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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

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GASPAR AVILA, Petitioner and Appellant, vs. TAYLORSVILLE CITY, Respondent and Appellee.	PUBLIC Appellate Court Docket No.: 2016-0612-CA

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APPEAL FROM THE THIRD DISTRICT COURT – SALT LAKE DEPT.,
SALT LAKE COUNTY, HONORABLE SU CHON

BRIEF OF THE APPELLANT

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Petitioner and Appellant is not incarcerated. This is not an Anders Brief.
Petitioner and Appellant request oral arguments on this matter.

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IN THE UTAH COURT OF APPEALS
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APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

The Utah Court of Appeals possesses jurisdiction to hear this appeal pursuant to Utah Code Annotated ("UCA"), § 78A-4-103(2)(e).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Petitioner Argues That His PCRA Petition Was Timely Filed

GASPAR AVILA ("Petitioner"), argues that after reviewing the pleadings, proffer, and evidence, on May 27, 2016, the Third Judicial District Court, Salt Lake Department, (hereinafter referred to as the "Court"), incorrectly determined that Petitioner's *Petition For Relief Under The Post-Conviction Remedies Act* ("PCRA"), was untimely filed.[1&2]

[1] Please refer to the *Order Granting Summary Judgment And Denying Petitioner Relief* at pages 171-172 of the record.
[2] Please refer to the transcripts at pages 186-253 of the record.

The issue was appropriately preserved via the following: (1) Petitioner's *PCRA Petition* and its accompanying *Memorandum*;[3] (2) Petitioner's *Memorandum in Response to Respondent's Motion*;[4] and (3) Petitioner's oral arguments presented to the Court at all of the court hearings held on this matter.[5]

The appropriate appellate review standard to contest the Court's incorrect ruling that Petitioner's PCRA Petition was untimely is based on the following holding from the Gordon court,

> "We review an appeal from an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court's conclusions of law. Likewise we review a grant of summary judgment for correctness, granting no deference to the lower court. We will affirm such a decision when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In making this assessment, we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party," (citations and quotations omitted). Gordon v. State, 2016 UT App 190, ¶ 13, 382 P.3d 1063.

The constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative or of central importance to this issue of the appeal are as follows:

1. Utah Code Annotated § 78B-9-107, Statute of limitations for postconviction relief.

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[3] Please refer to pages 1-69 of the record.
[4] Please refer to pages 116-125 of the record.
[5] Please refer to the transcripts at pages 186-253 of the record.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:

(a) exoneration through DNA testing under Section 78B-9-303; or

(b) factual innocence under Section 78B-9-401.

(5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

Renumbered and Amended by Chapter 3, 2008 General Session
Amended by Chapter 288, 2008 General Session
Amended by Chapter 358, 2008 General Session

2. Utah Constitution, Article I, Section 11. [Courts open -- Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

3. Utah Constitution, Article I, Section 7 [Due process of law.]

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

II. Petitioner Argues That The Court Inappropriately Granted Summary Judgment

Petitioner argues that after reviewing the pleadings, proffer, and evidence, on May 27, 2016, the Court incorrectly granted Taylorsville City's (the "City") motion for summary judgment.[6&7]

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[6] Please refer to the *Order Granting Summary Judgment And Denying Petitioner Relief* at pages 171-172 of the record.

[7] Please refer to the transcripts at pages 186-253 of the record.

The issue was appropriately preserved via the following: (1) Petitioner's *PCRA Petition* and its accompanying *Memorandum*;[8] (2) Petitioner's *Memorandum in Response to Respondent's Motion*;[9] and (3) Petitioner's oral arguments presented to the Court at all of the court hearings held on this matter.[10]

The appropriate appellate review standard to contest the Court's incorrect ruling that granted the City's motion for summary judgment is based on the following holding from the Lucky Seven court,

> "In reviewing a summary judgment, we apply the analytical standard required of the trial court. We liberally construe the facts and view the evidence in a light most favorable to the party opposing the motion. Moreover, because a summary judgment is granted as a matter of law rather than fact, we are free to reappraise the trial court's legal conclusion. After reviewing the facts in the light most favorable to appellant, if we conclude there is a dispute as to a material issue of fact, we must reverse the trial court's determination and remand for trial on that issue. It is inappropriate for courts to weigh disputed material facts in ruling on a summary judgment. It matters not that the evidence on one side may appear to be strong or even compelling. One sworn statement under oath is all that is needed to dispute the averments on the other side of the controversy and create an issue of fact, precluding the entry of summary judgment," (citations and quotations omitted). Lucky Seven Rodeo Corp. v. Clark, 755 P.2d 750, 752 (Utah App. 1988).

The constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative or of central importance to this issue of the appeal are as follows:

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[8] Please refer to pages 1-69 of the record.
[9] Please refer to pages 116-125 of the record.
[10] Please refer to the transcripts at pages 186-253 of the record.

1. Utah Constitution, Article I, Section 11. [Courts open -- Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

2. Utah Constitution, Article I, Section 7 [Due process of law.]

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

3. Utah Rules of Civil Procedure, Rule 56.

Rule 56. Summary judgment.

(a) Motion for summary judgment or partial summary judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.

(a)(1) Instead of a statement of the facts under Rule 7, a motion for summary judgment must contain a statement of material facts claimed not to be genuinely disputed. Each fact must be separately stated in numbered paragraphs and supported by citing to materials in the record under paragraph (c)(1) of this rule.

(a)(2) Instead of a statement of the facts under Rule 7, a memorandum opposing the motion must include a verbatim restatement of each of the

moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional materials facts in dispute, which must be separately stated in numbered paragraphs and similarly supported.

(a)(3) The motion and the memorandum opposing the motion may contain a concise statement of facts, whether disputed or undisputed, for the limited purpose of providing background and context for the case, dispute and motion.

(a)(4) Each material fact set forth in the motion or in the memorandum opposing the motion under paragraphs (a)(1) and (a)(2) that is not disputed is deemed admitted for the purposes of the motion.

