Appellate Clerks' Office (801) 578-3900
Judges' Reception (801) 578-3950
FAX (801) 578-3999
TDD (801) 578-3940



Marilyn M. Branch
Appellate Court Administrator

Paulette Stagg
Clerk of the Court

September 19, 2003

Calvin Paul Stewart 35197
Utah State Prison
P.O. Box 250
Draper UT 84020

RE: State v. Stewart

Appellate Case No. 20030757

Dear Mr. Stewart:

Please be advised that the notice of appeal in this case has been filed with the Court of Appeals. The case number is 20030757-CA and should be indicated on future filings and correspondence.

It appears that you will not have the assistance of an attorney in preparing papers for filing in this court. Enclosed is a pro se guide concerning appeal procedures. We hope it will be helpful to you in presenting your case. Please be aware that failure to file designated papers within the time limits established under the Utah Rules of Appellate Procedure may result in dismissal of your appeal.

Rule 11(e)(1) of the Utah Rules of Appellate Procedure requires that, within ten (10) days of the filing of the notice of appeal, appellant must submit a transcript request for such parts of the proceedings not already on file as the appellant deems necessary. The transcript request should be directed to the court executive in the trial court. A copy of the request should also be mailed to the clerk of the appellate court.

If no transcripts are requested, appellant must file a certificate to that effect with the clerk of the court from which the appeal is taken and a copy with the clerk of the appellate court.

Pursuant to Rule 21, of the Utah Rules of Appellate Procedure, copies of all papers filed with this court in connection with the

SEP 29 2003

Paulette Stagg
Clerk of the Court

Calvin-Paul :Stewart, Inmate #35197
Uinta 3 - 106B
c/o Utah State Prison
P.O. Box 250
Draper, Utah 84020

**FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH¹**

STATE OF UTAH ("this state"),

Plaintiff,

vs

CALVIN PAUL STEWART (a trust),

Defendant.

NOTICE OF APPEAL

**Criminal No. 0011403597
Appellate Case No. 20030757**

Magistrate/Judge: SCHOFIELD

To: District Court Clerk,
The Fourth District Court, Provo Department
Utah County, State of Utah

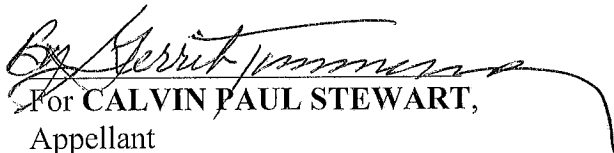
COMES NOW the Appellant, **CALVIN PAUL STEWART**, by and through Calvin-Paul :Stewart, Attorney-in-fact, to respectfully request from the District Court Clerk, Fourth District

¹The instant captioned Court is a nisi prius court not a court of the state of Utah. Aforesaid Court is a court of general jurisdiction locally applicable and confined to "this state," a foreign state as provided pursuant 4 USCS §112(a) & (b). Such a court of a "State of the United States" or pursuant 28 USCS 1332(c) and U.C.A. 61-1-13(25) is for all intents and purposes, a District of Columbia "State" court from which Calvin-Paul :Stewart is immune pursuant 28 USCS 1604 with attendant exceptions of 28 USCS 1605 to 28 USCS 1607.

Court, Provo Department, the entire transcript of all recorded hearings, transcribed or yet to be transcribed, upon satisfactory arrangement made by the Clerk with the reporter or transcriber, on the matter relating to the criminal matter under **Criminal No. 0011403597**, for inclusion on appeal of the Order of Judgment entered Aug 14, 2003 by the Honorable ANTHONY W. SCHOFIELD.

Appellant respectfully notices the Fourth Judicial District Court and the Court of Appeals that all phases of the proceedings are pertinent to the matter on appeal and shall be transcribed by a competent court transcriber with certified copies provided to the appellant and the Utah Court of Appeals at the earliest possible date without cost due to appellant's status *in forma pauperis*.

Respectfully submitted this 29th day of September, 2003.


For CALVIN PAUL STEWART,
Appellant

CERTIFICATE OF SERVICE

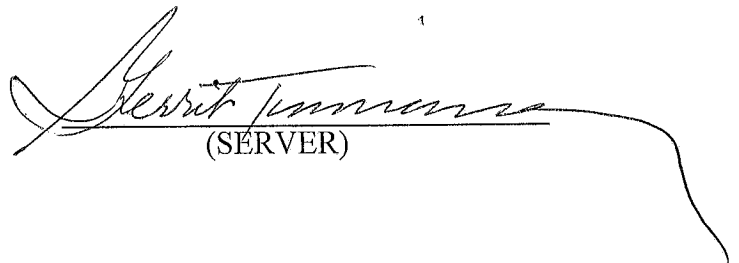
I, the undersigned, do HEREBY CERTIFY that I caused a true and correct copy of
REQUEST FOR TRIAL COURT TRANSCRIPT, served upon by either hand delivery, or by
United States mail, postage prepaid, in an envelope addressed to the following:

PAT BARTHOLEMEW, Clerk of the court
UTAH COURT OF APPEALS
450 South State Street
Salt Lake City, Utah 84114-0230

Court Clerk
FOURTH JUDICIAL DISTRICT
UTAH COUNTY, STATE OF UTAH
125 North 100 west
Provo, Utah 84603

C/O KAY BRYSON #0473
Utah County Attorney
100 East Center, Suite 2100
Provo, Utah 84606

DATED this 29th day of September, 2003.


(SERVER)

OCT - 3 2003

Paulette Stagg
Clerk of the Court

Calvin-Paul :Stewart, Inmate #35197
Uinta 3 - 106B
c/o Utah State Prison
P.O. Box 250
Draper, Utah 84020

IN THE UTAH COURT OF APPEALS

CALVIN PAUL STEWART,)	
Appellant/Defendant,	)	MOTION FOR ENLARGEMENT
	)	OF TIME TO FILE
	)	DOCKETING STATEMENT
vs.)	
)	
	)	Appellate Case No. <u>20030757</u>
STATE OF UTAH	)	Criminal No. <u>0011403597</u>
Appellee/Plaintiff.)	
)	


COMES NOW Appellant, CALVIN PAUL STEWART, to respectfully move this Court pursuant U.R.A.P., Rule 23 for an enlargement of time beyond the October 3, 2003 deadline, under U.R.A.P., Rule 22(b), in order to complete Appellant's docketing statement, for the following herein stated causes:

1. Appellant is an inmate at the Utah State Prison facility, undergoing new inmate procedures of orientation with little or no present opportunity to prepare a docketing statement within the time limit prescribed by rule;
2. Appellant is not a Bar attorney and not formally trained in technical and procedural

matters of this scope, has limited access to legal materials and codes for necessary information required in the appeal and requires more time to file the docketing statement;

3. Appellant prays this Court grant an enlargement of time of an additional 30-days or such other relief as the court deems appropriate to afford Appellant a meaningful opportunity for appeal;
4. Appellant also requests appropriate considerations provided for under U. R. App. P., Rule 4(f);
5. This is the first request for consideration of enlargement of time to file the docketing statement;
6. The time the docketing statement is anticipated for completion is 2 November 2003.

THE FOREGOING is respectfully submitted and dated this 3rd day of October, 2003.


For CALVIN PAUL STEWART,
Appellant

Attachments:

Letter of Deputy Clerk Maren Larson dated September 19, 2003.

CERTIFICATE OF SERVICE

I, the undersigned, do HEREBY CERTIFY that I caused a true and correct copy of
REQUEST FOR ENLARGEMENT OF TIME TO FILE DOCKETING STATEMENT, served
upon by either hand delivery, FAX or by postage prepaid, United States mail, in an envelope
addressed to the following:

Paulette Stagg,
Maren Larson,
Supreme Court of Utah,
450 South State Street,
Salt Lake City, Utah 84114-0230

Clerk of the Court
Deputy Clerk

Telephone: (801) 578-3900
Fax: (801) 578-3940

Kay Bryson #0473,
Utah County Attorney,
100 East Center, Suite 2100,
Provo, Utah 84606

Attorney for Appellee

DATED this 3rd day of October, 2003.


Server

Norman H. Jackson,
Presiding Judge


CERTIFICATE OF MAILING

I hereby certify that on October 8, 2003, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

J. FREDERIC VOROS, JR.
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

CALVIN PAUL STEWART 35197
UTAH STATE PRISON
PO BOX 250
DRAPER UT 84020

Dated this October 8, 2003.

By 
Deputy Clerk

Case No. 20030757

OCT - 6 2003

Paulette Stagg
Clerk of the Court

Calvin-Paul :Stewart, Inmate #35197
Uinta 3 - 106B
c/o Utah State Prison
P.O. Box 250
Draper, Utah 84020

**FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH¹**

STATE OF UTAH ("this state"),

Plaintiff-Appellee,

vs

CALVIN PAUL STEWART (a trust),

Defendant-Appellant.

**AMENDED² REQUEST FOR
TRIAL COURT TRANSCRIPTS**

Criminal No. 0011403597
Appellate Case No. 20030757

Magistrate/Judge: SCHOFIELD

To: District Court Clerk,
The Fourth District Court, Provo Department
Utah County, State of Utah


¹The instant captioned Court is a nisi prius court not a court of the state of Utah. Aforesaid Court is a court of general jurisdiction locally applicable and confined to "this state," a foreign state as provided pursuant 4 USCS §112(a) & (b). Such a court of a "State of the United States" or pursuant 28 USCS 1332(c) and U.C.A. 61-1-13(25) is for all intents and purposes, a District of Columbia "State" court from which Calvin-Paul :Stewart is immune pursuant 28 USCS 1604 with attendant exceptions of 28 USCS 1605 to 28 USCS 1607.

²This Amended Request for Trial Transcripts is submitted to avoid misconstruction of former, timely request submitted with incorrect caption of "Notice of Appeal."

COMES NOW the Appellant, **CALVIN PAUL STEWART**, by and through Calvin-Paul :Stewart, Attorney-in-fact, to respectfully request from the District Court Clerk, Fourth District Court, Provo Department, the entire transcript of all recorded hearings, transcribed or yet to be transcribed, upon satisfactory arrangement made by the Clerk with the reporter or transcriber, on the matter relating to the criminal matter under **Criminal No. 0011403597**, for inclusion on appeal of the Order of Judgment entered Aug 14, 2003 by the Honorable ANTHONY W. SCHOFIELD.

Appellant respectfully notices the Fourth Judicial District Court and the Court of Appeals that all phases of the proceedings are pertinent to the matter on appeal and shall be transcribed by a competent court transcriber with certified copies provided to the appellant and the Utah Court of Appeals at the earliest possible date without cost due to appellant's status *in forma pauperis*, which was filed into the Court September 12, 2003.

Respectfully submitted this 3rd day of October, 2003.


For **CALVIN PAUL STEWART**,
Appellant

CERTIFICATE OF SERVICE

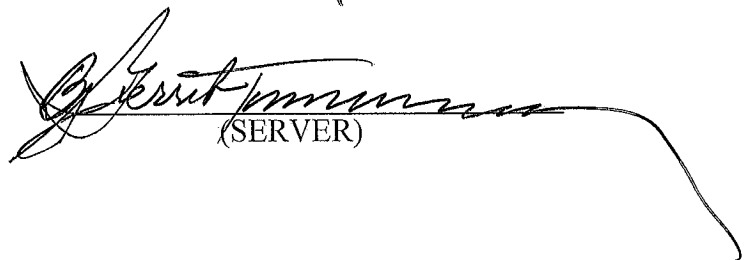
I, the undersigned, do HEREBY CERTIFY that I caused a true and correct copy of
AMENDED REQUEST FOR TRIAL COURT TRANSCRIPTS, served upon by either hand
delivery, or by United States mail, postage prepaid, in an envelope addressed to the following:

PAULETTE STAGG, Clerk of the court
UTAH COURT OF APPEALS
450 South State Street
Salt Lake City, Utah 84114-0230

Court Clerk
FOURTH JUDICIAL DISTRICT
UTAH COUNTY, STATE OF UTAH
125 North 100 west
Provo, Utah 84603

KAY BRYSON #0473
Utah County Attorney
100 East Center, Suite 2100
Provo, Utah 84606

DATED this 3rd day of October, 2003.


(SERVER)

CALVIN PAUL STEWART, Inmate #31579
A-WEST 429B
UTAH STATE PRISON
PO BOX 250
DRAPER, UT 84020

FILED
Utah Court of Appeals
NOV - 3 2003
Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS¹

CALVIN PAUL STEWART,)	
Appellant/Defendant,	)	DOCKETING STATEMENT
)	
vs.)	
)	
STATE OF UTAH	)	Appellate Case No. <u>20030757</u>
Appellee/Plaintiff.	)	Criminal No. <u>0011403597</u>
)	

PURSUANT TO RULE 9, Utah Rules of Appellate Procedure, appellant submits this docketing statement.

1. NATURE OF THE PROCEEDING. This appeal is from a final judgment: SENTENCE, JUDGMENT, COMMITMENT, dated 08-14-03, of Honorable ANTHONY W. SCHOFIELD, Judge, FOURTH DISTRICT COURT, PROVO DEPARTMENT, UTAH COUNTY, STATE OF UTAH on charges and disposition as reflected in court docket against the orthographically styled Defendant, CALVIN PAUL STEWART, a.k.a PAUL STEWART, as extracted from docket dated 09/10/03.

¹Appellant believes this is a case of first impression not assignable to the Utah Court of Appeals. See objection to assignment infra.

2. JURISDICTION. Under the doctrine of necessity, this Court has jurisdiction pursuant to foreign law under Utah Code Ann. §78-2-2(3)(j).

3. RELEVANT DATES.

a. Date the final judgment or order appealed from was entered: 08-14-03

b. Date the notice of appeal was filed: 09-12-03

c. (1) Date any motions filed pursuant to Rules 50(b), 52(b), or 59, Utah Rules of Civil Procedure, Rule 24, Utah Rules of Criminal Procedure, or Utah Code Ann. § 77-13-6 were filed: NO MOTIONS FILED

(2) Date and effect of any orders disposing of such motions: N/A

4. INMATE MAILBOX RULE. The appellant is an inmate confined in an institution invoking rule 4(f).

5. RULE 54(b). This appeal is not from an order in a multiple party or a multiple claim case in which the judgment has been certified as a final judgment by the trial court pursuant to Rule 54(b), Utah Rules of Civil Procedure.

6. CRIMINAL CASES. This is a criminal case, state:

a. The defendant was convicted of the following crime(s): Upon advisory jury verdict of guilty, filed 06-25-03, defendant over Agent's objection to the verdict, was convicted of:

6 COUNTS of U.C.A. 61-1-1 - SECURITIES FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

5 COUNTS of U.C.A. 61-1-7 - SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

5 COUNTS of U.C.A. 61-1-3 UNREGISTERED SECURITIES AGENT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

1 COUNT of U.C.A. 76-10-1603 - PATTERN OF UNLAWFUL ACTIVITY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

b. The defendant, over the objection and non-consent of Agent for defendant, received the following sentence: (extracted from docket)

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE: Each count to run consecutive with each other.

SENTENCE RECOMMENDATION NOTE: It is recommended to the board of pardons that the defendant serve at least 10 years and that when the defendant is placed on parole he is not to work in any fiduciary capacity. The defendant is to submit to DNA testing.

The defendant is to pay the following Restitution: Amount: \$2857600.00 Plus Interest

Pay in behalf of: VICTIMS C/O STATE OF UTAH

The amount of FOURTH DISTRICT COURT

This restitution is to be paid joint and severally with the co-defendants.

SENTENCE TRUST NOTE

c. The defendant currently is incarcerated in the UTAH STATE PRISON.

7. ISSUES ON APPEAL. Appellant intends to assert the following issue(s) on appeal:

a. First Issue: The captioned Defendant styled, CALVIN PAUL STEWART™ (TOTAL CAPS), a cestui que passive trust by and through Calvin-Paul :Stewart®, Agent (“Agent”), gave notice of representative capacity via specific negative averment, and without waiver of substantial rights, timely entered Notice of Claim to Foreign Sovereign Immunity with Memorandum in Support and Affidavit of CALVIN PAUL STEWART to the court of first instance.

Agent for captioned Defendant is a sentient being that has the faculty of perception, a Citizen of the United States in the American sense with secured Rights, Privileges and Immunities under the Constitution for the United States of America; an American sovereign recognized by treaty, domiciled in the state of Utah, living within the geographical boundaries of Salt Lake county not statutorily defined within this state of Utah, a state of the United States,

which is foreign state to the state of Utah, defendant's domicile. The state of Utah is on equal footing with the original states of the American Union and not subject to the legislative authority/jurisdiction of the United States.

