

2016

**State of Utah, Plaintiff/ Appellee, v. Robert Morgan Magness,
Defendant/ Appellant.**

Utah Court of Appeals

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Case No. 20150417-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

ROBERT MORGAN MAGNESS,
Defendant/Appellant.

Brief of Appellee

Appeal from denial of motion to withdraw guilty plea to forcible sexual abuse, a second degree felony, in the Third Judicial District, Salt Lake County, the Honorable Elizabeth Hruby-Mills, presiding

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FILED
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JAN 26 2016

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STATE OF UTAH,
Plaintiff/Appellee,

v.

ROBERT MORGAN MAGNESS,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from the denial of his motion to withdraw his guilty plea to forcible sexual abuse, a second degree felony. This Court has jurisdiction under Utah Code Ann. §78A-4-103(2)(e) (West Supp. 2012).

STATEMENT OF THE ISSUE

Defendant was charged with rape. He negotiated a plea bargain in which he would plead guilty to a reduced charge of forcible sexual abuse and the prosecutor would recommend no prison time. But the prosecutor expressly conditioned his sentencing recommendation on what the victim wanted at sentencing: "Our recommendation is simply that we would honor the victim's wishes. If the victim were asking for a prison sentence, we're not bound to not recommend prison. If the victim is not seeking a

prison sentence we will not go beyond her request.” The prosecutor told Defendant that he believed that the victim was not seeking prison time, but explained that he had not talked to her since the initial intake and had not discussed the plea agreement with her.

At sentencing, the victim asked the trial court to impose a prison sentence. Defendant moved to withdraw his guilty plea, alleging that the prosecutor had intentionally misrepresented the victim’s initial position in order to induce his guilty plea.

Issue: Did the trial court properly deny Defendant’s motion to withdraw his guilty plea where it is uncontroverted that Defendant knew and understood—before he pleaded guilty—that the prosecutor’s recommendation for no prison time was contingent on the victim’s wishes at sentencing?

Standard of Review. A trial court’s denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. *State v. Ruiz*, 2013 UT App 274, ¶12, 316 P.3d 984; *State v. Knowlden*, 2013 UT App 63, ¶2, 298 P.3d 691.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Relevant constitutional provisions, statutes, and rules are discussed as pertinent in the body of this brief.

STATEMENT OF THE CASE

A. Summary of facts.¹

Defendant's son and three other friends, including the female victim, M.C., partied one night at Defendant's house. M.C. eventually went to sleep on a bed in Defendant's basement. She awakened to find Defendant on top of her with his penis in her vagina. M.C. jumped up and demanded that Defendant get away from her.

When Defendant talked to investigating officers, he said that he only touched M.C.'s shoulder. State investigators performed DNA analysis on seminal fluid collected from M.C.'s Code R exam and found that it matched Defendant's DNA profile.

B. Summary of proceedings.

Defendant was charged with rape, a first degree felony, Utah Code Ann. §76-5-402 (West 2015). R1. Under a plea bargain, Defendant pleaded guilty to forcible sexual abuse, a second degree felony, Utah Code Ann. §76-5-404 (West 2015). R158-59;R154-55;R147-53.

At the plea hearing, the prosecutor told the trial court that he had spoken to M.C. "initially during intake," and that M.C.'s "first impression"

¹Because Defendant pleaded guilty, the facts are taken from the Amended Information and Defendant's "Memorandum in Support of Motions to Withdraw Guilty Pleas, Reinstate Preliminary Hearing, and Reinstate All Prior Filed Motions and Requests." See R159,R306-07.

was that “she was not seeking prison at the time and was fairly amenable to resolving the case.” R364:3 (Addendum A). But the prosecutor added that he had been unable to contact M.C. since negotiating the plea agreement with the defense. *Id.*

The trial court conducted a rule 11 colloquy with Defendant, and, after finding that Defendant’s guilty plea was both knowing and voluntary, authorized Defendant to sign his “Statement of Defendant in Support of Guilty Plea” (Statement) R364:7-8; *see also* R147-53 (Addendum A). Defendant’s signed Statement set forth the basis for the parties’ agreement: “In exchange for the Defendant’s plea of guilty the prosecution agrees that in the event the victim does not affirmatively insist upon the prosecutor seeking a prison commitment that the prosecutor will recommend probation and no prison.” R150.

Defense counsel also stated on the record that the prosecutor had agreed to recommend probation “unless the victim affirmatively requests a commitment of prison for the defendant’s behavior.” R364:8. The prosecutor affirmed defense counsel’s characterization of the parties’ agreement: “Our recommendation is simply that we would honor the victim’s wishes. If the victim were asking for a prison sentence, we’re not bound to not recommend prison. If the victim is not seeking a prison

sentence, we will not go beyond her request.” *Id.* Defense counsel concurred: “We recognize the same.” *Id.*

The trial court asked if Defendant understood that the court was “not bound by any such recommendation as well?” Counsel responded, “That is correct.” *Id.* The trial court then set a sentencing date, and instructed Defendant “to get down to AP&P to get a pre-sentence report.” R364:9-10.

At the sentencing hearing, defense counsel moved to continue, filed a defense-based sentencing report, and requested an evidentiary hearing. R365:2-3 (Addendum B). The defense motions were prompted by receipt of the AP&P report. R365:3. The trial court agreed to continue sentencing and to hold an evidentiary hearing. R365:6-9. The trial court also allowed M.C. to make a statement:

. . . . I am asking the Judge to sentence you to two-and-a-half years in prison, the same sentence you’ve dealt me, the prison I’ve been in waiting for this to be over. I also want you to be on the sexual offender’s list, so there’s a possibility a girl might see it and think twice about being in a vulnerable position in your presence, even if it is under the pretense of partying with your 20-something-year-old son.

R365:9.

Before the next hearing, Defendant moved to withdraw his guilty plea; he filed a supporting memorandum. *See* R233-36,323-24,306-19 (Addendum C). The defense also filed supporting affidavits from—one of

Defendant's attorneys—Larry Long, a defense investigator, and Defendant. See R244-273 (Addendum C). According to Long's affidavit, he had intended to cross examine M.C. at the preliminary hearing about "her consumption of alcohol during the evening," and "her sexual relations" the morning of the rape. R246. He had also intended to cross examine M.C.'s friend "as to her recollection of all events" and M.C.'s "state of mind." *Id.* But according to Long, the prosecutor told him before the preliminary hearing that M.C. did not want Defendant to go to prison. *Id.* Based on this information, the defense waived preliminary hearing. R246-48. Long, however, continued to prepare for trial. R248.

Among other things, Long hired an investigator. *Id.* The investigator spoke with M.C., who allegedly told him that she understood Defendant had already pleaded guilty. R248-49. The investigator also told Long that M.C. "expressed no anger or vindictiveness against Defendant in her conversation but did not mention, one way or the other what punishment he should receive." R249. The defense team also moved to suppress the evidence against Defendant. *Id.* But before the trial court ruled on the motion to suppress, the parties reached a plea agreement. R250-51. As noted, in exchange for Defendant's guilty plea to a second degree felony, the prosecutor agreed to "recommend no prison sentence be served by

Defendant provided that" M.C. "did not affirmatively insist upon the prosecution seeking a prison commitment." *Id.*

According to Long, the defense did not know that M.C. wanted Defendant to do prison time until they received the AP&P report. R252. Upon receiving the report, Long asked the defense investigator to again contact M.C. "to determine whether she had just changed her mind or whether she always wished to have a prison sentence served by the defendant." R253. The investigator reported that M.C. told him "that she always wanted a prison sentence for the defendant and had told the prosecuting attorney her desire from the very beginning." *Id.*

The investigator's affidavit reiterated information in Long's affidavit, and included a defense-prepared transcript of his telephone conversation with M.C., where she denied telling the prosecutor that she did not want Defendant to go to prison. R256-58,263 (Addendum C). According to the transcript, M.C. told the prosecutor that the most important thing to her was that Defendant be required to register as a sex offender: "I didn't say that I did not want him to go prison, I said, 'Well, it's more important to me that he's on the sexual offender's list.' That was like—I said that I wanted him to serve prison time, but the most important thing to me was that I wanted him to go on the sexual offenders list." R263-64.

Defendant's affidavit stated his understanding that, in exchange for his guilty plea to a reduced charge, the prosecutor "would recommend that [Defendant] not go to prison unless [M.C.] insisted that [he] go to prison." R271 (Addendum C).

Based on the affidavits, the defense argued that the prosecutor had allegedly intentionally misled Defendant about M.C.'s position on his serving prison time. This, Defendant argued, (1) constituted prosecutorial misconduct in violation of Defendant's right to due process, *see* R311-14; and (2) rendered Defendant's guilty plea unknowing and involuntary under the plea withdrawal statute, Utah Code Ann. §77-13-6 (West Supp. 2015-16), *see* R314-17. Alternatively, Defendant offered to withdraw his motions if the court would sentence him to probation with or without jail time. R317-19.

Represented by a new prosecutor, the State opposed Defendant's motion to withdraw his guilty plea. R329-33 (Addendum D). The State argued that Defendant's signed Statement and the change-of-plea hearing transcript showed that Defendant's plea was knowing and voluntary, and that it had not been induced by any alleged misrepresentation of M.C.'s wishes. *See* R329-333. Both the Statement and the hearing transcript made clear that the prosecutor was uncertain what M.C.'s wishes would ultimately be, that the prosecutor's recommendation of no prison was thus

contingent on M.C.'s wishes at sentencing, and that Defendant and his counsel understood that. See R332 (citing both R150 and R364:4,10).

Following argument, the trial court denied the defense motions in a three-page "Ruling and Order." R339-341 (Addendum F); see also R366 (Addendum E). The trial court found that Defendant voluntarily pleaded guilty to forcible sexual abuse. R339. In support, the trial court cited Defendant's signed Statement, which confirmed "that his plea was voluntary." *Id.* The trial court found that defense counsel also signed the Statement, thereby "confirming that the Defendant had read or was read and understood [its] contents," and "that the confirmations by the Defendant in the Statement were true." *Id.* The trial court also quoted the paragraph in the Statement that explained the plea agreement:

All the promises, duties and provisions of the plea agreement, if any, are fully contained in this statement, including those explained below: In exchange for the Defendant's plea of guilty *the prosecution agrees that in the event the victim does not affirmatively insist upon the prosecutor seeking a prison commitment that the prosecutor will recommend probation and no prison.*

R339 (quoting R150) (emphasis added).

The trial court also found that the prosecutor had earlier "represented to Defendant that, as of the time of the initial intake, [M.C.'s] impression was that she would not seek prison time." R340. But the trial court further found that the prosecutor told the defense at the plea hearing that he had

"not communicated" with M.C. since intake, and that his recommendation was "'simply that we would honor the victim's wishes.'" *Id.* The trial court found that M.C. made her wishes known at the initial sentencing hearing, where she asked the judge to sentence Defendant to prison. *Id.*

Based on the above, the trial court expressly rejected that the prosecutor had "made a material misrepresentation" that induced Defendant to plead guilty. *Id.* The trial court instead found that the record supported only that the prosecutor had represented that, when he spoke with M.C. during intake, "she was not seeking prison time," and that there was "no evidence that these representations were contrary to what the prosecutor knew to be true." *Id.* The trial court thus disagreed that the prosecutor's statement amounted to prosecutorial misconduct, or that the prosecutor made any intentional, or material misrepresentation of M.C.'s wishes in order to induce Defendant to plead guilty. *Id.*

For essentially the same reasons, the trial court rejected Defendant's argument that his guilty plea was rendered unknowing and involuntary by the alleged misrepresentation. *Id.* The trial court again found that the prosecutor made no statements or "misrepresentations, unfulfilled, or unfulfillable promises." *Id.* Rather, the prosecutor explained that M.C. "initially did not appear to want the Defendant to go to prison," but that his

recommendation was "contingent on whatever [M.C.] wanted" at sentencing. R340-41. The trial court also emphasized that defense counsel had "represented" at the plea hearing that Defendant "knew" that the trial court "was not bound by the recommendation of the prosecution." R341. As further support for its finding of a knowing and voluntary guilty plea, the trial court found that Defendant had alleged no violation of rule 11 in the taking of his guilty plea. *Id.*

Defendant moved to clarify the trial court's written ruling. R348-350 (Addendum G). Defendant argued that there was no support for the trial court's "apparent factual determinations"—that the State had made no intentional or material misrepresentation about M.C.'s wishes—where the State presented no "affidavit, transcript, recording, or other evidence as to any prior statements" M.C. "made to the police." R349. The trial court denied the motion. *See* R367:4 (Addendum H).

The trial court then imposed the statutory prison term: "[T]his is unacceptable conduct, and the victim in this case has suffered and will continue to suffer a great deal. So, sir, you are before me on a second-degree felony, and for that you will be sentenced to the Utah State Prison for 1 to 15 years." R367:12; *see also* R356-57 (Addendum H). Defendant filed a timely notice of appeal. R358-59.

SUMMARY OF ARGUMENT

Defendant seeks reversal of the denial of his motion to withdraw a guilty plea. Defendant asserts that the prosecutor intentionally misled him about M.C.'s wishes on his serving prison time before they reached a plea agreement, and that he relied on the prosecutor's initial representation that M.C. did not want him to serve prison time when he accepted the plea. Defendant argues that the alleged intentional misrepresentation constituted prosecutorial misconduct in violation of his right to due process and also rendered his plea unknowing and involuntary. Defendant also challenges the trial court's finding that there was no evidence that the prosecutor intentionally misled the defense on the ground that the State presented no contradictory evidence.

All of Defendant's arguments fail. It is undisputed that Defendant knew and understood before he entered his guilty plea that the prosecutor no longer knew what M.C.'s sentencing wishes would be and that his recommendation for no prison was thus contingent on what M.C. would say at sentencing. It necessarily follows that M.C.'s initial wishes were not material to the plea agreement. Defendant, therefore, cannot show that any misrepresentation—intentional or not—induced him to enter his plea, let alone rendered his plea unknowing or involuntary. And, in any event,

Defendant has not shown clear error in the trial court's finding that the prosecutor did not intentionally misrepresent M.C.'s wishes.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA WHERE IT IS UNCONTROVERTED THAT DEFENDANT KNEW AND UNDERSTOOD THAT THE PROSECUTOR'S RECOMMENDATION OF NO PRISON TIME WAS CONTINGENT ON THE VICTIM'S WISHES AT SENTENCING

Defendant alleges that the prosecutor fraudulently induced his guilty plea by intentionally misrepresenting M.C.'s pre-plea sentencing wishes. Aplt.Br.22-27. He argues that this rendered his plea unknowing and involuntary. *Id.* at 27-33. Defendant begins by challenging the trial court's finding that nothing showed that the prosecutor intentionally misrepresented M.C.'s initial sentencing wishes. *Id.* at 20-22. He then asserts that but for the alleged misrepresentation, he would not have pleaded guilty. *Id.* at 25-27. Defendant thus argues that the trial court

abused its discretion when it denied his motion to withdraw his plea. *Id.* at 2-3.²

Whether or not the prosecutor intentionally misrepresented M.C.'s pre-plea sentencing wishes, Defendant cannot prevail because M.C.'s initial wishes were not material to the plea agreement. The prosecutor's sentencing recommendation was expressly conditioned on M.C.'s wishes at sentencing, not on anything she had said to the prosecutor before the plea agreement. The record shows that Defendant knew and understood that when he pleaded guilty. Defendant, therefore, cannot show that any misrepresentation—intentional or not—induced him to enter his plea, let alone rendered his plea unknowing and involuntary. And, in any event, he has not shown clear error in the trial court's finding that the prosecutor did not intentionally misrepresent M.C.'s pre-plea wishes.

²Defendant's brief has three points. In the first, he challenges the trial court's finding that the prosecutor did not intentionally misrepresent the victim's pre-plea wishes. Aplt.Br.20-22. In the second, he contends that the prosecutor fraudulently induced his plea, thereby committing prosecutorial misconduct in violation of due process. Aplt.Br.22-27. In the third, he argues that the prosecutor's alleged misrepresentation rendered his plea unknowing and involuntary. Aplt.Br.27-33. Although Defendant couches his Points II and III in different terminology, they are really the same argument: that the prosecutor's alleged misrepresentation induced him to plead guilty and that if he had known M.C.'s true pre-plea wishes, he never would have accepted the plea deal. This brief will therefore answer both points in a single argument below.

A. Because the prosecutor's pre-plea representation of the victim's sentencing wishes were not material, Defendant cannot show that his plea was fraudulently induced or unknowing and involuntary.

A defendant may not withdraw his guilty plea unless it was unknowing and involuntary. Utah Code Ann. §77-13-6; *see also State v. Alexander*, 2012 UT 27, ¶29, 279 P.3d 371 (plea withdrawal statute "requires that, to withdraw a guilty plea, defendant must show that their pleas were 'not knowingly and voluntarily made'" (quoting section 77-13-6(2)(a)). "A plea is not knowing and voluntary when the defendant 'does not understand the nature of the constitutional protections that he is waiving, or because he has such an incomplete understanding of the charges that his plea cannot stand as an intelligent admission of guilt.'" *Alexander*, 2012 UT 27, ¶29 (quoting *Henderson v. Morgan*, 426 U.S. 637, 645n.13 (1976)). Defendant essentially argues that the prosecutor's alleged intentional misrepresentation fraudulently induced his plea and that this rendered his plea unknowing and involuntary.

While not controlling, contract principles may be useful in assessing whether a guilty plea was knowingly made. *See State v. Gladney*, 951 P.2d 247, 248 (Utah App. 1998) ("Contract analysis has some application to plea agreements."). To making a fraudulent inducement claim under contract principles, Defendant must show two things: show: (1) that he *relied* on the

prosecutor's pre-plea representation that M.C. did not want him to go to prison; and (2) that his reliance on the pre-plea representation was reasonable. See *Otsuka Electronics (USA, Inc.) v. Imaging Specialists, Inc.*, 937 P.2d 1274, 1278-79 (Utah App. 1997) (rejecting claim of fraudulent inducement where appellants did not reasonably rely on Otsuka's misrepresentations); *Despain v. Despain*, 855 P.2d 254, 257 (Utah App. 1993) (rejecting claim of fraudulent inducement absent proof of reasonable reliance).

Because the record here shows that M.C.'s initial sentencing wishes were not material to the plea agreement, Defendant cannot show that he relied on the prosecutor's representation about them—let alone reasonably so—in pleading guilty. First, Defendant always knew that the plea agreement had nothing to do with the victim's initially-expressed sentencing views, but everything to do with what she would express at sentencing. At the plea hearing, the prosecutor expressly stated that his recommendation for no prison was wholly contingent on M.C.'s future wishes *at sentencing* because he had not talked to her since the initial intake and he was uncertain what her wishes would be by that time. See R364:3,8. Indeed, the condition itself made it clear that the prosecutor was unsure

what M.C.'s sentencing position was and that he was making no promises about what it would be by the time of sentencing. *Id.*

The conditional nature of the prosecutor's recommendation was also clearly set out in the Defendant's Statement—signed by both Defendant and his counsel. *See* R150,152. Added to that, the trial court confirmed that Defendant understood that the prosecutor's recommendation was not binding on the court. R364:8-9. Finally, both Long's and Defendant's affidavits in support of the motion to withdraw the plea reiterated their understanding that the prosecutor's recommendation was contingent on M.C.'s wishes *at sentencing*. *See* R250-51;R271.

Thus, Defendant unquestionably knew that any sentencing recommendation was conditioned only on what the victim would say at sentencing and not on anything she might have said to the prosecutor earlier. Defendant also knew that regardless of what M.C.'s wishes were at the initial intake, the prosecutor was unsure if she would retain those wishes at sentencing. By agreeing to the conditional recommendation, Defendant assumed the risk that M.C.'s wishes could differ from what the prosecutor initially said they were. Thus, Defendant could not have relied on the prosecutor's representation of M.C.'s initial wishes in deciding to plead guilty.