(b) Time to file a motion. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move for summary judgment at any time after service of a motion for summary judgment by the adverse party or after 21 days from the commencement of the action. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move for summary judgment at any time. Unless the court orders otherwise, a party may file a motion for summary judgment at any time no later than 28 days after the close of all discovery.

(c) Procedures.

(c)(1) Supporting factual positions. A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

(c)(1)(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or

declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(c)(1)(B) showing that the materials cited do not establish the absence or presence of a genuine dispute.

(c)(2) Objection that a fact is not supported by admissible evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c)(3) Materials not cited. The court need consider only the cited materials, but it may consider other materials in the record.

(c)(4) Affidavits or declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

(d) When facts are unavailable to the nonmoving party. If a nonmoving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(d)(1) defer considering the motion or deny it without prejudice;

(d)(2) allow time to obtain affidavits or declarations or to take discovery; or

(d)(3) issue any other appropriate order.

(e) Failing to properly support or address a fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by paragraph (c), the court may:

(e)(1) give an opportunity to properly support or address the fact;

(e)(2) consider the fact undisputed for purposes of the motion;

(e)(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the moving party is entitled to it; or

(e)(4) issue any other appropriate order.

(f) Judgment independent of the motion. After giving notice and a reasonable time to respond, the court may:

(f)(1) grant summary judgment for a nonmoving party;

(f)(2) grant the motion on grounds not raised by a party; or

(f)(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to grant all the requested relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or declaration submitted in bad faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. The court may also hold an offending party or attorney in contempt or order other appropriate sanctions.

4. Utah Rules of Criminal Procedure, Rule 11(e).

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(e)(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(e)(2) the plea is voluntarily made;

(e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(e)(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and (e)(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

STATEMENT OF THE CASE

I. Nature Of The Case

This appeal is based on: (1) the Court's incorrect determination that Petitioner untimely filed his PCRA Petition; and (2) the Court's incorrect ruling granting the City's motion for summary judgment.[11&12]

II. Course Of Proceedings

On February 27, 2007, Petitioner pled guilty plea to Driving Under The Influence Of ALC/Drugs, a Class B Misdemeanor, in violation of UCA § 41-6A-502.[13] On December 8, 2015, Petitioner filed his PCRA Petition and its accompanying Memorandum.[14] On February 12, 2016, the City filed its Motion for Summary Judgment.[15] On March 14, 2016, Petitioner filed the Memorandum in Response to Respondent's Motion.[16] On May 27, 2016, there was a court hearing on the above-mentioned pleadings.[17] On June 2, 2016, there was a

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[11] Please refer to the *Order Granting Summary Judgment And Denying Petitioner Relief* at pages 171-172 of the record.
[12] Please refer to the transcripts at pages 186-253 of the record.
[13] Please refer to pages 23-28 of the record.
[14] Please refer to pages 1-69 of the record.
[15] Please refer to pages 84-113 of the record.
[16] Please refer to pages 116-125 of the record.
[17] Please refer to the transcripts at pages 213-244 of the record.

telephonic conference on the above-mentioned pleadings.[18] At the conclusion of said hearings, the Court ruled that Petitioner's PCRA Petition was untimely filed, and granted the City's motion for summary judgment.[19&20]

III. Statement Of Facts

1. On February 27, 2007, Petitioner pled guilty to Driving Under The Influence Of ALC/Drugs, a Class B Misdemeanor, in violation of UCA § 41-6A-502.[21]

2. Petitioner timely filed his PCRA Petition on December 8, 2015.[22,23,24&25]

3. Petitioner presented disputed material facts to the Court, which requires the Court to deny the City's motion for summary judgment.[26,27,28&29]

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[18] Please refer to the transcripts at pages 245-253 of the record.
[19] Please refer to the *Order Granting Summary Judgment And Denying Petitioner Relief* at pages 171-172 of the record.
[20] Please refer to the transcripts at pages 213-253 of the record.
[21] Please refer to pages 23-28 of the record.
[22] Please refer to Petitioner's PCRA Memorandum, at pages 17-20 of the record.
[23] Please refer to Petitioner's Affidavit, at pages 30-31 of the record.
[24] Please refer to Petitioner's Memorandum in Response to Respondent's Motion, at pages 120-124 of the record.
[25] Please refer to the transcripts at pages 213-253 of the record.
[26] Please refer to Petitioner's PCRA Memorandum, at pages 9-69 of the record
[27] Please refer to Petitioner's Affidavit, at pages 30-31 of the record.
[28] Please refer to Petitioner's Memorandum in Response to Respondent's Motion, at pages 116-125 of the record.
[29] Please refer to the transcripts at pages 213-253 of the record.

MARSHALLING THE EVIDENCE

I. Marshaling The Evidence Is Not Required As Petitioner Is Not Challenging The Evidence, But Rather The Court's Legal Conclusions Drawn Therefrom

The Utah Auto court held,

> "Utah Auto is not challenging the evidence underlying the court's decision, but the legal conclusions drawn therefrom. Thus, Utah Auto need not marshal." Utah Auto Auction v. Labor Comm'n, 2008 UT App 29, n. 4, 191 P.3d 1252.

In regard to marshalling, the Nielsen court held,

> "Too often, the appellee's brief is focused on this latter point, and not enough on the ultimate merits of the case. To encourage the latter and discourage the former, we also hereby repudiate the requirements of playing devil's advocate and of presenting every scrap of competent evidence in a comprehensive and fastidious order. That formulation is nowhere required in the rule. And its principal impact on briefing has been to incentivize appellees to conduct a fastidious review of the record in the hope of identifying a scrap of evidence the appellant may have overlooked. That is not the point of the marshaling rule, and will no longer be an element of our consideration of it," (citations and quotations omitted). State v. Nielsen, 2014 UT 10, ¶ 43, 326 P.3d 645.