Calvin-Paul :Stewart[®], by Commercial Registry of UCC-1 Financing Statement, is Creditor in the perfecting of a Security Agreement, as promulgated in the Commercial Registry of the Utah Department of Commerce, Agent, and Trustee administering all the substantial decisions concerning the legal and commercial affairs of CALVIN PAUL STEWART[™], as well as the Registered Collateral by and through a power of attorney. Such trust, is not subject to administration of a court of the United States or of this state.

And whereas the Division of Securities, Department of Commerce of this state of Utah has filed an affidavit in support of a criminal complaint for action brought in the name of the fiction, STATE OF UTAH, in a district court of this state. Such state is defined pursuant §61-1-13, subsection 25, Utah Code Ann. (1997) as "any state, territory, or possession of the United States, the District of Columbia, and Puerto Rico." And whereas, the meaning of the term "state" is limited to a meaning of terms state of the United States, territory of the United States, the District of Columbia, and Puerto Rico; and whereas all law is prima facie territorial, the laws of such "state" or "states" are limited to a territorial jurisdiction defined by law. And whereas the meaning of the term "state" in U.C.A. §61-1-13(25) is *in pari materia* with the meaning of "state" in Title 75, Chapter 1, section 75-1-201(46), Utah Code Ann. (1999), the term "[s]tate"

means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.”

And whereas, the state of prosecution is a “state” defined as a “state of the United States subject to the legislative authority of the United States”; with legislative power of the United States specifically authorized by U.S. Const., Art I, sec. 8, cl. 17, such state is a foreign jurisdiction to the captioned Defendant’s legal domicile in the state of Utah, its Agent’s legal domicile, which jurisdiction is not comprehended in the union of States of the American Union, admitted on equal footing with the original states, not subject to the legislative and territorial jurisdiction of the United States, and exclusive legislative authority of Congress.

All appearances by and through Agent were made de bene esse are for express purpose to answer over to the inquiries of the instant court under a claim of immunity, not submitting to in personam jurisdiction or the territorial jurisdiction of such court. Such appearances constitute appearance pursuant Title 28 U.S.C.A. §1330(c) as provided by Title 28 U.S.C. §1602 to claim immunity from the jurisdiction of courts of the United States and of the States as provided at §1604. The status of such immunity when disputed by a sworn controverting party, the issue is required to be set for an evidentiary hearing for determination of immunity in conformity with the principles set forth in Chapter 97, Title 28 U.S.C. as provided by §1602.

DETERMINATIVE LAW:

The Constitution for the United States of America, adopted 17 September 1787

Treaty of Peace with Great Britain (8 Stat. 80) signed September 3, 1783

Article the 2nd of the Six Articles of Compact of unanimous consent, 13 July 1787

The Utah Constitution, adopted 5 November 1895

§§61-1-13(25), Utah Code Ann. (1997)

70A-3-403(2) & (3), Utah Code Ann. (1993)

§§75-1-201(46), Utah Code Ann. (1999)

Rule 9, Utah Rules of Civil Procedure

Rule 4, Utah Rules of Civil Procedure

Rule 17, Utah Rules of Civil Procedure

Rule 44, Utah Rules of Civil Procedure

Rule 38, Utah Rules of Civil Procedure

Rule 39, Utah Rules of Civil Procedure

Title 28 U.S.C.A. §§1330(c)

Title 28 U.S.C.A. §§1602— 1608

Title 28 U.S.C.A. §§1330(c)

Title 28 U.S.C.A. §§1332 (c) and (d)

Argentine Republic v. Amerada Hess Shipping Corp., et al, (1989) 488 U.S. 428

Chisholm v. Georgia, 2 U.S. 419

Cook v. United States, 288 U.S. 102 (1933)

Employees of Dept. of Pub. Health v. Dept. of Pub. Health of Missouri, 411 U.S. 279

Ford v. United States, 273 U.S. 593 (1927)

Foster v. Neilson, 27 U.S. (2 Pet. 253) 253 (1829)

Head Money Cases (Edye v. Robertson), 112 U.S. 580 (1884)

International Shoe Co. v. Washington, 326 U.S. 310 (1945)

Martin v. Waddell's Lessee, 41 U.S. 367 (1842)

M'Ilvane v. Coxe's Lessee, 8 US (4 Cranch) 209 (1808)

Rhode Island v. Massachusetts, 12 Pet. 657, 9 L.Ed. 1233

Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416, 14 L.Ed. 997

Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565 (1877)

State v. Merritt, 67 Utah 325 (1926)

Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984)

United States v. Minnesota, 270 U.S. 181

United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833)

United States v. Rauscher, 119 U.S. 407 (1886);

Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)

Will v. Michigan Dept. of State Police, (1988) 491 U.S.

Judge Henry St. George Tucker, Blackstone's Commentaries: With Notes of Reference to The Constitution and Laws of the Federal Government of the United States; and the Commonwealth of Virginia, William Young Birch, and Abraham Small; Philadelphia, c 1803. "View of the Constitution of the United States, Section 1"

STANDARD OF REVIEW: [State applicable standard of appellate review for the first issue, with supporting authority.] The questions presented for review are solely questions of law, which is reviewable under a correctness standard. Thus, no deference is to be given the decision below. See City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah), cert. denied, 112 L.Ed.2d 89, 111 S. Ct. 120 (1990).

b. Second issue. Where defendant by and through Agent gave actual notice to the trial court and plaintiff of defendant's claim to foreign sovereign immunity, such "notice" was meant as information and advice or written admonition, in form of a specific negative averment, of plaintiff's lack of capacity to sue defendant. Defendant's "notice" was not a "motion" subject to Rule 12 of the Utah Rules of Criminal Procedure; it sought not the permission of the court to do a thing based on a petition for relief. Plaintiff's general averments were ineffectual to give the court jurisdiction. It is the facts specifically, specially and sufficiently pleaded by Defendant, by and through Agent, as evidenced by Notice of Sovereign Immunity and Memorandum in Support and Affidavit of CALVIN PAUL STEWART™, which control and not the general averments of the plaintiff. And, where plaintiff recited no waiver of immunity by defendant, by and through Agent, and made no averment specifically by affidavit or otherwise as to an act which would subject defendant to a statutory exception, there is no effectual grant of jurisdiction to the trial

court of the defendant and the subject matter.

The fundamental and initial inquiry of a court is always to determine its own jurisdictional authority over the subject matter of the claims asserted. Upon a determination by the Court that its jurisdiction is lacking, its authority extends no further than to dismiss the action.

DETERMINATIVE LAW:

Rule 9, Utah Rules of Civil Procedure

Rule 12, Utah Rules of Criminal Procedure

Accord Schlatter & Mo-Comm Futures, Ltd., 233 Kan. 324 (1983).

Bershaw v. Sarbacher, 40 Wash. App. 653, 700.

Hiltsley v. Ryder, 59 Utah Adv. Rep. 35 (1987)

In Re Saltis, 94 Wash.2d 889, 621 P.2d 716, 718 (1980)

La Bellman v. Gleason & Sanders, Inc., 418 P.2d 949 (Okl. 1966)

Minter-Wilson Drilling Co., Inc. v. Randle, 234 Kan. 624, 675 P.2d 365 (1984)

Rice v. Rice Foundation, 610 F.2d 471 (7th Cir. 1979)

Roskelley & Co. v. Lerco, Inc. 610 P.2d 1307 (Utah 1980)

Rybarczyk v. Dept. of Labor and Industries, 24 Wash. App. 591, 602 P.2d 724 (1979).

Thompson v. Jackson, 743 P.2d 1230, 1231 (Utah Ct. App. 1987)

STANDARD OF REVIEW: The questions presented for review are solely questions of law, which is reviewable under a correctness standard. Thus, no deference is to be given the decision below. See City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah)

c. Third issue. Defendant, CALVIN PAUL STEWART™ (TOTAL CAPS) by and through, Calvin-Paul :Stewart®, Agent (“Agent”) made appearance before the trial court de bene esse reserving all rights pursuant the condition precedent of the happening of an event, i.e., the finding of a competent court that defendant did not have a bona fide claim to foreign sovereign immunity and that the trial court was sustained as to subject matter jurisdiction in going forward to trial. Defendant, CALVIN PAUL STEWART™ (TOTAL CAPS) by and through, Calvin-Paul :Stewart®, Agent (“Agent”), upon the aforesaid condition precedent that trial court were to in fact sustain personal jurisdiction over defendant as well as subject matter jurisdiction, Agent moved trial court to dismiss the complaint because the defendant is entitled, pursuant to U.S.Const., Amendment VI and Utah Const. Art. I, Sec. 12 and §77-1-6 (1)(f), Utah Code Ann. (1980) to a speedy public trial, which was not met.

DETERMINATIVE LAW:

U.S.Const., Amendment VI

Utah Const. Art. I, Sec. 12

Rule 25(d), Utah Rules of Criminal Procedure

§§§77-1-6 (1)(f) and (h), Utah Code Ann. (1980)

§§ 77-1-7(1)(a)(i), Utah Code of Criminal Procedure

§§77-1-7(2), Utah Code of Criminal Procedure

Klopfer v. North Carolina, 386 U.S. 213 (1967)

State v. Ameida, 54 Haw. 443

State v. Renzo, 21 Utah 2d 205 (1968)

State v. Banner, 717 P.2d 1325

STANDARD OF REVIEW: The questions presented for review are solely questions of law, which is reviewable under a correctness standard. Thus, no deference is to be given the decision below. See City of Monticello v. Christensen, 788 P.2d 513, 516 (Utah), cert. denied, 112 L.Ed.2d 89, 111 S. Ct. 120 (1990).

8. FACTUAL SUMMARY. Defendant asserted immunity as a foreign sovereign to the courts of this state, a foreign jurisdiction to the domicile of defendant. Without explicit waiver of immunity or a finding by the trial court of exceptions pursuant federal law, court did not acquire personal jurisdiction or subject matter jurisdiction, wherefore on its own motion the trial judge had a duty to dismiss the action. Even if the trial court had acquired personal and subject matter jurisdiction

of the defendant, defect of lack speedy trial is “plain error” for violation of a substantial right. Misapprehension of applicable law is “plain error” that goes to the foundation of the action irrespective of the evidence, being error apparent of record.

9. ASSIGNMENT. This appeal is not subject to transfer by the Supreme Court to the Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4). The appellant opposes such a transfer on the following grounds:

a. SUBSTANTIAL CONSTITUTIONAL ISSUES

1. Defendant has fundamental right to immunity as an American sovereign not to be tried without his consent. Such is reviewed under “plain error” for violation of substantial rights and violation under treaty law.
2. Where the STATE OF UTAH and its agents are duly bound by the laws of this state which include the general laws, statutes, constitutions, and the decisions of the Utah Supreme Court as well as the U.S. Supreme Court and treaty, made in pursuance thereof, such is embodied in the “law of the land” which comprehends due process of law under the U.S. Constitution, Art. VI, Sec. 2. It is fundamental that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Wherefore, did officers of a court of this state duly bound by such ignore and not take cognizance of such when proceeding upon

inquiry of state interest against a citizen by the securities division and thereby deny due process of law injurious to substantial rights of CALVIN PAUL STEWART and further violate its Agent/representative Calvin-Paul :Stewart outside the standards of due process of law? Will it be the assertion of this Court that the people of the state of Utah are not sovereign and have no right to exercise immunity under the Foreign Sovereign Immunity Act? Will it be the assertion of this Court there be not a sovereign people and that all the inhabitants of the state or of this state of Utah are merely citizen/subjects in the English sense?

b. ISSUE OF FIRST IMPRESSION in the state and of substantial importance in the administration of justice for and to the inhabitants of Utah, whether domiciled in the state of Utah or in this state of Utah, an inferior autonomous jurisdiction defined by statute to be subject to the legislative authority of the United States.

10. RELATED APPEALS. The following is related for appeal:

a. THE STATE OF UTAH vs. CALVIN PAUL STEWART, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH;

Case Nos. 011915149 & 021901760.

11. ATTACHMENTS. The following are attached:

a. The final judgment or order from which the appeal is taken. (No order has ever been received by appellant. Evidence of final judgment is taken from certified court docket.)

b. The notice of appeal and any order extending the time for the filing of a notice of appeal.

DATED this 3rd day of November, 2003 A.D.


For CALVIN PAUL STEWART
Appellant

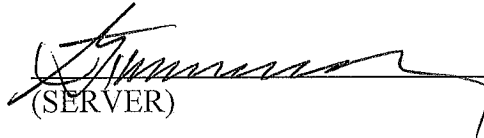
CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Docketing Statement was mailed by first class mail this 3rd day of November to the following:

KAY BRYSON #0473,
Attorney for Appellee
Utah County Attorney,
100 East Center, Suite 2100,
Provo, Utah 84606

MARK L. SHURTLEFF #4666
Attorney General
160 East 300 South, 5th Floor
P.O. Box 140874
Salt Lake City, Utah 84114-0874

DATED this 3rd day of November, 2003.


(SERVER)

ATTACHMENTS

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH vs. PAUL STEWART

CASE NUMBER 011403597 State Felony

CHARGES

Charge 1 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 2 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 3 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 4 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 5 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 6 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 7 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 8 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 9 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 10 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Dismissed
Charge 11 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Dismissed
Charge 12 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Dismissed
Charge 13 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 14 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 15 - 61-1-3 - UNREGISTERED SECURITIES AGENT

3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 16 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Dismissed
Charge 17 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Dismissed
Charge 18 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony
Disposition: June 25, 2003 Dismissed
Charge 19 - 61-1-1 - SECURITIES FRAUD (amended)
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 20 - 61-1-1 - SECURITIES FRAUD (amended)
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 21 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 22 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 23 - 76-10-1603 - PATTERN OF UNLAW ACTIVITY
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty

CURRENT ASSIGNED JUDGE
ANTHONY W. SCHOFIELD

PARTIES

Plaintiff - STATE OF UTAH

Defendant - PAUL STEWART
723 E Draper View Dr
Draper, UT

Represented by: RICHARD P MAURO

Also Known As - CALVIN PAUL STEWART

DEFENDANT INFORMATION

Defendant Name: PAUL STEWART
Date of Birth: October 05, 1947
Law Enforcement Agency: COUNTY ATTORNEY
Prosecuting Agency: UTAH COUNTY
Violation Date: January 26, 2001

PROVO, UT 84601

Before Judge: ANTHONY W. SCHOFIELD

08-04-03 SENTENCING scheduled on August 14, 2003 at 09:00 AM in Fourth floor, Rm 401 with Judge SCHOFIELD.

08-04-03 Note: SENTENCING minutes modified.

08-06-03 Filed: AP&P PV Report- Confidential

08-14-03 Fee Account created Total Due: 15.00

08-14-03 VIDEO TAPE COPY Payment Received: 15.00

Note: REF: 7529 BCH: 653

08-14-03 Minute Entry - Minutes for SENTENCING

Judge: ANTHONY W. SCHOFIELD

PRESENT

Clerk: jennyc

Reporter: LIVINGSTON, ANNI

Prosecutor: WAYMENT, DAVID H T

Defendant

teria
sherylc
jennyc
pamfw
pamfw

jennyc

HEARING

This matter comes before the court for sentencing. The defendant is present in custody of the sheriff. Mr. Stewart addresses. A correction is made to the PSI to include the defendant's correct birthdate which is 10-5-47, he is currently 55.

The court denies the writ of allocution. Mr. Wayment addresses. Leann Bailey, victim, addresses. Tracy Walpole, representative of victim, addresses. Wanda Condit, victim, addresses. Mr. Stewart addresses.

SENTENCE PRISON

Based on the defendant's conviction of SECURITIES FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of UNREGISTERED SECURITIES AGENT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of UNREGISTERED SECURITIES AGENT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of UNREGISTERED SECURITIES AGENT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of UNREGISTERED SECURITIES AGENT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

State Prison.

Based on the defendant's conviction of SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of UNREGISTERED SECURITIES AGENT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of PATTERN OF UNLAW ACTIVITY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

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

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Each count to run consecutive with each other.
SENTENCE RECOMMENDATION NOTE

It is recommended to the board of pardons that the defendant serve at least 10 years and that when the defendant is placed on parole he is not to work in any fiduciary capacity. The defendant is to submit to DNA testing.

SENTENCE TRUST

The defendant is to pay the following:

Restitution: Amount: \$2857600.00 Plus Interest

Pay in behalf of: VICTIMS C/O STATE OF UTAH

The amount of FOURTH DISTRICT COURT

This restitution is to be paid joint and severally with the co-defendants.

SENTENCE TRUST NOTE

Elsie Thomas is a victim but is not identified in the PSI.

