

2001

# Utah v. Felix G. Fernandez : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark Shurtleff, Attorney General; Attorney for Appellee.

William L. Schultz; Attorney for Appellant.

---

## Recommended Citation

Brief of Appellant, *Utah v. Fernandez*, No. 20010913 (Utah Court of Appeals, 2001).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/3554](https://digitalcommons.law.byu.edu/byu_ca2/3554)

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

---

**IN THE UTAH COURT OF APPEALS**

---

**STATE OF UTAH,**  
**Plaintiff/Appellee,**

**vs.**

**FELIX G. FERNANDEZ,**  
**Defendant/Appellant.**

:  
:  
:  
:  
:  
:  
:  
:  
:

**Case No. 20010913-CA**

**Priority No. 2 (incarcerated)**

---

**OPENING BRIEF OF APPELLANT**

---

**APPEAL FROM THE JUDGMENT AND ORDER OF PROBATION**  
**IN THE SEVENTH DISTRICT COURT**  
**IN AND FOR THE COUNTY OF SAN JUAN, STATE OF UTAH**  
**THE HONORABLE JUDGE LYLE R. ANDERSON, PRESIDING**

---

**MARK SHURTLEFF**  
**Attorney General**  
**160 E. 300 S. Heber Wells Bldg.**  
**Salt Lake City, Utah 84114**  
**Telephone: (801) 366-0180**

**Attorney for Appellee**

**WILLIAM L. SCHULTZ, #3626**  
**Attorney at Law**  
**69 East Center**  
**P.O. Box 937**  
**Moab, Utah 84532**  
**Telephone (435) 259-5914**

**Attorney for Appellant**

②

**FILED**  
**Utah Court of Appeals**

**MAR 21 2002**

**Paulette Stacey**  
**Clerk of the Court**

---

**IN THE UTAH COURT OF APPEALS**

---

**STATE OF UTAH,**  
**Plaintiff/Appellee,**

**vs.**

**FELIX G. FERNANDEZ,**  
**Defendant/Appellant.**

:  
:  
:  
:  
:  
:  
:  
:  
:

**Case No. 20010913-CA**

**Priority No. 2 (incarcerated)**

---

**OPENING BRIEF OF APPELLANT**

---

**APPEAL FROM THE JUDGMENT AND ORDER OF PROBATION**  
**IN THE SEVENTH DISTRICT COURT**  
**IN AND FOR THE COUNTY OF SAN JUAN, STATE OF UTAH**  
**THE HONORABLE JUDGE LYLE R. ANDERSON, PRESIDING**

---

**MARK SHURTLEFF**  
**Attorney General**  
**160 E. 300 S. Heber Wells Bldg.**  
**Salt Lake City, Utah 84114**  
**Telephone: (801) 366-0180**

**Attorney for Appellee**

**WILLIAM L. SCHULTZ, #3626**  
**Attorney at Law**  
**69 East Center**  
**P.O. Box 937**  
**Moab, Utah 84532**  
**Telephone (435) 259-5914**

**Attorney for Appellant**

## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities Cited.....	ii.
Statutes, Rules and Constitutional Provisions.....	ii.
Statement of Jurisdiction.....	1
Statement of Issues Presented and Standard of Review.....	1
Constitutional Provisions, Statutes and Rules.....	2
Statement of Case.....	3
A.    Nature of the Case.....	3
B.    Course of the Proceedings.....	4
C.    Disposition in the Court Below.....	4
D.    Statement of Facts.....	4
Summary of Argument.....	6
Argument .....	7
Point I: The trial court violated Fernandez’s right to a fair trial By permitting excessive courtroom security.....	7
Point II: The trial court erred in denying the for-cause challenge Of potential jurors.....	12
Point III: The trial erred in not granting a mistrial for the Introduction of evidence of the Defendant’s status as lock-down Inmates in violation of its in limine motion to exclude such Testimony.....	14
Point IV: The trial erred in refusing to order a pre-sentence report	16
Conclusion.....	17

## Addendum

- A. Judgment and Order of Commitment to Utah State Prison
- B. Constitutional Provisions Statutes and Rules

i.