Here, marshalling is not required, pursuant to Utah Auto, because Petitioner is not challenging the evidence underlying the court's decision, but the legal conclusions drawn therefrom. Notwithstanding, Petitioner lists all of the evidence provided to the Court as follows: (1) Petitioner's court docket for case number

061117770;[30] (2) Petitioner's Affidavit;[31] (3) the English translation of the Waiver;[32] (4) the Spanish Waiver;[33] (4) Utah Rules of Criminal Procedure, Rule 11(e) 2007;[34] (5) a copy of Pinder v. State;[35] and (6) a copy of Petitioner's request for discovery.[36]

After reviewing said evidence, Petitioner did not discover any new evidence that he may have overlooked, as required by Nielsen. Accordingly, Petitioner prays the Appellate Court to determine that Petitioner's marshalling is sufficient, thereby allowing the Appellate Court to consider the merits of Petitioner's appeal.

SUMMARY OF ARGUMENTS

I. The Court Incorrectly Determined That Petitioner's PCRA Petition Was Untimely Pursuant To UCA § 78B-9-107

In relation to the PCRA timeliness issues the Pinder court held,

> "Our cases establish that a defendant could have raised a claim when he or his counsel is aware of the essential factual basis for asserting it," (quotations omitted). Pinder v. State, 2015 UT 56, ¶ 44, 367 P.3d 968.

The Lovell court held,

> "we held that because of the importance of compliance with Rule 11(e) ... the law places the burden of establishing compliance with those

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[30] Please refer to pages 23-28 of the record.
[31] Please refer to pages 30-31 of the record.
[32] Please refer to pages 35-41 of the record.
[33] Please refer to pages 42-45 of the record.
[34] Please refer to pages 47-49 of the record.
[35] Please refer to pages 51-65 of the record.
[36] Please refer to pages 67-69 of the record.

> requirements on the trial judge. The trial judge must fulfill the ... requirements imposed by [rule 11(e)] on the record before accepting the guilty plea. Although rule 11(e) does not require the judge to personally address the defendant regarding the rights the defendant is waiving, our cases impose a duty on the trial judge under rule 11(e) to determine that a defendant has been affirmatively advised of the rights he is waiving," (citations and quotations omitted). State v. Lovell, 2011 UT 36, ¶ 12, 262 P.3d 803.

Here, the Taylorsville Justice Court (the "Plea Court"), possessed the duty to comply with Rule 11(e) pursuant to Lovell. However, the Plea Court failed to comply with the Utah Rules of Civil Procedure, Rule 11(e), thereby violating Petitioner's constitutional right to due process.[37] Petitioner reasonably relied on the Plea Court's disposition of his matter as being appropriate and constitutionally valid. At no point did Petitioner have any reason to believe that the Plea Court violated his constitutional right to due process because it failed to abide by Rule 11(e).

As such, it is impossible for Petitioner to file an appeal, nor could he have raised a claim regarding the Plea Court's failure to comply with Rule 11(e), because he was not aware of the essential factual basis for asserting it.

The Court's incorrect ruling is based on the unrealistic idea that Petitioner, who was not represented by counsel, and is a lay person, was aware of Rule 11(e) and its constitutional implications on the day he pled guilty. Most attorneys are unaware of Rule 11(e), unless they practice criminal law on a regular basis. For

[37] As completely described below.

this exact scenario, the legislature carved out an exception in UCA § 78-B-9(107)(2)(e), which states in pertinent part,

> "for purposes of this section, the cause of action accrues on the latest of the following dates: the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based."

Said statue is further buttressed by a large volume of case law that protects Petitioner's right to due process via Rule 11(e). Said case law equitably states that if a defendant's constitutional right to due process is violated via Rule 11(e), then the court must withdraw the plea and vacate the sentence, otherwise the court abuses its discretion.[38]

Common sense and equity dictates that Petitioner be allowed to file his PCRA Petition within the one year period of when he became aware that his constitutional right to due process was violated by the Plea Court. Therefore, it is appropriate for the Appellate Court to remand with instructions to the Court that Petitioner's PCRA Petition was timely filed. Further, this disputed fact of timeliness, in and of itself, is sufficient for the Court to deny the City's motion for summary judgment.

[38] As completely described below.

II. The Trial Court Incorrectly Granted Summary Judgment In Violation Of *Lucky Seven*

Here, it does not matter whether or not the City's evidence, in its motion for summary judgment, may appear to be strong or even compelling pursuant to Lucky Seven. What does matter is that Petitioner presented the disputed material facts to the Court,[39] and it is inappropriate for the Court to weigh said disputed material facts in its summary judgment ruling pursuant to Lucky Seven. Said disputed material facts as presented by Petitioner are as follows: (a) a sufficient record exists to determine that Petitioner's constitutional right to due process was violated, as more thoroughly explained in subsection "A", starting on page 28; (b) it is appropriate for the Court to apply the Lovell standard, as more thoroughly explained in subsection "B", starting on page 30; (c) the Waiver and other documents are invalid as they were not incorporated into the record, as more thoroughly explained in subsection "C", starting on page 31; (d) Petitioner's plea is unknowing and involuntary since the waiver and other documents were not incorporated into the record, as more thoroughly explained in subsection "D", starting on page 33; (e) Petitioner's plea is still unknowing and involuntary in the event the Court inappropriately chooses to rely on the unincorporated Waiver, as more thoroughly explained in subsection "E",

[39] In addition to the disputed material fact that Petitioner's PCRA Petition was timely filed, as discussed above.

starting on page 34; and (f) the Court abused its discretion, as more thoroughly explained in subsection "F", starting on page 36. It is appropriate for the Appellate Court to review said disputed facts in a light most favorable to Petitioner, and if the Appellate Court concludes that there is a dispute to said material issues of fact, then the Court's summary judgment decision must be reversed pursuant to Lucky Seven.

ARGUMENT

POINT ONE: The Court Incorrectly Determined That Petitioner's PCRA Petition Was Untimely Pursuant To UCA § 78B-9-107

It is appropriate for the Appellate Court to remand with instructions to the Court stating that Petitioner timely filed his PCRA Petition.

The Gardner court held,

> "Broadly speaking, if a defendant's sentence or conviction is affirmed after direct appeal, or if no direct appeal is taken, the convicted person may pursue a post-conviction remedy by filing a petition under the PCRA." Gardner v. State, 2010 UT 46, ¶ 58, 234 P.3d 1115.