08-14-03 Filed: Writ of Allocution

jennyc

08-14-03 Filed: Request for Video/ Audio Tape for hearing on June 27, 2003

teria

08-15-03 VIDEO TAPE COPY Payment Reversal: -15.00

nolanr

Note: money needs to be applied to Reporter Fees

08-15-03 Fee Account created Total Due: 15.00

nolanr

08-15-03 REPORTER FEES Payment Received: 15.00

nolanr

Note: REPORTER FEES

08-15-03 Tracking started for Exhibit. Review date Nov 20, 2003.

chrisj

08-22-03 Filed: Transcript Request Form for Jury Trial; Requested by: Tracey Walpole

jodym

08-22-03 Fee Account created Total Due: 145.00

ryandp

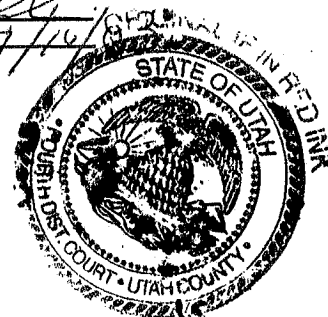
08-22-03 REPORTER FEES Payment Received: 145.00

ryandp

Note: REPORTER FEES; REF: 7653 BCH: 659

I CERTIFY THAT THIS IS A TRUE COPY OF
AN ORIGINAL DOCUMENT ON FILE IN THE
FOURTH JUDICIAL DISTRICT COURT, UTAH
COUNTY, STATE OF UTAH
DATE: 9/10/03

DEPUTY COURT CLERK



COPY

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

03 SEP 12 PM 1:56

Calvin-Paul :Stewart, Inmate #35197
Uinta 3 - 106B
c/o Utah State Prison
P.O. Box 250
Draper, Utah 84020

**FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH¹**

STATE OF UTAH ("this state"),

Plaintiff,

vs

CALVIN PAUL STEWART (a trust),

Defendant.

NOTICE OF APPEAL

Criminal No. 0011403597

Magistrate/Judge: SCHOFIELD

COMES NOW, Agent, Calvin-Paul :Stewart, for and on behalf of defendant trust,
CALVIN PAUL STEWART, having previously entered a special appearance pursuant §1330,
Title 28, United States Code, with a §1604 claim to immunity from the courts of the United

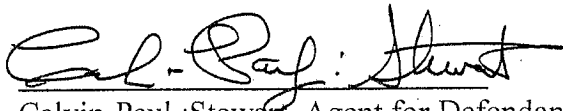
¹The instant captioned Court is a nisi prius court not a court of the state of Utah. Aforesaid Court is a court of general jurisdiction locally applicable and confined to "this state," a foreign state as provided pursuant 4 USCS §112(a) & (b). Such a "State of the United States" or pursuant 28 USCS 1332(c) and U.C.A. 11-13-3(8) and U.C.A. 61-1-13(25) which, for all intents and purposes, is a District of Columbia "state" court from which Calvin-Paul :Stewart is immune pursuant 28 USCS 1604 with attendant exceptions of 28 USCS 1605 to 28 USCS 1607.

States and of the States, and does so now appear without waiving any Rights, Privileges and/or Immunities by prescription and acquisition of sovereignty recognized by the Supreme Law of the Land, binding upon the instant Court through the Treaty of Peace, done at Paris, the third day of September in the year of our Lord, one thousand seven hundred and eighty-three. Agent for defendant, in sovereign capacity, and of necessity does herewith enter this instrument of NOTICE OF APPEAL pursuant U. R. Crim. P. 26.

Appeal is hereby taken from the Order of Judgment entered Aug 14, 2003 by the Honorable ANTHONY W. SCHOFIELD:

Appeal is taken as a matter of Right from the entire judgment to the Court of Appeals in Salt Lake City, Utah and is timely.

DATED this 12th day of September, 2003.


Calvin-Paul :Stewart, Agent for Defendant
CALVIN PAUL STEWART

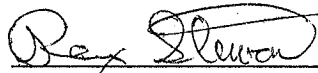
PROOF OF SERVICE

I, the undersigned, do HEREBY CERTIFY that I caused true and correct copies of
NOTICE OF APPEAL served upon by either hand delivery or United States mail, postage
prepaid, in an envelope addressed to the following:

Clerk of the Court
Fourth Judicial District
Utah County, State of Utah

Kay Bryson #0473
Utah County Attorney
100 East Center, Suite 2100
Provo, UT 84606

Dated this 12th day of September, 2003.


Server

FILED
Utah Court of Appeals

OCT - 3 2003

Paulette Stagg
Clerk of the Court

Calvin-Paul :Stewart, Inmate #35197
Uinta 3 - 106B
c/o Utah State Prison
P.O. Box 250
Draper, Utah 84020

IN THE UTAH COURT OF APPEALS

CALVIN PAUL STEWART,)	
Appellant/Defendant,	)	MOTION FOR ENLARGEMENT
	)	OF TIME TO FILE
	)	DOCKETING STATEMENT
vs.)	
)	
	)	Appellate Case No. <u>20030757</u>
STATE OF UTAH	)	Criminal No. <u>0011403597</u>
Appellee/Plaintiff.)	
)	

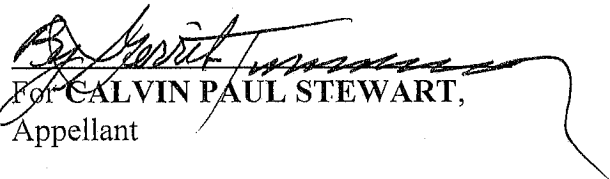
COMES NOW Appellant, CALVIN PAUL STEWART, to respectfully move this Court pursuant U.R.A.P., Rule 23 for an enlargement of time beyond the October 3, 2003 deadline, under U.R.A.P., Rule 22(b), in order to complete Appellant's docketing statement, for the following herein stated causes:

1. Appellant is an inmate at the Utah State Prison facility, undergoing new inmate procedures of orientation with little or no present opportunity to prepare a docketing statement within the time limit prescribed by rule;
2. Appellant is not a Bar attorney and not formally trained in technical and procedural

matters of this scope, has limited access to legal materials and codes for necessary information required in the appeal and requires more time to file the docketing statement;

3. Appellant prays this Court grant an enlargement of time of an additional 30-days or such other relief as the court deems appropriate to afford Appellant a meaningful opportunity for appeal;
4. Appellant also requests appropriate considerations provided for under U. R. App. P., Rule 4(f);
5. This is the first request for consideration of enlargement of time to file the docketing statement;
6. The time the docketing statement is anticipated for completion is 2 November 2003.

THE FOREGOING is respectfully submitted and dated this 3rd day of October, 2003.


For CALVIN PAUL STEWART,
Appellant

Attachments:

Letter of Deputy Clerk Maren Larson dated September 19, 2003.

Utah Court of Appeals

OCT - 8 2003

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

---○○○---

State of Utah,

Appellee,

V.

Calvin Paul Stewart,

Appellant.

ORDER

Case No. 20030757-CA

This matter is before the court upon Appellant's motion, filed October 3, 2003, for an extension of time to file the docketing statement.

The court generally grants requests for extensions of time to file docketing statements in 15 day increments. Appellant should note that, under the terms of Rule 9, Utah Rules of Appellate Procedure, the docketing statement is a comparatively simple document. Unlike the brief which will be filed later, it is not intended to detail the factual or legal basis of the appeal. Instead, its purpose is to inform the court generally about the appeal in order that the court may consider summary disposition and establish a preliminary calendar assignment. The docketing statement is, therefore, critical in the early stages of an appeal and the court is reluctant to prolong the time before it has the benefit of the docketing statement.

IT IS HEREBY ORDERED that Appellant is granted an extension of time to November 2, 2003, to file the docketing statement. Appellant should anticipate that no further extension of time will be granted for filing the docketing statement.

Dated this 5th day of October, 2003.

FOR THE COURT:

Norman H. Jackson,
Presiding Judge

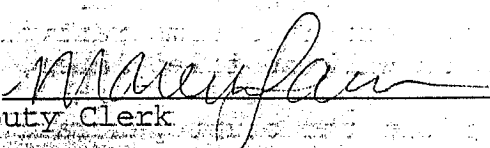
CERTIFICATE OF MAILING

I hereby certify that on October 8, 2003, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

J. FREDERIC VOROS, JR.
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

CALVIN PAUL STEWART 35197
UTAH STATE PRISON
PO BOX 250
DRAPER UT 84020

Dated this October 8, 2003.

By 
Deputy Clerk

Case No. 20030757

NOV - 7 2003

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

State of Utah,	)	SUA SPONTE MOTION FOR
	)	SUMMARY DISPOSITION
Plaintiff and Appellee,)	
)	
v.	)	Case No. 20030757-CA
)	
Calvin Paul Stewart,)	
)	
Defendant and Appellant.)	


TO THE ABOVE PARTIES AND/OR THEIR ATTORNEYS:

A docketing statement has been filed with the Court of Appeals in the above-captioned case. This appeal is being considered for summary disposition on the basis that it appears that no substantial question is presented. See Utah R. App. P. 10(e).

In lieu of a brief, the parties shall file a memorandum, not to exceed ten pages, explaining why summary disposition should, or should not, be granted by the court. Failure to file a memorandum may result in granting of the motion.

An original and four copies of the memorandum should be filed with the clerk of the Utah Court of Appeals on or before November 20, 2003.

DATED this 7th day of November, 2003.



Norman H. Jackson,
Presiding Judge

CERTIFICATE OF MAILING

I hereby certify that on November 7, 2003, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

J. FREDERIC VOROS, JR.
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

CALVIN PAUL STEWART 35197
UTAH STATE PRISON
PO BOX 250
DRAPER UT 84020

Dated this November 7, 2003.

By 
Deputy Clerk

Case No. 20030757

Norman H. Jackson
Presiding Judge
Judith M. Billings
Associate Presiding Judge
Russell W. Bench
Judge
James Z. Davis
Judge
Pamela T. Greenwood
Judge
Gregory K. Orme
Judge
William A. Thorne, Jr.
Judge

Utah Court of Appeals

450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230

Appellate Clerks' Office (801) 578-3900
Judges' Reception (801) 578-3950
FAX (801) 578-3999
TDD (801) 578-3940



Marilyn M. Branch
Appellate Court Administrator

Paulette Stagg
Clerk of the Court

November 25, 2003

J. FREDERIC VOROS, JR.
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

CALVIN PAUL STEWART #35197
UTAH STATE PRISON
PO BOX 250
DRAPER UT 84020

RE: State v. Stewart, Case No. 20030757-CA

Dear Counsel:

Judge Gregory K. Orme's spouse, Kristina Kindl Orme, is an assistant attorney general in the Education Division of the Utah Attorney General's office. She works primarily with various state-sponsored student loan programs, on behalf of such entities as the Board of Regents, the Utah Higher Education Assistance Authority, and the University of Utah. She does not now nor has she ever worked in the section of the Attorney General's office responsible for this case. To the best knowledge of Judge Orme, she does not have a close association, personally or professionally, with any assistant attorney general having responsibility for this matter. In accordance with the Ethics Opinion, a copy of which is enclosed, Judge Orme discloses the foregoing although he does not believe his disqualification is required.

Should counsel or their client(s) have a contrary view about the propriety of Judge Orme participating in the management or decision of this appeal, "any action they deem appropriate" should be taken within the next twenty days.

Very truly yours,

A handwritten signature in cursive script that reads "Paulette Stagg".
Paulette Stagg
Clerk of the Court

Enclosure

FILED
Utah Court of Appeals
NOV 24 2003
Paulette Stagg
Clerk of the Court

CALVIN PAUL STEWART, Inmate #35179
BIRCH 223B
CENTRAL UTAH CORRECTIONAL FACILITY
PO BOX 550
GUNNISON, UT 84634

IN THE UTAH COURT OF APPEALS

CALVIN PAUL STEWART,)	
Appellant/Defendant,	)	MOTION FOR LEAVE TO ENTER
	)	FOR GOOD CAUSE
vs.	)	MEMORANDUM IN SUPPORT
	)	OF WHY SUMMARY DISPOSITION
	)	SHOULD NOT BE GRANTED
)	
STATE OF UTAH	)	Appellate Case No. <u>20030757</u>
Appellee/Plaintiff.	)	Criminal No. <u>0011403597</u>
)	

Appellant/Defendant styled, CALVIN PAUL STEWART™ (TOTAL CAPS), a cestui que passive trust by and through Calvin-Paul :Stewart®, Agent (“Agent”), enters this Motion for Leave to Enter for Good Cause Memorandum in Support of Why Summary Disposition Should Not Be Granted.

On the Court’s Sua Sponte Motion for Summary Disposition, as attached, defendant was noticed that due to defendant’s apparent lack of presentation of substantial questions for review pursuant Utah R. App. P. 10(e), the parties shall file a memorandum on or before November 20, 2003, explaining why summary disposition should or should not be granted.

Due to exigent circumstances beyond the control of the appellant, appellant was unable to

comply with the November 20th deadline.

Appellant has been subjected to a secondary trial during the interim of this appeal and has been shuttled back and forth between the Third District Court in Salt Lake City and the Utah State Prison facility at Draper until October 24, 2003, making it difficult for appellant to comply with appeal deadlines. Just after filing of the appellant's rushed docketing statement, November 3, 2003, appellant was transferred to the Central Utah Correctional Facility at Gunnison, Utah and mail sent to appellant was slow to follow. Appellant did not receive the Court of Appeals November 7th Sua Sponte Motion For Summary Disposition until November 17, 2003. The short notice imposed an impossibility for compliance upon appellant.

Appellant is not an attorney and has few resources to rely upon for assistance with compliance with the letter of the appeals rules. If appellant's docketing statement did not state with specificity substantial questions for review, it is due to innocent neglect.

Appellant, for the above good cause(s) and in the interest of justice prays for relief from the November 20, 2003 deadline and requests leave to file a Memorandum in Support of Why Summary Disposition Should Not Be Granted, as attached and incorporated herewith.

DATED this 24th day of November, 2003 A.D.


For CALVIN PAUL STEWART, Appellant

Attachment: Sua Sponte Motion for Summary Disposition

CALVIN PAUL STEWART, Inmate #35179
BIRCH 223B
CENTRAL UTAH CORRECTIONAL FACILITY
PO BOX 550
GUNNISON, UT 84634

IN THE UTAH COURT OF APPEALS

CALVIN PAUL STEWART,)	
Appellant/Defendant,	)	MEMORANDUM IN SUPPORT
	)	OF WHY SUMMARY DISPOSITION
vs.	)	SHOULD NOT BE GRANTED
)	
	)	Appellate Case No. <u>20030757</u>
STATE OF UTAH	)	Criminal No. <u>0011403597</u>
Appellee/Plaintiff.)	
)	

Appellant/Defendant styled, CALVIN PAUL STEWART™ (TOTAL CAPS), a cestui que passive trust by and through Calvin-Paul :Stewart®, Agent (“Agent”), enters this Memorandum in Support of Why Summary Disposition Should Not Be Granted as follows:

MEMORANDUM

FACTS

1. Appellant is incarcerated in the Central Utah Correctional Facility at Gunnison, Utah;
2. Appellant is not an attorney;
3. Due to exigent circumstances beyond the control of the appellant, appellant was unable to comply with the November 20th deadline imposed for the filing of this memorandum.

4. Appellant files this memorandum pursuant motion and request made for good cause upon the Utah Court of Appeals for leave to allow the filing of this memorandum;
5. Appellant's docketing statement did not state with specificity substantial questions for review due to innocent neglect.

ARGUMENT

Appellant has been subjected to a secondary trial during the interim of this appeal and has been shuttled back and forth between the Third District Court in Salt Lake City and the Utah State Prison facility at Draper until October 24, 2003, making it difficult for appellant to comply with appeal deadlines. Just after filing of the appellant's rushed docketing statement, November 3, 2003, appellant was transferred to the Gunnison Correctional Facility and mail sent to appellant was slow to follow. Appellant did not receive the Court of Appeals November 7th Sua Sponte Motion For Summary Disposition until November 17, 2003. The short notice imposed an impossibility for compliance by the November 20, 2003 deadline of the filing of a memorandum explaining why summary disposition should not be granted by the court.

The notice to appellant by presiding judge Norman H. Jackson, that "[t]his appeal is being considered for summary disposition on the basis that it appears that no substantial question is presented", would seem to be displaced in view of what would be fair, regardless of Utah R. App. P. 10(e). Appeal would not be fairly subject to summary disposition for dismissal without first allowing appellant an opportunity to amend the docketing statement.