**TABLE OF AUTHORITIES**  
**CASES CITED**

	<b><u>Page</u></b>
<u>Cf Williams v. Estelle</u> , 435 U.S. 501, 504-5 (1976) .....	1
<u>Hardee v. Kuhlman</u> , 581 F. 2d 330, 332 (CA2 1978).....	11
<u>Hopt v. Utah</u> , 120 U.S. 430 (1887).....	13
<u>Kennedy v. Cardwell</u> , 487 F. 2d 101, 108 (CA6 1973).....	11, 12
<u>State v. Bishop</u> , 753 P. 2d 439, 448 (Utah 1988).....	2, 13
<u>State v. Carter</u> , 888 P. 2d 629, 649 (Utah 1995).....	13
<u>State v. Daniels</u> , 2002, UT2, 2002 Utah Lexis 4.....	8, 9, 10
<u>State v. De Corso</u> , 993 P. 2d 837 (Utah 1999) <i>cert denied</i> 528 U.S. 1164 .....	2, 16
<u>State v. Gali</u> , 967, P. 2d 930 (Utah 1998).....	2
<u>State v. Gardner</u> , 789 P. 2d 273, 281 (Utah 1989) <i>cert denied</i> 494 U.S. 1090 (1990).....	1
<u>State v. Jaeger</u> , 973 P. 2d 404 (Utah 1999).....	17
<u>State v. Menzies</u> , 889 P. 2d 393 (Utah) <i>cert denied</i> 513 U.S. 1115 (1995) .....	2, 13, 14
<u>State v. Saunders</u> , 992 P. 2d 951 (Utah 1999).....	14, 15
<u>State v. Widdson</u> , 28 P. 3d 1278, 1290 (Utah 2001).....	2
<u>State v. Young</u> , 853 P. 2d 327 (Utah 1993).....	10

## **STATUTES, RULES AND CONSTITUTIONAL PROVISIONS**

Utah Code Sec. 64-13-20 .....	3, 17
Utah Code Sec. 76-1-501 .....	3
Utah Code Sec. 76-8-418 .....	3, 4
Utah Code Sec. 77-18-1 .....	3, 17
Utah Code Sec. 78-2a-3(2)(e).....	1
Rule 3, Utah R. App. P.....	1
Rule 4 (a), Utah R. App. P.....	1
Utah Const. Art. I, Sec. 12.....	2
U.S. Const. Amend XIV.....	3
Utah Rules of Evidence 401.....	3
Utah Rules of Evidence 402.....	3
Utah Rules of Evidence 403.....	3
Utah Rules of Evidence 404.....	3, 15

## **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this appeal pursuant to Rule 3 of the Utah Rules of Appellate Procedure. The Judgment and Order of Commitment to the Utah State Prison were signed by the Honorable Lyle R. Anderson on November 8<sup>th</sup>, 2001 and entered by the Clerk of the Court on November 9<sup>th</sup> 2001. See also Section 78-2A-3(e) Utah Code Annotated, conferring jurisdiction on this Court.

The Notice of Appeal was filed on November 15<sup>th</sup>, 2001, within 30 days of the entry of judgment. Thus, pursuant to Rule 4(a) of the Utah Rules of Appellate Procedure, this appeal is timely.

## **STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW**

The issues presented for appeal are as follows:

- I. Did the trial court err in allowing excessive courtroom security including allowing Fernandez to be shackled?

This issue is reviewed with close scrutiny to assess whether the shackles were the intrusive security measure necessary. Cf Williams v. Estelle, 435 U.S. 501, 504-5 (1976) (courts should review inherently prejudicial trial circumstances such as prison garb on the Defendant with close scrutiny.); State v. Gardner, 789 P 2d 273, 281 (Utah 1989), affirming presence of security personnel as the least intrusive means of providing security, cert denied 494 U.S. 1090 (1990).

II. Did the trial court err in denying the for-cause challenges of potential jurors?

In reviewing the trial courts granting or denial of challenges for cause to prospective jurors, the Court reviews for abuse of discretion. See e.g., State v. Bishop, 753 P.2d 439, 448 (Utah 1988), overruled on other grounds, State v. Menzies, 889 P.2d 393 (Utah), cert denied 513 U.S. 1115 (1995).

III. Did the trial court err in denying the motions for mistrial stemming from the introduction of evidence concerning Fernandez's status as a lock-down inmate contrary to a ruling in limine to exclude?

This issue is reviewed for an abuse of discretion. See State v. Widdson, 28 P.3d 1278, 1290 (Utah 2001); State v. De Corso, 993 P.2d 837, (Utah 1999), cert denied, 528 U.S. 1164.

IV. Did the trial court err in refusing to order a presentence report and in Fernandez to serve consecutive prison terms?

The standard of review for sentencing decisions is an abuse of discretion. State v. Galli, 967 P.2d 930 (Utah 1998).

### **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

Article I, Section 12, of the Constitution of Utah provides, in relevant part, that:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel...to be confronted by the witnesses against him... and the right to appeal in all cases...The accused shall not be compelled to give evidence against himself.

Amendment Fourteen of the Constitution of the United States provides, in relevant part, that:

No State shall...deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

Utah Code Section 76-1-501 provides, in relevant part, that:

A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

The following constitutional provisions, statutes and rules are determinative of this appeal and are set forth in the addendum to this brief: Utah Code Section 64-13-20, Utah Code Section 77-18-1, Utah Code Section 76-8-418, Utah Rules of Evidence 401, 402, 403, and 404.