Here, Petitioner did not file a direct appeal for his underlying matter, and therefore, Petitioner properly filed his PCRA Petition pursuant to Gardner.

I. Petitioner Satisfies The PCRA Procedural Bar

The Gardner court describes the two PCRA time bars, i.e. the procedural bar and the limitations bar, wherein, under the procedural bar,

> "the petitioner may not seek relief based on grounds that may still be raised on direct appeal or by a post-trial motion, or on grounds that were already raised at trial or on direct appeal or could have been but [were] not raised at trial or on appeal. Relief is also precluded if the grounds

> for relief asserted by the petitioner were raised and addressed in a prior post-conviction proceeding or if the grounds could have been, but [were] not, raised in a prior post-conviction proceeding," (citations and quotations omitted). Gardner v. State, 2010 UT 46, ¶ 59, 234 P.3d 1115.

However, in relation to the PCRA procedural bar the Pinder court held,

> "Our cases establish that a defendant could have raised a claim when he or his counsel is aware of the essential factual basis for asserting it. And that conclusion holds even when the defendant later discovers additional evidence providing further support for the claim," (quotations omitted). Pinder v. State, 2015 UT 56, ¶ 44, 367 P.3d 968.

The Lovell court held,

> "we held that because of the importance of compliance with Rule 11(e) ... the law places the burden of establishing compliance with those requirements on the trial judge. The trial judge must fulfill the ... requirements imposed by [rule 11(e)] on the record before accepting the guilty plea. Although rule 11(e) does not require the judge to personally address the defendant regarding the rights the defendant is waiving, our cases impose a duty on the trial judge under rule 11(e) to determine that a defendant has been affirmatively advised of the rights he is waiving," (citations and quotations omitted). State v. Lovell, 2011 UT 36, ¶ 12, 262 P.3d 803.

Here, the Plea Court possessed the duty to comply with Rule 11(e) pursuant to Lovell. However, the Plea Court failed to comply with Rule 11(e), thereby violating Petitioner's constitutional right to due process. Petitioner reasonably relied on the Plea Court's disposition of his matter as being appropriate and constitutionally valid. At no point did Petitioner have any reason to believe that the Plea Court violated his

constitutional right to due process because it failed to abide by Rule 11(e). Petitioner reasonably relied on the Plea Court abiding by his constitutional right to due process

As such, it is impossible for Petitioner to file an appeal, nor could he have raised a claim regarding the Plea Court's failure to comply with Rule 11(e), because he was not aware of the essential factual basis for asserting it. Therefore, Petitioner overcomes the procedural bar pursuant to Pinder.

II. Petitioner Satisfies The PCRA Limitations Bar

The Gardner court held that the,

> "second procedural requirement, which we will refer to as the "limitations bar," establishes the time period within which new claims for relief must be raised. That is, even if a claim is not precluded by the procedural bar, a petitioner's claim for relief is barred if the petition is not timely filed. Under the PCRA, a petition for post-conviction relief must be filed within one year after the cause of action has accrued. By statute, the accrual date for the limitations bar is the latest date on which one of a number of specific milestones occur. Where the conviction is not challenged on appeal, the accrual date is the last day on which the direct appeal could have been filed. Where the conviction is challenged on direct appeal, the accrual date is the date that the appellate court decision is entered. Where certiorari review may be sought from either this court or the United States Supreme Court, the accrual date occurs either on the last date for filing a petition for certiorari, if such a petition is not filed, or, if one is filed, on the date that petition is denied or otherwise decided. Finally, if evidentiary facts arise at a date later than all of the dates already described, the petitioner may file a petition within one year of the date that the petitioner "knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based," (emphasis added). Gardner v. State, 2010 UT 46, ¶¶ 60-61, 234 P.3d 1115.

Thus, it is appropriate for the Court to disregard all of the PCRA accrual dates, except for the accrual date of UCA § 78B-9-107(2)(e), just as the Gardner court did because, in 1985, Ronnie Lee Gardner was convicted of first degree murder and sentenced to death. Nevertheless, Mr. Gardner could have brought a PCRA petition, 15 years after his conviction, between September 1999 and September 2000 because Mr. Gardner became aware of new evidence.

> "The district court found that Mr. Gardner's due process and equal protection claims were untimely because the conclusion of federal court review was not the relevant date for the PCRA statute of limitations, but rather the relevant date was the day on which Mr. Gardner became aware he had newly developed mitigation evidence, which was presented to the federal magistrate judge in September 1999. The district court concluded that the PCRA required Mr. Gardner to have brought this claim by September 2000, one year after having discovered the evidence." Id. ¶ 51.

Similarly here, the applicable accrual date for the limitations bar is one year from when Petitioner became aware of the evidence demonstrating the Plea Court's failure to abide by Rule 11(e) pursuant to Gardner. Since Petitioner reasonably relied on the Plea Court's ability to ensure that the disposition of his criminal matter was appropriate and constitutionally valid, there was no need for Petitioner to question whether or not the Plea Court complied with Rule 11(e). Therefore, Petitioner acted diligently when he first became aware, on or about November 13, 2015, when Petitioner's current counsel informed Petitioner that the Plea Court failed to comply with Rule 11(e).

Therefore, the appropriate accrual date for Petitioner's PCRA petition is November 13, 2015. Accordingly Petitioner's window to timely file his PCRA petition lies between November 13, 2015 and November 13, 2016. As such, Petitioner's PCRA petition was timely filed. Therefore, Petitioner overcomes the PCRA limitations bar pursuant to Gardner. For all of the above reasons, it is appropriate for the Court to maintain and move forward with the above-captioned matter.

"In 1985 Ronne Lee Gardner was convicted of first degree murder and sentenced to death."[40] His PCRA history is as follows:

1. Five (5) years after his conviction, "in 1990, Gardner filed his first post-conviction petition in the district court."[41]

2. Fourteen (14) years after his conviction, an evidentiary hearing took place in 1999, which concluded that Mr. Gardner's trial counsel did not spend enough time preparing and explaining mitigating factor's regarding Mr. Gardner's mental health, thereby creating a new due process claim for Mr. Gardner. "Indeed, that evidence came into existence, in its current form, during an evidentiary hearing conducted by the federal magistrate judge. That hearing took place over the course of approximately ten days in September and October 1999,"[42] (hereinafter referred to as the "New Evidence").