Agent for appellant is not an attorney and has limited knowledge and few resources to rely upon for assistance with compliance with the letter of the appeals rules. Appellant should not be held to the same standard as an attorney. It has be held that “pro se” pleadings are held to a less stringent standard than those drafted by lawyers, *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 595-96 (1972), and that unless it is clear that no amendment can cure its defects, “the preferred practice is to accord ...notice and an opportunity to amend.” *Mckinney v. State of Okla.*, 925 F.2d 363, 365 (10th Cir. 1991).

If appellant’s docketing statement did not state with specificity substantial questions for review, in question form, it is due to innocent neglect. Indeed, the substance of each of appellant’s question(s) for review is imbedded in the “Issues on Appeal”, beginning at item 7, page 4 of 15, in appellant’s docketing statement, and pervasive in each of the issues delineated as (a)First Issue, (b) Second Issue, and (c) Third issue, ending on page 12 of 15. Dismissal without an opportunity to amend is an appearance of court’s preference of form over function and denial of due process of law and opportunity to be heard.

The substance of issues (a), (b) and (c) above if restated in the form of a question may be substantially stated as follows:

QUESTION PRESENTED FOR REVIEW ON FIRST ISSUE: Where the captioned defendant styled, CALVIN PAUL STEWART™ (TOTAL CAPS), a cestui que passive trust by and through Calvin-Paul :Stewart®, Agent (“Agent”), gave notice of such

representative capacity via specific negative averment, and without waiver of substantial rights, timely entered Notice of Claim to Foreign Sovereign Immunity with Memorandum in Support and Affidavit of CALVIN PAUL STEWART to the court of first instance.

And, where such court is limited by statute to exercise jurisdiction to within “this state” of Utah, pursuant U.C.A. §78-3-20(4), which state is a foreign state to defendant’s state of declared domicile and is subject to the legislative authority of the United States. And, where a all defendant’s appearances by and through Agent were made de bene esse to answer over to the inquiries of such foreign court under a claim of immunity, not submitting to *in personam* jurisdiction or the territorial jurisdiction of such court. And, where defendant made appearance pursuant Title 28 U.S.C.A. §1330(c) as provided by Title 28 U.S.C. §1602 to claim immunity from the jurisdiction of courts of the United States and of the States as provided at §1604. Did the court err by not disposing of the issue of defendant’s status as a foreign sovereign under a claim of immunity to courts of this state in an evidentiary hearing for determination in conformity with the principles set forth in Chapter 97, Title 28 U.S.C. as provided by §1602?

QUESTION PRESENTED FOR REVIEW ON SECOND ISSUE: Where the defendant by and through Agent gave actual notice, in form of a specific negative averment, of plaintiff’s lack of capacity to sue the defendant, an instrumentality of a foreign sovereign, i.e., an American sovereign recognized by treaty. And, where plaintiff recited no waiver

of immunity by defendant, by and through Agent, and made no averment specifically by affidavit or otherwise as to an act which would subject defendant to a statutory exception, it would appear no effectual grant of jurisdiction may be presumed to exist over the person of the defendant and the subject matter. And, where the fundamental and initial inquiry of a court is always to determine its own jurisdictional authority over the subject matter of the claims asserted, did the trial judge err in the court's failure to dismiss the action on Agent for defendant's motion or in the alternative, on court's sua sponte motion?

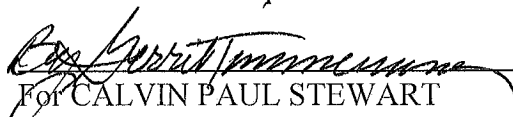
QUESTION PRESENTED FOR REVIEW ON THIRD ISSUE: Where defendant by and through Agent made appearance reserving all rights pursuant the condition precedent of trial court's finding that defendant did not have a bona fide claim to foreign sovereign immunity and that the trial court was sustained as to in personam and subject matter jurisdiction in going forward to trial, which was not met. And, and where Agent for defendant, under necessity against trial judge's apparent usurpation of in personam and subject matter jurisdiction, then moved trial court to dismiss the complaint without trial because the defendant is entitled, pursuant to U.S.Const., Amendment VI and Utah Const. Art. I, Sec. 12 and §77-1-6 (1) (f) and (1)(h), Utah Code Ann. (1980), to a speedy trial as well as unreasonable delay under U. R. Crim. P., Rule 25(d). Wherefore, under the Utah Code of Criminal Procedure, when the Defendant is not brought to trial within the

prescribed statutory time period, and under Utah Rules of Criminal Procedure, when there is unreasonable delay of trial and where defendant demonstrated that 21 months passed after the defendant first learned of charges of securities offenses, then an additional 20 months passed until defendant was first charged in district court with securities offenses, then an additional 10 months passed after arraignment before commencement of trial, did the trial court err in failing to dismiss plaintiff's action without trial?

RELIEF

Appellant, for the above good cause(s) and in the interest of justice prays for relief from the November 20, 2003 deadline and the granting of leave to file this Memorandum in Support of Why Summary Disposition Should Not Be Granted, and requests incorporation of the above questions for review as stated, as amendment to appellant's docketing statement of November 3, 2003, or such other relief as is appropriate to amendment.

DATED this 24th day of November, 2003 A.D.


For CALVIN PAUL STEWART
Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion for Leave to Enter for Good Cause Memorandum in Support of Why Summary Disposition Should Not Be Granted with Memorandum in Support of Why Summary Disposition Should Not Be Granted was mailed by first class mail this 24th day of November to the following:

J. FREDERIC VOROS, JR.
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

DATED this 24th day of November, 2003.

By: 
(SERVER)

Norman H. Jackson, Judge

CERTIFICATE OF MAILING

I hereby certify that on March 9, 2004, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

JEANNE B. INOUE
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

CALVIN PAUL STEWART 35197
UTAH STATE PRISON
PO BOX 250
DRAPER UT 84020

Dated this March 9, 2004.

By Maren Larson
Deputy Clerk

Case No. 20030757

Judith M. Billings
Presiding Judge
Russell W. Bench
Associate Presiding Judge
James Z. Davis
Judge
Pamela T. Greenwood
Judge
Norman H. Jackson
Judge
Gregory K. Orme
Judge
William A. Thorne, Jr.
Judge

Utah Court of Appeals

450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230

Appellate Clerks' Office (801) 578-3900
Judges' Reception (801) 578-3950
FAX (801) 578-3999
TDD (801) 578-3940



Marilyn M. Branch
Appellate Court Administrator

Paulette Stagg
Clerk of the Court

March 9, 2004

FOURTH DISTRICT, PROVO DEPT
ATTN: MARILYN NEAL
125 N 100 W
PROVO UT 84603

RE: State v. Stewart
Appellate Case No. 20030757
Trial Court Case No. 011403597

Dear Appeals Clerk:

Our office is in receipt of the enclosed record. The record is being returned to you for the following reason:

The record was borrowed and is now being returned so that it can be paginated and indexed. Please prepare and transmit the record to this court as soon as possible.

If you have any questions, please feel free to contact me at 578-3900.

Sincerely,

Maren Larson
Deputy Clerk

Enclosure

Judith M. Billings
Presiding Judge
Russell W. Bench
Associate Presiding Judge
James Z. Davis
Judge
Pamela T. Greenwood
Judge
Norman H. Jackson
Judge
Gregory K. Orme
Judge
William A. Thorne, Jr.
Judge

Utah Court of Appeals

450 South State Street
P.O. Box 140230
Salt Lake City, Utah 84114-0230
Appellate Clerks' Office (801) 578-3900
Judges' Reception (801) 578-3950
FAX (801) 578-3999
TDD (801) 578-3940



Marilyn M. Branch
Appellate Court Administrator
Paulette Stagg
Clerk of the Court

March 22, 2004

Calvin Paul Stewart 35197
Utah State Prison
P.O. Box 250
Draper UT 84020

RE: State v. Stewart

Appellate Case No. 20030757

Dear Mr. Stewart:

The record concerning this appeal has been filed in this court and is on file for your use in preparing your brief. The matter may now proceed to briefing.

Pursuant to Rules 13 and 26 of the Utah Rules of Appellate Procedure, appellant's brief must be served and filed on or before May 4, 2004. This due date takes into consideration the additional time allowed by Rule 22(d) of the Utah Rules of Appellate Procedure.

Parties are advised to refer to Rules 24, 26 and 27, of the Utah Rules of Appellate Procedure for content and format requirements. These rules are strictly enforced and the brief may be returned pursuant to Rule 27(d) if the requirements are not met.

All parties are specifically advised that the typeface requirements of Rule 27(b), will be strictly enforced and noncomplying briefs will be rejected. A proportionally spaced typeface must be 13-point or larger for text and footnotes. A monospaced typeface may not contain more than ten characters per inch for both text and footnotes.

Parties may request oral argument and/or a published decision by so indicating at the bottom on the cover of their brief. The court will not formally respond to such requests, but will consider the same during its regular calendaring process.

Please note, failure to perfect an appeal at any time during the appeal process may result in dismissal of the appeal.

Sincerely,

Maren Larson

Maren Larson
Deputy Clerk

cc: JEANNE B. INOUE

FILED 3/15/04
Fourth Judicial District Court
of Utah County, State of Utah

Ann D. [unclear]

4TH DISTRICT COURT - PROVO
STATE OF UTAH

STATE OF UTAH
Plaintiff
vs.
PAUL STEWART
Defendant

JUDGMENT ROLL AND INDEX

Civil No: 011403597

Appellate No: *20030757-CA*

STATE OF UTAH)

: ss.

COUNTY OF UTAH)

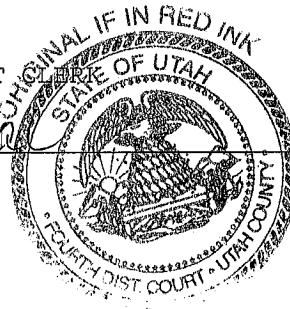
I, MARILYN W NEAL, Deputy Clerk of the District Court of the
4TH DISTRICT COURT - PROVO, State of Utah, do hereby certify that the attached
papers constitute the Judgment Roll and Index and other papers in the
above-entitled action; that the following is a list of said papers:

Refer to the attached document list

WITNESS MY HAND THE SEAL OF THIS Court, affixed at
my office in 4TH DISTRICT COURT - PROVO, STATE OF UTAH, this 15 day
of March, 2004.

DISTRICT COURT

By *M. Neal*
Deputy Clerk



000705

In the Fourth Judicial District Court Of Utah County
State of Utah

STATE OF UTAH,

Appellee,

vs

CALVIN PAUL STEWART,

Appellant.

Case No. 001403597

Utah Court of Appeals No. 20030757-CA

Judge Anthony W. Schofield

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IN THE UTAH COURT OF APPEALS

----ooOoo----

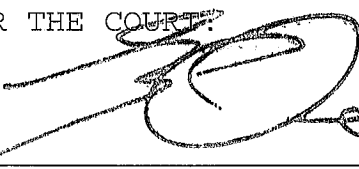
State of Utah,)	
)	
Plaintiff and Appellee,)	
)	ORDER OF DISMISSAL
v.)	
	)	Appellate Case No. 20030757-CA
Calvin Paul Stewart,)	
)	
Defendant and Appellant.)	

Before Judges Orme, Greenwood, and Bench.

For failure of Appellant to file the Appellant's brief within the time permitted by Utah R. App. P. 26(a), which time expired on May 4, 2004, IT IS HEREBY ORDERED that the appeal is dismissed, see Utah R. App. P. 3(a); provided, however, that if the Appellant's brief is submitted within ten (10) days from the date hereof, the appeal shall be thereby reinstated without further order of the court.

Dated this 2nd day of June, 2004.

FOR THE COURT



Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of June, 2004, a true and correct copy of the foregoing ORDER OF DISMISSAL was deposited in the United States mail to the parties listed below:

JEANNE B. INOUE
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

CALVIN PAUL STEWART #35179
CUCF
PO BOX 550
GUNNISON UT 84634

Dated this 2nd day of June, 2004.

By Maren Larson
Deputy Clerk

Case No.: 20030757-CA
FOURTH DISTRICT, PROVO DEPT, #011403597

In the UTAH COURT OF APPEALS

CALVIN PAUL STEWART
Appellant/Defendant

NOTICE

vs.

STATE OF UTAH
Appellee/Plaintiff

Case # 20030757

Comes Now, Agent Calvin-Paul:Stewart for and behalf
of defendant trust, CALVIN PAUL STEWART, to give
Court notice of address change:

CALVIN PAUL STEWART 35179
Central Utah Correctional Facility
PO BOX 550
Gunnison, Utah 84634

Please state on envelope, "Legal Material" to expedite
a timely delivery.

Dated this 17th day of March, 2004.

Calvin-Paul:Stewart
Calvin-Paul:Stewart, Agent for
Defendant CALVIN PAUL STEWART

IN THE UTAH COURT OF APPEALS

FILED
UTAH APPELLATE COURTS
AUG / 3 2004

-----ooOoo-----

State of Utah,

Plaintiff and Appellee,

v.

Calvin Paul Stewart,

Defendant and Appellant.

)
)
) REMITTITUR
) Appellate Case No. 20030757-CA
)
) FOURTH DISTRICT, PROVO DEPT
) Trial Court Case No.:
) 011403597
)

The above-entitled case was submitted to the court for decision and the order has been issued.

Order Issued: June 2, 2004

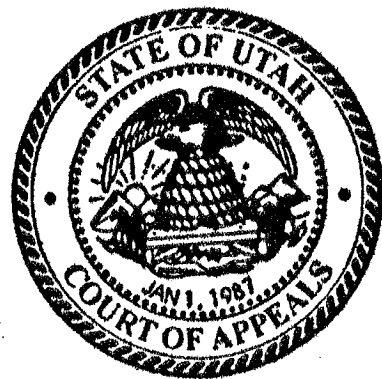
Remittitur Issued: August 3, 2004

Record: VOL - 4, ENV - 3, EXH - 0

Paulette Stagg
Paulette Stagg
Clerk of Court

BY Maren Larson
Maren Larson
Deputy Clerk

Date Aug 3, 2004



CERTIFICATE OF MAILING

I hereby certify that on August 3, 2004, a true and correct copy of the foregoing REMITTITUR was deposited in the United States mail to the parties listed below:


JEANNE B. INOUE
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

CALVIN PAUL STEWART 35179
CUCF
PO BOX 550
GUNNISON UT 84634

And a true and correct copy of the foregoing REMITTITUR /was deposited in the United States mail to the trial court listed below:

FOURTH DISTRICT, PROVO DEPT
ATTN: MARILYN NEAL
125 N 100 W
PROVO UT 84603

Dated this August 3, 2004.

By 
Maren Larson
Deputy Clerk

Case No.: 20030757-CA
FOURTH DISTRICT, PROVO DEPT, #011403597

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH vs. PAUL STEWART

CASE NUMBER 011403597 State Felony

CHARGES

Charge 1 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 2 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 3 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 4 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 5 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 6 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 7 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 8 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 9 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 10 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Dismissed
Charge 11 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Dismissed
Charge 12 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Dismissed
Charge 13 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 14 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 15 - 61-1-3 - UNREGISTERED SECURITIES AGENT

FILED
UTAH APPELLATE COURTS

MAR 17 2004

20030757CA

3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 16 - 61-1-1 - SECURITIES FRAUD
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Dismissed
Charge 17 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Dismissed
Charge 18 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony
Disposition: June 25, 2003 Dismissed
Charge 19 - 61-1-1 - SECURITIES FRAUD (amended)
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 20 - 61-1-1 - SECURITIES FRAUD (amended)
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 21 - 61-1-7 - SALE OF UNREGISTERED SECURITY
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 22 - 61-1-3 - UNREGISTERED SECURITIES AGENT
3rd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty
Charge 23 - 76-10-1603 - PATTERN OF UNLAW ACTIVITY
2nd Degree Felony Plea: July 05, 2002 Not Guilty
Disposition: June 25, 2003 Guilty

CURRENT ASSIGNED JUDGE
ANTHONY W. SCHOFIELD

PARTIES

Plaintiff - STATE OF UTAH

Defendant - PAUL STEWART
723 E Draper View Dr
Draper, UT

Represented by: RICHARD P MAURO

Also Known As - CALVIN PAUL STEWART

DEFENDANT INFORMATION

Defendant Name: PAUL STEWART
Date of Birth: October 05, 1947
Law Enforcement Agency: COUNTY ATTORNEY
Prosecuting Agency: UTAH COUNTY

Violation Date: January 26, 2001

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	843.50
	Amount Paid:	843.50
	Credit:	0.00
	Balance:	0.00

BAIL/CASH BONDS	Posted:	210.00
	Applied:	0.00
	Forfeited:	210.00
	Balance:	0.00

TRUST TOTALS	Trust Due:	210.00
	Amount Paid:	210.00
	Credit:	0.00
	Trust Balance Due:	0.00
	Balance Payable:	0.00

REVENUE DETAIL - TYPE: VIDEO TAPE COPY

	Amount Due:	15.00
	Amount Paid:	15.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

	Amount Due:	8.50
	Amount Paid:	8.50
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: POSTAGE-COPIES

	Amount Due:	3.00
	Amount Paid:	3.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: REPORTER FEES

	Original Amount Due:	104.00
	Amended Amount Due:	0.00
	Amount Paid:	0.00
	Amount Credit:	0.00
	Balance:	0.00

Account Adjustments

Date	Amount	Reason
Feb 04, 2003	-104.00	Reversal of transaction which

created the account.