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE.**

Mr. Fernandez case parallels that of his co-defendant Joseph Madsen, with the exception that Mr. Madsen has an additional charge and conviction for Class B Misdemeanor theft. Mr. Fernandez and Mr. Madsen were charged at the same

time and had their preliminary hearing and trial together. Mr. Madsen has a companion appeal # 2001092-CA.

Mr. Fernandez appeals from his conviction following a jury trial of Damage of a Jail, a Third Degree Felony in violation of Section 76-8-418 U.C.A.

**B. COURSE OF PROCEEDINGS.**

Mr. Fernandez was charged in a one count Information with the above charge. (R-3). He was bound over after a preliminary hearing on October 15<sup>th</sup>, 2001. A consolidated jury trial with co-defendant Madsen was held on October 31<sup>st</sup>, 2001.

Fernandez was convicted.

**C. DISPOSITION IN THE COURT BELOW.**

Sentencing was on November 5<sup>th</sup>, 2001. Defendant was sentenced to a term in the Utah State Prison not to exceed five years. His sentence is to run consecutively with the sentence he is already serving. (See Judgment and Order of Commitment-Appendix).

**D. STATEMENT OF FACTS.**

Mr. Fernandez and Mr. Madsen were inmates in the San Juan County Jail on September 17<sup>th</sup>, 2001 (TR-82) (References designated "TR-" refer to the page

number of Volume I of the official court transcript of the case.) At the beginning of his shift on the date, Corrections Officer James Meyer was shown Polaroid pictures of Fernandez's cell (TR-82, 3). Jail staff believed these pictures might have been taken with a camera that had been taken from booking (TR-83).

Later Meyer observed Fernandez place his arms into the tray slot of Madsen's cell and saw flashes. Believing that they were using the camera Meyer went to investigate (TR-84).

Madsen's cell was searched and the camera, three Polaroid photos of Madsen and a new roll of film were found in Madsen's pants (TR-86,8).

Meyer locked Madsen down and searched Fernandez's cell. Meyer found hair oil, clothing belonging to another inmate, sharpened safety scissors, and excessive prescription medication. He confiscated these items (TR-89).

As a result of these actions both inmates made threats. Fernandez threatened to do something stupid and hurt one of the officers (TR-89). He did not threaten to damage the jail (TR-89; 109).

Madsen threatened to strangle Meyer and to flood the jail (TR-89-91).

Meyer determined to move Fernandez to a different cell (TR-91). He examined the new cell including flushing the toilet (TR-92-93). Meyer did not check the plumbing in Madsen's room and did not know whether the toilet was working or not (TR-116).

Approximately an hour and one half to an hour and forty-five minutes later Meyer was advised by Dispatch that water was coming off the tier where

Fernandez and Madsen were housed and flowing into the day room (TR-94). He returned to that area and found that only Fernandez and Madsen's cells were flooded and had full toilets (TR-94-6).

Madsen's toilet had been clogged with some rags, pieces of underwear, a piece of a T-shirt and the orange part of a jump suit (TR-99). These items were admitted as Exhibit 3. Mr. Madsen's toilet was clogged with a laundry bag, admitted as Exhibit 2.

The items could have been in the toilet for a lengthy period before they would have wadded enough or moved to create a clog (TR-148). In fact, the laundry bag that was not the type issued to him as a state inmate. It was a county inmate bag in Fernandez's possession when he checked his room shortly before the flooding (TR-114).

No other inmates had access to the cells shortly before the flooding (TR-172).

Fernandez exercised his Constitutional right not to testify, Madsen did testify. Madsen testified that he did not flood it (TR-195). He did not put the items in his toilet and was unaware who had (TR-197). His toilet had been sluggish earlier (TR-196). He had tried to alert jail staff about the flooding pushing his intercom button and by waving (TR-204).

### **SUMMARY OF ARGUMENT**

1. Allowing the Defendants to be shackled and permitted uniformed armed guards in the courtroom violated Defendants state and federal rights to a fair trial.
2. The trial court improperly denied Defendants for cause challenges to potential jurors.
3. The trial court erred in denying the motion for mistrial when the State violated the Order not to refer to the Defendants status as punitive isolation on lockdown inmates.
4. The trial court erred in refusing to allow Defendants a pre-sentence report and in ordering consecutive sentences.

### **ARGUMENT**

**Point I:                    The trial court violated Fernandez's right to a fair trial by permitting excessive courtroom security.**

Defendants filed a Motion in Limine seeking to prohibit unnecessary courtroom security and to have the state detail and justify its proposed security plan (R-41, 6).

A hearing was held immediately prior to the trial at which time the state alleged Fernandez said he would escape if the opportunity presented itself and that a third inmate with an escape conviction was going to testify. The State contended that a screening apron on the front of counsel table would prevent the jury from seeing the shackles (TR-7-9).