3. Fifteen (15) years after his conviction, Mr. Gardner filed his, "second state petition for post-conviction relief, which he filed on

[40] Gardner v. State, 2010 UT 46, ¶ 1, 234 P.3d 1115.
[41] Gardner v. Galetka, 2004 UT 42, ¶ 4, 94 P.3d 263.
[42] Gardner v. State, 2010 UT 46, ¶ 67, 234 P.3d 1115.

May 12, 2000."[43] Mr. Gardner failed to include the New Evidence in his second PCRA Petition.

4. Twenty-five (25) years after his conviction, in 2010, Mr. Gardner files his third PCRA petition.[44] Mr. Gardner included the New Evidence in his third PCRA Petition, wherein, Mr. Gardner incorrectly argued that the tolling of the time period starts upon learning the legal significance of the new evidence, which occurred after the conclusion of the federal court review, which occurred shortly before the filing of his third PCRA petition.[45]

5. "The district court found that Mr. Gardner's due process and equal protection claims were untimely because the conclusion of federal court review was not the relevant date for the PCRA statute of limitations, but rather the relevant date was the day on which Mr. Gardner became aware he had newly developed mitigation evidence, which was presented to the federal magistrate judge in September 1999. The district court concluded that the PCRA required Mr. Gardner to have brought this claim by September 2000, one year after having discovered the evidence."[46]

6. The Gardner court confirmed the district court's ruling, and held,

   "Because Mr. Gardner became aware of this evidence in 1999, he had an opportunity to raise issues related to the evidence in his second state petition for post-conviction relief. Because he did not do so, his claims are now precluded by the procedural bar of the PCRA. From this conclusion, it necessarily follows that Mr. Gardner's due process claims are also precluded by the limitations bar of the PCRA. That is, because the claims could have been raised in 2000, they also could have been raised more than one year before Mr. Gardner filed this petition."[47]

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[43] Gardner v. State, 2010 UT 46, ¶ 68, 234 P.3d 1115.
[44] Gardner v. State, 2010 UT 46, ¶ 1, 234 P.3d 1115.
[45] Gardner v. State, 2010 UT 46, ¶¶ 72-75, 234 P.3d 1115.
[46] Gardner v. State, 2010 UT 46, ¶ 51, 234 P.3d 1115.
[47] Gardner v. State, 2010 UT 76, ¶ 51, 234 P.3d 1115.

7. The Gardner court also held,

> "Broadly speaking, if a defendant's sentence or conviction is affirmed after direct appeal, or if no direct appeal is taken, the convicted person may pursue a post-conviction remedy by filing a petition under the PCRA."[48]

Therefore, in order to recap, the following issues are highlighted. The term "new evidence" does not mean completely new evidence that is discovered after trial for the first time. As Gardner points out, Mr. Gardner's trial counsel's failure to appropriately present the New Evidence occurred during Mr. Gardner's trial in 1985. What is important for PCRA purposes is that Mr. Gardner first became aware of the New Evidence fourteen (14) years after his conviction in 1999. As such both the district and appellate courts held that Mr. Gardner could have timely filed a second PCRA petition within one year of becoming aware of the New Evidence.

Gardner is buttressed by Brown. The Brown court holds that the PCRA time bar is triggered upon the, "actual or imputed discovery of the evidentiary facts supporting the petition," and not when a petitioner "recognizes their legal significance."[49] Mr. Brown was sentenced on March 31, 2011.[50] However, Mr. Brown "does not claim that he was unaware of these facts [that formed the basis of his PCRA petition] when he pled guilty. Indeed, he concedes that he 'may have

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[48] Gardner v. State, 2010 UT 76, ¶ 58, 234 P.3d 1115.
[49] Brown v. State, 2015 UT App 254, ¶ 10, 361 P.3d 124.
[50] Brown v. State, 2015 UT App 254, ¶ 2, 361 P.3d 124.

known of these basic facts at the time of sentencing.'"[51] As such, Mr. Brown's tolling period for PCRA purposes began on March 31, 2011, i.e., the time when he became "aware of the evidence."[52] Therefore, Mr. Brown had until March 31, 2012 to timely file his PCRA petition.

However, Mr. Brown (just as Mr. Gardner), untimely filed his PCRA petition on November 25, 2013, when he became aware of the legal significance of the facts that formed the basis of his PCRA petition.[53] Therefore, the Brown court correctly held that Mr. Brown's PCRA Petition was untimely.

In its recent holding, the Utah Supreme Court continues to support the Gardner and Brown rulings, when it held, in relation to the PCRA time bar that,

> "Our cases establish that a defendant 'could have" raised a claim when he or his counsel is aware of the essential factual basis for asserting it.'"[54]

Here, Petitioner timely filed his PCRA petition pursuant to Gardner, Brown, and Pinder. Petitioner did not file an appeal, however, pursuant to Gardner, an appeal is not required in order to file a PCRA petition.[55] In Gardner, Mr. Gardner first became aware of a due process violation, via an investigation by a federal court,

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[51] Brown v. State, 2015 UT App 254, ¶ 11, 361 P.3d 124.
[52] Gardner v. State, 2010 UT 76, ¶ 51, 234 P.3d 1115.
[53] Brown v. State, 2015 UT App 254, ¶ 4, 361 P.3d 124.
[54] Pinder v. State, 2015 UT 56, ¶ 44, 367 P.3d 968.
[55] Gardner v. State, 2010 UT 76, ¶ 58, 234 P.3d 1115.

fourteen (14) years after his conviction. Similarly here, Petitioner first became aware of a due process violation, via an investigation by current counsel, nine (9) years after his conviction.

What is important for PCRA timeliness purposes is the actual date a petitioner first becomes aware of new evidence that forms the basis of the PCRA petition. In Gardner, both the district and appellate courts correctly held that Mr. Gardner could have timely filed a second PCRA petition within one year that Mr. Gardner became aware of the New Evidence. In other words, Mr. Gardner could have timely brought a second PCRA petition based on the New Evidence between 1999 and 2000.