But even if Defendant had relied on the prosecutor's representation, any reliance was unreasonable. See *Otsuka*, 937 P.2d at 1279 (rejecting claim of reasonable reliance where appellants' "obviously knew Otsuka could not timely deliver an Otsuka MRI machine" before signing "amended lease agreement"); *Despain*, 855 P.2d at 257 (rejecting ex-wife's claim that she reasonably relied on ex-husband's representations before signing quit claim deed where evidence supported trial court's finding that her reliance was unreasonable). On this record, the most that Defendant could hope for was that the prosecutor's impression of M.C.'s wishes when he spoke with her at intake would remain consistent with her wishes when she appeared at the sentencing hearing.³

³To the extent that Defendant cites *Brady v. Maryland*, 373 U.S. 83 (1963) and progeny to support his prosecutorial misconduct allegation, his reliance is unavailing. *Brady* recognizes a due process violation when the prosecution suppresses favorable material evidence to induce a plea. See, e.g., *United States v. Avellino*, 136 F.3d 249, 255 (2nd Cir. 1998) ("The defendant is entitled to make [the decision to plead guilty] with full awareness of favorable material evidence known to the government."). But Defendant does not claim that the prosecutor withheld exculpatory evidence to induce his plea. See Aplt.Br.20-33. He claims at most that the prosecutor intentionally misrepresented the victim's pre-plea sentencing wishes. But, as stated, those earlier wishes were not a term of the plea agreement—only her unknown future wishes at sentencing were. Thus, *Brady* is inapposite.

Finally, even if Defendant could show that his reliance on the prosecutor's representation was reasonable, he cannot show that it rendered the plea unknowing and involuntary because, again, M.C.'s pre-plea sentencing wishes were not a term of the plea agreement, let alone a material term. As explained, the prosecutor expressly conditioned any sentencing recommendation on M.C.'s wishes at sentencing. The prosecutor made it clear that he did not know what those wishes would be, which is why he made his recommendation conditional. And, as explained, Defendant understood the condition.

Defendant's reliance on *State v. Copeland*, 765 P.2d 1266 (Utah 1988), is unavailing for the same reason. In *Copeland*, the record was unclear as to "what recommendation the State promised to make." *Id.* at 1274. The Utah Supreme Court thus vacated Copeland's sentence and remanded to the trial court to "determine the exact recommendation promised by the State, defendant's understanding of that promise, and whether the State fulfilled its promise." *Id.* at 1276. But here—as the trial court found—there is no ambiguity about the conditional nature of the prosecutor's sentencing recommendation, Defendant's knowledge and understanding of it, and the prosecutor's fulfillment of his promise. See R340-41 (finding "prosecution's recommendation remained consistently contingent on whatever the victim

wanted," "Defendant knowingly and voluntarily entered into the plea," and defense counsel "represented to the Court that his client knew the Court was not bound by the recommendation").

In short, because the plea was not conditioned on M.C.'s initial sentencing wishes as represented by the prosecutor, any misrepresentation as to those wishes could not be material to the plea agreement. Defendant therefore has not shown that any misrepresentation—intentional or not—either induced him to enter his plea or otherwise rendered his plea unknowing or involuntary.

B. Defendant shows no clear error in the trial court's findings that any misrepresentation of the victim's initial sentencing wishes was unintentional.

Defendant's arguments also fail because he hasn't shown that the prosecutor intentionally misrepresented M.C.'s initial sentencing wishes. Indeed, the trial court specifically found that the prosecutor did not intentionally misrepresent "the nature" of M.C.'s "wishes" before the plea hearing:

Rather, the prosecutor represented that, at the time he spoke with [M.C.], she was not seeking prison time. There is no evidence that these representations were contrary to what the prosecutor knew to be true.

R340.

Defendant challenges these findings because—according to him—uncontroverted defense evidence shows that M.C. “always desired a prison incarceration for” Defendant. Aplt.Br.21. Defendant asks this Court to remand for additional findings or for an evidentiary hearing to resolve the alleged conflict. Aplt.Br.22. Remand is not warranted because—as explained—the prosecutor’s alleged misrepresentation was not material to the parties’ plea agreement. It is also not warranted because Defendant has not shown any clear error in the trial court’s findings.

Again, the prosecutor’s recommendation was expressly contingent only on what M.C.’s wishes would be at sentencing and Defendant understood as much. *See* R364:3,8; R150;R250-51; R271. The condition itself signaled to the defense that the prosecutor did not in fact purport to know the victim’s wishes and that those wishes could very well end up being prison time. If the prosecutor had truly intended to mislead the defense about M.C.’s wishes to induce a guilty plea, it made no sense for him to condition his recommendation for no prison time on M.C.’s then unknown wishes at sentencing. *See id.*

And while Defendant proffered a transcript of a telephone exchange between a defense investigator and M.C. suggesting that M.C. told the prosecutor she wanted Defendant to go to prison, Defendant presented no

direct evidence that the prosecutor deliberately misled the defense about M.C.'s wishes. At most, M.C.'s statements in the telephone transcript suggest that the prosecutor merely misunderstood her priorities when he spoke with her at intake. See R262-265. For example, M.C. denied telling the prosecutor that she did not want Defendant to go to prison, but she acknowledged that she told the prosecutor that the most important thing to her was that Defendant be required to register as a sex offender: "I didn't say that I did not want him to go prison, I said, 'Well, it's more important to me that he's on the sexual offenders list.' That was like—I said that I wanted him to serve prison time, but the most important thing to me was that I wanted him to go on the sexual offenders list." R263-64.

Given that M.C.'s biggest concern was that Defendant register as a sex offender, it is understandable that the prosecutor focused on that concern. See R364:3,8. But, again, the prosecutor's condition alone makes clear that the prosecutor was making no representations as to what M.C.'s wishes would be at sentencing. The transcript thus fails to establish clear error in the trial court's finding that the prosecutor did not intentionally mislead the defense about M.C.'s wishes. See *Steinberg v. Community Housing Services-Capitol Villa, Ltd.*, 2014 UT App 102, ¶10, 326 P.3d 673 (recognizing "existence of conflicting evidence does not give rise to clear

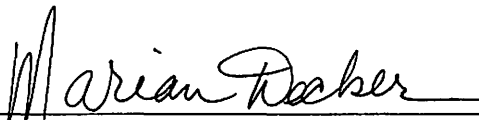
error as long as evidence supports the trial court's decision" (quotation and citation omitted)). Because Defendant has not shown clear error in the trial court's finding, his claim fails for this reason as well.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on January 26, 2016.

SEAN D. REYES
Utah Attorney General



MARIAN DECKER
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on January 26, 2016, two copies of the Brief of Appellee were ☒ mailed ☐ hand-delivered to:

Craig S. Cook
Craig S. Cook, PC
3645 East Cascade Way
Salt Lake City, Utah 84109

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

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

Lee Nakamura

Addenda

Addendum A

17-00077-0

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

ORIGINAL

STATE OF UTAH,

Plaintiff,

vs.

ROBERT MORGAN MAGNESS,

Defendant.

Case No. 131903746 FS

FILED DISTRICT COURT
Third Judicial District

JUN - 1 2015

SALT LAKE COUNTY

Change of Plea Hearing
Electronically Recorded on
January 5, 2015

Deputy Clerk

BEFORE: THE HONORABLE ELIZABETH A. HRUBY-MILLS
Third District Court Judge

APPEARANCES

For the State:

Thaddeus J. May
DISTRICT ATTORNEY'S OFFICE
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (385)468-7600

For the Defendant:

William B. Parsons III
Larry N. Long
1 Lakeview
Stansbury Park, Utah 84074
Telephone: (801)466-6311

Transcribed by: Wendy Haws, CCT

1771 South California Avenue
Provo, Utah 84606
Telephone: (801) 377-2927

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UTAH APPELLATE COURTS

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P R O C E E D I N G S

(Electronically recorded on January 5, 2015)

THE COURT: All right, so we're ready, then, on the
State of Utah vs. Robert Magness --

MR. PARSONS: Yes, ma'am.

THE COURT: -- case No. 131903746. Could I have
appearances, please.

MR. PARSONS: Yes, ma'am. William Parsons and Larry
Long together with Robert Magness.

THE COURT: Okay, thank you.

MR. MAY: Thaddeus May on behalf of the State.

THE COURT: All right, and my understanding was that we
were going to have a little bit more --

MR. MAY: We were going to take evidence, your Honor,
and we did have witnesses that were prepared to do so.

THE COURT: Okay. All right, however there's been a
change in plans?

MR. PARSONS: Well, there's been a plea offer made in
the meantime, Judge.

THE COURT: Okay.

MR. PARSONS: We have negotiated at length, and we have
reached a resolution.

THE COURT: All right, then. So are you prepared, then,
to proceed on that today?

MR. MAY: We are, your Honor. The only aspect of the

1 resolution that's not technically prepared is the State does
2 not have an Amended Information. We will e-file that. We can
3 proceed by interlineation. The proposed resolution is that
4 he's presently charged with rape. We will be pleading to a
5 -- which is a first-degree felony. He will be pleading guilty
6 to a forcible sexual abuse under 76-5-404, which is a second-
7 degree felony.

8 THE COURT: All right.

9 MR. MAY: The State will file within 48 hours that
10 Amended Information. The State's happy to make a factual basis
11 of the elements of the crime.

12 THE COURT: All right, is this done with the alleged
13 victim's --

14 MR. MAY: Correct.

15 THE COURT: Okay.

16 MR. MAY: She's been contacted twice by the State since
17 the offer of this, since we've discussed (inaudible) the case.
18 She's made no response to my attempts to get to her. Her phone
19 does not work. When we met initially during the intake, her
20 very first impression of the case was actually she was not
21 seeking prison at the time and was fairly amenable to resolving
22 the case, and not had any prior (inaudible). Since that time
23 has not communicated with the State at all, although we've made
24 multiple attempts to contact her.

25 MR. PARSON: I think the factual statement will clarify

1 that to some degree, your Honor. I would represent that --
2 MR. MAY: Her wishes are not being cut out of this
3 resolution.
4 THE COURT: All right.
5 MR. PARSONS: I would represent that the victim and the
6 perpetrator in this case were so drunk that neither of them
7 knew what was going on or the context.
8 THE COURT: I apologize, my computer is being extremely
9 slow. Thank you. So was there a preliminary hearing or was
10 there a waiver?
11 MR. MAY: It was a waiver, your Honor.
12 THE COURT: All right, thank you. Then anything else
13 you wish to put on the record, then?
14 MR. MAY: We will as a part of this when we state the
15 actual resolution, I believe.
16 THE COURT: Okay. All right, then, so Mr. Magness, you
17 have a plea form there that you've reviewed with your attorney?
18 MR. MAGNESS: Yes.
19 THE COURT: Do you have any question about those rights
20 that you're giving up by going forward today?
21 MR. MAGNESS: No.
22 THE COURT: If you'd just step forward to make sure
23 that you're on the record, sir. Thank you.
24 MR. MAGNESS: No.
25 THE COURT: Thank you. You understand that you're

1 presumed innocent?

2 MR. MAGNESS: Yes.

3 THE COURT: Do you understand that you're entitled to

4 go to trial in front of impartial jurors?

5 MR. MAGNESS: Yes.

6 THE COURT: You understand that it's the State's burden

7 to prove all the elements of the charge against you and that

8 you don't need to prove anything?

9 MR. MAGNESS: Yes.

10 THE COURT: You also understand that you can make

11 witnesses come forward, you can put on evidence, and you can

12 testify yourself in your defense?

13 MR. MAGNESS: Yes.

14 THE COURT: All right, so you're giving up those rights

15 among others by going forward today?

16 MR. MAGNESS: Yes.

17 THE COURT: All right, and you understand that what's

18 been represented is that you be pleading guilty to a second-

19 degree felony?

20 MR. MAGNESS: Yes.

21 THE COURT: You understand that a second-degree felony

22 could result in 1 to 15 years at the Utah State Prison, in

23 addition to fines and surcharges?

24 MR. MAGNESS: Yes.

25 THE COURT: Is restitution an issue as well?

1 MR. MAY: Your Honor, I don't know that there would be
2 a large amount, if it's an issue. I think that there could be
3 counseling costs, but I don't know for a fact. That is just
4 out there.

5 THE COURT: All right, but you under --

6 MR. MAY: It is not part of this resolution.

7 THE COURT: Okay.

8 MR. PARSONS: There is nothing in the record that would
9 indicate at this particular point.

10 MR. MAY: Right.

11 THE COURT: All right, but you understand, sir, that if
12 there is a claim for restitution, that that would be something
13 that you would be responsible for as well?

14 MR. MAGNESS: Yes.

15 THE COURT: All right, are you thinking clearly today?

16 MR. MAGNESS: Uh-huh.

17 THE COURT: You have to answer with a "yes" or a "no,"
18 sir.

19 MR. MAGNESS: Yes.

20 THE COURT: Are you under the influence of anything
21 that might impair your ability to make a good decision?

22 MR. MAGNESS: No.

23 THE COURT: Do you understand that when you enter a
24 plea like this it really limits your ability to make any sort
25 of appeal?

1 MR. MAGNESS: (No verbal response).
2 MR. PARSONS: Answer affirmatively.
3 MR. MAGNESS: Yes.
4 THE COURT: All right, do you have any questions before
5 we proceed?
6 MR. MAGNESS: No.
7 THE COURT: All right, could I have a factual basis,
8 please.
9 MR. MAY: Yes, your Honor, on April 12th, 2012 in Salt
10 Lake County the defendant did touch the breast, genitals area
11 of the victim, MC, and did so without her consent. He also did
12 so with intent to gratify his sexual desire. I believe that
13 establishes the elements. At the time the victim was over 14
14 years of age.
15 MR. PARSONS: That is what we have so indicated in the
16 plea agreement.
17 THE COURT: All right, thank you. Mr. Magness, you
18 heard the description of what occurred. It is that an accurate
19 description as to what occurred?
20 MR. MAGNESS: Yes.
21 THE COURT: All right, then, sir, to the charge of
22 forcible sexual abuse as a second-degree felony, how do you
23 plead?
24 MR. MAGNESS: Guilty.
25 THE COURT: Court finds that you're knowingly and

1 voluntarily entering into the plea, and you can go ahead and
2 sign that plea form.

3 (Defendant signing document)

4 THE COURT: Thank you.

5 MR. PARSONS: Your Honor, may we make a statement on
6 the record relative to the basis for the agreement?

7 THE COURT: Yes.

8 MR. PARSONS: Yes, it is anticipated, your Honor,
9 that in exchange for this guilty plea, that as the prosecution
10 has heretofore indicated to the Court that unless the victim
11 affirmatively requests a commitment of prison for the defend-
12 ant's behavior, that the prosecution in this matter will recom-
13 mend no prison time, and will recommend probation in some form.

14 MR. MAY: That is correct, your Honor. Our recommend-
15 ation is simply that we would honor the victim's wishes. If
16 the victim were asking for a prison sentence, we're not bound
17 to not recommend prison. If the victim is not seeking a prison
18 sentence, we will not go beyond her request. That recommend-
19 ation, however, does not bind the State in any way as to jail,
20 that it would be seeking in event, regardless of (inaudible).

21 THE COURT: Thank you.

22 MR. PARSONS: We recognize the same. Thank you.

23 THE COURT: You also recognize that the Court's not
24 bound by any such recommendation as well?

25 MR. PARSONS: That is correct, and so -- we have so

1 explained to our client.

2 THE COURT: All right, and so do you anticipate, then
3 a pre-sentence report?

4 MR. PARSONS: Yes.

5 THE COURT: All right, and does your client, then,
6 waive the maximum time for sentencing?

7 MR. PARSONS: Yes.

8 THE COURT: All right, so we'll have AP&P do a pre-
9 sentence report. Remind me, then, as Mr. Magness is out on --
10 do we --

11 MR. PARSONS: He's out of jail.

12 THE COURT: Okay, he's out on bond, right?

13 MR. PARSONS: Yes.

14 THE COURT: Okay. All right, so, Mr. Magness, so you're
15 waiving the maximum time, because the next sentencing date we
16 have -- would you anticipate a special set or you don't --

17 MR. MAY: No, your Honor, I don't believe so.

18 MR. PARSONS: I don't believe so, Judge.

19 THE COURT: All right, so March 2nd at 9 a.m.?

20 MR. PARSONS: May we just check, Judge, please?

21 THE COURT: Certainly.

22 MR. PARSONS: Judge, that should work just fine. Thank
23 you.

24 THE COURT: Okay, so March 2nd at 9 a.m., but in the
25 meantime, sir, you'll need to get down to AP&P to get a pre-

1 sentence report. So you'll -- and it's a two-step process.
2 Basically you down and you pick up your packet and you make
3 an appointment for a followup. So you'll need to get to AP&P
4 probably not today, but if not today, tomorrow, to pick up
5 your packet to begin that process, all right? So that's your
6 referral form to take that with you, and that tells you where
7 to go.

8 MR. MAGNESS: Okay.

9 THE COURT: All right, any questions about what we
10 expect from you in the meantime?

11 MR. MAGNESS: No.

12 THE COURT: All right, so you make sure you take care
13 of that with AP&P, and then we'll see everyone here on March 2nd
14 at 9 a.m.

15 MR. PARSONS: Thank you very much, your Honor.

16 THE COURT: All right, thank you.

17 MR. MAY: Thank you.

18 MR. PARSONS: May we be excused, Judge.

19 MR. MAY: Yeah, may we briefly approach, your Honor.

20 THE COURT: Certainly.

21 (Discussion at the bench off the record)

22 THE COURT: Okay, fine. Thank you.

23 MR. PARSONS: Thank you, Judge.

24 THE COURT: All right, we will see you, then, in March.

25 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Wendy Haws, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these proceedings.

That I have been authorized by Beverly Lowe to prepare said transcript, as an independent contractor working under her license as a certified court reporter appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

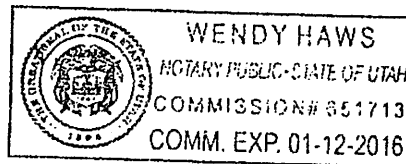
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 21st day of May 2015.

My commission expires:
January 12, 2016

Wendy Haws
Wendy Haws, CCT
NOTARY PUBLIC
Residing in Utah County



Signed: _____

Beverly Lowe, CCR/CCT

FILED DISTRICT COURT
Third Judicial District

JAN 05 2015

SALT LAKE COUNTY

By _____
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH

Plaintiff,

VS

STATEMENT OF DEFENDANT
IN SUPPORT OF GUILTY PLEA
AND CERTIFICATE OF
COUNSEL

Case No. 131903746

ROBERT MORGAN MAGNESS
Defendant

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

Notification of Charges

I am pleading guilty (or no contest) to the following crimes:

	Crime & Statutory Provision	Degree	Punishment Min/Max and / or Minimum Mandatory
A.	<u>FORCIBLE SEXUAL ABUSE</u>	<u>2°</u>	<u>1-15 UT. ST. PRISON</u> <u>\$10,000 FINE + 90%</u> <u>SURCHARGE</u>
B.	_____	_____	_____
C.	_____	_____	_____
D.	_____	_____	_____

00147

I have received a copy of the (Amended) Information against me. I have read it, or had it read to me, and I understand the nature and the elements of crime(s) to which I am pleading guilty (or no contest).

The elements of the crime(s) to which I am pleading guilty (or no contest) are:

THAT ON 4.12.12 IN S.C. COUNTY, UTAH, THE
DEFENDANT DID TOUCH THE GENETALS OR BREAST OF
ANOTHER WITHOUT CONSENT. THE VICTIM BEING A
FEMALE 14 YRS OR OLDER FOR PURPOSES OF GRATIFYING
HIS SEXUAL INTEREST.

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

ON 4.12.12 IN S.C. CO. UTAH I DID TOUCH THE
PRIVATE PARTS OF THE VICTIM WITHOUT HER CONSENT.