REVENUE DETAIL - TYPE: REPORTER FEES

Amount Due:	104.50
Amount Paid:	104.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFIED COPIES

Amount Due:	2.00
Amount Paid:	2.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFICATION

Amount Due:	4.00
Amount Paid:	4.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: VIDEO TAPE COPY

Original Amount Due:	15.00
Amended Amount Due:	0.00
Amount Paid:	0.00
Amount Credit:	0.00
Balance:	0.00

Account Adjustments

Date	Amount	Reason
Jun 27, 2003	-15.00	Reversal of transaction which created the account.

REVENUE DETAIL - TYPE: REPORTER FEES

Amount Due:	15.00
Amount Paid:	15.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	6.50
Amount Paid:	6.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: REPORTER FEES

Original Amount Due:	525.00
Amended Amount Due:	0.00
Amount Paid:	0.00
Amount Credit:	0.00

Balance: 0.00

Account Adjustments

Date	Amount	Reason
Sep 24, 2003	-525.00	Reversal of transaction which created the account.

REVENUE DETAIL - TYPE: VIDEO TAPE COPY

Original Amount Due:	15.00
Amended Amount Due:	0.00
Amount Paid:	0.00
Amount Credit:	0.00
Balance:	0.00

Account Adjustments

Date	Amount	Reason
Aug 15, 2003	-15.00	Reversal of transaction which created the account.

REVENUE DETAIL - TYPE: REPORTER FEES

Original Amount Due:	15.00
Amended Amount Due:	0.00
Amount Paid:	0.00
Amount Credit:	0.00
Balance:	0.00

Account Adjustments

Date	Amount	Reason
Sep 24, 2003	-15.00	Reversal of transaction which created the account.

REVENUE DETAIL - TYPE: REPORTER FEES

Original Amount Due:	145.00
Amended Amount Due:	0.00
Amount Paid:	0.00
Amount Credit:	0.00
Balance:	0.00

Account Adjustments

Date	Amount	Reason
Sep 24, 2003	-145.00	Reversal of transaction which created the account.

REVENUE DETAIL - TYPE: CERTIFIED COPIES

Amount Due:	3.50
Amount Paid:	3.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	8.00
Amount Paid:	8.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFICATION

Amount Due:	8.00
Amount Paid:	8.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFIED COPIES

Amount Due:	3.00
Amount Paid:	3.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFICATION

Amount Due:	4.00
Amount Paid:	4.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	7.00
Amount Paid:	7.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: REPORTER FEES

Amount Due:	475.00
Amount Paid:	475.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: REPORTER FEES

Amount Due:	142.00
Amount Paid:	142.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: REPORTER FEES

Amount Due:	34.50
Amount Paid:	34.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: REPORTER FEES

Original Amount Due:	142.00
Amended Amount Due:	0.00
Amount Paid:	0.00
Amount Credit:	0.00
Balance:	0.00

Account Adjustments

Date	Amount	Reason
Oct 27, 2003	-142.00	Reversal of transaction which created the account.

BAIL/CASH BOND DETAIL - TYPE: BAIL

Posted By:	PARR WADDOUPS BROWN GEE
Posted:	50.00
Forfeited:	0.00
Refunded:	50.00
Balance:	0.00

BAIL/CASH BOND DETAIL - TYPE: BAIL

Posted By:	TRACEY WALPOLE
Posted:	3.00
Forfeited:	0.00
Refunded:	3.00
Balance:	0.00

BAIL/CASH BOND DETAIL - TYPE: BAIL

Posted By:	TRACEY WALPOLE
Posted:	15.00
Forfeited:	0.00
Refunded:	15.00
Balance:	0.00

BAIL/CASH BOND DETAIL - TYPE: BAIL

Posted By:	BRENT YOUNG
Posted:	142.00
Forfeited:	0.00
Refunded:	142.00
Balance:	0.00

TRUST DETAIL

Trust Description:	Bail/Bond Refund
Recipient:	BRENT YOUNG
Amount Due:	142.00
Paid In:	142.00
Paid Out:	142.00

TRUST DETAIL

Trust Description:	Bail/Bond Refund
Recipient:	PARR WADDOUPS BROWN GEE

Amount Due:	50.00
Paid In:	50.00
Paid Out:	50.00

TRUST DETAIL

Trust Description:	Bail/Bond Refund
Recipient:	TRACEY WALPOLE
Amount Due:	15.00
Paid In:	15.00
Paid Out:	15.00

TRUST DETAIL

Trust Description:	Bail/Bond Refund
Recipient:	TRACEY WALPOLE
Amount Due:	3.00
Paid In:	3.00
Paid Out:	3.00

PROCEEDINGS

08-31-01 Judge HARDING assigned. amykm
08-31-01 Filed: Affidavit Of Probable Cause In Support Of Arrest Warrant amykm
08-31-01 Warrant ordered on: August 31, 2001 Warrant Num: 985032910 Cash
Bail Only amykm
Bail amount: 15000.00
08-31-01 Warrant issued on: August 31, 2001 Warrant Num: 985032910 Cash
Bail Only amykm
Bail amount: 15000.00
Judge: ANTHONY W. SCHOFIELD
Issue reason: Based on the probable cause statement.
08-31-01 Case filed by amykm amykm
09-07-01 Warrant recalled on: September 07, 2001 Warrant num: 985032910
Recall reason: Warrant recalled because defendant was
booked.
09-07-01 Minute Entry - Minutes for SURRENDER/REVIEW BENCH WARRA tippyl
Judge: RAY HARDING
PRESENT
Clerk: tippyl
Prosecutor: TAYLOR, TIMOTHY L
Defendant
Defendant's Attorney(s): MAURO, RICHARD P

Video

Tape Number: 40 Tape Count: 9:35

HEARING

The defendant surrenderst to the court on the warrant. The Court will order bail to be reduced to \$5000 cash/bond/surety and order

the defendant to surrender to the Utah County Jail today. The matter is set for a Waiver hearing.

WAIVE PRELIM HEARING is scheduled.

Date: 10/01/2001

Time: 10:00 a.m.

Location: Third floor, Rm 302
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: RAY HARDING

CUSTODY

The defendant is ordered to the UTAH COUNTY jail.

Defendant's release from custody on bail.

Bail is reduced to \$5000 cash/bond/surety and the defendant is ordered to surrender at the Utah County Jail today.

Bail set 5000.00.

09-11-01	Filed: Discovery Request	tippyl
09-11-01	Filed: Appearance of Counsel/ATD Richard P. Mauro	tippyl
09-11-01	Filed: Bail Commissioner's Release Form (PTA 10/01/01 10am - B&B Bail Bonds \$5000)	tippyl
09-16-01	FELONY FIRST APPEARANCE scheduled on October 01, 2001 at 10:00 AM in Third floor, Rm 302 with Judge HARDING.	tippyl
09-19-01	WAIVE PRELIM HEARING scheduled on October 01, 2001 at 10:00 AM in Third floor, Rm 302 with Judge HARDING.	tippyl
10-01-01	Minute Entry - Minutes for Law & Motion Judge: RAY HARDING PRESENT Clerk: tippyl Prosecutor: LARSON, CURTIS L Defendant	tippyl

Video

Tape Number: 44 Tape Count: 10:08

HEARING

The matter is continued.

WAIVE PRELIM HEARING is scheduled.

Date: 10/15/2001

Time: 10:00 a.m.

Location: Third floor, Rm 302
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: RAY HARDING

10-01-01	WAIVE PRELIM HEARING scheduled on October 15, 2001 at 10:00 AM in Third floor, Rm 302 with Judge HARDING.	tippyl
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10-09-01 Filed return: Warrant of Arrest tippyl
Service Type: Personal

10-15-01 Minute Entry - Minutes for Waive Prelim Hearing tippyl
Judge: RAY HARDING
PRESENT
Clerk: tippyl
Prosecutor: STURGILL, DAVID S.
Defendant not present

Video
Tape Number: 45 Tape Count: 10:53

HEARING

Stipulation to a continuance.
WAIVE PRELIM HEARING.
Date: 10/29/2001
Time: 10:00 a.m.
Location: Third floor, Rm 302
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: RAY HARDING

10-15-01 WAIVE PRELIM HEARING scheduled on October 29, 2001 at 10:00 AM
in Third floor, Rm 302 with Judge HARDING. tippyl

10-19-01 Filed: Undertaking of Bail (revoked) shonay

10-24-01 Filed order: Transportation Order keris
Judge gstott
Signed October 24, 2001

10-29-01 Minute Entry - Minutes for Waive Prelim Hearing tippyl
Judge: RAY HARDING
PRESENT
Clerk: tippyl
Prosecutor: TAYLOR, TIMOTHY L
Defendant not present
Defendant's Attorney(s): MAURO, RICHARD P

Video
Tape Number: 47 Tape Count: 11:04

HEARING

Mr. Mauro request a continuance with no objections. The Court
grants the motion.

WAIVE PRELIM HEARING.
Date: 11/05/2001
Time: 08:30 a.m.

Location: Third floor, Rm 302
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: RAY HARDING

10-31-01 WAIVE PRELIM HEARING scheduled on November 05, 2001 at 08:30 AM
in Third floor, Rm 302 with Judge HARDING.

tippyl
terik

10-31-01 Filed order: Transportation Order
Judge gburning
Signed October 31, 2001

11-05-01 Filed: Amended Information

marilynn

11-05-01 Charge 61-1-1 Sev F2 was amended to 61-1-1 Sev F2
11-05-01 Charge 61-1-7 Sev F3 was amended to 61-1-7 Sev F3
11-05-01 Charge 61-1-1 Sev F3 was amended to 61-1-3 Sev F3
11-05-01 Charge 61-1-7 Sev F3 was amended to 61-1-1 Sev F2
11-05-01 Charge 61-1-1 Sev F2 was amended to 61-1-1 Sev F2
11-05-01 Charge 61-1-21 Sev F3 was amended to 61-1-7 Sev F3
11-05-01 Charge 61-1-1 Sev F3 was amended to 61-1-3 Sev F3
11-05-01 Charge 61-1-7 Sev F3 was amended to 61-1-1 Sev F2
11-05-01 Charge 61-1-7 Sev F3 was amended to 61-1-7 Sev F3
11-05-01 Charge 61-1-7 Sev F3 was amended to 61-1-3 Sev F3
11-05-01 Charge 61-1-3 Sev was amended to 61-1-1 Sev F2
11-05-01 Minute Entry - Minutes for Arraignment

tippyl

Judge: RAY HARDING

PRESENT

Clerk: tippyl

Prosecutor: WAYMENT, DAVID H T

Defendant

Defendant's Attorney(s): MAURO, RICHARD P

Video

Tape Number: 48 Tape Count: 8:59

INITIAL APPEARANCE

A copy of the Information is given to the defendant.

Defendant waives reading of Information.

Advised of charges and penalties.

HEARING

An Amended Information is filed by the State and received and
accepted by the Court. The matter is set for a Waiver hearing.

The State will need to prepare a Transportation Order as the
defendant is in custody of the Adult Detention Center in Salt Lake
County.

WAIVE PRELIM HEARING is scheduled.

Date: 12/17/2001

Time: 10:00 a.m.

Location: Third floor, Rm 302

FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: RAY HARDING

11-05-01 WAIVE PRELIM HEARING scheduled on December 17, 2001 at 10:00 AM
in Third floor, Rm 302 with Judge HARDING.

tippyl

11-09-01 Filed order: Transportation Order--12/17/01 10am
Judge jharding
Signed November 09, 2001

tippyl

12-17-01 Minute Entry - Minutes for Waive Prelim Hearing
Judge: RAY HARDING

sherryt

PRESENT

Clerk: sherryt

Defendant

Video

Tape Number: 54

HEARING

This matter is set for a preliminary hearing.
PRELIMINARY HEARING is scheduled.

Date: 04/23/2002

Time: 01:30 p.m.

Location: Third floor, Rm 302

FOURTH DISTRICT COURT

125 N 100 W

PROVO, UT 84601

Before Judge: RAY HARDING

12-18-01 PRELIMINARY HEARING scheduled on April 23, 2002 at 01:30 PM in
Third floor, Rm 302 with Judge HARDING.

sherryt

04-08-02 PRELIMINARY HEARING rescheduled on June 24, 2002 at 01:00 PM
Reason: Counsel's request..

shonay

04-23-02 Filed: RULING

berniced

05-06-02 Filed return: Subpoena on return

berniced

Party Served: John Dixon

Service Type: Personal

Service Date: May 02, 2002

06-24-02 Minute Entry - Minutes for Preliminary Hearing

shonay

Judge: RAY HARDING

PRESENT

Clerk: shonay

Reporter: BEATTY, MICHELLE

Prosecutor: WAYMENT, DAVID H T

Defendant

Defendant's Attorney(s): MAURO, RICHARD P

HEARING

On record exclusionary rule is invoked. Witnesses are identified. Mr Keller and Mr Mauro object to witnesses being allowed to remain in the courtroom. Rule 615 is discussed. Court allows witness/victims to remain in the proceedings as well as Mr Tagerett Doug Whitney, UCSO is sworn and testifies for the State. Cross-exam by Mr Keller. Cross-exam by Mr Mauro. Re-direct by Mr Wayment. Richard Clayton is sworn and testifies for the State. Cross-exam by Mr Keller. Cross-exam by Mr Mauro. Re-direct by Mr Wayne

nt. Re-cross by Mr Keller. Ryan Keisell is sworn and testifies for the State. Cross-exam by Mr Keller. Cross-exam by Mr Mauro. Re-direct by Mr Wayment. Re-cross by Mr Keller. William Hunter is sworn and testifies for the State. Cross-exam by Mr Keller. Cross-exam by Mr Mauro. Re-cross by Mr Keller. Redirect by Mr Wayment. State's exhibit #1 mk,id,off'd objection by Mr Mauro, rec'd. Re-cross by Mr Keller. Jeff Hales is sworn and testifies for the State. Cross-exam by Mr Keller. Cross-exam by Mr Mauro. Re-direct by Mr Wayment. This matter is continued for completion to 7/3/02 at 11 a.m. Witnesses are ordered to appear without further notice.

CONTINUANCE OF PREL HEARING is scheduled.

Date: 07/03/2002

Time: 11:00 a.m.

Location: Third floor, Rm 302

FOURTH DISTRICT COURT

125 N 100 W

PROVO, UT 84601

Before Judge: RAY HARDING

06-27-02 CONTINUANCE OF PREL HEARING scheduled on July 03, 2002 at 11:00 AM in Third floor, Rm 302 with Judge HARDING.

shonay

06-27-02 Note: PRELIMINARY HEARING minutes modified.

shonay

07-03-02 Minute Entry - Minutes for Preliminary Hearing

berniced

Judge: RAY HARDING

PRESENT

Clerk: berniced

Reporter: BARKER, CREED

Prosecutor: WAYMENT, DAVID H T

Defendant

Defendant's Attorney(s): MAURO, RICHARD P

ARRAIGNMENT

Defendant waives reading of Information.

Advised of rights and penalties.

Defendant is arraigned.

Defendant enters "not guilty" pleas to all the charges boundover in the information. Case is set for a Scheduling Conference 8/6/02.

All parties are present. No further notice will be given.
HEARING

On record PAUL STEWART, Defendant present with Counsel Mr. Mauro.
Joseph Moffett sworn and testified on behalf of the state.

COUNT: 11:32

Mr. Keller cross-exam.

COUNT: 12:45

Lunch recess 1/2 hour. 1:20 Court resumes all parties are
present. Counsel Mr. Mauro cross-exam of Mr. Moffett. Re-direct
by Mr. Wayment. Re-cross Mr. Mauro. Witness excused.

Robert Sprong sworn and testified on behalf of the state. No
cross-exam. Witness excused.

COUNT: 1:47

LeeAnn Bailey sworn and testified on behalf of the State.

COUNT: 1:58

Cross-exam Mr. Keller, cross-exam Mr. Mauro.

COUNT: 2:10

Mr. Keller re-cross. Witness excused.

COUNT: 2:12

Leroy Condit sworn and testified on behalf of the State.