It was explained that Fernandez had stated that he would escape from a work release program because he did not want to participate in work release (TR-10). The Court was advised the third inmate would not be called in as witness (TR-10).

The Court having determined that the Defendant's were wearing leg irons ruled,

I can't see them. I can't see why the jury would be able to see'em and so the prejudice is virtually nonexistent. There exists a possibility that a juror might see them, but these are jurors that are gonna know these guys are in jail anyway. There're not gonna be shocked by, ah, catching a glimpse of leg irons, even if that should happen. So I'm gonna keep'em in leg irons. I think there's a need for protection here.

The State did not disclose that armed, uniformed guards would be present in the Courtroom. The Court did not authorize the same.

Following jury selection, counsel for Fernandez and Madsen objected to the presence of two armed uniformed officers in the courtroom, one seated directly behind the Defendants (TR-69).

The Court then ruled that the guard's presence was necessary and appropriate (TR-69).

The Utah Supreme Court has recently ruled on the balance between the need for courtroom security and a Defendants constitutional rights to a fair trial. State v. Daniels, 2002 UT2, 2002 Utah Lexis 4.

In Daniels, the trial court ordered the defendant, charged with co-defendant Kell in the capital prison murder of a third inmate, Blackmon, to be tried in the prison courtroom because

(1) defendant participated in the planning and attack of Blackmon; (2) officers found a handcuff key in defendant's cell after the attack; (3) defendant made racially-related threats after the attack; (4) officers overheard banging and grinding noises, followed by a toilet flushing after the attack; (5) defendant threw urine on a prison control officer and said "This is for you...for testifying against me in court"; (6) defendant was involved in a prison riot in 1993, during which inmates destroyed property and removed a steel door from a shower room and used it as a battering ram to break down the door between the unit and the hallway around the control room; (7) excluding witnesses, at least twenty-three non-inmate citizens would be present at trial and (8) defendant Kell would likely testify at trial.

In its order, the trial court described the three courtrooms in Sanpete County and explained that of the two located in Manti, only the smaller courtroom has adequate seating for fourteen jurors. The Department of Corrections presented a security plan for trying the case in this courtroom insisting that defendant be shackled, but proposing that a floor-length fabric be placed around counsel table to conceal the shackles from the jury. This option would also have involved two plain-clothed security officers near defendant and others in the courtroom. Because of the size and security concerns presented by this courtroom, the Department of Corrections recommended that the trial be conducted inside the prison facility.

Id. at paragraph 19, n.2.

In assessing the propriety of the trial court's order on appeal, the court began by reviewing the basic federal constitutional law:

The right to a fair trial is a fundamental constitutional right secured by the due process and equal protection guarantees of the Sixth and Fourteenth Amendments. Central to this right "is the principle that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of ...other circumstances not introduced as proof at trial." The presumption of innocence is a component of this guarantee of the right to a fair trial and has become a basic element of our criminal justice system. Even though the

trial judge has broad latitude to control and manage the proceedings to preserve the integrity of the trial process when a courtroom action or arrangement is challenged as inherently prejudicial, we consider whether the practice presents an unacceptable risk of bringing into play impermissible factors that might erode the presumption of innocence. If the challenged practice is not inherently prejudicial, the judgment of the trial court will be affirmed. If the practice is inherently prejudicial, we must then consider whether the prejudicial practice is outweighed by any competing essential state interests.

Id. at paragraph 20 (citations omitted).

As in Daniels, the jury in the instant case knew that Fernandez was a State inmate through the essential facts presented during the case. Regardless, shackling the Defendant and allowing armed uniformed law enforcement officers in the courtroom was prejudicial and eroded the presumption of innocence.

The Utah Supreme Court has recognized this undermining of the presumption of innocence in State v. Young, 853 P. 2d 327 (Utah 1993). Although the Young decision condoned Defendants restraint, it did so only after an analysis of the specific fact situation of that case held that trial courts needed the need for security against the potential prejudice in each case Id. at 350-1.

The Daniels cases, Supra also supports the contention that the presence of the uniformed officers was prejudicial to Defendants and in a manner distinguishable from other indicia of his status as an inmate.

The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily

believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become insured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm. See *Hardee v. Kuhlman*, 581 F. 2d 330, 332 (CA2 1978).

To be sure, it is possible that the sight of a security force within the courtroom might under certain conditions "create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." *Kennedy v. Cardwell*, 487 F. 2d 101, 108 (CA6 1973), cert denied, 416 U.S. 959 (1974). However, "reason, principle, and common human experience." *Williams, supra*, at 504, counsel against presumption that any use of identifiable security guards in the courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate.