Here, Petitioner does not concede that he was aware of the facts that form the basis of his PCRA petition at the time of his conviction and sentence. This is in stark contrast to Brown, because Mr. Brown did make such a concession. Here, Petitioner states that he first became aware of the new evidence that forms the basis of his appeal on November 13, 2015. Therefore, Petitioner timely filed his PCRA petition from the date he became "aware of the essential factual basis for asserting it."[56] For all of the above reasons, it is appropriate for the Appellate Court to remand with instructions to the Court that Petitioner's PCRA Petition is timely filed.

[56] Pinder v. State, 2015 UT 56, ¶ 44, 367 P.3d 968.

POINT TWO: The Trial Court Incorrectly Granted Summary Judgment In Violation Of *Lucky Seven*

The Lucky Seven court held,

> "In reviewing a summary judgment, we apply the analytical standard required of the trial court. We liberally construe the facts and view the evidence in a light most favorable to the party opposing the motion. Moreover, because a summary judgment is granted as a matter of law rather than fact, we are free to reappraise the trial court's legal conclusion. After reviewing the facts in the light most favorable to appellant, if we conclude there is a dispute as to a material issue of fact, we must reverse the trial court's determination and remand for trial on that issue. It is inappropriate for courts to weigh disputed material facts in ruling on a summary judgment. It matters not that the evidence on one side may appear to be strong or even compelling. One sworn statement under oath is all that is needed to dispute the averments on the other side of the controversy and create an issue of fact, precluding the entry of summary judgment," (citations and quotations). Lucky Seven Rodeo Corp. v. Clark, 755 P.2d 750, 752 (Utah App. 1988).

It is appropriate for the Appellate Court to remand with instructions to the reverse its Summary Judgment ruling because Petitioner provided disputed material facts that requires the City's motion for summary judgment to be denied.

I. The Trial Court Failed To Review The Facts In The Light Most Favorable To Petitioner For Summary Judgment Purposes, In Violation Of *Lucky Seven*

It is appropriate for the Appellate Court to review the following disputed facts in a light most favorable to Petitioner, and if the Appellate Court concludes that there is a dispute to said material issues of fact, then the Court's summary judgment decision must be reversed pursuant to Lucky Seven.

A. A Sufficient Record Exists To Determine That Petitioner's Constitutional Right To Due Process Was Violated

After serving 8 years in State Prison, the Whetton defendant argued that he should be released, "mainly on the basis of his own self-serving assertions, that he was not accorded due process of law nor given a fair trial." Whetton v. Turner, 497 P.2d 856, 857 (Utah 1972). The Whetton court held, "Upon the basis of the record before us it is not made to appear that there is any likelihood that anything of that character exists in this case," primarily on the basis that the defendant was unable to procure a transcript. Id. at 858.

However, the Whetton court held,

> "We do not desire to be so arbitrary as to say that in no instance would the lack of a transcript be deemed of critical importance. Common sense as to what fairness and justice demand should be applied to the circumstances shown. If it appears that there is any reasonable likelihood that there was some substantial failure to accord the accused the protections our law affords, or that there may have been a miscarriage of justice, such as, for example, where there may have been some chicanery or connivance to convict one innocent of crime, or a case of obvious mistaken identity, or some other such circumstance that it would be wholly unconscionable not to re-examine the conviction, then the best possible effort should be made to reconstruct the record and ascertain just what occurred." Id.

Similarly, here, there is a reasonable likelihood that there was some substantial failure to accord Petitioner the protections our law affords him, specifically the violation of his right to due process. Therefore the best possible efforts should be made to reconstruct the record and ascertain just what occurred.

As is the case here, the defendant in Walker also argued that his constitutional right to due process was violated because he entered his guilty plea unknowingly and involuntarily. The Walker court determined that such a claim warrants the court's best possible effort to reconstruct the record, without a transcript.

> "No transcript exists for this proceeding; however, the record does contain the trial court's minute entry of the hearing. The court's minutes indicate that Defendant was advised of his rights and the consequences of entering into a guilty plea." State v. Walker, 2013 UT App 198, ¶ 4, 308 P.3d 573; *see also* RM Lifestyles, LLC v. Ellison, UT App 290, Notes 1 & 2, 263 P.3d 1152 ("However, our review of this hearing is limited to the applicable minute entry because a transcript of the hearing was not included in the appellate record. Again, the Ellisons have not provided a transcript of this March 5 hearing, and thus, our review of what occurred during this hearing is limited to the trial court's minute entry, order, and findings of fact"

The Walker court determined that the defendant entered a knowing and voluntary plea based on the trial court's minute entry and because the defendant,

> "failed to identify any other document in the record revealing a significant departure by the plea-taking court from the rule 11(e) requirements that would create doubt that Defendant's plea was anything other than knowing and voluntary." Id. ¶ 38.

Here, through no fault of Petitioner, a transcript is not available because the Plea Court was not in the practice of recording its hearings during the course of Petitioner's case.[57] Nevertheless, Petitioner provides numerous documents that reveal a significant departure by the Plea Court from the Rule 11(e) requirements,

[57] The Plea Court currently does record its hearings.

including but not limited to the Request For Your Case To Be Called (the "Waiver"),[58] the court docket,[59] and the lack of an Information.[60] Said documents create doubt that Petitioner's plea was anything other than knowing and voluntary. Accordingly: (1) it is inappropriate for the Court to assume the regularity of the proceedings below because the Plea Court's documents provide sufficient doubt that Petitioner's plea was anything other than knowing and voluntary; (2) a sufficient record exists that demonstrates Petitioner's unconstitutional plea; and (3) it is appropriate for the Court to make its best possible effort to reconstruct the record and ascertain just what occurred with the remaining available record.