COUNT: 2:19

Mr. Keller cross-exam.

COUNT: 2:32

Clyde Johnson sworn and testified on behalf of the State.

COUNT: 2:40

Mr. Keller cross-exam.

COUNT: 3:01

Troy Naylor sworn and testified on behalf of the State. 3:11
cross-exam Mr. Keller. 3:18 cross-exam mr. Mauro. Witness
excused.

State offers affidavits of investors not present. State's
exhibit's #2 & #3. Mr. Keller objects to the affidavits being
received by the Court. Mr. Mauro joins in the objection. Court
overrules and receives the affidavits.

Mr. Taggart sworn and testified on behalf of the State.

COUNT: 4:04

Cross-exam by Mr. Mauro. State moves to dismiss counts #19, #20,
#21, #23, #24, #28, #29 & #30, granted. Court hears arguments from
both the State and Defense.

The Court having heard testimony hereby finds probable cause that
the defendant in this case did in fact commit the charges in the
information.

Having determined probable cause, the Court binds over for Trial
counts #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, #11, #12, #13, #14,
#15, #16, #17, #18, #22, #25, #26, #27 & #31. Defendant wishes to
be arraigned today.

SCHEDULING CONFERENCE is scheduled.

Date: 08/06/2002

Time: 08:30 a.m.

Location: Third floor, Rm 302
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: RAY HARDING

07-05-02 Notice - Final Exhibit List

07-05-02 SCHEDULING CONFERENCE scheduled on August 06, 2002 at 08:30 AM
in Third floor, Rm 303 with Judge STOTT.

berniced

07-05-02 Charge 61-1-1 Sev F2 was amended to 61-1-1 Sev F2

07-05-02 Charge 61-1-21 Sev F3 was amended to 61-1-7 Sev F3

07-05-02 Charge 61-1-1 Sev F3 was amended to 61-1-3 Sev F3

07-05-02 Charge 61-1-7 Sev F3 was amended to 61-1-1 Sev F2

07-05-02 Charge 61-1-7 Sev F3 was amended to 61-1-7 Sev F3

07-05-02 Charge 61-1-7 Sev F3 was amended to 61-1-3 Sev F3

07-05-02 Charge 61-1-3 Sev F3 was amended to 61-1-1 Sev F2

07-05-02 Charge 61-1-7 Sev F3 was amended to 61-1-7 Sev F3

07-05-02 Charge 61-1-1 Sev F2 was amended to 61-1-3 Sev F3

07-05-02 Charge 61-1-3 Sev F3 was amended to 61-1-1 Sev F2

07-05-02 Charge 61-1-7 Sev F3 was amended to 61-1-7 Sev F3

07-05-02 Charge 61-1-1 Sev F2 was amended to 61-1-3 Sev F3

07-05-02 Charge 61-1-3 Sev F3 was amended to 61-1-1 Sev F2

07-05-02 Charge 61-1-7 Sev F3 was amended to 61-1-7 Sev F3

07-05-02 Charge 61-1-1 Sev F2 was amended to 61-1-3 Sev F3

07-05-02 Charge 61-1-3 Sev F3 was amended to 61-1-1 Sev F2

07-05-02 Charge 61-1-7 Sev F3 was amended to 61-1-7 Sev F3

07-05-02 Charge 61-1-1 Sev F2 was amended to 61-1-3 Sev F3

07-05-02 Charge 61-1-3 Sev F3 was amended to 61-1-1 Sev F2

07-05-02 Note: PRELIMINARY HEARING minutes modified.

berniced

07-27-02 Note: Calendar Judge assignment changed from RAY HARDING to
GARY D. STOTT for appearance on 08/06/2002

berniced

07-27-02 Judge STOTT assigned.

dpx

08-06-02 Minute Entry - Minutes for SCHEDULING CONFERENCE

keris

Judge: GARY D. STOTT

PRESENT

Clerk: keris

Prosecutor: WAYMENT, DAVID H T

Defendant

Defendant's Attorney(s): MAURO, RICHARD P

Agency: ADULT PROBATION AND PAROLE

Video

Tape Number: 30 Tape Count: 9:11

HEARING

This matter comes before the Court for a scheduling conference.
Counsel request a jury trial. The Court sets a final pretrial, and
a jury trial. Motion cutoff is set for 11/1/02, jury instructions

and voir dire are due by 12/31/02.
FINAL PRETRIAL CONFERENCE is scheduled.

Date: 12/10/2002
Time: 08:30 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: GARY D. STOTT

5 DAY JURY TRIAL.

Date:
Date:
Date:
Date:
Date: 01/06/2003
Time: 08:30 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

before Judge GARY D. STOTT

Date: 01/08/2003
Time: 08:30 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

before Judge GARY D. STOTT

08-06-02 Notice - NOTICE for Case 011403597 ID 1381084

keris

5 DAY JURY TRIAL is scheduled.

Date:
Date: 01/06/2003
Time: 08:30 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

before Judge GARY D. STOTT

Date: 01/08/2003
Time: 08:30 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

before Judge GARY D. STOTT

Date: 01/09/2003
Time: 08:30 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

before Judge GARY D. STOTT

Date: 01/10/2003
Time: 08:30 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

before Judge GARY D. STOTT

Date: 01/13/2003
Time: 08:30 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

before Judge GARY D. STOTT

08-06-02	FINAL PRETRIAL CONFERENCE scheduled on December 10, 2002 at 08:30 AM in Third floor, Rm 303 with Judge STOTT.	keris
08-06-02	5 DAY JURY TRIAL scheduled on January 06, 2003 at 08:30 AM in Third floor, Rm 303 with Judge STOTT.	keris
08-06-02	5 DAY JURY TRIAL scheduled on January 08, 2003 at 08:30 AM in Third floor, Rm 303 with Judge STOTT.	keris
08-06-02	5 DAY JURY TRIAL scheduled on January 09, 2003 at 08:30 AM in Third floor, Rm 303 with Judge STOTT.	keris
08-06-02	5 DAY JURY TRIAL scheduled on January 10, 2003 at 08:30 AM in Third floor, Rm 303 with Judge STOTT.	keris
08-06-02	5 DAY JURY TRIAL scheduled on January 13, 2003 at 08:30 AM in Third floor, Rm 303 with Judge STOTT.	keris
08-28-02	Note: Video tape request submitted by Linda Pantuso	chrisk
08-28-02	Fee Account created Total Due: 15.00	chrisk
08-28-02	Fee Account created Total Due: 8.50	chrisk
08-28-02	Fee Account created Total Due: 3.00	chrisk
08-28-02	VIDEO TAPE COPY Payment Received: 15.00	chrisk
08-28-02	COPY FEE Payment Received: 8.50	chrisk
08-28-02	POSTAGE-COPIES Payment Received: 3.00	chrisk
08-28-02	Filed: Transcript Request Form	keris
10-16-02	Filed: Subpoena (Court Copy)	keris
10-18-02	Filed: Subpoena (Court Copy)	keris
10-22-02	Filed return: Subpoena	keris
	Party Served: Dennis Dayton	
	Service Type: Personal	
	Service Date: October 28, 2002	

10-22-02 Filed return: Subpoena keris
Party Served: Angie Dayton
Service Type: Personal
Service Date: October 18, 2002

10-22-02 Filed return: Subpoena keris
Party Served: Leanne Bailey
Service Type: Personal
Service Date: October 17, 2002

10-22-02 Filed return: Subpoena keris
Party Served: Joe Moffatt
Service Type: Personal
Service Date: October 18, 2002

10-31-02 Filed: Motion to Withdraw as Counsel (Mauro) marilynn
10-31-02 Filed return: Subpoena keris
Party Served: Jeff Hales
Service Type: Personal
Service Date: October 29, 2002

10-31-02 Filed return: Subpoena keris
Party Served: Stacey Hales
Service Type: Personal
Service Date: October 29, 2002

11-04-02 Filed return: Subpoena keris
Party Served: Ryan Keisel
Service Type: Personal
Service Date: October 30, 2002

11-04-02 Filed return: Subpoena keris
Party Served: Wanda Condit
Service Type: Personal
Service Date: October 30, 2002

11-04-02 Filed return: Subpoena keris
Party Served: Leroy Condit
Service Type: Personal
Service Date: October 30, 2002

11-21-02 Notice - NOTICE for Case 011403597 ID 1443454 keris
MOTION TO WITHDRAW is scheduled.
Date: 12/10/2002
Time: 08:30 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Judge: GARY D. STOTT

This matter is set at the Court's request to address Defendant's motion to withdraw as counsel. The defendant is asked to be present.

11-21-02 MOTION TO WITHDRAW scheduled on December 10, 2002 at 08:30 AM in Third floor, Rm 303 with Judge STOTT. keris

11-26-02 Filed: Joint Motion to Continue marilynn

11-27-02 Filed order: Order for Continuance marilynn
Judge gstott
Signed November 27, 2002

12-10-02 FINAL PRETRIAL CONFERENCE scheduled on January 07, 2003 at marilynn
08:30 AM in Fourth floor, Rm 401 with Judge SCHOFIELD.

12-10-02 Minute Entry - Minutes for Pretrial Conference marilynn
Judge: GARY D. STOTT
PRESENT
Clerk: marilynn
Prosecutor: WAYMENT, DAVID H T
Defendant
Defendant's Attorney(s): MAURO, RICHARD P
Agency: ADULT PROBATION AND PAROLE

Video
Tape Number: 48 Tape Count: 9:03, 9:27

HEARING

This matter comes before the Court for a final pretrial conference and hearing on the motion to withdraw. The defendant completes an affidavit of indigency and the Court finds the defendant qualifies for a public defender. The motion of counsel Mauro to withdraw is granted. The pro se motion of the defendant is denied. The matter is set for a final pretrial conference. FINAL PRETRIAL CONFERENCE is scheduled.
Date: 01/07/2003
Time: 08:30 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Judge: GARY D. STOTT

12-10-02 Filed return: Subpoena corag
Party Served: BURROWS, ERVIN
Service Type: Personal
Service Date: November 25, 2002

12-10-02 Filed return: Subpoena corag
Party Served: BURROWS, COLLEEN
Service Type: Personal
Service Date: November 25, 2002

12-10-02 Filed order: Order Granting Withdrawal (in open court) marilynn
Judge gstott
Signed December 10, 2002

12-12-02 Filed: Transcript Request Form jefft

12-30-02 5 DAY JURY TRIAL Cancelled.

12-30-02 Filed order: Affidavit of Indigency (approved) juliea
Judge gstott
Signed December 20, 2002

01-01-03 Note: Calendar Judge assignment changed from GARY D. STOTT to JUDGE JUDGE for appearance on 01/07/2003 marilynn
01-01-03 Judge SCHOFIELD assigned.
01-01-03 Note: Calendar Judge assignment changed from JUDGE JUDGE to ANTHONY W. SCHOFIELD for appearance on 01/07/2003 marilynn
01-01-03 Judge SCHOFIELD assigned. dpx
01-07-03 FINAL PRETRIAL CONFERENCE scheduled on January 21, 2003 at 08:30 AM in Fourth floor, Rm 401 with Judge SCHOFIELD. jennyc
01-07-03 Minute Entry - Minutes for FINAL PRETRIAL CONFERENCE jennyc
Judge: ANTHONY W. SCHOFIELD
PRESENT
Clerk: jennyc
Prosecutor: BUHMAN, JEFFREY R
Defendant
Defendant's Attorney(s): MEANS, THOMAS

Video

Tape Number: AWS 1 Tape Count: 9:25

HEARING

This matter comes before the court for a final pretrial conference. There is a possible settlement in this case. A further pretrial conference is scheduled.
FINAL PRETRIAL CONFERENCE.

Date: 01/21/2003

Time: 08:30 a.m.

Location: Fourth floor, Rm 401
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: ANTHONY W. SCHOFIELD

01-21-03 FINAL PRETRIAL CONFERENCE scheduled on February 04, 2003 at 10:00 AM in Fourth floor, Rm 401 with Judge SCHOFIELD. jennyc
01-21-03 Minute Entry - Minutes for FINAL PRETRIAL CONFERENCE jennyc
Judge: ANTHONY W. SCHOFIELD
PRESENT
Clerk: jennyc
Prosecutor: ALLAN, JOHN L
Defendant
Defendant's Attorney(s): MEANS, THOMAS

Video

Tape Number: AWS 3 Tape Count: 10:53

HEARING

This matter comes before the court for a final pretrial conference. The request for a continuance by Mr. Means is granted,

more time is needed.

FINAL PRETRIAL CONFERENCE.

Date: 02/04/2003

Time: 10:00 a.m.

Location: Fourth floor, Rm 401
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: ANTHONY W. SCHOFIELD

02-03-03	Fee Account created	Total Due:	104.00	rebeccaw
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02-03-03	REPORTER FEES	Payment Received:	104.00	rebeccaw
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Note: REPORTER FEES

02-04-03	FINAL PRETRIAL CONFERENCE scheduled on February 25, 2003 at 10:00 AM in Fourth floor, Rm 401 with Judge SCHOFIELD.	jennyc
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02-04-03	Minute Entry - Minutes for FINAL PRETRIAL CONFERENCE	jennyc
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Judge: ANTHONY W. SCHOFIELD

PRESENT

Clerk: jennyc

Prosecutor: WAYMENT, DAVID H T

Defendant

Defendant's Attorney(s): MEANS, THOMAS .

Video

Tape Number: AWS 6 Tape Count: 10:58

HEARING

This matter comes before the court for a final pretrial conference. The request for a continuance by Mr. Means is granted.

FINAL PRETRIAL CONFERENCE.

Date: 02/25/2003

Time: 10:00 a.m.

Location: Fourth floor, Rm 401
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: ANTHONY W. SCHOFIELD

02-04-03	REPORTER FEES	Payment Reversal:	-104.00	nolanr
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Note: Wrong amount

02-04-03	Fee Account created	Total Due:	104.50	nolanr
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02-04-03	REPORTER FEES	Payment Received:	104.50	nolanr
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Note: REPORTER FEES

02-19-03	Filed: Petition for Joining Informations	teria
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02-19-03	Filed: Memorandum in Support of Entry of Appearance	teria
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02-19-03	Filed: Entry of Appearance (Calvin Paul Stewart)	teria
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02-25-03	Filed: Petition for Hearing for Joining Information(s)	teria
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02-25-03	Filed: Memorandum in Support of Petition for Joining Informations	teria
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02-25-03	Minute Entry - Minutes for FINAL PRETRIAL CONFERENCE	jennyc
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Judge: ANTHONY W. SCHOFIELD
PRESENT
Clerk: jennyc
Prosecutor: WAYMENT, DAVID H T
Defendant
Defendant's Attorney(s): GALE, RICHARD

Video
Tape Number: AWS 9 Tape Count: 11:14

HEARING

This matter comes before the court for a final pretrial conference. Mr. Gale is present for Mr. Means. The defendant has motions to file with the court.

The state doesn't object to standby counsel, but is concerned that public defender may not be both attorney and standby counsel. Mr. Means is to be present at the next hearing. An evidentiary hearing is scheduled.

03-04-03	Fee Account created	Total Due:	2.00	corettac
03-04-03	Fee Account created	Total Due:	4.00	corettac
03-04-03	CERTIFIED COPIES	Payment Received:	2.00	corettac
03-04-03	CERTIFICATION	Payment Received:	4.00	corettac
03-04-03	Filed: Petition to Quash Hearing			teria
03-04-03	Filed: Affidavit in Support of Petition to Quash Hearing and Mandatory Judicial Notice Utah Rules of Evidence 201(d)			teria
03-10-03	Filed: Utah County Public Defender Association's Opposition to Appoint as "Stand-By" Counsel			teria
03-11-03	EVIDENTIARY HEARING scheduled on March 18, 2003 at 01:30 PM in Fourth floor, Rm 401 with Judge SCHOFIELD.			jennyc
03-11-03	Minute Entry - Minutes for EVIDENTIARY HEARING			jennyc

Judge: ANTHONY W. SCHOFIELD
PRESENT
Clerk: jennyc
Reporter: BEATTY, MICHELLE
Prosecutor: WAYMENT, DAVID H T
Defendant
Defendant's Attorney(s): JOHNSON, CHRISTINE

HEARING

This matter comes before the court for an evidentiary hearing. The court continues this matter to allow time to review the document filed by Mr. Means.

EVIDENTIARY HEARING.