Waiver of Constitutional Rights

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

Counsel: I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the court at no cost to me. I understand that I might later, if the judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I (have not) (~~have~~) waived my right to counsel. If I have waived my right to counsel, I have done so knowingly, intelligently, and voluntarily for the following reasons: _____

00148

If I have waived my rights to counsel, I certify that I have read this statement and that I understand the nature and elements of the charges and crimes to which I am pleading guilty (or no contest). I also understand my rights in this case and other cases and the consequences of my guilty (or no contest) plea(s).

If I have not waived my right to counsel, my attorney is L. Long AND Wm. Parsons. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty (or no contest) plea(s).

Jury Trial: I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty (or no contest).

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

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

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

Presumption of innocence and burden of proof: I know that if I do not plead guilty (or no contest), I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty," and my case will be set for a trial. At a trial, the State would have the burden of proving each element of the charges(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

I understand that if I plead guilty (or no contest), I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

Appeal: I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty (or no contest). I understand that if I wish to appeal my sentence I must file a notice of appeal within 30 days after my sentence is entered.

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

Consequences of Entering a Guilty (or No Contest) Plea

Potential penalties: I know the maximum sentence that may be imposed for each crime to which I am pleading guilty (or no contest). I know that by pleading guilty (or no contest) to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

I know that in addition to a fine, an ninety percent (90%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

Consecutive/concurrent prison terms: I know that if there is more than one crime involved, the sentences may be imposed one after another (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty (or no contest), my guilty (or no contest) plea(s) now may result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the court to impose consecutive sentences unless the court finds and states on the record that consecutive sentences would be inappropriate.

Plea agreement: My guilty (or no contest) plea(s) (is/are) (is/are not) the result of a plea agreement between myself and the prosecuting attorney. All the promises, duties and provisions of the plea agreement, if any, are fully contained in this statement, including those explained below:

In Exchange for the DEFENDANTS plea of guilty the
prosecution agrees that in the event the victim does
NOT AFFIRMATIVELY INSIST upon the prosecutor seeking a
prison commitment that the prosecution will recommend
probation and NO prison.

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

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

Defendant's Certification of Voluntariness

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

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

I am satisfied with advice and assistance of my attorney.

I am 33 years of age. I have attended school through the 12 grade. I can read and understand the English language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgment when I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgment.

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

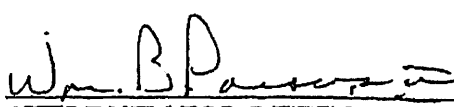
I understand that if I want to withdraw my guilty (or no contest) plea(s), I must file a written motion to withdraw my plea(s) before sentence is announced. I understand that for a plea held in abeyance, a motion to withdraw from the plea agreement must be made within 30 days of pleading guilty or no contest. I will only be allowed to withdraw my plea if I show that it was not knowingly and voluntarily made. I understand that any challenge to my plea(s) made after sentencing must be pursued under the Post-Conviction Remedies Act in Title 78, Chapter 35a, and Rule 65C of the Utah Rules of Civil Procedure.

Dated this 5 day of Jan, 2015.


DEFENDANT'S SIGNATURE

Certificate of Defense Attorney

I certify that I am the attorney for Robert MAGNESS, the defendant above, and that I know he/she has read the statement or that I have read it to him/her; I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.


ATTORNEY FOR DEFENDANT
Bar No. 2535

Certificate of Prosecuting Attorney

I certify that I am the attorney for the State of Utah in the case against Robert MAGNESS, defendant. I have reviewed this Statement of Defendant and find that the factual basis of the defendant's criminal conduct which constitutes the offense(s) is true and correct. No improper inducements, threats, or coercion to encourage a plea has been offered to defendant. The plea negotiations are fully contained in the Statement and in the attached Plea Agreement or as supplemented on the record before the Court. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense(s) for which the plea(s) is/are entered and that the acceptance of the plea(s) would serve the public interest.


PROSECUTING ATTORNEY

Bar No. 11317

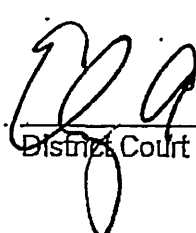
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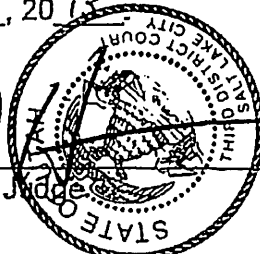
Order

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

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

Dated this 5 day of Jan, 2015


District Court Judge



3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	CHANGE OF PLEA
	:	NOTICE
	:	
vs.	:	Case No: 131903746 FS
ROBERT MORGAN MAGNESS,	:	Judge: ELIZABETH A HRUBY-MILLS
Defendant.	:	Date: January 5, 2015

PRESENT

Clerk: susanp

Prosecutor: MAY, THADDEUS J

Defendant

Defendant's Attorney(s): LARRY N LONG

WILLIAM B PARSONS III

DEFENDANT INFORMATION

Date of birth: August 2, 1959

Sheriff Office#: 92630

Audio

Tape Number: CR W35 Tape Count: 3:53-4:02

CHARGES

1. FORCIBLE SEXUAL ABUSE - 2nd Degree Felony

Plea: Guilty - Disposition: 01/05/2015 Guilty

Defendant waives the reading of the Information.

Court advises defendant of rights and penalties.

Defendant waives time for sentence.

A pre-sentence investigation was ordered.

The Judge orders Adult Probation and Parole to prepare a Pre-sentence report.

Change of Plea Note

Defendant pled guilty to Count 1 as charged in the Amended Information.

The defendant is advised that this offense may be used as an enhancement to the penalties for a subsequent offense.

Counsel represent to the Court that a resolution has been reached. The State agrees that they will not recommend a prison sentence if the victim is not requesting prison. The State also represents to the Court that the victim is aware of the resolution and in agreement.

SENTENCING is scheduled.

Date: 03/02/2015

Time: 09:00 a.m.

Location: THIRD FLOOR - W35

THIRD DISTRICT COURT

450 SOUTH STATE STREET

SALT LAKE CITY, UT 84114-1860

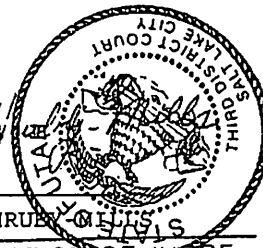
Before Judge: ELIZABETH A. HRUBY-MILLS

Date: 1/5/15

By

ELIZABETH A HRUBY-MILLS

STAMP DISTRICT COURT JUDGE



Individuals needing special accommodations (including auxiliary communicative aids and services) should call Third District Court-Salt Lake at (801)238-7500 three days prior to the hearing. For TTY service call Utah Relay at 800-346-4128. The general information phone number is (801)238-7300.

SIM GILL, Bar No. 6389
District Attorney for Salt Lake County
THADDEUS MAY, Bar No. 11317
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, UT 84111
Telephone: (385) 468-7600

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH

Plaintiff,

vs.

ROBERT MORGAN MAGNESS

DOB: 08/02/1959,

AKA:

4290 W PASKAY DR

WVC, UT 84120

D.L.# 006970261

OTN

SO# 92630

Booking#

Defendant.

Screened by: THADDEUS MAY

Assigned to: THADDEUS MAY

**AMENDED
INFORMATION**

DAO # 13007593

Case No. 131903746

The undersigned Deputy District Attorney upon a written declaration states on information and belief that the defendant, ROBERT MORGAN MAGNESS, committed the crime(s) of:

COUNT 1

FORCIBLE SEXUAL ABUSE, 76-5-404 UCA, Second Degree Felony, as follows: That on or about April 12, 2012 at 4290 West Paskay Drive, in Salt Lake County, State of Utah, the defendant did, where the victim was 14 years of age or older, touch the anus, buttocks, or any part of the genitals of another, or touch the breasts of a female, or otherwise took indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desires of any person, without the consent of the other, regardless of the sex of any participant.

THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

D HAMILTON, J AVERETT, SHANTEL BILLINGS, M.C., A COWAN, MORGAN MAGNESS, P PLESE, M SILLER,

DECLARATION OF PROBABLE CAUSE:

----- Your Declarant bases this Information upon the following: -----

The statement of M.C. that on April 12, 2012, she was asleep at 4290 West Paskay Drive, Salt Lake County. M.C. states that she went to sleep with her friend in a bed downstairs. M.C. states that when she woke up her friend's father, defendant ROBERT M. MAGNESS, had his penis inside her vagina. M.C. states that she jumped up and told the defendant to get away from her.

The statement of West Valley Police Officer D. Hamilton that he arrived at the above address and spoke to the defendant. The defendant states that he only touched M.C. on the shoulder.

The statement of Pilar Shortsleeve, a Chief Forensic Scientist with the State of Utah Crime Laboratory, that she was able to complete a DNA analysis on evidence collected from M.C.'s Code R exam. Seminal fluid located on the anal/perianal swabs matched the DNA profile for the defendant.

Pursuant to Utah Code Annotated § 78B-5-705 (2008) I declare under criminal penalty of the State of Utah that the foregoing is true and correct to the best of my belief and knowledge.

Executed on: 1/5/15

/s/ Thaddeus May
Declarant

Authorized for presentment and filing
SIM GILL, District Attorney

/s/ Thaddeus May

Deputy District Attorney
5th day of January, 2015
KRH / DAO # 13007593

Addendum B

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

ORIGINAL

STATE OF UTAH,

Plaintiff,

vs.

ROBERT MORGAN MAGNESS,

Defendant.

Case No. 131903746 FS

FILED DISTRICT COURT
Third Judicial District

JUN - 1 2015

SALT LAKE COUNTY

Sentencing Hearing
Electronically Recorded on
March 2, 2015

By [Signature] Deputy Clerk

BEFORE: THE HONORABLE ELIZABETH A. HRUBY-MILLS
Third District Court Judge

APPEARANCES

For the State:

Thaddeus J. May
DISTRICT ATTORNEY'S OFFICE
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (385) 468-7600

For the Defendant:

William B. Parsons III
Larry N. Long
1 Lakeview
Stansbury Park, Utah 84074
Telephone: (801) 466-6311

Transcribed by: Wendy Haws, CCT

1771 South California Avenue
Provo, Utah 84606
Telephone: (801) 377-2927

-1-

FILED
UTAH APPELLATE COURTS

SEP 14 2015

20150417-CA

365

1 P R O C E E D I N G S

2 (Electronically recorded on March 2, 2015)

3 (The inaudible portions in this transcript are due to
4 the inferior quality of recording provided.)

5 THE COURT: Good morning.

6 MR. PARSONS: Good morning, Judge. No. 61, Magness,
7 M-a-g-n-e-s-s.

8 THE COURT: Thank you.

9 MR. MAY: Thaddeus May on behalf of the State.

10 THE COURT: All right, so this is case No. 131903746.

11 MR. PARSONS: May I approach, your Honor.

12 THE COURT: Certainly.

13 MR. PARSONS: Well, I'll just give it to the bailiff,
14 documents for the Court.

15 THE COURT: Thank you. Are these things that the State
16 has been provided?

17 MR. PARSONS: Yes, I spoke to Thaddeus this morning,
18 and he's received electronic copy.

19 MR. MAY: It was e-filed yesterday.

20 MR. PARSONS: Yeah, we only filed them yesterday. We
21 just got the report.

22 THE COURT: Oh, in fact, last night; is that correct?

23 MR. PARSONS: Yeah, that's right, Judge.

24 THE COURT: All right, so it's a motion to continue and
25 then a defense based sentencing report, it looks like?

1 MR. PARSONS: That's right. Motion to continue, your
2 Honor, if I may. It is based upon the fact that we're entitled
3 by statute to three days-- three business days, having received
4 the AP&P report three business days prior to today's hearing,
5 we did not. We haven't had the opportunity of, accordingly,
6 addressing all of the issues contained therein. There are some
7 material issues associated with the report, AP&P's report that
8 I would need to address.

9 I am also asking for an evidentiary hearing for
10 sentencing purposes, and we have submitted a Utah sentencing
11 alternatives defense base report which we would very much like
12 to have the Court read before the Court considers sentencing.
13 Accordingly, for those reasons we would ask that we continue
14 this matter for a short term.

15 THE COURT: All right, Mr. May?

16 MR. MAY: I don't know about the delay in the reception
17 of the pre-sentence report, your Honor. I'm not certain what
18 it shows. It was filed in the Court's docket. (Inaudible) the
19 State has reviewed this, I can't really answer that response,
20 not knowing.

21 The other request by the defense the State would
22 object to, we've had plenty of time to prepare for today's
23 proceedings. The is here. I can't understand what if
24 anything would it profit this to be filed on a Sunday, the day
25 before sentencing, provided (inaudible) notice for the or the

1 State. We have (inaudible) statement.

2 This case is already an old one. If there are errors
3 or alleged factual discrepancies in this report, defense
4 Counsel can clearly state them. They can be considered on
5 the record at present. The sentencing, Judge, is (inaudible)
6 sentencing based on the reasonable, reliable and relevant
7 information. That should be the governing standard for your
8 Honor to consider.

9 The AP&P report is not a mandatory document. There
10 has been no defense -- no defects or deficiencies cited. I
11 don't know the point of the hearing other than to drag out
12 this process further.

13 MR. PARSONS: Has nothing to do with dragging it out,
14 your Honor. A short term continuance for purposes of being
15 able to allow the Court to review the sentencing alternatives
16 that we have --

17 THE COURT: Why did I just get that last night?

18 MR. PARSONS: You just got it last night, Judge, because
19 we only received the -- Wednesday night is when the AP&P report
20 came to us. We're entitled to (inaudible). We're entitled.

21 THE COURT: All right, so this is just in response to
22 the pre-sentence report?

23 MR. PARSONS: Yes. Yes, your Honor.

24 THE COURT: It's not an independent recommendation?

25 MR. PARSONS: Yes, your Honor, and in accordance with

1 that, so is our motion to continue the sentencing.

2 THE COURT: I'm not sure -- wait, so was --

3 MR. PARSONS: (Inaudible) short term why you just
4 received the motion also, the short term. The limited amount
5 of time we've had since we received the AP&P report is why you
6 just received the motion as well.

7 THE COURT: I see, thank you.

8 MR. PARSONS: I only received it from the co-Counsel.
9 It didn't even come to me. I never (inaudible). I'm the one
10 who would have tried the case. The nature of the -- again, the
11 nature of the charge is sufficiently severe that the defendant
12 is entitled to all of the due process (inaudible). That's all
13 we're asking.

14 MR. MAY: Your Honor, I know the question the State
15 has, and I did not check the docket this morning, but when
16 does the docket show that that pre-sentence report was filed?
17 It's not whether -- when Mr. Parsons received the report as a
18 co-Counsel. It's when the document has been filed.

19 THE COURT: We have it having been filed on the 25th of
20 February.

21 MR. MAY: Which is the -- it's Tuesday, is that
22 correct, Tuesday of last week?

23 COURT CLERK: Wednesday.

24 THE COURT: Wednesday.

25 MR. PARSONS: If it was (inaudible) --

1 MR. MAY: Wednesday, Thursday, Friday.

2 MR. PARSONS: No, Friday, Saturday. Thursday and

3 Friday. You do not count the beginning. You count the day --

4 THE COURT: Okay, I'm going to allow the continuance so

5 I can review that. However, if the -- if the wishes to speak

6 today, if she wants to come back, that's fine, too; but I'm

7 willing to hear from that to avoid any inconvenience to her.

8 MR. MAY: Your Honor, I believe she does wish to address

9 the Court today; is that correct?

10 MC: Yes.

11 MR. MAY: She has made the trouble of coming, too, so--

12 THE COURT: Okay, well, let's go ahead with allowing

13 her to speak at this time.

14 MR. PARSONS: No problem. Then we should set the date

15 at this time?

16 THE COURT: We can do that. How about we have you back

17 on -- and you asked for an evidentiary hearing; is that --

18 MR. PARSONS: Yes, I would like to be able to present

19 witnesses.

20 THE COURT: All right, so you're asking for a special

21 setting?

22 MR. PARSONS: Yes.

23 THE COURT: How long do you anticipate needing for that?

24 MR. PARSONS: An hour and a half.

25 MR. MAY: Your Honor, I guess the State has some

1 inquiry as to what this evidentiary hearing (inaudible). It's
2 a novel approach, in the State's mind. I'm not understanding
3 why there's the necessity. There's no error noted so far in
4 the pre-sentence report.

5 THE COURT: So how -- what witnesses would you antici-
6 pate calling?

7 MR. PARSONS: I'm going to call the private investigator
8 that worked in our behalf. I'm going to call Dr. Manea who
9 prepared the report concerning the defendant's behavior. Those
10 are a minimum, as well as the defendant and perhaps his son.

11 MR. MAY: I guess, your Honor, the State would simply
12 remind the Court none of the above is required, and all of the
13 above included in the defense case (inaudible) report that sits
14 on your Honor's desk (inaudible).

15 THE COURT: All right, thank you. We can have you back
16 on March 16th at 1:30.

17 MR. PARSONS: That's great, Judge.

18 MR. MAY: Your Honor, the State -- the State's prosecu-
19 tor is being reassigned that date, and I don't want my replace-
20 ment to walk completely blind into this matter. If we can come
21 back in two weeks so that he can be brought up to speed and be
22 prepared (inaudible). I'm being reassigned to the West Jordan
23 and I don't believe I can be here for that.

24 THE COURT: All right, so come back when?

25 MR. MAY: If we could come back a week from then, at

1 least, so that Mr. Flater, who's going to be my replacement
2 in the Special 's Unit will be able to be brought up to speed
3 on this matter.

4 MR. PARSONS: We're accommodating. We don't have any
5 objection. The 23rd is fine. That's what he's asking for, I
6 think.

7 THE COURT: No. Is that what you're asking for?

8 MR. MAY: I think that or two -- I said one or two
9 weeks. That's one week, but that's -- either way.

10 THE COURT: Would it -- two weeks would be the 16th.
11 That's the date I gave.

12 MR. MAY: Two weeks from the 16th. So the 16th is the
13 date that the State --

14 THE COURT: Oh, I see. I gotcha. That would be the
15 first day of the change.

16 MR. MAY: Right.

17 THE COURT: I understand.

18 MR. PARSONS: The 30th is fine, Judge. That's what he--

19 THE COURT: Well, I was working on my calendar, which
20 had availability on the afternoon of the 16th.

21 MR. PARSONS: Sure.

22 COURT CLERK: We can do it at 3:30 on the 30th.

23 THE COURT: So 3:30 on March 30th.

24 MR. PARSONS: That also is fine, Judge.

25 MR. MAY: Just so the State understands what to expect

1 on that date, we anticipate the taking of evidence from defense
2 witnesses in addition to the actual sentencing, or is the State
3 going to take -- or is the Court going to take evidence and
4 sentence it at a later date?

5 THE COURT: I anticipate going forward with sentencing
6 on that date.

7 MR. PARSONS: Yes.

8 THE COURT: All right, then. So -- but we'll hear from
9 the witness now?

10 MR. MAY: Correct.

11 THE COURT: All right, thank you. Okay. All right, so
12 Mr. Magness, if you would step over here, please.

13 MC: I don't know how appropriate this is now, since I
14 was expecting him to be sentenced, but I'm just going to --

15 THE COURT: You're welcome to come back on that date
16 as well. I just don't want you to be inconvenienced.

17 MC: I just want to say what I have to say and then
18 leave.

19 THE COURT: Okay.

20 MC: Robert, you have hurt me in such a deep way, I
21 wonder if you can even comprehend what you have done. I want to
22 know why you did this to me. I have done nothing to you. You
23 took something precious to me, my piece of mind, and a piece
24 of my spirit, and I want it back. It was not yours to take.