B. It Is Appropriate For The Court To Apply The Lovell Standard To This Matter

The Lovell court determined that after Rule 11(l) became effective on April 1, 2005, a petitioner must meet the following two prongs in order to withdraw a guilty plea: (1) the plea-court failed to strictly comply with Rule 11(e); and (2) the defendant's plea was not entered into knowingly and voluntarily. State v. Lovell, 2011 UT 36, ¶ 20, 262 P.3d 803. Here, Petitioner entered his guilty plea on February 27, 2007, and thus he must demonstrate both prongs.

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[58] Please refer to the copies of the English translation of the Waiver and its Spanish original at pages 35-45 of the record.
[59] Please refer to a copy of the court docket at pages 23-28 of the record.
[60] Petitioner requested a copy of the court file, where, upon receipt of the copy of the court file, an Information was not included.

C. The Waiver And Other Documents Are Invalid As They Were Not Incorporated Into The Record

If a court uses a waiver/affidavit to fulfill the plea colloquy, Rule 11(e) requirements,

> "The trial judge should then review the statements in the affidavit with the defendant, question the defendant concerning his understanding of it ... on the record before accepting the guilty plea ... This procedure may take additional time, but constitutional rights may not be sacrificed in the name of judicial economy. The procedure outlined is designed to assist trial judges in making the constitutionally required determination that the defendant's plea is truly knowing and voluntary and will tend to discourage, or at least facilitate swift disposition of, post-conviction attacks on the validity of guilty pleas because the trial judge will have produced a clearly adequate record for review." State v. Gibbons, 740 P.2d 1309, 1314 (Utah 1987).

The Lehi court reiterated the proper incorporation rule by stating,

> "that defendant's affidavit was not properly incorporated into the record because the trial court made no inquiry into whether defendant had read, understood, and acknowledged the affidavit," (citations and quotations omitted). State v. Lehi, UT App 212, ¶ 9, 73 P.3d 985.

Here, the Plea Court relied on the Waiver[61] in order to ensure that Petitioner's plea was knowing and voluntary. However, there is no evidence on the record that demonstrates that the Plea Court made an inquiry as to whether Petitioner had read, understood, and acknowledged the Waiver as required by Gibbons and Lehi. This is

[61] Please refer to the copies of the English translation of the Waiver and its Spanish original at pages 35-45 of the record.

further corroborated via Petitioner's Affidavit.[62] Therefore, it is inappropriate for the Court to use the Waiver in order to demonstrate that Petitioner was aware of any aspect of Rule 11(e) prior to pleading guilty because the Waiver was never incorporated into the record.

The Lovell court stated,

> "although a variety of sources may be used to show that the defendant was informed of his rights, those sources must be incorporated into the record in the same manner as a plea affidavit. That is, the record must reflect that those documents were read and understood by the defendant." State v. Lovell, 2011 UT 36, ¶ 16, 262 P.3d 803.

Here, the February 27, 2007 court docket note states that, "def advsd of rule 11 and signed waiver." However, the record fails to demonstrate that Plea Court asked Petitioner if he had read, understood, and acknowledged the February 27, 2007 court docket note. This is further corroborated via Petitioner's Affidavit.[63] Therefore, it is inappropriate for the Court to use the court docket, or any other document that the Plea Court failed to incorporate into the record, in order to demonstrate that Petitioner was aware of his Rule 11(e) rights prior to pleading guilty.

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[62] Please refer to Petitioner's Affidavit at pages 30-31 of the record.
[63] Please refer to Petitioner's Affidavit at pages 30-31 of the record.

However, in the event that that Court inappropriately relies on said court docket note it is still insufficient for Rule 11(e) purposes because the Gibbons court found that the

> "form included in the record in this case is inadequate, being nothing more than a form with boxes for the trial judge to check denoting "The defendant acknowledges receiving a copy of the information and the same was read to him" (in this case, the information was not read); "Defendant is advised of his/her rights"; and "Plea is determined to be voluntary." State v. Gibbons, 740 P.2d 1309, 1314 at note 4, (Utah 1987).

Just as the Gibbons court found that the "form ... is inadequate, being nothing more than a form with boxes for the trial judge to check denoting ... Defendant is advised of his/her rights," it is appropriate for the Court to find the same, i.e., the court docket note is inadequate especially since the Plea Court did not create the court docket. In Gibbons, the form was at least checked and signed by the court. In stark contrast, here, Plea Court did not check nor sign the court docket thereby making it inappropriate for the Court rely on the court docket in any fashion pursuant to Gibbons.

D. Petitioner's Plea Is Unknowing And Involuntary Since The Waiver And Other Documents Were Not Incorporated Into The Record

As a result of the Plea Court's failure to incorporate the Waiver, court docket, and Information into the record, it is inappropriate for the Court to rely on said documents in order to ascertain whether or not Petitioner pled knowingly and

voluntarily. Therefore, there is no evidence on the record demonstrating that the Plea Court abided by Rule 11(e).

Accordingly, Petitioner meets the two-prong Lovell standard because: (1) the Plea Court failed to strictly comply with Rule 11(e)(1-8); and (2) said failure constitutes an unknowing and involuntary plea pursuant to Lovell, Alexander, and Nicholls infra, thereby making it appropriate for the Court to vacate Petitioner's conviction and withdraw his guilty plea, nunc pro tunc, as a result of the violation of his constitutional right to due process.

E. Petitioner's Plea Is Still Unknowing And Involuntary In The Event The Court Inappropriately Chooses To Rely On The Unincorporated Waiver

a. The Plea Court Failed To Explain The Consequences Of Petitioner's Plea In Violation Of Rule 11(e)(5)[64]

Here, the Waiver[65] provides a table with potential jail time and potential fine associated with different misdemeanors. However, the Waiver fails to distinguish whether or not Petitioner will be facing: (1) solely a jail sentence; (2) solely a fine; or (3) a jail sentence along with a fine. As such the Plea Court fails to inform Petitioner of the possible consequence of his plea in violation of Rule 11(e)(5). The Knowlden court states,

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[64] Please refer to the copy of the Utah Rules of Criminal Procedure, Rule 11(e) (2007), at pages 47-49 of the record.

[65] Please refer to the copies of the English translation of the Waiver and its Spanish original at pages 35-45 of the record.