Date: 03/18/2003
Time: 01:30 p.m.
Location: Fourth floor, Rm 401

FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: ANTHONY W. SCHOFIELD

03-14-03 Filed order: Ruling on Defendant's Request for Standby Counsel jennyc
Judge aschofie

Signed March 14, 2003

03-18-03 Minute Entry - Minutes for EVIDENTIARY HEARING

jennyc

Judge: ANTHONY W. SCHOFIELD

PRESENT

Clerk: jennyc

Prosecutor: WAYMENT, DAVID H T

Defendant

Defendant's Attorney(s): MEANS, THOMAS

Video

Tape Number: AWS 13 Tape Count: 2:08

HEARING

This matter comes before the court for an evidentiary hearing. The defendant wishes to represent himself. The defendant is fully advised of his right to have counsel and of procedural matters.

He will be held at the same standard as counsel if he represents himself. The defendant acknowledges and still agrees to proceed pro se. It is ordered that the defendant may represent himself and that the public defender be released.

If the defendant changes his mind and wishes to have counsel represent him at trial he must do so by May 1st. Any motions to be filed must be done by the end of April for the defendant. The state must file responses by May 15th.

ORAL ARGUMENTS is scheduled.

Date: 05/20/2003

Time: 03:30 p.m.

Location: Fourth floor, Rm 401

FOURTH DISTRICT COURT

125 N 100 W

PROVO, UT 84601

Before Judge: ANTHONY W. SCHOFIELD

04 DAY JURY TRIAL.

Date: 06/23/2003

Time: 08:30 a.m.

Location: Fourth floor, Rm 401

FOURTH DISTRICT COURT

125 N 100 W

PROVO, UT 84601

Before Judge: ANTHONY W. SCHOFIELD

04 DAY JURY TRIAL.

Date: 06/25/2003

Time: 08:30 a.m.

Location: Fourth floor, Rm 401
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: ANTHONY W. SCHOFIELD

04 DAY JURY TRIAL.

Date: 06/26/2003

Time: 08:30 a.m.

Location: Fourth floor, Rm 401
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: ANTHONY W. SCHOFIELD

04 DAY JURY TRIAL.

Date: 06/27/2003

Time: 08:30 a.m.

Location: Fourth floor, Rm 401
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: ANTHONY W. SCHOFIELD

03-18-03	04 DAY JURY TRIAL scheduled on June 23, 2003 at 08:30 AM in Fourth floor, Rm 401 with Judge SCHOFIELD.	jennyc
03-18-03	04 DAY JURY TRIAL scheduled on June 25, 2003 at 08:30 AM in Fourth floor, Rm 401 with Judge SCHOFIELD.	jennyc
03-18-03	04 DAY JURY TRIAL scheduled on June 26, 2003 at 08:30 AM in Fourth floor, Rm 401 with Judge SCHOFIELD.	jennyc
03-18-03	04 DAY JURY TRIAL scheduled on June 27, 2003 at 08:30 AM in Fourth floor, Rm 401 with Judge SCHOFIELD.	jennyc
03-19-03	Filed: Withdrawal of Counsel (atty Thomas Means for defendant)	teria
03-21-03	ORAL ARGUMENTS scheduled on May 20, 2003 at 03:30 PM in Fourth floor, Rm 401 with Judge SCHOFIELD.	jennyc
03-24-03	Filed: Joint Motion to Continue Sentencing	teria
03-26-03	Filed: Mandatory Judicial Notice	teria
04-01-03	Filed: Subpoena	teria
04-01-03	Filed: Subpoena	teria
04-01-03	Filed: Subpoena	teria
04-01-03	Filed: Subpoena	teria
04-01-03	Filed: Subpoena	teria
04-01-03	Filed: Subpoena	teria
04-01-03	Filed: Subpoena	teria
04-01-03	Filed: Subpoena	teria
04-01-03	Filed: Subpoena	teria

04-01-03	Filed: Subpoena	teria
04-01-03	Filed: Subpoena	teria
04-01-03	Filed: Subpoena	teria
04-01-03	Filed: Subpoena	teria
04-01-03	Filed: Subpoena	teria
04-01-03	Filed: Subpoena	teria
04-03-03	Filed return: Subpoena on Return	teria
	Party Served: Doug Whitney	
	Service Type: Personal	
	Service Date: April 02, 2003	
04-04-03	Filed return: Subpoena on Return	teria
	Party Served: Jessica Moffatt for Joe Moffatt	
	Service Type: Personal	
	Service Date: April 02, 2003	
04-04-03	Filed return: Subpoena on Return Unable to Locate	teria
04-04-03	Filed return: Subpoena on Return	teria
	Party Served: Paul Stewart for Ryan Keisel	
	Service Type: Personal	
	Service Date: April 03, 2003	
04-04-03	Filed return: Subpoena on Return Unable to Locate	teria
04-11-03	Filed return: Subpoena	teria
	Party Served: Leanne Bailey	
	Service Type: Personal	
	Service Date: April 07, 2003	
04-11-03	Filed return: Subpoena	teria
	Party Served: Leroy Condit	
	Service Type: Personal	
	Service Date: April 08, 2003	
04-11-03	Filed return: Subpoena	teria
	Party Served: Wanda Condit	
	Service Type: Personal	
	Service Date: April 08, 2003	
04-11-03	Filed return: Subpoena	teria
	Party Served: Gloria Goss for Stacy Hales	
	Service Type: Personal	
	Service Date: April 07, 2003	
04-11-03	Filed return: Subpoena	teria
	Party Served: Gloria Goss for Jeff Hales	
	Service Type: Personal	
	Service Date: April 07, 2003	
04-15-03	Filed return: Subpoena	teria
	Party Served: Ervin Burrows	
	Service Type: Personal	
	Service Date: April 10, 2003	
04-15-03	Filed return: Subpoena	teria
	Party Served: Colleen Burrows	
	Service Type: Personal	
	Service Date: April 10, 2003	
04-30-03	Filed: Petition to Quash Preliminary Hearing	teria

04-30-03 Filed: Notice of Claim of Foreign Sovereign Immunity with Memorandum in Support and Affidavit of Calvin Paul Stewart teria
04-30-03 Filed: Memorandum in Support of Notice of Claim of Foreign Sovereign Immunity teria
04-30-03 Filed: Affidavit of Calvin Paul Stewart teria
04-30-03 Filed: Motion to Dismiss for Lack of Speedy Trial teria
04-30-03 Filed: Affidavit in Support of Motion for Lack of Speedy Trial teria
04-30-03 Filed: Memorandum in Support of Motion to Dismiss for Lack of Speedy Trial teria
04-30-03 Filed: Mandatory Judicial Notice teria
05-07-03 Filed: Opposition to Notice of Claim of Foreign Sovereign Immunity teria
05-07-03 Filed: Opposition to Motion to Quash Preliminary Hearing teria
05-08-03 Filed: Opposition to Motion to Dismiss fo (SIC) Lack of Speedy Trial teria
05-19-03 Filed: Motion to Dismiss for Lack of Jurisdiction teria
05-19-03 Filed: Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction teria
05-20-03 Minute Entry - Minutes for ORAL ARGUMENTS jennyc
Judge: ANTHONY W. SCHOFIELD
PRESENT
Clerk: jennyc
Reporter: BARKER, CREED
Prosecutor: TAYLOR, TIMOTHY L
Defendant
Defendant pro se

HEARING

This matter comes before the court for oral arguments. Mr. Stewart addresses. Mr. Taylor addresses. Mr. Stewart responds. The court will issue a ruling within a couple of weeks.

05-20-03 Filed: Notice of Felony teria
06-05-03 Filed order: Ruling jennyc
Judge aschofie
Signed June 05, 2003
06-17-03 Filed order: Transportation Order miket
Judge fhoward
Signed June 17, 2003
06-17-03 Filed: Plaintiff's Proposed Jury Instructions teria
06-17-03 Filed: Third Amended Information teria
06-18-03 Filed: Notice of Removal of Judge teria
06-18-03 Filed: Notice of Removal of Judge teria
06-23-03 Filed: Notice for Competency and Incompetence, Revocation of Power of Attorney and Firing all Persons below and Demand to cease and desist jennyc
06-23-03 Filed: Juror Questionnaire's jennyc
06-23-03 Filed: Jury List jennyc

06-23-03 Filed: Preliminary Jury Instructions jennyc
06-23-03 Filed order: Order jennyc
 Judge aschofie
 Signed June 23, 2003
06-23-03 Minute Entry - Minutes for FOUR DAY JURY TRIAL- DAY ONE jennyc
 Judge: ANTHONY W. SCHOFIELD
 PRESENT
 Clerk: jennyc
 Reporter: TAYLOR, TASHA
 Prosecutor: WAYMENT, DAVID H T
 Defendant

TRIAL

TIME: 8:37AM This matter comes before the court for a jury trial. Mr. Stewart addresses as to his motion to remove Judge Schofield. The motion is denied.

TIME: 8:43AM Mr. Wayment addresses as to the third amended information. Mr. Stewart objects.

TIME: 8:44AM Court is in recess.

TIME: 9:16AM Court reconvenes. The third amended complaint is authorized. A document is submitted by Mr. Stewart. The court will make no change in the ruling. Mr. Wayment addresses.

TIME: 9:26AM The jury enters. The selection process begins. Roll is called, the potential jurors are sworn in.

TIME: 10:07AM Court is in recess to allow counsel, the defendant and the Judge to discuss jury issues in chambers. A few jurors are excused for cause.

TIME: 10:15AM Court reconvenes. Jury selection process continues.

TIME: 10:30AM Court is in recess. Counsel and the defendant meet with the Judge. The court allows Mr. Wayment 5 pre-emptions. Mr. Stewart will not participate.

TIME: 10:42AM Court re-convenes.

TIME: 10:49AM The nine jurors are selected, all remaining are excused. The selected jurors are sworn in.

TIME: 10:50AM Court is in recess.

TIME: 11:21AM Court reconvenes. The preliminary jury instructions are read. The information is read.

TIME: 11:44AM Opening statements by Mr. Wayment.

TIME: 12:11PM Mr. Stewart addresses, he does not wish to make an opening statement.

TIME: 12:13PM Court is in recess for lunch.

TIME: 1:28PM Court reconvenes. Steven Taggard is called and testified by Mr. Wayment.

TIME: 1:58PM Mr. Taggard is excused. Douglas Witney is called and testified by Mr. Wayment.

TIME: 2:21PM Mr. Witney is excused. Daniel Starr is called and

testified by Mr. Wayment.

TIME: 2:31PM Mr. Starr is excused. Court is in recess.

TIME: 2:45PM Court reconvenes. The Judge addresses.

TIME: 2:49PM The jury enters. Clay Harrison is called and testified by Mr. Wayment.

TIME: 3:08PM Mr. Harrison is excused. The jury is admonished and excused for the day.

TIME: 3:13PM Discussion ensues on other trial issues.

TIME: 3:16PM Court adjourns for the day.

06-24-03 Filed: Discharge Bond jennyc

06-25-03 Filed: Notice of Withdrawal of Consent to Contract with the Forum Court jennyc

06-25-03 Filed: Affidavit of Removal jennyc

06-25-03 Filed: Transcript Request Form for 6/23/03 & 6/25/03 Hearings; Requested by: Calvin Paul Stewart; Court Reporter: Tasha Taylor jodym

06-25-03 Filed: Transcript Request Form for Partial Transcript of 6/23/03 & 6/25/03 Hearings; Requested by: Joe Cartwright; Court Reporter: Tasha Taylor jodym

06-25-03 Fee Account created Total Due: 15.00 corettac

06-25-03 VIDEO TAPE COPY Payment Received: 15.00 corettac

06-25-03 Filed: Exhibit List jennyc

06-25-03 Minute Entry - Minutes for 04 DAY JURY TRIAL- DAY TWO jennyc

Judge: ANTHONY W. SCHOFIELD

PRESENT

Clerk: jennyc

Reporter: TAYLOR, TASHA

Prosecutor: WAYMENT, DAVID H T

Defendant

TRIAL

TIME: 8:47AM Court reconvenes. Mr. Stewart files documents. The relief requested is denied.

TIME: 8:48AM Court is in recess for ruling on affidavit of removal.

TIME: 8:54AM Court re-convenes. Judge Davis takes the bench to rule on the affidavit of removal. Mr. Stewart addresses. Judge Davis rules, the affidavit is not sufficient to remove Judge Schofield. The request is denied.

TIME: 9:07AM Court is in recess.

TIME: 9:08AM Court re-convenes. Joseph Moffat is called and testified by Mr. Wayment. The witness identifies the defendant.

TIME: 9:19AM Mr. Moffat is excused. William Hunter is called and testified by Mr. Wayment.

TIME: 9:32AM Mr. Hunter is excused. Victoria Hunter is called and testified by Mr. Wayment.

TIME: 9:39AM Ms. Hunter is excused. The exhibit folders are

distributed to the jury.

TIME: 9:44AM Colleen Burrows is called and testified by Mr. Wayment.

TIME: 9:58AM Ms. Burrows is excused. LeAnn Bailey is called and testified by Mr. Wayment.

TIME: 10:15AM Ms. Bailey is excused. Court is in recess.

TIME: 10:36AM Court re-convenes. Leroy Condit is called and testified by Mr. Wayment.

TIME: 10:49AM The jury exits. The Judge instructs to defendant. Exhibit 6 is received.

TIME: 10:51AM The jury enters. Direct continued of Mr. Condit by Mr. Wayment.

TIME: 10:54AM Mr. Condit is excused. Court is in recess for lunch.

TIME: 1:02PM Court re-convenes.

TIME: 1:04PM The jury enters. Clyde Ed Johnson is called and testified by Mr. Wayment.

TIME: 1:16PM Mr. Johnson is excused. Jeff Hales is called and testified by Mr. Wayment.

TIME: 1:31PM Mr. Hales is excused. Exhibit 8 is received. Court is in recess.

TIME: 1:42PM Court reconvenes. Lawrence Dale McAllister is called and testified by Mr. Wayment.

TIME: 1:56PM Mr. McAllister is excused. Tim Taylor is called and testified by Mr. Wayment. The witness identifies the defendant.

TIME: 2:05PM Mr. Taylor is excused. The state rests. The jury steps out. The court orders counts 10-12 & 16-18 of the third amended complaint dismissed.

TIME: 2:08PM Court is in recess.

TIME: 2:27PM Court reconvenes. Mr. Stewart addresses, he does not wish to present evidence.

TIME: 2:31PM The jury enters.

TIME: 2:33PM The jury is excused. The jury instructions are discussed.

TIME: 2:35PM Court is in recess to prepare final jury instructions.

TIME: 3:11PM Court reconvenes. Mr. Stewart objects to instruction #1. Objection over-ruled.

TIME: 3:27PM The jury enters. The final jury instructions are read.

TIME: 3:57PM Closing arguments by Mr. Wayment.

TIME: 4:28PM Mr. Stewart does not wish to make closing arguments. The jury is excused to deliberate.

TIME: 6:01PM Court reconvenes. The verdict is read. The jury finds the defendant guilty of all charges in the third amended information. The jury is excused. The matter is set for sentencing. The court orders that the defendant be taken into custody.

AP&P is to meet with the defendant at the jail for a PSI.
SENTENCING is scheduled.

Date: 08/06/2003

Time: 11:00 a.m.

Location: Fourth floor, Rm 401
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: ANTHONY W. SCHOFIELD

06-25-03	Filed: Third Amended Information	jennyc
06-25-03	Filed: Final Jury Instructions	jennyc
06-25-03	Filed: Jury Verdict	jennyc
06-26-03	Filed: Request for Video/ Audio Tape for June 23,25	teria
06-26-03	SENTENCING scheduled on August 06, 2003 at 11:00 AM in Fourth floor, Rm 401 with Judge SCHOFIELD.	jennyc
06-26-03	Note: 04 DAY JURY TRIAL- DAY TWO minutes modified.	jennyc
06-26-03	Notice - Final Exhibit List	
06-27-03	VIDEO TAPE COPY Payment Reversal: -15.00	nolanr
	Note: money needs to be applied to reporter fees	
06-27-03	Fee Account created Total Due: 15.00	nolanr
06-27-03	REPORTER FEES Payment Received: 15.00	nolanr
	Note: REPORTER FEES	
06-30-03	Fee Account created Total Due: 6.50	debbier
06-30-03	COPY FEE Payment Received: 6.50	debbier
06-30-03	Filed: Transcript Request for 6/23/03 & 6/25/03 Hearings; Requested by Perrin Love; Court Reporter: Tasha Taylor	jodym
07-09-03	SENTENCING scheduled on August 04, 2003 at 10:30 AM in Fourth floor, Rm 401 with Judge SCHOFIELD.	jennyc
07-09-03	Minute Entry - Minutes for Review Hearing	jennyc
	Judge: ANTHONY W. SCHOFIELD	
	PRESENT	
	Clerk: jennyc	
	Prosecutor: RAGAN, SHERRY E	
	Defendant	

Video

Tape Number: AWS 27 Tape Count: 9:59 approx

HEARING

This matter comes before the court for a review hearing. The defendant is present in custody of the sheriff. The court received a call from a Judge in Salt Lake, Mr. Stewart has a trial in another matter at the time we have sentencing scheduled.