25 Along with your penis, you put fear, distrust, pain

1 and a hollowness inside of me, and I am here to give it -- to
2 return it to you. I don't know what happened in your life or
3 what makes you think you have the right to do this to somebody,
4 but you do not. It seems you have lost your decency and human-
5 ity at some point, and perhaps you should spend the rest of
6 your life looking inside of the ugliness you've created and
7 figuring out how to remove it so you are not destroying the
8 lives of other people.

9 As far as what I believe should be dealt to you, I
10 am asking the Judge to sentence you two-and-a-half years in
11 prison, the same sentence you've dealt me, the prison I've been
12 in waiting for this to be over. I also want you to be on the
13 sexual offenders list, so there's a possibility a girl might
14 see it and think twice about being in a vulnerable position
15 in your presence, even if it is under the pretense of partying
16 with your 20-something-year-old son.

17 Even though I have not seen you in over two years,
18 you have still been a presence in my life. After this, you
19 are not. I hope you never do this again; and if so, may karma
20 and the universe have its way with you.

21 THE COURT: Thank you. All right, with that, then, we
22 have our new date, and I will see you then. Thank you.

23 MR. MAY: Thank you, Judge.

24 MR. PARSONS: Thank you, your Honor.

25 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Wendy Haws, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these proceedings.

That I have been authorized by Beverly Lowe to prepare said transcript, as an independent contractor working under her license as a certified court reporter appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

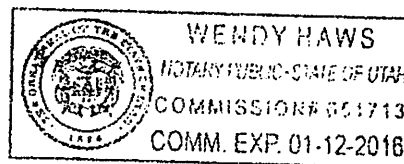
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 21st day of May 2015.

My commission expires:
January 12, 2016

Wendy Haws
Wendy Haws, CCT
NOTARY PUBLIC
Residing in Utah County



Signed: Beverly Lowe
Beverly Lowe, CCR/CCT

Addendum C

LARRY LONG (#1989)
L. LONG LAWYER, INC.
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E-mail: llong@llonglawyer.com

Attorney for Defendant

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

ROBERT MORGAN MAGNESS,

Defendant.

**MOTION FOR LEAVE TO
WITHDRAW GUILTY PLEA
AND STAY SENTENCING
PROCEEDINGS**

CASE No. 131903746

JUDGE: ELIZABETH A. HRUBY-MILLS

COMES NOW, the Defendant, ROBERT MORGAN MAGNESS, by and through his counsel of record, Larry Long, and pursuant to Utah Code § 77-13-6(2), hereby respectfully requests leave of the Court to withdraw his plea of guilty to the charge of forcible sexual abuse, under Utah Code § 76-5-404, a second degree felony, as entered on January 5, 2015. The Defendant requests 30 days to prepare and file a Memorandum of Law and Authorities in

support of this Motion. The Defendant needs this time because one of his material witnesses required to substantiate the facts surrounding the basis for this Motion is out of the country.

The Defendant further requests that this Motion serve as a basis to stay the sentencing hearing currently scheduled for March 30, 2015, at 3:30 PM.

BASIS FOR MOTION

The Defendant agreed to plead guilty to the charges in this case after lengthy negotiations under which the Defendant and his legal counsel were assured that the alleged victim would not ask the Court to sentence the Defendant to prison. This was a critical element of the negotiations and the basis for why he agreed to the plea bargain. However, after the Defendant entered his plea of guilty in this case, the alleged victim personally appeared and beseeched this Court to sentence the Defendant to prison.

Utah Code Ann. § 77-13-6(2)(a) provides that “[a] plea of guilty or no contest may be withdrawn [if] . . . it was not knowingly and voluntarily made.” The Defendant will provide evidence in his forthcoming Memorandum of Law and Authorities that will show that his plea was not knowingly or voluntarily made because he was unduly and unlawfully misled into accepting the plea agreement. Accordingly, the Defendant respectfully asks that sentencing in this case be stayed until this matter can be fully briefed and the Court has an opportunity to rule on this Motion. The Defendant anticipates that he can complete and file the Memorandum of Law and Authorities within 30 days from the date of filing of this Motion.

RESPECTFULLY SUBMITTED this 26th day of March, 2015.

/s/ Larry Long

Larry Long for
L. LONG LAWYER, INC.
Attorney for Defendant

CRAIG S. COOK, Bar No. 713
CRAIG S. COOK, PC
3645 East Cascade Way
Salt Lake City, Utah 84109
Phone: (801) 485-8123
E-mail: kiskaa@att.net

Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

ROBERT MORGAN MAGNESS,

Defendant.

**AMENDED MOTION FOR
LEAVE TO WITHDRAW GUILTY
PLEA, REINSTATE PRELIMINARY
HEARING, AND REINSTATE ALL
PRIOR FILED MOTIONS AND
REQUESTS**

Case No. 131903746

Judge: ELIZABETH A. HRUBY-MILLS

COMES NOW the defendant Robert Morgan Magness by and through his attorneys Craig S. Cook, Larry Long, and William Parsons III and respectfully request leave of the Court to withdraw his guilty plea to the charge of forcible sexual abuse (Utah Code Section 76-5-404) as entered on January 5, 2015. In addition, Defendant requests that this Court reinstate a preliminary hearing to give Defendant the opportunity to cross-examine witnesses and to evaluate the evidence of the prosecution. Finally, Defendant requests that all prior motions and requests

made by defense counsel prior to the entry of the guilty plea be reinstated and ruled upon by this Court.

Defendant bases these requests upon Section 77-13-6(2) U.C.A. and upon the United States and Utah Constitutions as to due process of law and all other applicable rights of trial by jury.

The legal and factual basis for these requests is contained in the accompanying Memorandum and Affidavits.

In the alternative, Defendant is willing to withdraw these motions in the event the Court elects to impose probation with or without jail time.

DATED this 10th day of April 2015.

S/Craig S. Cook
CRAIG S. COOK
Attorney for Defendant

Notice has been served upon counsel of record in the above-listed case by electronic notification in accordance with U.S.C.P. 5(B1Ai).

/s/ Craig S. Cook

CRAIG S. COOK, Bar No. 713
CRAIG S. COOK, PC
3645 East Cascade Way
Salt Lake City, Utah 84109
Phone: (801) 485-8123
E-mail: kiskaa@att.net

Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

ROBERT MORGAN MAGNESS,

Defendant.

**MEMORANDUM IN SUPPORT OF
MOTIONS TO WITHDRAW GUILTY
PLEA, REINSTATE PRELIMINARY
HEARING, AND REINSTATE ALL
PRIOR FILED MOTIONS AND
REQUESTS**

Case No. 131903746

Judge: ELIZABETH A. HRUBY-MILLS

COMES NOW the defendant Robert Morgan Magness by and through his attorneys Craig S. Cook, Larry Long, and William B. Parsons, III and submits the following memorandum in support of the contemporaneously filed motions.

STATEMENT OF FACTS

The following Statement of Facts is based upon the Affidavits of Shawn Kane, Larry Long, and Robert Morgan Magness that are attached herein. In addition, Defendant has attached the transcriptions of a hearing held on January 5, 2015 and March 2, 2015.

Defendant was charged with first-degree rape resulting from an incident that occurred at his residence on April 12, 2012. The complainant was employed at a local bar and was acquainted with the defendant and his son. She along with defendant's son and two other individuals went to Defendant's residence in the early morning hours to party. They consumed a

large quantity of hard liquor and other forms of alcohol. It was during her overnight stay at his residence that the alleged rape occurred.

Defendant retained attorney Larry Long to represent him in this matter. Mr. Long evaluated the case and concluded that Defendant had a valid defense concerning the consent of the complainant and the fact that all parties were totally intoxicated to a high level even when the police arrived. Mr. Long planned to use the preliminary hearing to extensively examine the complainant and the other participants as to all the facts and circumstances of that morning including their consumption of alcohol and sexual activity.

On June 6, 2013 the matter was set for a preliminary hearing. Prior to the hearing, however, Mr. Tad May, the Deputy District Attorney, met with the complainant and her girlfriend. Afterwards, Mr. May approached Mr. Long and Defendant and expressly told them that the complainant did not want Defendant to go to prison. Mr. May said that perhaps a plea agreement could be reached in the future.

From Mr. Long's vast experience as a criminal defense attorney, he informed the defendant that it would now be unwise to conduct a preliminary hearing to cross examine the complainant based upon her statement that she did not want Defendant to serve time in the prison. Mr. Long informed the defendant that should he examine her it would be highly probable that she would change her attitude and become hostile against him and would seek prison incarceration. Upon this advice, Defendant elected to waive his preliminary hearing.

Because no plea bargain had been offered to Mr. Long, he immediately began to undertake a defense of the defendant by arranging to have William Brad Parsons III join the defense team and by filing various motions and requests. He sought and received an order to turn over all DNA and clothing for independent examination and sought a motion to suppress

some of the statements made by the defendant to the arresting officer on the basis that the defendant had not been properly Mirandized. Additional motions and requests were made that were all opposed by the District Attorney's Office.

Mr. Long also employed private investigator Shawn Kane to assist him and Mr. Parsons in preparation for trial. In January of 2014 Mr. Kane telephoned the complainant and interviewed her as to her version of what had occurred that morning. She told Mr. Kane that she was surprised that the questions were being asked since it was her understanding that the defendant had already entered a guilty plea and that she would only have to testify as to his sentencing hearing. Mr. Kane advised her to speak with the prosecutor to clarify the status of the case. He did not inquire as to her feelings for Defendant's punishment.

Nearly a year later on January 5, 2015 an evidentiary hearing was scheduled as to all of the prior defense motions and requests. Mr. Parsons and Mr. Long met with Mr. May immediately prior to the hearing to discuss a potential plea bargain. At that time Mr. May stated he would agree to reduce the charges from a first-degree rape to a second degree forcible sexual abuse charge. He once again emphasized that the complainant did not want the defendant to go to prison and that he would even recommend no prison time to the court unless she affirmatively insisted for a prison commitment.

Accordingly, the defendant executed a "Statement of Defendant in Support of Guilty Plea and Certificate of Counsel". He impliedly withdrew the score of motions that were the subject matter of the original hearing.

During a dialogue between this Court and counsel the following conversation occurred:

THE COURT: All right, and is this done with the alleged victim's—

MR. MAY: Correct. She's been contacted twice by the state since the offers, since we've discussed resolving the case, she's made no response

to my attempts to get response, her phone did not work. When we met initially during the intake, her very first impression of the case was, actually, she was not seeking prison at the time and was fairly amenable to resolving the case. And I had (unintelligible) prior. Since that time, she has not communicated with the state at all although we made multiple attempts to contact her.

MR. PARSONS: And I think the factual statement will clarify that to some degree, Your Honor, I would represent that—

MR. MAY: Her wishes are not being cut out of this resolution

MR. PARSONS: I would represent that the victim and the perpetrator in this case were so drunk that neither of them knew what was going on in the context. (pp. 4-5, Tr. of Jan. 5, 2015).

At the end of the proceeding, the following statements were made:

MR. PARSONS: As it is anticipated, Your Honor, that in exchange for this guilty plea, that is Mr.—the prosecution has heretofore indicated to the Court that unless the victim affirmatively requests a commitment of prison for the defendant's behavior, that the prosecutor in prosecution in this matter will recommend no prison time and will recommend probation of some form.

MR. MAY: That's correct Your Honor. Our recommendation is simply that we would honor the victim's wishes. If the victim were asking for a prison sentence, we're not bound to not recommend prison and the victim is not seeking a prison sentence. That's not her request. That recommendation, however, does not bind the state in any way as to jail, that would be speaking in any event regardless of the recommendation. (*Id.* at pp. 10-11).

Mr. Long and Mr. Parsons advised the defendant to accept the plea bargain on the basis that it gave him a highly probable chance of being placed on probation and serving only county jail time instead of a much longer prison sentence. They informed the defendant that because the complainant was not hostile and did not seek his prison incarceration that it was highly probable that the APP would also recommend probation in conjunction with the recommendation of the District Attorney. They further informed him that the Court would likely take into account his

complete absence of any sexual criminal history of a similar nature and would favorably view the complainant's request to not send him to prison.

In preparation for sentencing, the defendant cooperated with APP, which was preparing a report for this Court. In addition, he participated with a private company called Utah Sentencing Alternatives in order to give this Court the defense perspective of a sentence recommendation.

In addition, the defendant was regularly attending sex therapy sessions relating to sexual aggression and was refraining from the use of alcohol or other substances.

APP sent its recommendations to this Court and to Mr. Long on February 25, 2015. To Mr. Long's and Mr. Parsons' complete surprise APP recommended imprisonment. Most surprising, however, was the victim impact statement. The report stated:

MC said she has been dealing with the consequences of this crime now for three years and feels it is appropriate the defendant be required to feel and understand the same consequences in the form of incarceration. She feels it is appropriate for the defendant to serve at least two years in prison for what he has done so he can also feel the real consequences of his actions as she has the past three years. MC said she plans to be present at sentencing and would like to address the Court if allowed to do so.

The APP report was the first indication to the defense team that the complainant was seeking a prison term contrary to the representations made by the Deputy District Attorney. Accordingly, the defense requested that the sentencing be delayed because the defense team received the report late and it needed additional time to evaluate what to do in light of this devastating recommendation.

On March 1, 2015 Mr. Kane easily contacted the complainant at the same number that he had talked to her previously, some fifteen months prior. This was in sharp contrast to the claims of Mr. May that she was unreachable. She informed him that she always wanted a prison term for the defendant and also wanted to make sure that he would be on a sex offender list. She stated that Mr. May was aware of her desire when she last met with him. She expressed great hostility

toward the defendant contrary to the picture painted by the Deputy District Attorney throughout the prosecution period. *See* telephone transcript attached to Shawn Kane Affidavit.

On March 2, 2015, the date originally set for the sentencing, this Court granted a continuation in order to allow the defense team to evaluate the APP report. The complainant was present in the courtroom and asked to speak. A portion of her statement was as follows:

As far as what I believe should be done to you, I'm asking the judge to sentence you two-and-a-half years in prison, the same sentence you've dealt me. A prison I've been in, waiting for this to be over. I also want you to be on the sexual offender list. (p. 12, Tr. March 2, 2015).

Thus, the intent of the defense team and the defendant of entering into the plea bargain was completely overridden by the revelation that the complainant was in fact very hostile and vindictive against the defendant and sought a prison term for him in complete contradiction to the representations made by the Deputy District Attorney during the span of the prosecution. The complainant, instead of being an asset to defendant as anticipated from the representations of the Deputy District Attorney, was instead, a tremendous liability who significantly influenced the APP recommendation, foreclosed any recommendation by the District Attorney for a probation recommendation under the plea agreement, and presented herself to the court in a very emotional and adverse manner.

Based upon the material misrepresentation as to the complainant's prison desires toward defendant, the present Motions are made.

ARGUMENT

POINT I

**THE PROSECUTORIAL MISCONDUCT OF THE DEPUTY
DISTRICT ATTORNEY IN MISREPRESENTING THE
DESIRES OF THE COMPLAINANT VIOLATED
DEFENDANT'S DUE PROCESS RIGHTS AND CAUSED
HIM TO FOREGO HIS RIGHT TO TRIAL BY JURY.**

The Utah Supreme Court in *Utah v. Hay*, 859 P.2d 1 (Utah 1993) enunciated the duty of a prosecutor to provide information to the defense. The Court stated:

The prosecution's responsibility is that of a "minister of justice and not simply that of an advocate" which includes a duty "to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." A criminal trial is more than a contest between the prosecution and the defense; it is a search for the truth.

In *Berger v. United States*, 295 U.S. 78 (1935) Justice Sutherland explained prosecutorial misconduct to mean "overstepping the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."

In the instant case, the Deputy District Attorney Mr. May either intentionally misrepresented the desires of the complainant as to punishment for the defendant or was grossly negligent in failing to ascertain her real feelings. This misrepresentation caused the defendant to waive his right to a preliminary hearing because he did not want to alienate what seemed to be a forgiving complainant. As such, therefore, he gave up his constitutional right to cross-examine the complainant and to challenge the sufficiency of the evidence in the criminal prosecution.

"The prosecutor has a special duty not to mislead; the government should, of course, never make affirmative statements contrary to what it knows to be the truth." *United States v. Universita*, 298 F.2d 365 (2d Cir. 1961). The government cannot properly, either explicitly or implicitly mischaracterize information that it has. A prosecutor cannot make knowing use of false evidence by misrepresenting the nature of non-testimonial evidence. *Miller v. Pate*, 386 U.S. 1 (1967).

The continued misrepresentation of the desires of the complainant induced Defendant to later give up his right to a jury trial and to enter a plea based on the false assumption that the complainant would be favorable to him by not seeking a prison term. This positive attitude

would be reflected in the APP report, the recommendation of the prosecutor, and any testimony before the sentencing court. "When specific guarantees of the Bill of Rights are involved, the Supreme Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes upon them. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

It is well settled that the "Brady Doctrine" provides that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecution's violation of *Brady* can render a defendant's guilty plea involuntary. *United States v. Wright*, 43 F.3d 491, 496 (10th Cir. 1994). "In the context of an attack on the validity of a plea, evidence is considered material where there is a reasonable probability but for the failure to produce such information the defendant would not have entered the plea but instead would have insisted on going to trial." *United States v. Avellino*, 136 F.3d 249 (2d Cir. 1998). This same principle is applicable here.

In the instant case the prosecutor made several representations to induce the defendant to give up his right to a jury trial. First, the chargeable offense was reduced from a first degree offense to a second degree offense; second, the prosecutor agreed to recommend no prison time provided the complainant did not "affirmatively insist on the prosecution seeking a prison commitment"; third, the prosecutor affirmatively stated that the complainant did not desire Defendant to serve a prison sentence and that her wishes were in compliance with the plea agreement.

As stated in the filed Affidavits, this plea agreement was mostly attractive because by reducing the offense from a first to a second degree, it gave the defendant the opportunity to eliminate any prison sentence. However, this could only occur if the complainant was

cooperative and did not demand prison incarceration pursuant to the victim rights statutes. The defense attorneys knew that if this occurred the defendant would have a high probability of probation (with county jail time required) because a non-vindictive complainant would significantly influence the APP report, the recommendation of the prosecutor, and the sentencing court.

As evidenced by the Affidavits, if the prosecutor merely offered to reduce the charge from a first to a second, the defense team may not have accepted it. While the range of years is certainly much greater for a first than a second, the estimated time used by the Board of Pardons for this particular offense would be approximately the same under either charge. It was only the inducement of knowing that the complainant did not seek prison time that caused the defendant to give up his constitutional rights including a trial by jury.

The prosecutorial misconduct by the prosecutor in misrepresenting and misleading the defendant deprived him of due process and made his guilty plea involuntary. Therefore, under constitutional law Defendant is entitled to withdraw his guilty plea, for a reinstatement of the preliminary hearing, and a reinstatement of all of the motions and other matters that were pending prior to the entry of the guilty plea. This ruling will allow the defendant to be restored to his position before the Deputy District Attorney made the misrepresentations and to prepare for a trial by jury. *Utah v. Gentry*, 797 P.2d 456 (1990).

POINT II

**ALTERNATIVELY, DEFENDANT IS ENTITLED TO WITHDRAW
HIS GUILTY PLEA UNDER SECTION 77-13-6(2)(A) U.C.A. SINCE
THE RECORD SHOWS THAT THE PLEA WAS NOT
KNOWINGLY OR VOLUNTARILY MADE.**

Section 77-13-6 U.C.A. states: "A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made."

Defendant maintains that under the circumstances of this case his guilty plea was not "voluntary" under controlling case law.

The Utah Supreme Court in *State v. Copeland*, 765 P.2d 1266 (Utah 1988) extensively dealt with the "voluntariness of a plea." The Court cited a U.S. Supreme Court case that stated:

A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to them by the court, prosecutor, or his own counsel, must stand unless induced by threat (or promises to discontinue improper harassment), misrepresentation, including unfulfilled or unfulfillable promises, or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribe). *Brady v. United States*, 397, 742 (1970). (Emphasis added).