475 U.S. at 569 (Emphasis added).

The *Kennedy* case cited by *Holbrook* further explains,

A second category of cases involving the indicia of innocence pertains to an excessive number of guards in the courtroom during a criminal trial. The general rule derived from these decisions is that a defendant has a right to be tried in an atmosphere free of partiality created by the use of excessive guards except where special circumstances, which in the discretion of the trial judge, dictate added security precautions. One reason underlying this right is that guards seated around or next to the defendant during a jury trial are likely to create the impression in the minds of the jury that the defendant is dangerous or untrustworthy. Also the placement of guards in relation to the defendant could materially interfere with his ability to consult with counsel. However, the use of guards for security purposes, when wisely employed, provides the best means for protecting a defendant's fair trial right and only in rare cases would greater security precautions be warranted. Since guards can be strategically placed in the courtroom when more than normal security is needed and can be hidden in plainclothes, the jury never needs to be aware of the added protection so that no prejudice would adhere to the defendant. These cases provide an excellent point of comparison since they illustrate oftentimes-extreme situations, which were

adequately handled without the need for the much more drastic and prejudicial step of shackling.

Kennedy, 487 F. 2d 108-109 (citations and footnotes omitted).

**Point II:                    The trial court erred in denying the for-cause challenge of potential jurors.**

During the jury selection process one juror indicated a close relationship with law enforcement officials in San Juan County. Ms. Bradford revealed that her son is an officer with the Blanding City Police but that she could be fair (TR-35). Jason Jones revealed that he had a close working relationship with one of the States witnesses, working with him once or twice a month in the Search and Rescue for San Juan County (TR 44-5). Mr. Jones further had an attorney client relationship with Craig Halls, the Prosecutor. Mr. Halls had done some estate work for Mr. Jones (TR-46). Mr. Jones thinks a lot about his association with attorney Halls (TR-47).

Counsel approached the bench for an off the record discussion of the jurors and to challenge for cause (TR-53). Subsequently the Court allowed Fernandez's attorney to question Mr. Jones directly. Mr. Jones admitted he would be more likely to believe Mr. Halls because he knew him and did not know Fernandez's attorney (TR-55).

Both counsel reiterated their challenges made at sidebar and Judge Anderson passed the jury for cause (TR-57). After the panel had been selected the court and counsel made a record of the bench conference. Fernandez's attorney stated his motion to strike Juror Jones for cause (TR-66). Madsen's counsel noted

she had objected for cause to all the jurors who had indicated an affiliation or positive feeling for law enforcement (TR-67). The panel members objected to were identified as Daniel Brandt; Dennis Anderson; Loretta Bradford Stacy Cressler; and Jones. Madsen's attorney used two of her preemptory strikes to remove Bradford and Cressler. Fernandez's attorney used a preemptory challenge to remove Jones. (TR-67). (The court allowed each side four challenges to a sixteen-member panel. Defendants counsel exercised their challenges jointly (TR-57)).

Prior to State v. Menzies, 889 P. 2d 393 (Utah 1994), a criminal Defendant in Utah was entitled to a reversal whenever he was compelled to exercise a preemptory challenge to remove a panel member who should have been stricken for cause. Id. at 398, citing State v. Bishop, 753, P. 2d 439, 451 (Utah 1988). Since Menzies the Utah rule has been that the loss of preemptory challenge does not automatically create a loss of the constitutional right to an impartial jury. Rather the Defendant is required to show actual prejudice. He must show that a member of the jury was partial or incompetent. Menzies, at 398 citing Hopt v. Utah, 120 U.S. 430 (1887).

The requirement that a Defendant prove or at least assert that he faced a partial or biased jury was upheld in State v. Carter, 888 P. 2d 629, 649 (Utah 1995), holding such failure to be harmless error. However, the Supreme Court acting under its supervisory powers then went on to address its concern on trial courts passing jurors when legitimate concerns had been raised during voir dire

about their suitability. The Court stated “If a party raises legitimate questions as to a potential juror’s beliefs, biases or physical ability to serve, the potential juror should be struck for cause, even when it would be legally erroneous to refuse.” Id at 650. Admittedly this admonition is directed specifically towards capital cases, but its rationale extends beyond.

Further erosion of the Menzies standard is found in State v. Saunders, 992 P. 2d 951 (Utah 1999), the Utah Supreme Court distinguished the fact situation from Menzies, holding that ruling “did not foreclose all considerations of erroneous for-cause rulings in determining whether there is sufficient prejudice in the circumstances of the case to require a reversal of a conviction. Id at 965.

As in Saunders, the juror Jones expressed a belief that he was “uncomfortable” in deciding this case, at least to the extent that he favored the State’s counsel for reasons that went beyond anything Defendants could do to cure. As in Saunders, given this attitude, the jurors should have been removed. As in Saunders, the trial courts refusal to strike the juror is reversible error.

**Point III:**            The trial erred in not granting a mistrial for the introduction of evidence of the Defendant’s status as lock-down inmates in violation of its in limine motion to exclude such testimony.