> "a plea is knowing and voluntary if it is made with sufficient awareness of the relevant circumstances and likely consequences." State v. Knowlden, 2013 UT App 63, ¶ 3, 298 P.3d 691.

As such, Petitioner successfully meets both prongs of the Lovell standard because: (1) the Plea Court failed to strictly comply with Rule 11(e)(5) by not explaining the consequences of the plea to Petitioner; and (2) said failure constitutes an unknowing and involuntary plea pursuant to Knowlden. Therefore, it is appropriate for the Court to vacate Petitioner's conviction, and allow him to withdraw his no contest plea, nunc pro tunc.

b. The Plea Court Failed To Explain The Criminal Elements In Violation Of Rule 11(e)(4)(A)[66]

Here, the Waiver[67] fails to state the elements of the charged crime, in violation of Rule 11(e)(4)(A). The Alexander court held,

> "Because a review of the record does not demonstrate that [defendant] was informed of or understood the essential elements of the ... charge ... we therefore conclude that [defendant's] plea was unknowingly and involuntarily made, and we hold that [defendant] has made the showing necessary to withdraw his guilty plea." State v. Alexander, 2012 UT 27, ¶ 37, 279 P.3d 371.

As such, Petitioner successfully meets both prongs of the Lovell standard because: (1) the Plea Court failed to strictly comply with Rule 11(e)(4)(A) by not stating the elements of the charged crime; and (2) said failure constitutes an

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[66] Please refer to the copy of the Utah Rules of Criminal Procedure, Rule 11(e) (2007), at pages 47-49 of the record.

[67] Please refer to the copies of the English translation of the Waiver and its Spanish original at pages 35-45 of the record.

unknowing and involuntary plea pursuant to Alexander. Therefore, it is appropriate for the Court to vacate Petitioner's conviction, and allow him to withdraw his no contest plea, nunc pro tunc.

c. The Plea Court Failed To Explain The Factual Basis For the Plea In Violation Of Rule 11(e)(4)(B)[68]

Here, the Waiver[69] fails to explain the factual basis for the plea in violation of Rule 11(e)(4)(B). The Nicholls court held,

> "A knowing and voluntary plea is one that has a factual basis for the plea and ensures that the defendant understands and waives his constitutional right against self-incrimination, the right to a jury trial, and the right to confront witnesses." Nicholls v. State, 2009 UT 12, ¶ 20, 203 P.3d 976.

As such, Petitioner successfully meets both prongs of the Lovell standard because: (1) the Plea Court failed to strictly comply with Rule 11(e)(4)(B) by failing to explain the factual basis for the plea; and (2) said failure constitutes an unknowing and involuntary plea pursuant to Nicholls. Therefore, it is appropriate for the Court to vacate Petitioner's conviction, and allow him to withdraw his no contest plea, nunc pro tunc.

F. The Court Abused Its Discretion

The Nicholls court stated,

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[68] Please refer to the copy of the Utah Rules of Criminal Procedure, Rule 11(e) (2007), at pages 47-49 of the record.

[69] Please refer to the copies of the English translation of the Waiver and its Spanish original at pages 35-45 of the record.

> "A guilty plea is not valid under the Due Process Clause of the United States Constitution unless it is knowing and voluntary," (citations and quotations omitted). Nicholls v. State, 2009 UT 12, ¶ 20, 203 P.3d 976; *see also* State v. Alexander, 2012 UT 27, ¶ 16, 279 P.3d 371 ("A guilty plea involves the waiver of several constitutional rights and is therefore valid under the Due Process Clause of the U.S. Constitution only if it is made voluntarily, knowingly, and intelligently," (citations and quotations omitted)).

Here, Petitioner's constitutional right to due process was violated because the Plea Court failed strictly comply with Rule 11(e), thereby making his plea unknowingly and involuntarily as more thoroughly described above. Accordingly, the Court abused its discretion by failing to grant Petitioner's requested relief.[70]

II. The Court Failed To Consider Appellant's Affidavit, For Summary Judgment Purposes, In Violation Of *Lucky Seven*

The Lucky Seven court held,

> "One sworn statement under oath is all that is needed to dispute the averments on the other side of the controversy and create an issue of fact, precluding the entry of summary judgment," (citations and quotations). Lucky Seven Rodeo Corp. v. Clark, 755 P.2d 750, 752 (Utah App. 1988).

It is appropriate for the Appellate Court to remand with instructions to the Court to reverse its summary judgment ruling because Petitioner provided a sworn

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[70] "if the trial court failed to strictly comply with Rule 11 of the Utah Rules of Criminal Procedure in taking the defendant's guilty plea, and subsequently denies the withdrawal of the plea, the trial court has exceeded its permitted range of discretion as a matter of law." State v. Mills, 898 P.2d 819, 821 (Utah App. 1995).

statement, via his Affidavit,[71] which disputes the City's averments which creates an issue of fact, and thereby precludes the Court's entry of summary judgment pursuant to Lucky Seven. For all of the above reasons, it is appropriate for the Appellate Court to remand with instructions to the Court to deny the City's motion for summary judgment.

CONCLUSION

WHEREFORE, Petitioner prays the Appellate Court to: (1) remand with instructions to the Court that Petitioner timely filed his PCRA Petition; (2) remand with instructions to the Court to deny the City's motion for summary judgment; and (3) provide Petitioner with any and all other relief that the Appellate Court deems appropriate, equitable, and proper.

ADDENDUM

No addendum is necessary under the Utah Rules of Appellate Procedure, Rule 24(a)(11).

DATED this 17th day of January, 2017.

NEWTON & HELFER, PLLC

Steven L. Newton
Alexander J. Helfer
Attorneys for Petitioner/Appellant

[71] Please refer to pages 30-31 of the record.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2017, a copy of the Brief of the Appellant was served via E-Mail, and two (2) copies of said Brief were served via personal, hand-delivery to the following:

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DATED this 17th day of January, 2017. **NEWTON & HELFER, PLLC**

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because this brief contains 10,155 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using 2010 Word, in font size number 14, in Times New Roman style.

DATED this 17th day of January, 2017. **NEWTON & HELFER, PLLC**

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