The Court then cited a Federal 4th Circuit case in which the defendant was told he could receive a prison sentence of 90 years--- when in fact the maximum sentence was 55 years.

Defendant pleaded guilty so as to receive no more than a 25-year sentence. The 4th Circuit "held this misinformation vitiated the voluntariness of the plea because the benefit of the defendant's bargain had been grossly exaggerated. The defendant was therefore not aware of the true value of the state's agreement." *Hammond v. United States*, 528 F.2d 15 (4th Cir. 1975), 765 P.2d at 1278.

In *Copeland*, the defendant was promised by the prosecutor to be placed in a sex offender program at the Utah State Hospital rather than prison incarceration. Based upon that representation defendant pled guilty. However, the sentencing judge had no power at that time to commit him to the hospital rather than the prison. The Court concluded that the promise was illusory and permitted the defendant to withdraw his guilt plea.

In *State v. Norris*, 57 P.3d 238 (Utah App. 2002) the trial court and the prosecutor promised the defendant that he could pursue a claim for vindictive prosecution on appeal, but neither the court nor the prosecutor could fulfill that promise since the trial judge never entered a final order disposing of the defendant's vindictive prosecution claim and thus it could not be raised on appeal. The Court of Appeals held that because the defendant's "pleas were not made voluntarily with full knowledge of the consequences of pleading guilty, the defendant must be allowed to withdraw his guilty plea." 57 P.3d at 240.

The initial misrepresentation caused Defendant to waive his right to a preliminary hearing which was critical to his defense if the complainant was hostile and desired blood. Later, in exchange for Defendant waiving his right to trial by jury, the prosecutor agreed to reduce the charge by one degree. The handwritten statement under the category "Plea Agreement" added an additional incentive: "In exchange for the defendant's plea of guilty the prosecution agrees that in the event the victim does not affirmatively insist upon the prosecution seeking a prison commitment then the prosecution will recommend probation and no prison."

At the time the plea agreement was entered into the prosecutor had misrepresented that the complainant did not want Defendant to serve a prison sentence. It was therefore presumed by Defendant and his counsel that only in the unlikely event that complainant changed her mind would the prosecution not recommend probation and no prison term. In fact, however, the condition was completely meaningless since the complainant at that very moment was insisting upon prison for the defendant. The plea agreement, therefore, was illusory and while defendant and his counsel believed there was a high probability that the prosecutor would honor this promise, in fact, there was next to no probability based upon the complainant's strong desire to punish Defendant by prison incarceration at the very moment the document was signed.

In addition, the prosecutor's misrepresentation of the complainant's desires not only affected the recommendations of the prosecutor but would also affected the APP report and possibly this Court when the complainant spoke so forcefully on March 2, 2015 demanding that Defendant be sent to prison. These repeated misrepresentations throughout the course of the prosecution created a false belief that probation was achievable if the defendant agreed to give up his right to a jury trial and plead guilty to the second-degree offense. Once again, this belief was also illusionary since the ship had already sailed, the bell had already rung, and the email had already been sent dooming the probability of probation while at the same time eliminating Defendant's constitutional rights under our jury trial system.

It is clear that Mr. May either intentionally misrepresented the complainant's position, or was grossly negligent in making the representations because he had no idea what the complainant actually wanted. Critically, the defendant had no means of knowing what the alleged victim wanted and therefore had to fully rely upon Mr. May's representations in deciding whether or not to enter the guilty plea.

Thus, the criteria for Section 77-13-6(2)(A) have been fully satisfied and Defendant is entitled to withdraw his guilty plea and to proceed to trial.

POINT III

**IN THE ALTERNATIVE, IF THIS COURT IN ITS DISCRETION
CHOOSES TO SENTENCE DEFENDANT TO PROBATION,
WITH OR WITHOUT JAIL TIME, DEFENDANT WILL WITHDRAW
HIS MOTIONS AND ACCEPT THE PLEA BARGAIN AGREEMENT.**

Rule 11 of the Rules of Criminal Procedure provides that any recommendation as to sentencing is not binding upon the court. (h)(2). It is well established that a court is not bound by any recommendations from any source but has complete discretion to sentence a defendant in accordance with the applicable statute. *State v. Thurston*, 781 P.2d 1296 (Utah 1989). *See also*

State v. Angus, 581 P.2d 992, 995 (Utah 1978) (“after conviction, the penalty to be imposed is an entirely separate proposition to be determined by the court as a matter of law.”)

Defendant’s counsel would urge this Court to closely examine the facts and circumstances of this case as well as the sentencing recommendations from both the APP and the Utah Sentencing Alternatives. Counsel also would submit that the latter has correctly evaluated the conduct of the defendant in light of the many factors used to determine a fair and proper sentence.

Here, the defendant has no prior history of sexual assault but does have a long history of alcohol and substance problems. It is undisputed that all of the participants in the party at his house were heavily intoxicated throughout the morning and up until the police officers arrived.

The defendant did not seek the companionship of the complainant but was merely residing in his home when the group decided to come over to continue their partying. There was no premeditation on his part toward the complainant and, if anything, this could be termed a crime of spur of the moment opportunity rather than premeditation. There was no violence on Defendant’s part against the complainant. In fact, the only violence was directed at him when complainant hit him in his glasses.

The defendant has voluntarily submitted himself to sex offender treatment with Dr. Juan Mejia. He has demonstrated a record of sobriety spanning thirty months and has agreed not to use or possess alcohol or to frequent establishments where alcohol is the primary item for sale.

Defense counsel submits that Mr. Magness is an appropriate candidate for probation with or without additional county jail time imposed regardless of the recommendations of APP and the desire of the complainant.

In the event this Court chooses to sentence Defendant to probation rather than to a prison sentence, Defendant will withdraw all present motions attacking the guilty plea and prosecutorial misconduct and will willingly comply with all requirements imposed by this Court.

CONCLUSION

Based upon the preceding arguments and authorities, Defendant asks this Court to grant the relief requested.

DATED this 10th day of April, 2005.

s/Craig S. Cook
Craig S. Cook
Attorney for Defendant

Notice has been served upon counsel of record in the above-listed case by electronic notification in accordance with U.S.C.P. 5(B1Ai).

/s/ Craig S. Cook

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Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

AFFIDAVIT OF
LARRY LONG

Case No. 131903746

ROBERT MORGAN MAGNESS,

Defendant.

Judge: ELIZABETH A. HRUBY-MILLS

STATE OF UTAH)
 ss.
COUNTY OF SALT LAKE)

Being duly sworn and under penalty of law the declarant hereby declares
and states as follows:

1. I am over 18 years of age and attest to the veracity of the statements
made herein.

2. I am a licensed Utah attorney and have been practicing for over 45 years. I have undertaken the defense of numerous defendants who have been accused of similar offenses as claimed in the instant case.

3. I was first contacted by defendant Robert Morgan Magness in April of 2013 and asked to enter an appearance to defend him in this prosecution for violation of Section 76-5-402 U.C.A. first degree felony rape. I entered my appearance on April 22, 2013.

4. My preliminary investigation revealed that the complainant in this case together with a friend, the son of Defendant, and another male had been drinking and partying at a bar in which the complainant worked. After the bar closed, the four decided to go to Defendant's home to continue to drink and party.

5. Upon arriving at Defendant's residence all of the participants including Defendant continued to drink and party throughout the early morning hours.

6. During the late morning around 9:00 a.m. the alleged sexual assault occurred against the complainant. When officers arrived at the residence they noted that the complainant, her female friend, and the defendant were all intoxicated in various degrees.

7. Based upon this investigation I determined that Defendant had a legitimate defense as to whether or not the complainant had consented to sexual

intercourse or whether Defendant believed she had consented in light of both of their impaired conditions.

8. A preliminary hearing was scheduled for June 6, 2013. It was my intention at this hearing to thoroughly probe the complainant as to her memory and to her consumption of alcohol during the evening. I also intended to thoroughly cross-examine the complainant as to her sexual relations on the morning in question with Defendant's son prior to his going to work that morning. Finally, I intended to question the complainant's girlfriend as to her recollection of all events and the state of mind of the complainant during the timeline that the rape allegedly occurred.

9. On the date of the preliminary hearing—June 6, 2013, I observed Tad May, the Deputy District Attorney assigned to this case, consulting with the complainant and a female companion.

10. Mr. May then left the two females and approached me to discuss the case. He specifically told me that the complainant informed him that she did not want the defendant to go to prison.

11. In my experience, this was a significant revelation. I have found that when the complainant or alleged victim to a sexual assault desires no prison time for the alleged perpetrator that a much better result will occur with the defendant than if the complainant seeks maximum punishment and retribution.

12. From my experience I have found that a complainant who is not vindictive will greatly assist a defendant in a sentencing proceeding since the prosecuting attorney and the APP representative will give a much more favorable recommendation towards reduced punishment or parole. In addition, I have observed that a complainant who is not vindictive will also influence a sentencing judge to impose a much less severe sentence.

13. On the other hand, I have observed throughout my career that a vindictive and determined complainant who seeks maximum punishment towards an alleged perpetrator will almost always increase the sentence and punishment that an alleged perpetrator receives upon conviction or upon pleading guilty. This is especially true with the current victim advocacy law and representation.

14. Upon hearing this revelation that the complainant did not seek a prison term against Defendant I completely abandoned my desire for a preliminary hearing. My experience has taught me that if a complainant is favorable to my client then it is very harmful for me to put that witness on the stand and cross examine her as to very personal and sensitive issues. Such cross-examination will almost certainly result in hostility toward the defendant that again will result in greater punishment.

15. I discussed this new information with my client and advised him that the preliminary hearing should be waived. He agreed and I informed the court that we would waive the preliminary hearing in the matter.

16. Mr. May stated that a plea bargain to a reduced charge may be possible in the future but that he was not prepared to do so at the time.

17. Since no plea agreement had been reached I believed that it was necessary to prudently continue in the defense of Defendant as to matters that did not directly affect the complainant and her attitude toward Defendant. I requested the court, for example, to order discovery of the DNA evidence including clothing of the alleged victim in order to allow my experts to verify the conclusions of the State lab. On December 16, 2013 the Court entered an Order granting discovery of DNA and clothing evidence.

18. In order to continue the defense of my client I employed private investigator Shawn Kane to assist me in preparation for our defense. On January 10, 2014 Mr. Kane telephoned the complainant and spoke with her concerning her version of the events which occurred that night. I informed Mr. Kane to be very gentle with the complainant and to only try to obtain her version of the facts in case it was necessary to go to trial. Mr. Kane gave me a summary of her statement including her version of the facts relating to consent. He informed me that the complainant believed that the case had been settled with Defendant taking a guilty

plea based on her conversation with Mr. May during the prior preliminary hearing date. Mr. Kane informed me that he told her that she should get in touch with the prosecutor to clarify the status of the case since he was not at liberty to discuss it. Finally, he reported to me that the complainant expressed no anger or vindictiveness against Defendant in her conversation but did not mention, one way or the other, what punishment he should receive.

19. Since no plea agreement had been reached or discussed with Mr. May, I retained Mr. William B. Parsons, III to assist me in any forthcoming trial in the matter. It was my intention to thoroughly protect the interests of Defendant in case it was necessary to go to trial but I was hopeful that the matter could be settled in light of the attitude of the complainant.

20. On January 30, 2013 Mr. Parsons moved to suppress statements of the defendant as well as all evidence gathered in conjunction therewith as fruit of the poisonous tree. In addition, Mr. Parsons moved to reinstate the preliminary hearing in order to be able to examine two witnesses that were discovered by the private investigator Mr. Kane, and were not listed on the original discovery documents supplied by Mr. May.

21. Mr. Parsons also filed a supplemental discovery requesting copies of the digital audio recordings of all interviews with witnesses and the supplemental narrative by Officer Siller.

22. On February 14, 2014 Mr. May, on behalf of the State, objected to Defendant's motion to reinstate the preliminary hearing arguing that the two new witnesses discovered by the defense did not justify a preliminary hearing reopening.

23. Mr. May also opposed the defendant's motion to suppress Defendant's statements, Defendant's requests for a bill of particulars, and objected to the designation of a defense expert witness.

24. During this period of time it was the intent of myself and Mr. Parsons to continue to provide a vigorous defense in preparation of a trial should the need occur. However, based upon the representation of Mr. May as to the attitude of the complainant we were hopeful that a settlement could be reached.

25. This Court scheduled an evidentiary hearing to rule on the various matters that were still pending. While originally requesting such a hearing in March it was continued for various reasons until January 5, 2015.

26. Both Mr. Parsons and myself were fully prepared to argue all the various matters that were still pending before the Court in order to protect the constitutional rights of our client in preparation of a trial. However, Mr. May approached us and proposed that a plea agreement be reached in which the first degree felony would be reduced to a second degree felony—forcible sexual abuse, and that the prosecutor would recommend no prison sentence be served by

Defendant provided that the complainant did not affirmatively insist upon the prosecution seeking a prison commitment.

27. Mr. May informed this Court on the record that the alleged victim had been contacted by the state since the initial preliminary hearing meeting but that she had made no response and that her phone did not work. He stated, "When we met initially during the intake, her very first impression of the case was, actually, she was not seeking prison at the time and was fairly amenable to resolving the case." Based upon this representation Mr. Parsons and myself suggested to the defendant that he accept the plea agreement which he did.

28. At this time I realized that we were giving up all the previous defenses and discovery requests that had been made during the last year but felt that the plea bargain was in the best interest of my client especially believing that the complainant would not seek a prison term against my client thereby resulting in a favorable recommendation by the prosecutor and APP to this Court at the time of sentencing. Because probation with jail time was an option to a second degree offense but not a first degree offense, I felt there would be a good chance for my client to avoid a lengthy prison sentence under either a first or second.

29. An amended information was filed by Mr. May on January 5, 2015 reducing the charge to forcible sexual abuse.

30. Because my client did not have any prior criminal history involving sexual abuse I wish to supplement any report by APP with a report prepared by Utah Sentencing Alternatives, a company I have used extensively to evaluate defendants such as Mr. Magness. I believe that the APP would give a favorable report of Mr. Magness in light of the complainant's attitude against a prison sentence and wanted to supplement its findings with that of the Utah Sentencing Alternatives report. The report of Utah Sentencing Alternatives recommended 36 months probation, 270 days in jail, completion of a sex therapy program and several other requirements.

31. On February 26, 2015 I received a copy of the APP presentence investigation report and was totally shocked at what I saw. The report recommended a prison sentence. The victim impact statement recited an interview with the complainant that stated, "She feels it is appropriate for the defendant to serve at least two years in prison for what he has done so he can also feel the real consequences of his actions as she has the past three years." Such a statement was completely contrary to all prior representations of Mr. May.

32. On March 1, 2015 Mr. Parsons and I filed a Motion to Continue Sentencing based on the surprise contained in the APP report together with the inadequate time to examine it. We also filed the Utah Sentencing Alternatives'

report recommending probation with 270 days in the Salt Lake County Jail. This Court granted a continuance of the sentencing hearing until March 30.

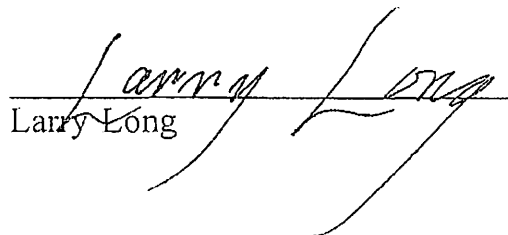
33. Because of this shocking revelation contained in the APP report I instructed my investigator Mr. Kane to attempt to contact the complainant to determine whether she had just changed her mind or whether she always wished to have a prison sentence served by the defendant. Mr. Kane contacted the complainant with no difficulty and transcribed her conversation where she stated that she always wanted a prison sentence for the defendant and had told the prosecuting attorney her desire from the very beginning.

34. Based upon this information Mr. Parsons and I determined that we had been seriously misled by the prosecutor into entering into a guilty plea based upon his claim that the complainant did not seek a prison term for our client. We believe that we had been deceived into giving up Mr. Magness' constitutional rights to confront witnesses during the preliminary hearing as well as to implement the various requests and motions that we waived at the time the guilty plea was entered as well as all of the constitutional rights that go with a trial by jury.

35. Accordingly, on March 26, 2015 we filed a Motion for Leave to Withdraw the Guilty Plea and Stay Sentencing Procedure proceedings. This Court subsequently allowed briefing of this issue and set oral argument for April 27, 2015.

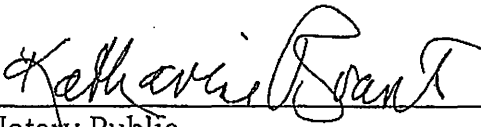
36. In reviewing the facts and circumstances of this case as stated in the preceding paragraphs of this Affidavit, there is no doubt in my mind that I would not have recommended that my client plead guilty even to a lesser offense knowing that the complainant was hostile and vindictive and would undoubtedly cause him to receive an unfavorable report by APP and an unfavorable recommendation by the prosecuting attorney as well as testifying before the Court in the sentencing hearing. It is my belief that the evidence in this case creates a reasonable probability of acquittal based upon the incapacitation of the complainant and the defendant on the morning of the incident and that, in any event, my client's total time served at the Utah State Prison for this offense, if convicted, will be approximately the same time under either a first degree or second degree conviction. I believed that it was the best course of action to seek probation with jail time based upon what I thought would be a forgiving complainant as described by Mr. May.

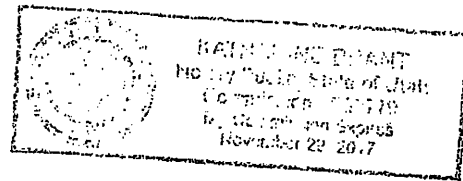
Under penalty of perjury under the laws of the State of Utah, I, Larry Long hereby swear that the foregoing is true and correct to the best of my knowledge and understanding.


Larry Long

SUBSCRIBED AND SWORN to before me on this 10th day of April, 2015

in Salt Lake County, Utah.


Notary Public



CRAIG S. COOK, Bar No. 713
CRAIG S. COOK, PC
3645 East Cascade Way
Salt Lake City, Utah 84109
Phone: (801) 485-8123
E-mail: kiskaa@att.net

Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

AFFIDAVIT OF
SEAWN KANE

vs.

Case No. 131903746

ROBERT MORGAN MAGNESS,

Judge: ELIZABETH A. HRUBY-MILLS

Defendant.

STATE OF UTAH)

COUNTY OF DAVIS)
ss.

Being duly sworn under penalty of law, the declarant hereby declares and states the following:

1. I am over 18 years of age and can attest to the veracity of the statements made herein.

2. I am the owner of Kane Consulting, Inc. which is a licensed private investigation service located in West Bountiful, Utah. I am a member of the following organizations: ASIS, PACSCO, UACDL, NCISS, and PIAU. I was chairman of the DPS PI hearing and licensure board from 2008 to 2014.

2. I was retained by attorney Larry Long to assist him concerning the rape charges made against his client Robert Morgan Magness.

3. On Friday, January 10, 2014 I contacted the alleged victim by telephone using the phone number that was contained in the police and court records.

4. I explained that I was an investigator for the defense and requested that she provide me information as to what occurred on the night of the charged crime. She gave me a detailed description of her version of the events including her employment at the Good Spirits Bar that led to her meeting of Defendant, a regular customer, as well as his son Shawn. She described how after her shift ended, she and her girlfriend together with Shawn and another male went to the residence of Defendant in order to drink and party.

5. She described the events that night and the following morning when Defendant allegedly sexually assaulted her while she was sleeping in the basement area. She further described her reaction and her interaction with the police on that morning.

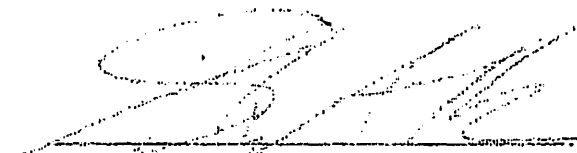
6. She informed me that in her mind the defendant had already entered a guilty plea based upon her conversations with the prosecutor at the hearing she last attended. She stated that the prosecutor told her that she would not need to testify unless she wanted to go to the defendant's sentencing hearing to say something about how he should be punished.