Madsen joined in a pre-trial motion to exclude evidence of his status as a lock down prisoner at trial (R-34-40). Judge Anderson granted the Motion and Ordered the State not to inform the jurors that Defendants were kept in a punitive or high security area of the jail (TR-14, 15).

Flaunting that Order, Troy Butler, a jail officer, testified that the Defendants were in punitive isolation lockdown cells (TR-171). In response to objections taken by counsel for both Defendants the State indicated it had wanted Butler to testify to clarify that no one else had access to the flooded cells (TR-174). After the court opined such testimony could have been obtained without reference to the punitive isolation (TR-175) counsel moved for mistrial (TR-173, 176). The Court denied the motion holding such testimony not prejudicial in light of other derogatory testimony about Defendants (TR-182-3).

Fernandez's contends that contrary to the Courts ruling, such evidence was unduly prejudicial and violated his rights to a fair trial under case law and Utah Rule Of Evidence.

See e.g. State v. Saunders, 992, P. 2d 951 (Utah 1999),

It is fundamental in our law that a person may be convicted criminally only for his acts, not his general character. That principle is violated if a conviction is based on an inference that conviction is justified because of the defendant's criminal character or propensity to commit bad acts. The admission of evidence of prior crimes may have such a powerful tendency to mislead the finder of facts as to subvert the constitutional principle that a defendant may be convicted only if guilty beyond a reasonable doubt of a specific crime charged.

1999 Utah 59 at paragraph 15.

Utah Rule of Evidence 404.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. In other

words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.

Based on the foregoing, the trial court was clearly correct in its ruling to exclude the evidence and erred in denying a mistrial. Admission of the evidence of the punitive isolation and lockdown, enhanced by the shackles and excessive courtroom security, so likely prejudiced the jury it cannot be said the Defendants had a fair trial. The Court's ruling meets the "plainly wrong" standard of State v. DeCorso, 993 P. 2d 837 (Utah 1999). Defendants should be granted a new trial.

**Point IV:                    The trial erred in refusing to order a pre-sentence report.**

After Defendants were convicted, both counsel requested pre-sentence reports (TR-251-2). Counsel requested that the same be prepared and prior to sentencing due to difficulties in obtaining copies of the reports or convincing a court it has jurisdiction to correct errors in the reports (TR-251). Despite acknowledging the validity of these arguments, the court denied the request because he could not imagine anything a pre-sentence report would contain that would convince him to place Fernandez on probation (TR-252). Fernandez was sentenced to five years in the Utah State Prison to be served consecutively with the sentence he was already serving. However, the position ignores the other purpose a Pre-sentence report serves other than convincing a trial court to grant probation.

As the record in this case demonstrates (TR-251-2), and the cases interpreting Section 77-18-1 U.C.A. the Utah sentencing statute recognize, the Pre-sentence report is used by the Board of Pardons in setting release dates. As such, Defendants have a right to review and correct their reports. See e.g. State v. Jaeger, 973 P. 2d 404 (Utah 1999); Section 64-13-20 U.C.A.

There is no legitimate criteria by which trial court should be enrolled to decide what Defendants should or shouldn't receive pre-sentence reports. This is especially true in the instant case where consecutive sentences have been imposed. The Board of Pardons needs to have an accurate report it issue fairness and accuracy in setting Fernandez's parole date.

#### CONCLUSION

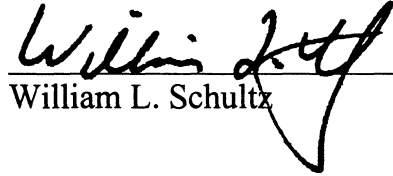
This Court should order a new fair trial.

DATED this 18<sup>th</sup> day of March 2002.

  
WILLIAM L. SCHULTZ  
Attorney for Appellant

### CERTIFICATE OF SERVICE

I hereby certify that I mailed true and correct copies of the foregoing Opening Brief of Appellant to Mark Shurtleff, Utah Attorney General, 160 E. 300 South 6<sup>th</sup> Floor, Heber Wells Bldg., Salt Lake City, Utah 84114-0854 and Happy Morgan, Attorney for Madsen, 8 South 100 East, Moab, Utah 84532, postage prepaid, this 18<sup>th</sup> day of March 2002.

  
\_\_\_\_\_  
William L. Schultz

# **Addendum A**

CRAIG C. HALLS #1317  
San Juan County Attorney  
P. O. Box 850  
Monticello, Utah 84535  
Phone: (435) 587-2128  
Fax No. (435) 587-3119

SEVENTH DISTRICT COURT  
San Juan County

FILED NOV 09 2001

CLERK OF THE COURT

BY \_\_\_\_\_

IN THE SEVENTH JUDICIAL DISTRICT COURT  
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

FELIX G. FERNANDEZ

Defendant.