Sentencing in this matter is rescheduled. The defendant is to be transported.

SENTENCING is scheduled.

Date: 08/04/2003

Time: 10:30 a.m.

Location: Fourth floor, Rm 401
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: ANTHONY W. SCHOFIELD

07-09-03 SENTENCING Cancelled.

07-10-03 Fee Account created Total Due: 525.00 pamfw

07-10-03 REPORTER FEES Payment Received: 525.00 pamfw

Note: REPORTER FEES

07-10-03 Filed: Transcript Request Form for 6/23/03 & 6/25/03 hearing;
Requested by: John Wood; Reporter: Tasha Taylor jodym

07-16-03 Filed: Notice of Mistrial Withdrawal of Consent teria

07-22-03 Filed: Motion for Hearing Status on Detention During the
Pendancy of Sentencing. teria

07-25-03 Filed: Subpoena teria

07-28-03 Filed: AP&P PSI- Confidential jennyc

07-30-03 Filed: Subpoena teria

08-04-03 Filed: Affidavit of Truth teria

08-04-03 Filed: Affidavit of Delivery teria

08-04-03 Minute Entry - Minutes for SENTENCING teria

Judge: ANTHONY W. SCHOFIELD

PRESENT

Clerk: teria

Reporter: TAYLOR, TASHA

Prosecutor: WAYMENT, DAVID H T

Defendant

Defendant pro se

CAT/CIC

HEARING

COUNT: 10:35

This matter comes before the court for sentencing. The defendant is present in custody of the sheriff. The defendant requests a continuance for sentencing. Defendant received the PSI report on Thursday, July 31, 2003 at 9:00pm.

Defendant states that the date of birth on the PSI is incorrect and he disagrees on the amount of restitution. Mr. Wayment addresses the court. Court is in recess.

COUNT: 10:50

The Court reviews the statute and finds the defendant did not have sufficient 3 working days to review the Presentence Investigation Report.

Defendant addresses as to his motion for hearing on status on detention during the pendency of sentencing. The matter is set for hearing. Victims address court.

The court asks AP&P to revisit with the defendant the date of birth and the age of the defendant listed on the PSI and any

pending cases. Matter is set for a motion hearing and sentencing.
SENTENCING.

Date: 08/14/2003

Time: 09:00 a.m.

Location: Fourth floor, Rm 401
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: ANTHONY W. SCHOFIELD

08-04-03 SENTENCING scheduled on August 14, 2003 at 09:00 AM in Fourth
floor, Rm 401 with Judge SCHOFIELD.

teria

08-04-03 Note: SENTENCING minutes modified.

sherylc

08-06-03 Filed: AP&P PV Report- Confidential

jennyc

08-14-03 Fee Account created Total Due: 15.00

pamfw

08-14-03 VIDEO TAPE COPY Payment Received: 15.00

pamfw

Note: REF: 7529 BCH: 653

08-14-03 Minute Entry - Minutes for SENTENCING

jennyc

Judge: ANTHONY W. SCHOFIELD

PRESENT

Clerk: jennyc

Reporter: LIVINGSTON, ANNI

Prosecutor: WAYMENT, DAVID H T

Defendant

HEARING

This matter comes before the court for sentencing. The defendant is present in custody of the sheriff. Mr. Stewart addresses. A correction is made to the PSI to include the defendant's correct birthdate which is 10-5-47, he is currently 55.

The court denies the writ of allocution. Mr. Wayment addresses. Leann Bailey, victim, addresses. Tracy Walpole, representative of victim, addresses. Wanda Condit, victim, addresses. Mr. Stewart addresses.

SENTENCE PRISON

Based on the defendant's conviction of SECURITIES FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of UNREGISTERED SECURITIES AGENT a 3rd Degree Felony, the defendant is sentenced to an

indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of UNREGISTERED SECURITIES AGENT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of UNREGISTERED SECURITIES AGENT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of UNREGISTERED SECURITIES AGENT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 2nd

Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SECURITIES FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of SALE OF UNREGISTERED SECURITY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of UNREGISTERED SECURITIES AGENT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of PATTERN OF UNLAW ACTIVITY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

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

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Each count to run consecutive with each other.
SENTENCE RECOMMENDATION NOTE

It is recommended to the board of pardons that the defendant serve at least 10 years and that when the defendant is placed on parole he is not to work in any fiduciary capacity. The defendant is to submit to DNA testing.

SENTENCE TRUST

The defendant is to pay the following:

Restitution: Amount: \$2857600.00 Plus Interest

Pay in behalf of: VICTIMS C/O STATE OF UTAH

The amount of FOURTH DISTRICT COURT

This restitution is to be paid joint and severally with the co-defendants.

SENTENCE TRUST NOTE

Elsie Thomas is a victim but is not identified in the PSI.

08-14-03	Filed: Writ of Allocution		jennyc
08-14-03	Filed: Request for Video/ Audio Tape for hearing on June 27, 2003		teria
08-15-03	VIDEO TAPE COPY	Payment Reversal: -15.00	nolanr
	Note: money needs to be applied to Reporter Fees		
08-15-03	Fee Account created	Total Due: 15.00	nolanr
08-15-03	REPORTER FEES	Payment Received: 15.00	nolanr
	Note: REPORTER FEES		
08-15-03	Tracking started for Exhibit. Review date Nov 20, 2003.		chrisj
08-22-03	Filed: Transcript Request Form for Jury Trial; Requested by: Tracey Walpole		jodym
08-22-03	Fee Account created	Total Due: 145.00	ryandp
08-22-03	REPORTER FEES	Payment Received: 145.00	ryandp
	Note: REPORTER FEES; REF: 7653 BCH: 659		
09-10-03	Fee Account created	Total Due: 3.50	joyc
09-10-03	Fee Account created	Total Due: 8.00	joyc
09-10-03	Fee Account created	Total Due: 8.00	joyc
09-10-03	CERTIFIED COPIES	Payment Received: 3.50	joyc
09-10-03	COPY FEE	Payment Received: 8.00	joyc
09-10-03	CERTIFICATION	Payment Received: 8.00	joyc
09-11-03	Filed: Original Transcript of Jury Trial on June 23, 2003; Reported by: Tasha Taylor		jodym
09-11-03	Filed: Original Transcript of Jury Trial on June 25, 2003; Reported by: Tasha Taylor		jodym
09-12-03	Fee Account created	Total Due: 3.00	mereditw
09-12-03	Fee Account created	Total Due: 4.00	mereditw
09-12-03	CERTIFIED COPIES	Payment Received: 3.00	mereditw
09-12-03	CERTIFICATION	Payment Received: 4.00	mereditw
09-12-03	Filed: Notice of Appeal		teria
09-12-03	Filed: Affidavit of Impecuniosity		teria
09-12-03	Filed: Declaration of Domicil		teria

09-15-03	Note: Defendant's current address is C/O Inmate #35197, Uinta 3-106B, Utah State Prison, P.O. Box 250, Draper, Utah 84020.		teria
09-16-03	Note: A certified copy of the Notice of Appeal is sent to Court of Appeals via State Mail 55500004895 on this date.		marilynn
09-18-03	Filed: TRANSCRIPT REQUEST OF HEARING 9/11/03 (JUST OF TESTIMONY OF DANIEL STARR)		racheld
09-18-03	Fee Account created	Total Due: 7.00	racheld
09-18-03	COPY FEE	Payment Received: 7.00	racheld
	Note: COPY FEE		
09-22-03	Filed: Letter addressed to Calvin Paul Stewart from the Court of Appeals; their no. 20030757-CA		marilynn
09-24-03	REPORTER FEES	Payment Reversal: -145.00	nolanr
	Note: per Jody, to refund \$3.00		
09-24-03	REPORTER FEES	Payment Reversal: -15.00	nolanr
	Note: money to be refunded per Jody		
09-24-03	Note: Address changed from		nolanr
09-24-03	Note: Address changed to 185 S STATE SUITE 1300 SLC UT 84111		nolanr
09-24-03	REPORTER FEES	Payment Reversal: -525.00	nolanr
	Note: \$50 to be refunded		
09-24-03	Bail Account created	Total Due: 50.00	nolanr
09-24-03	Fee Account created	Total Due: 475.00	nolanr
09-24-03	Bail Posted	Payment Received: 50.00	nolanr
	Note: REPORTER FEES		
09-24-03	REPORTER FEES	Payment Received: 475.00	nolanr
09-24-03	Trust Account created	Total Due: 50.00	nolanr
09-24-03	Bail Refunded	Payment Received: -50.00	nolanr
09-24-03	Bail/Bond Refund	Payment Received: 50.00	nolanr
09-24-03	Bail Account created	Total Due: 3.00	nolanr
09-24-03	Note:		
09-24-03	Note:		
09-24-03	Fee Account created	Total Due: 142.00	nolanr
09-24-03	Bail Posted	Payment Received: 3.00	nolanr
	Note: REPORTER FEES		
09-24-03	REPORTER FEES	Payment Received: 142.00	nolanr
09-24-03	Bail Account created	Total Due: 15.00	nolanr
09-24-03	Bail Posted	Payment Received: 15.00	nolanr
09-24-03	Trust Account created	Total Due: 3.00	nolanr
09-24-03	Bail Refunded	Payment Received: -3.00	nolanr
09-24-03	Bail/Bond Refund	Payment Received: 3.00	nolanr
09-24-03	Bail/Bond Refund	Payment Received: 3.00	nolanr
09-24-03	Trust Account created	Total Due: 15.00	nolanr
09-24-03	Bail Refunded	Payment Received: -15.00	nolanr
09-24-03	Bail/Bond Refund	Payment Received: 15.00	nolanr
09-24-03	Bail/Bond Refund	Payment Received: 15.00	nolanr
09-24-03	Note:		
09-24-03	Bail/Bond Refund Check # 23944 Trust Payout:	50.00	nolanr
10-01-03	Filed: Notice of Appeal with Certificate of Service (this document is actually a request for entire transcript of all recorded hearings - copy to Jody on 10/7/03)		marilynn

10-03-03	Fee Account created	Total Due:	34.50	shellys
10-03-03	REPORTER FEES	Payment Received:	34.50	shellys
	Note: REPORTER FEES			
10-06-03	Filed: Amended 2 Request for Trial Court Transcripts			teria
10-06-03	Fee Account created	Total Due:	142.00	juliepa
10-06-03	REPORTER FEES	Payment Received:	142.00	juliepa
	Note: REPORTER FEES			
10-27-03	REPORTER FEES	Payment Reversal:	-142.00	nolanr
	Note: Money needs to be applied to trust			
10-27-03	Bail Account created	Total Due:	142.00	nolanr
10-27-03	Bail Posted	Payment Received:	142.00	nolanr
10-27-03	Trust Account created	Total Due:	142.00	nolanr
10-27-03	Bail Refunded	Payment Received:	-142.00	nolanr
10-27-03	Bail/Bond Refund	Payment Received:	142.00	nolanr
10-27-03	Bail/Bond Refund Check # 24137	Trust Payout:	142.00	nolanr
10-27-03	Note:			nolanr
12-17-03	Note: The Record is Sent to Court of Appeals, Attention Maren Larson, Via State Mail #55500006381 on this date (2 red files, 2 transcripts, 1 manilla exhibit envelope)			sharonj
03-10-04	Filed: Letter from Court of Appeals (return of "as is" record - 2 red files, 2 transcripts, 1 manila exhibit envelope)			marilynn
03-15-04	Filed: Judgment Roll and Index			marilynn
03-15-04	Filed: Clerk's Certificate on Transcript			marilynn
03-15-04	Filed: Clerk's Certificate			marilynn
03-15-04	Note: The record is sent to the Court of Appeals, Attn: Maren Larson, via State Mail 55500010250 this date (2 red files, purple file documents, 1 white confidential AP&P envelope, 2 manila envelopes, 2 transcripts)			marilynn

FILED

Calvin Paul Stewart #158216
 Central Utah Correctional Facility

PO Box 550

Gunnison, Utah 84634

2015 APR 15 PM 1:16

FOURTH DISTRICT COURT
 PROVO

IN THE FOURTH JUDICIAL DISTRICT COURT
 UTAH COUNTY, STATE OF UTAH

State of Utah
 Plaintiff

v

Calvin Paul Stewart
 Defendant

Motion to Reinstate Period for Filing Direct Appeal
 Pursuant to Rule 4(F) URA App P

Case NO: 011403587

Judge:

I move this court to reinstate period for filing my direct appeal pursuant to Rule 4(F) URA App P. In support of Motion, I say:

I am a hearing-impaired person. See "Affidavit" and Exhibit A.

Utah law plainly states that, "If a hearing-impaired person is a party or witness at any stage of any... criminal court proceeding... the appointing authority shall appoint and pay for a qualified interpreter... If the hearing-impaired person does not understand sign language, the appointing authority shall take necessary steps to ensure that the hearing-impaired person may effectively and accurately communicate in the proceeding." UCA 78-24a-2 (1) (2003) - emphasis *see* ADA added. Shall or shall not imposes binding obligations to respecting engage in or refrain from the described conduct. Code of Judicial Conduct (2008).

"[T]he failure of a state to abide by its own statutory command may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state." *Fretterly v Paskett*, 997 F2d 1299, 1300 (9th Cir 1993), cert denied 513 US 917 (1994); Accord *Lambright v Stewart*, 167 F3d 477, 482 (11th Cir 1999).

The court failed to take the necessary steps to correct my hearing-impairment. Due to that failure, I was unable to hear with an understanding the proceedings of the court. Rule (c) U.R. Crim P. requires the court to notify the defendant after sentencing of the right of appeal. Since the court failed to correct my hearing-impairment, they failed to inform me of my right of appeal including the right to counsel on appeal. I was denied counsel on appeal. See *Northwest Court of Appeals*, 522 U.S. 132 (2000), *Douglas v. California*, 372 U.S. 253 (1963).

Therefore the court proceed in violation to UCA 78c-24a-1 et al and the Americans with Disability Act (ADA). Both Rule 4 (F) URAP and Rule 22 (c) permits a motion to correct a sentence at anytime and reinstate period for filing my direct appeal. In *Manning*, the court stated that, "The exceptions set forth above have been established in the interest of fundamental fairness." *Manning v. State*, 122 P3D (Utah 2005).

The appeal process provides that, "upon showing that a criminal defendant was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal." and "If the defendant is not represented and is indigent, the court shall appoint counsel." Rule 4 (F) U.R. App P. emphasis added.

Since the court did not correct my hearing-impairment, it proceeded in an illegal manner, denying me the right of appeal and due process protected by the U.S. Const amend VI and XIV and Utah Const Art I § 7. It is well established that the failure of the trial court to exercise discretion renders any proceeding defective.

Therefore, I move this court to correct my sentence and reinstate the thirty-day period to file an appeal.

Dated this 16th day of April, 2015.



Calvin Paul Stewart

MEDICAL TRANSFER SHEET
Utah Department of Corrections
Bureau of Medical Services
(801) 576-7100

Name: STEWART, CALVIN

USP #: 35179

DOB: 10/05/47 Sex: M

CURRENT HOUSING: 03@119B

Printed from the CHART Medical Record on: 5/8/2009

Past Testing

Date of Last PPD: 11/10/2005

Results: PPD READ 0MM NEG

Date of Last Tetanus:

Results: None

ALLERGIES

Current Therapies

SCHEDULED APPOINTMENTS

CURRENT PROBLEM LIST

#	Problem	First seen	# of Enc	Last seen
1	HEARING LOSS	4/19/2004	1	4/19/2004

FILED

Calvin Paul Stewart #158216

Central Utah Correctional Facility

PO Box 550

Gunnison, Utah 84634

2015 APR 15 PM 1:16

FOURTH DISTRICT COURT
PROVO

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

STATE OF UTAH

Plaintiff

✓

Calvin Paul Stewart

Defendant

Motion for Appointment of Counsel

Case No: 011403597

Judge:

I, Calvin Paul Stewart, move this court for an appointment of counsel to represent me in this matter. In support of this motion I state:

- 1) I am unable to afford counsel. See "Affidavit of Imppecuniosity" attached.
- 2) I have a balance disability and have fallen three times resulting in trauma to the brain. Due to this trauma, I have difficulty in vocalizing my thoughts, formulating my thoughts, finding the proper words to use, arranging issues in a meaningful fashion, and determining a meaningful strategy. See "Affidavit" attached.
- 3) I am hearing impaired.

Dated this 16th day of April, 2015.