7. I advised her at several times in the conversation that she should contact the prosecutor to clarify the status of the case.

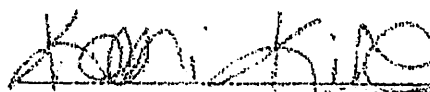
8. I did not have any further contact with the alleged victim until March 1, 2015. I was asked by attorney Larry Long to try to contact her, once again, in order to clarify the time frame as to when she first let it be known that she wanted the defendant to serve time in prison. I contacted her on the same phone number that I had previously used in my January 2014 call.

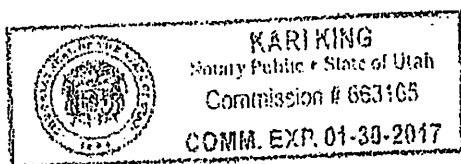
9. I recorded the conversation with the alleged victim so that a complete and accurate record could be made. I have reviewed the transcript dated March 26, 2015 of this telephone call and believe that it accurately reflects the conversation that I had with the alleged victim on March 1, 2015. This transcript is attached to this affidavit.

Under penalty of perjury under the laws of the State of Utah, I, Shawn Kane
hereby swear that the foregoing is true and correct to the best of my knowledge and
understanding.


Shawn Kane

SUBSCRIBED AND SWORN to before me on this 10th day of April,
2015 in DAVIS County, Utah.


Notary Public



IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

ROBERT MORGAN MAGNESS,

Defendant.

CASE No. 131903746

TRANSCRIPTION OF MARCH 1ST, 2015
TELEPHONE INTERVIEW

JUDGE: ELIZABETH A. HRUBY-MILLS

COMES NOW, the Defendant and offers this transcription taken from the recording of a telephone interview between Shawn Kane, a private investigator, and M. C., the victim in this case, which took place on March 1st, 2015. This Transcription was prepared by Aaron A. Crabtree, law clerk for Larry Long.

A P P E A R A N C E S

SHAWN KANE

PRIVATE INVESTIGATOR WORKING ON BEHALF OF LARRY LONG

M. C.

VICTIM

P R O C E E D I N G S

1
2 MR. KANE:
3 Melissa, can you hear me OK?
4 M. C.:
5 Yeah, I can hear you.
6 MR. KANE:
7 Ok. Thank you for calling me back, I appreciate it. Again-
8 M. C.:
9 I was-
10 MR. KANE:
11 Oh, go ahead.
12 M. C.:
13 I just wanted to clarify. So you are working on behalf of Robert, right?
14 MR. KANE:
15 Correct. So, I'm a licensed private investigator here in the state of Utah. I work-
16 M. C.:
17 Wait, why would I want to talk to you?
18 MR. KANE:
19 Oh, no, understandable. I work for attorney Larry Long. You and I actually spoke two years ago.
20 M. C.:
21 Yes, I'm actually upset about that because I was a little bit confused as to like who I was talking
22 with.
23 MR. KANE:

1 Oh, sorry, sorry. I try and explain up front, and sometimes people aren't- don't completely
2 understand, so, 'cause again I have to be transparent, and so you don't have to talk to me. I'm
3 not- you know, I can't force you to talk to me, anything like that. You don't have to. I just- the
4 attorney asked me to ask you a question about, you had talked to that adult probation & parole
5 officer.

6 M. C.:

7 Yes.

8 MR. KANE:

9 Hold that thought. I forgot her name. Jennifer.

10 M. C.:

11 Yeah.

12 MR. KANE:

13 And there was a question, Jennifer Murray asked you a question, and then the attorney had a
14 question. I say "the attorney," sorry, Larry Long had a question about prison. And so, initially,
15 and I'll explain kind of the question and then- initially, when this whole thing started and you
16 had spoken with the district attorney and the prosecutor – that would be Thad May – at a hearing
17 they believe you said that you did not want Robert to go to prison.

18 M. C.:

19 No, I didn't say that.

20 MR. KANE:

21 Ok.

22 M. C.:

23 I didn't say that I did not want him to go to prison. I said, "Well, it's more important to me that

1 he's on the sexual offenders list." That was like- I said that I wanted him to serve prison time,
2 but the most important thing to me was that I wanted him to go on the sexual offenders list.
3 MR. KANE:
4 Ok. So you- just to clarify, so I know, you do want him on the sexual offenders list.
5 M. C.:
6 Yes.
7 MR. KANE:
8 And, at the time, did you want, when you talked to him, did you want him to go to prison too?
9 M. C.:
10 Yes, I felt like he deserved some time in prison.
11 MR. KANE:
12 Ok. Alright. And that- I just wanted to double check, 'cause there was some confusion from the
13 attorneys' side, and not your attorneys but Larry Long and the paperwork that came in, in
14 making sure that he had the correct information, that when you talked to the- talked to Thad
15 May-
16 M. C.:
17 Yeah.
18 MR. KANE:
19 Did you say you wanted Robert to go to prison? And then, when you talked to Jennifer Murphy,
20 did you also tell her you wanted him to go to prison too?
21 M. C.:
22 Yes. I said the- I said essentially the same thing to her.
23 MR. KANE:

1 Ok. Ok, and that's all I was trying to clarify. I do appreciate you, you know, at least talking to
2 me and letting me know on that. And so, that- that was just truly it. They wanted clarification on
3 that just to- to double check and clarify if you wanted him to go to prison and also be on the
4 sexual offenders registry.

5 M. C.:

6 I'm planning on going there tomorrow, and maybe you could help me with a question. Does it
7 start at 9AM?

8 MR. KANE:

9 I believe it does, yes. At the- as far as I know it does start at 9AM, yes.

10 M. C.:

11 Ok.

12 MR. KANE:

13 Yeah. So. If you are planning on attending, I'd probably get there maybe about 8:30, 8:45. You
14 know, if you are planning on attending. That way, you can, for you.

15 M. C.:

16 Well basically I just want to say what I have to say and then leave. You know.

17 MR. KANE:

18 Ok. 'Cause, it might- it might start directly at 9 o'clock, but it's planned to. And so.

19 M. C.:

20 Ok.

21 MR. KANE:

22 Yeah. Ok, well thank you, and I do appreciate you calling me back.

23 M. C.:

1 Ok. No problem.

2 MR. KANE:

3 Buh-bye.

4 M. C.:

5 Bye.

6 END OF RECORDING

7

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TRANSCRIBER'S CERTIFICATE

STATE OF UTAH)

) ss.

COUNTY OF SALT LAKE)

I, Aaron Crabtree, clerk for Larry Long, do hereby Certify:

That this transcription is an accurate representation of a telephone interview which took place between Shawn Kane, a private investigator, and M. C., the victim of this case, on March 1st, 2015.

WITNESS MY HAND this 26th day of March, 2015


AARON CRABTREE, CLERK

Residing in Salt Lake County

CRAIG S. COOK, Bar No. 713
CRAIG S. COOK, PC
3645 East Cascade Way
Salt Lake City, Utah 84109
Phone: (801) 485-8123
E-mail: kiskaa@att.net

Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

AFFIDAVIT OF
ROBERT MORGAN MAGNESS

Case No. 131903746

ROBERT MORGAN MAGNESS,

Defendant.

Judge: ELIZABETH A. HRUBY-MILLS

STATE OF UTAH)
 ss.
COUNTY OF SALT LAKE)

Being duly sworn and under penalty of law the declarant hereby declares
and states as follows:

1. I am over 18 years of age and attest to the veracity of the statements
made herein.

2. I am 55 years old and have lived my entire life in Salt Lake County.

While I have had many problems with alcohol and substance abuse I have never been involved in a sexual assault matter.

3. Upon being charged and arrested, I researched various defense attorneys and concluded that Larry Long was experienced in this type of case and had a very good reputation for representing his clients.

4. At the time I retained Mr. Long he informed me that the entire case would evolve around the question of consent and the credibility of the complainant versus my credibility in light of the extreme intoxication that occurred in my house that morning.

5. On June 6, 2013 I accompanied Mr. Long to the Salt Lake County Courthouse to observe the preliminary hearing scheduled in my case. Mr. Long informed me that it would be necessary to thoroughly cross examine the complainant and her girlfriend as to all the facts and circumstances that night including their alcohol consumption and sexual acts. I felt bad to have to put these girls through such examination but believed Mr. Long that it would have to be accomplished in order to protect my rights.

6. While waiting in the vestibule I witnessed Mr. Tad May, the Deputy District Attorney, consulting with the complainant and her girlfriend. He then joined me and Mr. Long. Mr. May informed us that the complainant did not want

me to go to prison. He said that it may now be possible to enter into a plea bargain where I might not go to prison. I was very happy to hear this news. Mr. Long then stated that he advised me that we should waive the preliminary hearing because to proceed would greatly alienate the complainant and may make her hostile or antagonistic toward me when she was asked questions about drinking and sex. I agreed that we should waive the preliminary hearing because of this new information.

7. For the next year and a half Mr. Long kept me informed as to what was happening. He said that until a plea agreement had been reached we must assume that we would be going to trial and that he would be filing all the necessary motions and requests to protect my interests and to gather evidence on our behalf. He also received my approval to hire Mr. Brad Parsons, III to further assist him in preparing for a possible trial. He still expressed hope that the District Attorney would agree to a plea bargain in light of the complainant's positive attitude.

8. On January 5, 2015 I attended a proceeding in the Salt Lake County Court for the purpose of hearing the various motions and requests that Mr. Parsons and Mr. Long had filed. While waiting for the court to start I witnessed Mr. Long, Mr. Parsons and Mr. May conferring for quite a long time. Mr. Long and Mr. Parsons then came to me and informed me that Mr. May had agreed to reduce the charge to forcible sexual abuse which was a second degree felony and not a first.

They also said it would be likely that I would not face any prison time because Mr. May had expressly confirmed with Mr. Long and Mr. Parsons that the complainant in this case did not want me to go to prison. I figured she knew that both of us shouldn't have been so drunk that morning and that it was an unfortunate incident that should be forgiven if I spent some time in jail.

9. They told me that the prosecuting attorney would recommend that I not go to prison unless the complainant insisted I go to prison. However, my attorneys thought it was very improbable that this would happen in light of Mr. May's strong assurance that she did not want me to serve time in prison. I was also told by Mr. Long and Mr. Parsons that I would be giving up all of my constitutional rights to contest this charge against me. They believed, however, that there was a very good likelihood that while I may have to serve time in the county jail I would not have to serve time at the State Prison based upon the circumstances of the night, my prior favorable record, and the positive attitude of the complainant. I agreed that I would waive my right to a trial and plead guilty.

10. During the hearing with the court I again heard Mr. May state that the complainant did not want a prison term for me even though he had been unable to contact her for several months. Based upon his statements I felt very good about my decision to enter into a guilty plea in this case.

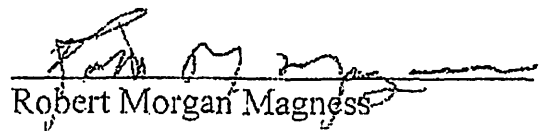
11. During January and February of this year I felt very relieved but still apprehensive about my sentencing. I spoke with the lady from the parole department and told her my whole story. I attended the various classes Mr. Long had set up for me concerning sexual problems and also discussed in detail my life with the private company he hired to do an evaluation on me. He informed me that the private company thought that I should be placed on probation but should have to serve time in a county jail for over 250 days which I thought was okay compared to prison.

12. In the last part of February Mr. Long called me and told me he had very bad news. He informed me that the complainant had told the parole department that she wanted me to go to prison and that the parole department had recommended that I go to prison under my plea. I was very upset to hear this and could tell that Mr. Long was also very upset.

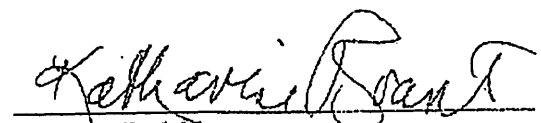
13. Later Mr. Long informed me that his private investigator had talked to the complainant who said that she had always wanted me to go to prison from the very beginning. I was very upset to hear this as was Mr. Long. He informed me that now my chances for going to prison was almost a sure thing because the prosecuting attorney was not obligated to recommend county jail time, the parole department had already recommended prison, and the complainant wanted to speak to the judge about her desire to send me to prison.

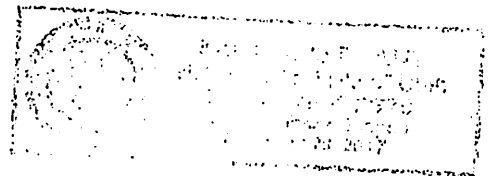
14. Mr. Long informed me that he would never have recommended that I plead guilty had he known this was really her attitude and because I listened to Mr. Long for his advice I would not have done so if he had recommended against it.

Under penalty of perjury under the laws of the State of Utah, I, Robert Morgan Magness hereby swear that the foregoing is true and correct to the best of my knowledge and understanding.


Robert Morgan Magness

SUBSCRIBED AND SWORN to before me on this 10th day of April, 2015
in Salt Lake County, Utah.


Notary Public



Addendum D

SIM GILL
District Attorney for Salt Lake County
AARON FLATER, Bar No. 9458
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

-vs-

Robert Morgan Magness,

Defendant.

**STATE'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION TO WITHDRAW GUILTY
PLEA**

Case Nos. 131903746

JUDGE HRUBY-MILLS

The State of Utah, through its counsel, SIM GILL, Salt Lake County District Attorney, and Aaron Flater, Deputy District Attorney, hereby submits this Memorandum in Opposition to Defendant's Motion to Withdraw Guilty Plea and respectfully requests that this Court deny Defendant's motion.

PREFACE

The practice of law is an honorable practice in which honorable men and women diligently labor. For the most part those that work within the profession treat each other with courtesy, civility and dignity. The Utah Standards of Professionalism and Civility state, "Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity,

intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.” For those reasons the State was disappointed to read that the attorneys for the Defendant accused an esteemed colleague of intentional misrepresentation or gross negligence when there is simply not a factual basis to make such accusations. Throughout the case the prosecutor represented honestly what his understanding was and at worst may have misunderstood the victim’s desires when he first met with her. This certainly does not make him guilty of intentional misrepresentation nor gross negligence. The State asks the Court to not consider the personal attacks on the character of the prosecutor and focus on the record as a whole of the court proceedings.

INTRODUCTION

On January 5, 2015, Robert Morgan Magness (Defendant) entered a plea of guilty in this case to the charge of Forcible Sexual Abuse. The Defendant now moves this Court to allow him to withdraw his guilty plea. For the reasons noted below, the State respectfully requests that this Court deny the Defendant’s motion.

ARGUMENT

I. **THE DEFENDANT SHOULD NOT BE ALLOWED TO WITHDRAW HIS GUILTY PLEA BECAUSE THE PLEA WAS KNOWINGLY AND VOLUNTARILY ENTERED**

Recent Utah case law addresses when courts may allow Defendants to withdraw guilty pleas. In State v. Velarde the Utah Supreme Court clarified that Rule 11 governs the taking of guilty pleas, but not their withdrawal. 2015 UT App 71, ¶¶ 8-9. Although rule 11 provides guidance for the entry of guilty pleas, any attempt to withdraw that plea is governed by statute." State v. Alexander, 2012 UT 27, ¶ 19, 279

P.3d 371. Utah Code section 77-13-6(2)(a) provides in part that a "plea of guilty . . . may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made." "This statutory standard mirrors the showing necessary for defendants to prove that their pleas are unconstitutional." Alexander, 2012 UT 27, ¶ 19, 279 P.3d 371.

In Velarde the court further clarified that the existence of a factual basis for a guilty plea "shall be determined by examining the record as a whole." Utah R. Crim. P. 11(l). The record as a whole includes "transcripts of the plea hearing, the circumstances surrounding the case and including the plea affidavit. State v. Velarde, 2015 UT App 71, ¶¶ 8-9 (citations omitted) *See also* State v. Trotter, 330 P.3d 1267, 1270 (Utah 2014).

In State v. Ferretti the Court rejected a Defendant's motion to withdraw his plea in part because the plea affidavit explicitly outlined the elements, the State's burden to prove them beyond a reasonable doubt if the case proceeded to trial, and the factual basis for the plea. 2014 UT App 224, P5 (Utah Ct. App. 2014).

In this case the record as a whole indicates that the Defendant entered his plea knowingly and voluntarily. Defendant, with the advice of counsel, signed a Statement of Defendant in Support of Guilty Plea and Certificate of Counsel confirming that his plea was voluntary, not coerced. See Statement of Defendant in Support of Plea. His attorney also signed the Statement confirming that the Defendant had read or was read and understood the contents of the Statement and that the confirmations by the Defendant in the Statement were true. On the bottom of the fourth page of the Statement it states that "All the promises duties and provisions of the plea agreement, if any, are fully contained

in this statement, including those explained below;” Those words are followed by the handwritten language, “In exchange for the defendant’s plea of guilty the prosecution agrees that in the event the victim does not affirmatively insist upon the prosecutor seeking a prison commitment that the prosecutor will recommend probation and no prison.” See *Statement of Defendant in Support of Guilty Plea* at page 4. Explicit in those words is the understanding that the victim may be asking for a prison commitment. Implicit in those words is the understanding that the state was not aware of what the victim’s position on sentencing would be.

The discussion about a potential prison recommendation was further clarified in open court on the record. According to the transcript provided by defense counsel, the Defendant’s own attorney said, “the Prosecution has heretofore indicated to the court that unless the victim affirmatively requests a commitment of prison for the defendant’s behavior, that the prosecution in this matter will recommend no prison time and will recommend probation of some form.” See *Transcription of Evidentiary Hearing* page 10 lines 16-19. Explicit in that statement is the understanding that the victim may request prison. Implicit in that statement is the understanding that the State was not aware of what the victim would request. The prosecutor explained further that the State’s primary focus was to “honor the victim’s wishes.” During that hearing the prosecutor explained that although the victim did not initially request prison time, he had difficulty contacting her and was not aware of what her position was. See *Transcription of Evidentiary Hearing* page 4 lines 14-19.

Because it was made very clear to the Defendant that there was a possibility that the victim would recommend prison, he cannot now say that her recommendation of

prison makes his plea unknowing or involuntary. Defendant got the benefit of a bargain. His charge was reduced from a first degree felony to a second degree felony. Together with that bargain he assumed risk that the victim would recommend prison, that AP&P would recommend prison, and the risk that the Court is not bound by any recommendations from anyone.

CONCLUSION

Based on the foregoing, the State submits this Memorandum in Opposition to Defendant Motion to Withdraw Guilty Plea, and respectfully requests that the Court deny Defendant's Motion.

DATED this 24th day of April, 2015

SIM GILL
District Attorney for Salt Lake County

/S/ Aaron Flater
Aaron Flater
Deputy District Attorney

MOTIONS:

Notice has been served upon counsel of record in the above-listed case by electronic notification in accordance with URCP 5(b)(1)(A)(i).

Addendum E

171-0-018) 75-2

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,
Plaintiff,
vs.
ROBERT MORGAN MAGNESS,
Defendant.

ORIGINAL

Case No. 131903746 FS

FILED DISTRICT COURT
Third Judicial District

JUN - 1 2015

SALT LAKE COUNTY

By [Signature] Deputy Clerk

Oral Argument
Electronically Recorded on
April 27, 2015

BEFORE: THE HONORABLE ELIZABETH A. HRUBY-MILLS
Third District Court Judge

APPEARANCES

For the State: Aaron W. Flater
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Transcribed by: Wendy Haws, CCT

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Provo, Utah 84606
Telephone: (801) 377-2927

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UTAH APPELLATE COURTS

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P R O C E E D I N G S

(Electronically recorded on March 2, 2015)

THE COURT: Okay, we're back on the record in the matter of State of Utah vs. Robert Magness, case No. 131903746. Could I have appearances, please.