**JUDGEMENT AND ORDER  
OF COMMITMENT TO  
UTAH STATE PRISON**

Case No. 0117-97

Case Judge: Lyle R. Anderson

IT IS HEREBY ORDERED:

That the Defendant is forthwith remanded to the custody of the San Juan County Sheriff for transportation to the Utah State Prison and execution to the sentence given herein. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted of the offense(s) of:

Count 1: DAMAGING A JAIL, a third degree felony

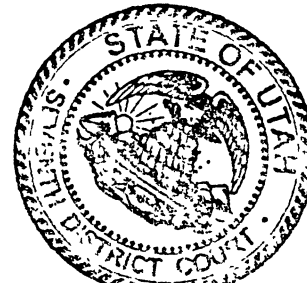
Defendant being now present in court and ready for sentence and represented by William L. Schultz, defendant is now adjudged guilty of the above offense(s) and is now sentenced to a term in the Utah State Prison not to exceed five years; such sentence is to run consecutively with sentence he is already serving.

DATED this 8th day of November, 2001.

Lyle R. Anderson  
Lyle R. Anderson  
District Court Judge

ATTEST:

Bernadette Young  
Clerk of the Court



**CERTIFICATE OF MAILING/HAND DELIVERY**

I hereby certify that I mailed, postage prepaid, or hand delivered a true copy of the foregoing JUDGEMENT AND ORDER OF COMMITMENT to William L. Schultz, Attorney for the defendant; Adult Probation Department at 1165 South Highway 191 #3, Moab, UT 84532; and to the Department of Corrections, P.O. Box 250, Draper, UT 84020

DATED this 9<sup>th</sup> day of November, 2001.

Bernadette Young

# **Addendum B**

- (1) The department shall:
  - (a) provide investigative and diagnostic services and prepare reports to:
    - (i) assist the courts in sentencing;
    - (ii) assist the Board of Pardons and Parole in its decisionmaking responsibilities regarding offenders;
    - (iii) assist the department in managing offenders; and
    - (iv) assure the professional and accountable management of the department;
  - (b) establish standards for providing investigative and diagnostic services based on available resources, giving priority to felony cases;
  - (c) employ staff for the purpose of conducting:
    - (i) thorough presentence investigations of the social, physical, and mental conditions and backgrounds of offenders;
    - (ii) examinations when required by the court or the Board of Pardons and Parole; and
    - (iii) thorough diagnostic evaluations of offenders as the court finds necessary to supplement the presentence investigation report under Section 76-3-404.
- (2) The department may provide recommendations concerning appropriate measures to be taken regarding offenders.
- (3) (a) The presentence diagnostic evaluation and investigation reports prepared by the department are protected as defined in Section 63-2-304 and after sentencing may not be released except by express court order or by rules made by the Department of Corrections.
  - (b) The reports are intended only for use by:
    - (i) the court in the sentencing process;
    - (ii) the Board of Pardons and Parole in its decisionmaking responsibilities; and
    - (iii) the department in the supervision, confinement, and treatment of the offender.
- (4) Presentence diagnostic evaluation and investigation reports shall be made available upon request to other correctional programs within the state if the offender who is the subject of the report has been committed or is being evaluated for commitment to the facility for treatment as a condition of probation or parole.
- (5) (a) The presentence investigation reports shall include a victim impact statement in all felony cases and in misdemeanor cases if the defendant caused bodily harm or death to the victim.
  - (b) Victim impact statements shall:
    - (i) identify the victim of the offense;
    - (ii) itemize any economic loss suffered by the victim as a result of the offense;
    - (iii) identify any physical, mental, or emotional injuries suffered by the victim as a result of the offense, and the seriousness and permanence;
    - (iv) describe any change in the victim's personal welfare or familial relationships as a result of the offense;
    - (v) identify any request for mental health services initiated by the victim or the victim's family as a result of the offense; and
    - (vi) contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.
- (6) If the victim is deceased; under a mental, physical, or legal disability; or otherwise unable to provide the information required under this section, the information may be obtained from the personal representative, guardian, or family members, as necessary.
- (7) The department shall employ staff necessary to pursue investigations of complaints from the public, staff, or offenders regarding the management of corrections programs.

A person who willfully and intentionally breaks down, pulls down, destroys, floods, or otherwise damages any public jail or other place of confinement is guilty of a felony of the third degree.

Utah Code Ann. § 77-18-1

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

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

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

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

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

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

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

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

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

(i) the type of offense;

(ii) the demand for services;

(iii) the availability of agency resources;

(iv) the public safety; and

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

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

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

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

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

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

defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the department or information from other sources about the defendant.

(b) The presentence investigation report shall include a victim impact statement describing the effect of the crime on the victim and the victim's family. The victim impact statement shall:

(i) identify all victims of the offense;

(ii) include a specific statement of the recommended amount of complete restitution as defined in Subsection 76-3-201(4), accompanied by a recommendation from the department regarding the payment of court-ordered restitution as defined in Subsection 76-3-201(4) by the defendant;

(iii) identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

(iv) describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(v) identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

(vi) contain any other information related to the impact of the offense upon the victim or the victim's family and any information required by Section 77-38a-203 that is relevant to the trial court's sentencing determination.