MR. COOK: I'm Craig Cook for the defendant.

MR. LONG: Larry Long for the defendant.

MR. PARSONS: William Parsons.

THE COURT: All right, thank you.

MR. FLATER: Aaron Flater for the State.

THE COURT: All right, thank you; and Mr. Magness is here as well. All right, so I've reviewed the opposition filed by the State. So I have read everything. Is there anything else I should know?

MR. FLATER: I don't think so.

MR. COOK: No, your Honor.

THE COURT: All right, so no one wishes to make oral argument, then?

MR. COOK: Oh, yeah.

THE COURT: Oh, okay.

MR. COOK: Right.

THE COURT: Now will be the time.

MR. COOK: Your Honor, if I can sit down, I have a bad back right now, and standing up --

THE COURT: That's certainly -- and we're clearly

1 picking you up on the record, so that's fine.

2 MR. COOK: Okay, fine. If it please the Court, I'm
3 Craig Cook, representing the defendant in this matter related
4 to this guilty plea. Just on a couple of procedural matters,
5 as the Court knows, we just received the memo from the State
6 today at 2 -- one at 2 o'clock, and I read it basically like
7 the Court. So, you know, we may have been able to do a little
8 more depth reply had we had time, but anyway that's how it is.

9 The important thing is I think, your Honor, is that
10 there is no counter affidavits filed by the State. So I think
11 for purposes of our motion today we have to assume that all of
12 our facts are true. Then the legal ramifications, of course,
13 would be decided; but I think the facts as we state them will
14 have to be assumed as given, basically.

15 So going over this case in the chronological order that
16 it occurred, on April 12th, 2012, this was when the incident
17 occurred in the defendant's home involving the complainant.
18 It was an overnight party of drinking, and the next morning is
19 when the alleged assault occurred.

20 The defendant hired Mr. Long. He began representing
21 him. On June 6, 2013 a preliminary hearing was scheduled,
22 and at that time, as stated in the affidavits, Mr. Long was
23 prepared to thoroughly cross examine the complainant and her
24 girlfriend and some other witnesses possibly as to what had
25 happened on that night or that morning.

1 Prior to going into the preliminary hearing, however,
2 the -- Mr. May of the District Attorney's Office approached
3 Mr. Long and the defendant and said the complainant has decided
4 she does not want defendant to go to prison, and she's sort of
5 optimistic that something can be resolved. We are, too.

6 Upon hearing that news, that she was not vindictive,
7 Mr. Long and the defendant decided to waive the preliminary
8 hearing, based on Mr. Long's experience that if you do have
9 a favorable complainant in a case like this, if you put them
10 on the stand in a preliminary hearing and cross examine them,
11 that that could well change their disposition. So they chose
12 not to -- not to have a preliminary hearing, based upon that
13 representation that she would be -- she did not want him to go
14 to prison.

15 During the remainder of January, they filed -- there
16 was no plea agreement made. Mr. Long filed various motions for
17 DNA evidence and suppression of evidence and things like this;
18 and in January 2014 his investigator Mr. Shaun Kane spoke to
19 the complainant, who -- to find out exactly what her version of
20 the story was, and he was told that she basically said, "Well,
21 I thought it was already over. I thought we'd already -- he'd
22 already pled guilty, because I was told all I would have to do
23 now is go to Court and talk to them about the sentencing."

24 So Mr. Kane said, "Well, you need to talk to the
25 District Attorney. I don't know what's going on, but that's

1 not my knowledge of the case. So that was it for that. It
2 went on again for another year with various motions being
3 presented to the Court. Then finally in January of 2015 all
4 these various motions and motions to suppress and different
5 things were before the Court on an evidentiary hearing; and it
6 was at this time that the -- Mr. May approached Mr. Long again,
7 and co-Counsel, and suggested that a deal could be struck.

8 At that point, they -- he represented that he was
9 willing to go to a second-degree felony on the assumption that
10 the victim did not want the defendant to go to prison. Once
11 again he said, "Yes, I'm sure she doesn't want him to go to
12 prison, and we're very confident of this."

13 So on the record, as we quoted in our memorandum,
14 there was a colloquy between the Court and the Counsel, and
15 the Court specifically asked about the victim, and he said,
16 "Well, the victim doesn't want him to go to prison." Based
17 upon that representation, a plea agreement was struck where
18 it was stated that the prosecutor would represent -- would
19 recommend probation as long as the complainant did not wish
20 him to go to prison. So under that scenario it was assumed
21 by everyone that she did not want him to go to prison. That's
22 why Mr. Long and the defendant agreed to waive -- basically all
23 rights to a jury trial and plead guilty.

24 Then Mr. Magness went to counseling. He's been going
25 to counseling. He's been undergoing alcohol rehabilitation and

1 various other programs. He did his AP&P interview. He went
2 before a private company hired by Mr. Long, this other company,
3 and you know, he was very cooperative in every respect.

4 So in February of 2015, just a couple of months after
5 this, suddenly the AP&P report comes in and it's very negative.
6 It says that they recommend that Mr. Magness go to prison, and
7 that the complainant wanted him to go to prison, wanted him to
8 at least serve three years, based upon what she had suffered.

9 So the quotation in the pre-sentence report was very
10 vindictive. You know, she wanted revenge, basically, for what
11 she believed he had done to her. So this was the first indica-
12 tion that the defense had that there was a problem with this
13 representation of her -- of her desires.

14 So then on March 1st, 2015 Mr. Kane, the investigator,
15 contacted the complainant and spoke with her on the phone, and
16 we have a transcript of that in the file. Basically she said
17 she had never said she didn't want him to go to prison. She
18 wanted him to be on the sex registry list, but she always
19 wanted him to go to prison based from the very beginning.

20 So, you know, from her statement on that phone conver-
21 sation, it's obviously in conflict with what Mr. May said in
22 his various representations to defense and to the Court. On
23 April 10th, based on that, we filed a motion to set aside the
24 guilty verdict and-- or the guilty plea and to reopen basically
25 the entire case.

1 So we have two grounds, essentially, really I guess
2 it's all basically the same; but our first foremost ground is
3 prosecutorial misconduct. The State raises the question about
4 civility with lawyers and treating Counsel of the side fairly,
5 which we of course believe in; but in this particular case, you
6 know, we have an obligation to defend our client. A prosecutor,
7 you know, has a very high duty to disclose things that maybe a
8 civil attorney would not. I mean, the Brady -- the whole Brady
9 rule of disclosing evidence and not misrepresenting things.

10 So, you know, we hate to do it, you might say, but
11 it's something that has to be done. In this case there was
12 clearly a -- either an intentional misrepresentation or a
13 completely gross negligent effort on the part of Mr. May to
14 find out the intent of this -- of this witness.

15 Because of that, they conveyed this information to
16 Mr. Long, which seriously modified the defense of this case.
17 The main -- the main element to begin with was the waiver of
18 the preliminary hearing. That is a very important feature in
19 a case like this because of the ability to cross examine the
20 complainant, find out the whole history of what happened that
21 night, the friends.

22 It is a very critical thing for a defendant to be able
23 to do; and had it not been for this representation they would
24 not have waived it. They would have proceeded and obtained, you
25 know -- whether they would have obtained valuable information

1 now is not known, but they certainly didn't obtain anything
2 because they weren't able to.

3 Secondly, after the various motions and efforts for
4 discovery and suppression, all that was given up, too, because
5 of the fact that the plea agreement was entered into. Therefore
6 all of these various defenses which may have had an effect on
7 the defense, again were waived on the very assumption that she
8 was favorably going to not recommend -- or didn't want prison.

9 So this was another motivation which made him give up
10 all of his rights to jury trial, to all the discovery, every-
11 thing else. It was based simply on the assumption that when a
12 complainant in a case like this is vindictive, there's a much
13 higher probability of no -- no prison, as opposed to prison on
14 a second-degree felony. They were very confident, based upon
15 Mr. May's representation to the Court, that this would be the
16 case.

17 The State argues, "Well, they knew it could change,"
18 you know, that it was conditioned upon the fact that it could
19 change. She may change her mind or whatever; but at the very
20 time this representation was made, she had already adamantly
21 decided she wanted him to go to prison. So it was not a matter
22 of changing. It was a matter that it was completely opposite
23 of what everyone including the Court had decided.

24 I've kind of -- I kind of have an analogy. If you
25 have a plea bargain saying the prosecutor would recommend

1 probation if the Jazz lost the NBA finals, that's one thing;
2 but if you say they would recommend probation only if they
3 win the NBA finals, that's another thing. That's essentially
4 what happened here, the complete change of what the defendant
5 believed were the facts occurred by this misrepresentation or
6 gross negligence, however you want to say it.

7 So we quoted, I think, cases, your Honor, that shows
8 that this type of behavior is critical for a defendant to be
9 able to rely upon the integrity of the prosecution, and it
10 would be no different than had the prosecutor informed the
11 defendant that they found a gun that they hadn't actually
12 found, or that they didn't find a gun that they had found. So
13 it goes to the very thinking of the defense team based upon
14 what the prosecution is obligated to correctly and adequately
15 report.

16 The second part of the argument, but which is really
17 tied into this, is the statute itself, which is 77-13-6, which
18 says that a plea can be overturned if it was not voluntarily
19 or knowingly made. It's the same thing we were just talking
20 about. As the Supreme Court said in several cases, if you have
21 an illusory promise that something can occur, then you're not
22 actually fulfilling the bargain that you're making with the
23 State.

24 We've cited several causes in which the defendant
25 believed something would occur, and it didn't occur because

1 of various impossibilities or misrepresentations. We believe
2 that's the same situation here, that had they known that the
3 defendant -- or the complainant was going to recommend prison
4 very vehemently as she did to the Court when she made her
5 statement, this deal would not have been made because there
6 was just too much to lose to not be able to go to trial.

7 So basically that's our second argument. Then the
8 third, as we said here, is that what we're -- the basis of the
9 bargain was to try to get the State to recommend probation; and
10 you know, if the Court chose to just follow your own recom --
11 your own feeling without the recommendation of the prosecutor,
12 then -- and actually give a probation sentence, then we would
13 withdraw these motions, because that would then give us the
14 benefit of the bargain that we expected.

15 THE COURT: All right, thank you.

16 MR. FLATER: Are you ready for the response, your
17 Honor?

18 THE COURT: Yes, I am.

19 MR. FLATER: Okay, thank you. Your Honor, I think a
20 lot of this discussion sort of just muddies the water. The
21 important analysis here is what happened at the time defendant
22 entered his plea. He's asking for the Court -- for leave of
23 the Court to withdraw his guilty plea.

24 His claim is that he didn't enter his plea knowingly
25 and voluntarily. So the most important analysis is to look at

1 what happened when he did in fact enter his plea. There were
2 at least two different ways in which the agreement between the
3 defendant and the State was put on the record at that time, and
4 which indicated what the agreement was.

5 The first way that was put on the record is the state-
6 ment of the defendant in support of the guilty plea and certifi-
7 cate of Counsel. In that document on page 4 at the bottom
8 of that document, it indicates that the entire promises and
9 agreements of the plea agreement are fully contained in the
10 statement.

11 It says, "In exchange for the defendant's plea of
12 guilty, the prosecution agrees that in the event the victim
13 does not affirmatively insist upon the prosecutor seeking
14 a prison commitment, that the prosecution will recommend
15 probation and no prison."

16 As pointed out in the -- in the memorandum, there's
17 two understandings that are clear from those words. No. 1 was
18 that the victim may come to Court and request prison. No. 2,
19 that the prosecutor was not aware of what the victim's position
20 would be, that the defendant wasn't aware of what the victim's
21 position would be. In fact, it was an unknown at that time
22 what the position of the victim would be.

23 That was clarified orally, as well, on the record,
24 in the transcript provided by the defendant. His own -- his
25 own attorney indicated essentially the same -- the same agree-

1 ment and the same understanding was that the prosecution had
2 indicated that unless the victim affirmatively requests a
3 commitment of prison for the defendant's behavior, that the
4 prosecution will recommend no prison time, and will recommend
5 probation of some form.

6 Those same words indicate the same understanding.
7 No. 1, that the victim may in fact come to Court and request
8 prison; and that the State was not aware of what the victim
9 would request when she came to Court. The prosecutor further
10 explained that the State's primary focus was just to honor the
11 victim's wishes.

12 Although he hadn't -- and during that same hearing the
13 prosecutor explained that although the victim didn't initially
14 request prison time when he met with her that he had difficulty
15 contacting her, and wasn't aware of what her position was.

16 I guess at this point I would take just a moment to
17 address a couple of things raised by defendant with regards to
18 that. He indicates that because his investigator was able to
19 contact the victim and ascertain that she did in fact want
20 prison, and as she indicated from the beginning, that Mr. May
21 is somehow guilty of intentional misrepresentation to the Court
22 or gross negligence for failing to explain or understand what
23 the victim's position was, in a transcription of the phone call
24 that Mr. Kane had with the victim, was provided to the Court as
25 well -- and I don't dispute any of the -- any of the facts or

1 the transcription of that phone call. It appears that it was
2 probably -- for purposes of this hearing I won't dispute it --
3 it appears that the victim indicated that her primary concern,
4 even when she was speaking to Mr. Kane, was that he be on the
5 sex offender registry.

6 If that was in fact also communicated to Mr. May,
7 that her primary concern was that he be on the sex offender
8 registry, he may very well have understood her to mean "That's
9 my focus. That's my goal. I want him to be on the sex offender
10 registry," he may have misunderstood, or she may have not fully
11 communicated to him that she also, in addition to that, wanted
12 a prison commitment.

13 He believes, and it's clear based on the prosecutor's
14 statements from on the record, that he believed that she didn't
15 want that. If there was a misunderstanding, I would submit
16 to the Court that it was essentially a misunderstanding that
17 Mr. May and the victim may have misunderstood one another, but
18 I believe that's exactly why Mr. May wasn't clear on what the
19 victim wanted.

20 That's exactly why he stated the agreement on the
21 record the way that it was stated. That the victim may come
22 to Court and ask for prison; and he's not going to obligate the
23 State to go contrary to the victim's wishes, because that's
24 what she may want to do. So because he was unclear of that, he
25 made the decision to articulate -- articulate it in such a way

1 to protect the victim's rights and opportunity to come to Court
2 and ask for prison.

3 It was clear that the defendant understood as well
4 that that was just a recommendation from the State, from the
5 victim, from anybody else. The Court could do whatever it
6 wanted to do; and in fact, AP&P can do whatever it wants to
7 do. The Adult Probation and Parole pre-sentence report that
8 was submitted to the Court also made a prison recommendation.
9 I would ask the Court to take judicial notice that the Adult
10 Probation and Parole reports frequently make recommendations
11 wholly independent of what victim's desires are, what the
12 State's recommendations are. They make their own independent
13 recommendations.

14 It appears in this case that the defendant just took a
15 calculated risk. He got the benefit of the bargain, a second-
16 degree felony. Was hoping that the victim wouldn't show up
17 and wouldn't come to Court and wouldn't recommend prison. If
18 there was negligence I submit that the defendant also shares
19 some -- some blame in failing to ascertain what the victim's
20 wishes were before the plea; because it was clear that the
21 State could recommend prison if that's what the -- if that's
22 what the victim wanted.

23 The defendant has shown that he's capable of contacting
24 the victim and interviewing her and ascertaining her wishes.
25 If he wanted to make it absolutely clear before the sentencing,

1 he had the opportunity and the right to contact the victim to
2 attempt to determine her wishes before he entered his plea. He
3 chose not to, and made that calculated risk.

4 Now that he made the risk and entered his plea and
5 admitted his guilt, there's no legal -- legally sufficient
6 reason for him to withdraw his plea. The plea was made know-
7 ingly and voluntarily and with a calculated risk; and now he
8 has to face the consequences of his decisions.

9 THE COURT: All right, thank you. Mr. Cook, anything
10 further?

11 MR. COOK: Yes, just a brief reply, your Honor. Well,
12 I guess for starters we could say that the representations
13 made by Counsel are fine and good, but we have no affidavit
14 of Mr. May as to any of these statements whether they -- what
15 actually occurred from the -- from his point of view. His
16 suppositions I don't think can really be taken in this case
17 to contradict what actually are in these affidavits.

18 Secondly, I think the colloquy in the Court during the
19 -- during the guilty plea is very important, because it isn't
20 quite as nebulous as Counsel would say. The -- Mr. Parsons
21 -- he quoted Mr. Parsons, who said that "It's understood the
22 prosecutor will recommend no prison time and will recommend
23 probation."

24 Then Mr. May says, "That's correct, your Honor. Our
25 recommendation is simply that we would honor the victim's

1 wishes. If the victim were asking for a prison sentence,
2 we're not bound to not recommend prison, and the victim is
3 not seeking a prison sentence. That's not her request. That
4 recommendation does not bind the State in any way as to jail."
5 Then he goes on.

6 So he specifically says that's not her request, and
7 she is not seeking a prison sentence. So it was not just a
8 "Well, we're not quite sure what she's going to do." It was
9 very -- a very powerful statement to the contrary.

10 Secondly, the transcript of the phone conversation
11 where Counsel is saying, "Well, he-- she may have been confused
12 or not really pointed out she wanted prison" is again not quite
13 accurate. In the -- in the questioning Mr. Kane says that
14 basically that they -- he wanted to clarify whether Thad May,
15 the prosecutor at a hearing, believed you to not want Robert to
16 go to prison. This is on page 4.

17 She says, "No, I didn't say that." Mr. Kane says,
18 "Okay," and she says, "I didn't say that I did not want him
19 to go to prison. I said, 'Well, it's more important to me that
20 he's on the sexual offender's list.' That was like -- I said
21 that I wanted him to serve prison time, but the more important
22 thing to me was I wanted him to go on the sexual offender's
23 list."

24 Then later he says, "At this time did you want -- did
25 you want him to go to prison?" "Yes, I felt he deserved some

1 prison time also." You know, she repeatedly says it throughout
2 this interview she wanted him to go to prison. So I don't think
3 there could be a misunderstanding. It seems quite adamant she
4 wanted him to go to prison.

5 Now, the final question here is, you know, what were we
6 -- what were we bargaining for. The representation, again, I
7 mean, aside from the guilty plea, which is the State's focus,
8 we're also focusing upon the preliminary hearing, and the
9 waiving of that right, and the waiving of the trial itself.
10 That occurred long before the guilty plea.

11 By this representation of she is -- she is wanting
12 probation, she does not want him sent to prison, this affected
13 the defense of this case substantially, and cost them the
14 preliminary hearing. So this goes to the prosecutorial mis-
15 conduct, aside from the question of the guilty plea and the
16 language of the guilty plea.

17 When you add the language of the guilty plea, where
18 the statements were made to this Court right in front of all
19 the people basically saying, you know, we believe that she --
20 no, they didn't say "believe" -- we know she does not want the
21 prison time.

22 As far calling, I think it's quite risky for a defense
23 attorney to be calling a witness in an ongoing case to find
24 out what she desires. I think that would be very, very risky.
25 It's one thing to ask for the facts. It's another thing to ask

1 what she wants, or to go into it when there's no -- no guilty
2 plea. The only reason they did inquire about that was because
3 of the representations made in the AP&P report that completely
4 contradicted Mr. May.

5 So we believe, your Honor, in summary, that there
6 is sufficient grounds to reinstate the first -- the original
7 charge, allow a preliminary hearing to go forth, allow all the
8 discovery that was omitted to continue, and to set this matter
9 for trial, and of course set aside the guilty plea unless, of
10 course, the Court would grant probation. Thank you.

11 THE COURT: All right, thank you. One of the -- one of
12 the issues I'm having with regard to the defense's request here
13 is -- is knowing all along that the Court's not bound by any of
14 this recommendation.