(c) The presentence investigation report shall include a specific statement of pecuniary damages, accompanied by a recommendation from the department regarding the payment of restitution with interest by the defendant in accordance with Subsection 76-3-201(4).

(d) The contents of the presentence investigation report, including any diagnostic evaluation report ordered by the court under Section 76-3-404, are protected and are not available except by court order for purposes of sentencing as provided by rule of the Judicial Council or for use by the department.

(6) (a) The department shall provide the presentence investigation report to the defendant's attorney, or the defendant if not represented by counsel, the prosecutor, and the court for review, three working days prior to sentencing. Any alleged inaccuracies in the presentence investigation report, which have not been resolved by the parties and the department prior to sentencing, shall be brought to the attention of the sentencing judge, and the judge may grant an additional ten working days to resolve the alleged inaccuracies of the report with the department. If after ten working days the inaccuracies cannot be resolved, the court shall make a determination of relevance and accuracy on the record.

(b) If a party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.

(7) At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony, evidence, or information shall be presented in open court on record and in the presence of the defendant.

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

(a) perform any or all of the following:

(i) pay, in one or several sums, any fine imposed at the time of being placed on probation;

(ii) pay amounts required under Title 77, Chapter 32a, Defense Costs;

(iii) provide for the support of others for whose support he is legally liable;

(iv) participate in available treatment programs;

(v) serve a period of time, not to exceed one year, in a county jail designated by the department, after considering any recommendation by the court as to which jail the court finds most appropriate;

(vi) serve a term of home confinement, which may include the use of electronic monitoring;

(vii) participate in compensatory service restitution programs, including the compensatory service program provided in Section 78-11-20.7;

(viii) pay for the costs of investigation, probation, and treatment services;

(ix) make restitution or reparation to the victim or victims with interest in accordance with Subsection 76-3-201(4); and

(x) comply with other terms and conditions the court considers appropriate; and

(b) if convicted on or after May 5, 1997:

(i) complete high school classwork and obtain a high school graduation diploma, a GED certificate, or a vocational certificate at the defendant's own expense if the defendant has not received the diploma, GED certificate, or vocational certificate prior to being placed on probation; or

(ii) provide documentation of the inability to obtain one of the items listed in Subsection (8)(b)(i) because of:

(A) a diagnosed learning disability; or

(B) other justified cause.

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

(a) the parole period and any extension of that period in accordance with Subsection 77-27-6(4); and

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

(10) (a) (i) Probation may be terminated at any time at the discretion of the court or upon

completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions.

(ii) (A) If, upon expiration or termination of the probation period under Subsection (10)(a)(i), there remains an unpaid balance upon the account receivable as defined in Section 76-3-201.1, the court may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable.

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

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

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

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

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

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

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

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

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

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

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

(c) (i) The order to show cause shall specify a time and place for the hearing and shall be

served upon the defendant at least five days prior to the hearing.

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) persons described in Subsection 62A-12-209(2)(g) are receiving priority for treatment over the defendants described in this Subsection (13).

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

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

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

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

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

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

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

(b) The department shall establish procedures and standards for home confinement, including electronic monitoring, for all individuals referred to the department in accordance with Subsection (16).

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

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

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

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

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

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

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

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

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

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

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

Utah Code of Judicial Administration, Rule 4-203

Applicability:

This rule shall apply to all courts, the Department of Corrections, state prosecutors and criminal defense attorneys.  
Statement of the Rule:

(1) Presentence investigation reports shall be completed by order of the court as provided in Utah Code Ann. Sections 77-18-1 and 64-13-20. Presentence reports shall either be physically removed from the case file and kept in a separate storage area or retained in the case file in a sealed envelope marked "Controlled."

(2) Full disclosure of the presentence investigation report shall be made to defense counsel, or the defendant if the defendant is not represented by counsel, and to the prosecutor unless disclosure of the presentence report would jeopardize the life or safety of third parties. The presentence investigation report shall be made available to prosecutors and defense counsel or the defendant if the defendant is not represented by counsel at least three working days in advance of the scheduled sentencing date at the local office of the Department of Corrections or such other location as ordered by the court. The presentence report shall also be made available to prosecutors, defense counsel and the defendant at the court on the date of sentencing. In cases where a party or a party's counsel notifies the court clerk, in writing, that the presentence investigation report is the subject of an appeal, the clerk shall include the sealed presentence investigation report as part of the record.

#### Utah Rule of Evidence 401

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

#### Utah Rule of Evidence 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

#### Utah Rule of Evidence 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence

#### Utah Rule of Evidence 404

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In other words, evidence offered under this rule is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.