15 MR. COOK: That's true.

16 THE COURT: In fact, that's a specific part of the
17 colloquy that I thought was interesting that no one made
18 reference to.

19 MR. COOK: Yes. Well, and I think -- I think that's
20 certainly a relevant thing, but you know, it is-- nevertheless,
21 you sort of-- you're expecting certain things. Although you're
22 not bound by the prosecutor's recommendation, you assume under
23 the facts that he's going to make a favorable recommendation.
24 You're not bound by the AP&P, but you assume that the victim is
25 going to give a favorable impression.

1 You're not bound by her representations, but you know,
2 all these things combine to make it so that a defendant is
3 still optimistic that something is going to happen based upon
4 a set of facts that isn't present. Even though they know you
5 can do this, it's a whole different scenario when you -- when
6 you have a very vindictive claimant as opposed to a very
7 cooperative or a very forgiving one.

8 THE COURT: But despite all of that, when -- after
9 Mr. May did his colloquy and -- well, his putting on the record
10 on June 5th, just to make sure everybody was clear, I went back
11 and I said, "Well, you understand the State -- that the Court's
12 not bound by any of this?" Because every time he made a repre-
13 sentation and the defense made representations, I reminded
14 everybody it doesn't matter; the Court's not bound by it. So
15 everybody's on notice.

16 MR. COOK: Uh-huh.

17 THE COURT: Mr. Parsons, "That's correct, as we have so
18 explained to our client." So everybody was clear -- clearly on
19 notice that that was the situation. So that's what I'm having
20 a hard time overcoming that --

21 MR. COOK: Uh-huh.

22 THE COURT: -- because we specifically discussed that
23 the Court's going to do whatever it wants to do based on this
24 info.

25 MR. COOK: Sure, but the difference is that we're --

1 they're counting on a 90 -- a high probability of something
2 occurring, or the basis to make that plea, and now the proba-
3 bility is completely switched. At the time they made this
4 agreement, the victim or complainant was adamant of him going
5 to prison, which was completely different than what was repre-
6 sented.

7 Granted, the Court cannot go by the recommendations or
8 not, but you know, they were under the mistaken belief that it
9 would be a favorable recommendation that would be favorable to
10 the Court. In fact, it was a done -- it was a dead deal at the
11 time it was signed because she didn't -- she wanted him to go
12 to prison and would continue to want him to go to prison. So
13 there was no chance of a recommendation from the prosecutor.
14 Even though the Court does have discretion, we lost that chance
15 to influence the Court by the prosecutor's recommendation.

16 THE COURT: Does the State have anything further, since
17 I allowed defense additional --

18 MR. FLATER: Your Honor, I have the same -- the same
19 issues and the same -- and the same problem. The defendant was
20 aware, No. 1, that the victim might come to Court and ask for
21 prison. No. 2, that the State in turn might come to Court and
22 ask for prison, recommend prison.

23 In fact, the State hasn't even made a sentencing
24 recommendation yet. I think a lot of what they're complaining
25 about, as far as I know, I don't believe the State's even made

1 a recommendation at this point. It's just that the victim has
2 come to Court and made her recommendation. It was clear that
3 even before he entered his plea that she may do that, and she
4 may come in and ask for prison.

5 No. 2, that the pre-sentence report would -- could
6 make a contrary recommendation; and No. 3, that the Court was
7 not bound by any of those recommendations. The defendant,
8 knowing all of those things, still chose to go ahead and enter
9 his plea. He took a calculated risk, hoping that the recom-
10 mendations would be favorable. They were not. It seems like
11 buyer's remorse now. He wants to back out because he doesn't
12 believe that the recommendations are beneficial to him. So he
13 wants to back out of the plea that was very legally valid and
14 legitimate.

15 MR. COOK: Judge, may I make a statement.

16 THE COURT: Sure.

17 MR. COOK: Thank you. Just briefly, Judge. I would
18 assert, your Honor, having 41 years of practice in the field,
19 that the system would fail in its entirety if we weren't in a
20 position where the vast, vast majority of the time the Courts
21 follow the recommendations that are jointly made, especially a
22 recommendation made by a prosecutor.

23 It is the norm, it is just simply good practice for
24 Counsel in the defense industry to assume that prosecutorial
25 recommendations are going to be highly persuasive to the Court.

1 We always know a Court can change its mind and can deviate.
2 We recognize that; but a vast, vast majority of the time we
3 are entitled to rely upon the expectation that the Court will
4 follow the recommendation made by the prosecution. That's all
5 I have to say. Thanks.

6 THE COURT: Thank you. I really dislike delaying this
7 any further, because this has been a substantial delay which
8 has been extremely frustrating to the Court. However, I'm
9 going to take the matter under advisement. I will give you
10 another date. My hope is to issue a written ruling. In the
11 meantime -- but if not, we'll call it a ruling/sentencing
12 hearing. So depending on what the ruling is, there will also
13 be a sentencing. TJ, how many do we have on May 11th?

14 COURT CLERK: It's not too bad.

15 THE COURT: Okay, we'll have you back on May 11th on the
16 9 o'clock law and motion calendar.

17 MR. COOK: May I inquire, your Honor, what will occur
18 precisely on that date?

19 THE COURT: Well, if I don't issue a written ruling in
20 between, I will give my ruling.

21 MR. COOK: At that time?

22 THE COURT: Correct.

23 MR. COOK: In the alternative, if you have given a
24 written ruling, will that be a continuation of the sentencing
25 process?

1 THE COURT: Even if -- I will either rule previously,
2 and it will be then a sentencing or a scheduling conference,
3 depending on what the ruling is. Otherwise, you'll come that
4 day and it will be a ruling, and it will in turn lead into a
5 scheduling conference or a sentencing, okay?

6 MR. COOK: Yes, ma'am. Thank you.

7 THE COURT: So -- and the State's clear on that as
8 well?

9 MR. MAY: Yes, your Honor.

10 THE COURT: All right.

11 MR. COOK: At 9 a.m., your Honor?

12 THE COURT: Correct.

13 MR. COOK: Thank you, your Honor.

14 THE COURT: All right, so I will see, then, 9 a.m. on
15 the 11th of May. Okay, thank you.

16 MR. MAY: Thank you.

17 MR. COOK: That's all we have. May we be excused, your
18 Honor.

19 THE COURT: Yes, thank you, and I do believe that
20 concludes our afternoon calendar.

21 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Wendy Haws, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these proceedings.

That I have been authorized by Beverly Lowe to prepare said transcript, as an independent contractor working under her license as a certified court reporter appropriately authorized under Utah statutes.

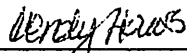
That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

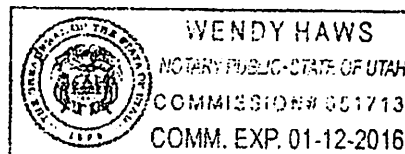
That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 21st day of May 2015.

My commission expires:
January 12, 2016



Wendy Haws, CCT
NOTARY PUBLIC
Residing in Utah County



Signed: 

Beverly Lowe, CCR/CCT

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Addendum F

MAY 06 2015

By: _____
Salt Lake County TJ
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

ROBERT MORGAN MAGNESS,

Defendant.

RULING AND ORDER

Case No. 131903746

Judge Elizabeth A. Hraby-Mills

Before the Court is Defendant's Amended Motion for Leave to Withdraw Guilty Plea, Reinstate Preliminary Hearing, and Reinstate All Prior Filed Motions and Requests ("Motion"). The Court has reviewed the moving, opposition, and reply papers. A hearing was held on April 27, 2015. Having considered the briefing and arguments of counsel, the Court now rules as follows.

On April 12, 2012, Defendant was charged with Rape, a first degree felony. On January 5, 2015, Defendant entered a guilty plea to the charge of Forcible Sexual Abuse, a second degree felony. With the advice of counsel, Defendant signed a Statement of Defendant in Support of Guilty Plea and Certificate of Counsel ("Statement") confirming that his plea was voluntary. That Statement was also signed by his counsel confirming that the Defendant had read or was read and understood the contents of that Statement and that the confirmations by the Defendant in the Statement were true. The bottom of page four of the Statement reads as follows:

All the promises, duties and provisions of the plea agreement, if any, are fully contained in this statement, including those explained below: In exchange for the Defendant's plea of guilty the prosecution agrees that in the event the victim does not affirmatively insist upon the prosecutor seeking a prison commitment that the prosecutor will recommend probation and no prison.

Before signing the Statement, the prosecution had represented to the Defendant that, as of the time of initial intake, the victim's impression was that she would not seek prison time. Defendant was aware that the prosecution had not communicated with the victim since getting her initial impression. At an evidentiary hearing on January 5, 2015, the prosecution explained that the State's "recommendation is simply that we would honor the victim's wishes." On March 2, 2015, the victim appeared in court and, in part, made the following statement:

As far as what I believe should be dealt to you, I'm asking the Judge to sentence you two-and-a-half years in prison, the same sentence you've dealt me. A prison I've been in, waiting for this to be over. I also want you to be on the sexual offenders list.

Defendant contends that the prosecution made a material misrepresentation when it stated that the victim did not want Defendant to go to prison. According to Defendant, this material misrepresentation, which allegedly induced Defendant to accept the guilty plea, amounted to prosecutorial misconduct which violated the Defendant's due process rights and caused him to forego his right to a jury trial. The Court disagrees. Based on the record, the Court cannot conclude that the prosecutor made "affirmative statements contrary to what it knows to be the truth." *United States v. Universita*, 298 F.2d 365 (2d Cir. 1961). Nor has the prosecutor intentionally made knowing use of false evidence by misrepresenting the nature of the victim's wishes. Rather, the prosecutor represented that, at the time he spoke with the victim, she was not seeking prison time. There is no evidence that these representations were contrary to what the prosecutor knew to be true.

Next, Defendant contends that he is entitled to withdraw his guilty plea under Utah Code Ann. § 77-13-6(2)(A) because the plea was not knowing and voluntary. The Court respectfully disagrees. Contemplating voluntariness, the Utah Supreme Court recognized:

[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

State v. Copeland, 765 P.2d 1266, 1274 (Utah 1988). Based on the record, the Court cannot characterize the prosecutor's statements as misrepresentations, unfulfilled, or unfulfillable promises. All of the statements on the record made by the prosecution were some version of an

explanation that the victim initially did not appear to want the Defendant to go to prison, but the prosecution's recommendation remained consistently contingent on whatever the victim wanted. Importantly, Counsel for the Defendant, after the Court found that the Defendant knowingly and voluntarily entered into the plea, further represented to the Court that his client knew that the Court was not bound by the recommendation made by the prosecution.

Additionally, the Utah Supreme Court has explained:

In order to assist courts in determining whether a plea is knowingly and voluntarily made, we created rule 11. Rule 11 highlights important rights that defendants must understand in order for their pleas to be valid. By addressing those rights with the defendant in the plea hearing, district courts can test the knowing and voluntary nature of the plea and create a record of their inquiry. Indeed, where a district court complies with all the provisions of rule 11, the court forecloses many potential arguments that the defendant's plea was not knowingly and voluntarily made.

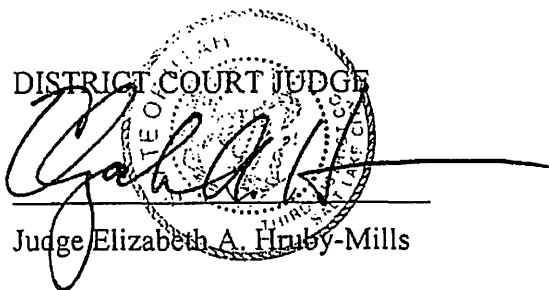
State v. Alexander, 2012 UT 27, ¶ 24, 279 P.3d 371, 378. Here, there are no allegations that Rule 11 was violated. The Court is satisfied that there was compliance with Rule and that Defendant knowingly and voluntarily entered into a guilty plea, particularly where "both the plea colloquy and the plea agreement, which was incorporated into the plea hearing record, clearly set forth the charges and the alleged conduct by [Defendant] that corresponded with the elements of the charges, in compliance with rule 11." *State v. Candland*, 2013 UT 55, ¶ 18, 309 P.3d 230.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that Defendant's Amended Motion for Leave to Withdraw Guilty Plea, Reinstate Preliminary Hearing, and Reinstate All Prior Filed Motions and Requests is DENIED, consistent with the Court's Ruling above. The Court anticipates sentencing the Defendant at the date previously set, May 11, 2015.

This Ruling and Order is the order of the Court, and no additional order is required to be prepared in this matter.

DATED this 6 day of May, 2015.

DISTRICT COURT JUDGE

Judge Elizabeth A. Hruby-Mills

Addendum G

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Attorneys for Defendant

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

ROBERT MORGAN MAGNESS,

Defendant.

**MOTION TO CLARIFY THE RULING
AND ORDER ON DEFENDANT'S
MOTIONS TO WITHDRAW GUILTY
PLEA, REINSTATE PRELIMINARY
HEARING, AND REINSTATE ALL
PRIOR FILED MOTIONS AND
REQUESTS**

CASE No. 131903746

JUDGE: ELIZABETH A. HRUBY-MILLS

COMES NOW, the Defendant, ROBERT MORGAN MAGNESS, by and through his counsel of record, Craig S. Cook, William B. Parsons and Larry Long, and hereby respectfully moves this Court for a clarification of the Ruling and Order ("Ruling and Order") issued by this Court on May 6, 2015, in conjunction with the Defendant's Motions to Withdraw Guilty Plea, Reinstate Preliminary Hearing, and Reinstate all Prior Filed Motions and Requests. The Ruling and Order contains no specified Findings of Fact or Conclusions of Law. Further, in a plain reading of the Ruling and Order it is not clear where the Court relied on factual determinations and where the Court made legal conclusions.

Moreover, it is entirely unclear the basis for the Court's apparent factual determinations. The only affidavits or other factual evidence presented to the Court in the pleadings on this issue came from the Defendant. The Prosecution failed to provide any affidavit, transcript, recording, or other evidence as to any prior statements the alleged victim made to the police, the Prosecution, or any other party concerning her desire to have the Defendant sentenced to prison. All such information was duly requested by the Defendant during discovery and should have already been provided to the Defendant's legal counsel. But for reasons unknown to the Defendant this information was intentionally withheld. Critically, in spite of the lack of evidence presented by the Prosecution, the Court made a determination that the Prosecution did not make a material misrepresentation.

The Defendant is entitled to a clear and unambiguous ruling on his Motion. In order to apply the proper standard of review, the Utah Supreme Court and the Utah Court of Appeals require a clear delineation between the trial court's factual findings and legal conclusions. This Court did not make such delineation in its Ruling and Order. Accordingly, the Defendant

respectfully requests the Court clarify the basis for its denial of the Defendant's Motions to Withdraw Guilty Plea, Reinstate Preliminary Hearing, and Reinstate All Prior Filed Motions and Requests; make clear and unambiguous Findings of Fact and Conclusions of Law in conjunction with the Ruling and Order; and clarify the basis for the Court's factual determinations.

DATED this 11th day of May, 2015.

/s/ Larry Long

Larry Long for
L. LONG LAWYER, INC.
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2015, I caused to be served via e-mail/e-filing/fax/mail/delivery a true and correct copy of the foregoing **MOTION TO CLARIFY THE RULING AND ORDER ON DEFENDANT'S MOTIONS TO WITHDRAW GUILTY PLEA, REINSTATE PRELIMINARY HEARING, AND REINSTATE ALL PRIOR FILED MOTIONS AND REQUESTS** to the following:

Salt Lake District Court
450 South State Street
Salt Lake City, UT 84111

Salt Lake County District Attorney Offices
111 East Broadway, Suite 400
Salt Lake City, UT 84111

/s/ Neil Crabtree

Clerk

Addendum H

17) - 050(17) 177 - 0

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

ORIGINAL

STATE OF UTAH,

Plaintiff,

vs.

ROBERT MORGAN MAGNESS,

Defendant.

FILED DISTRICT COURT
Third Judicial District
Case No. 13190548 PS

JUN - 1 2015

SALT LAKE COUNTY

By [Signature] Deputy Clerk

Sentencing Hearing
Electronically Recorded on
May 11, 2015

BEFORE: THE HONORABLE ELIZABETH A. HRUBY-MILLS
Third District Court Judge

APPEARANCES

For the State:

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Transcribed by: Wendy Haws, CCT

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P R O C E E D I N G S

(Electronically recorded on May 11, 2015)

THE COURT: All right, so Mr. Magness. This matter is 131903746; and we're set for sentencing today?

MR. LONG: Yes, your Honor. Although apparently the ruling was entered with the Court on the 6th, which was Wednesday, but no electronic notification was ever sent to Mr. Flater at the DA's office or Mr. Parsons, me, nor Mr. Cook. I got a call on Friday afternoon from Mr. Cook that the ruling was to deny the motion.

So I called Dr. Mahea, trying to get a hold of him. I haven't received any return calls from him. We expected him to be here to testify in terms of he'd been in treatment for the last two-and-a-half years with Dr. Mahea. We wanted your Honor to have the input on that. We had about over 30 people that were scheduled to show up, but we didn't have the time to contact them.

THE COURT: I specifically asked if anyone thought we needed a special setting, and I was told no by both sides.

MR. LONG: Well, that may have been the case at the time, but I think it would certainly be advisable if we could have one. We did file this morning a motion to clarify the ruling, because we thought it was rather ambiguous and we know that the Court of Appeals as well as the Supreme Court wants a clear record for review.

1 Also we filed the motion to continue the sentencing
2 based on the fact that we needed to get Dr. Maheas here to
3 testify, as well as the 30 supporters that we were trying
4 to have show up in his behalf. He went through 220 hours of
5 training and bonded with a lot of people over there. So we
6 thought that would be significant for the Court.

7 THE COURT: All right, thank you.

8 MR. FLATER: Your Honor, I object to the request for a
9 continuance. I'd ask -- I would ask the Court to go forward
10 with sentencing today for a number of reasons. As the Court is
11 well aware, this has been previously scheduled for sentencing
12 at least twice. That sentencing had been delayed at the request
13 of the defendant.

14 At the motion, the evidentiary hearing, the argument
15 that we had when the Court took the matter under advisement,
16 the Court informed all parties that you would have a decision
17 by today's date, and that it would either be a sentencing or a
18 scheduling conference based on your ruling.

19 So the defendant was on notice that today may -- may
20 in fact be a sentencing. He had ample time to contact all of
21 the witnesses and get them here if he thought that he needed
22 people to testify. He's previously submitted quite a few
23 documents in preparation, anticipation of sentencing, and has
24 had multiple opportunities to present whatever information he
25 wanted to to the Court and/or was under notice that today would

1 be set for scheduling if the Court denied the -- I mean, excuse
2 me, that today would be set for sentencing if the Court denied
3 his motion.

4 The Court gave no indication of whether that would
5 be in advance at the hearing or at the hearing itself. The
6 Court said, "I may come to the bench on this day and deny your
7 motion; and if that's the case, then we will go forward with
8 sentencing." So based on that procedural history, I strongly
9 object to any more continuances on the sentencing, and I would
10 ask the Court to go forward.

11 THE COURT: All right, thank you. Anything further?

12 MR. LONG: Did your Honor have an opportunity to read
13 our written motion to continue?

14 THE COURT: I did. I took a brief break --

15 MR. LONG: Oh, okay.

16 THE COURT: -- from the bench and I read that. Thank
17 you. Anything else I should know?

18 MR. LONG: I don't believe so, your Honor.

19 THE COURT: All right, I am -- I have reviewed those
20 documents that were filed this morning, and I am denying the
21 motions to continue the sentence, and to clarify the ruling
22 further. I did make it clear at that oral argument on the --
23 on the last motion that I would likely even issue the ruling
24 this morning. So the fact that you got it earlier should just
25 give you additional time.

1 I also indicated, as the State has indicated as well,
2 that I would -- today we were going forward either with the
3 sentencing or with a scheduling conference, depending on how I
4 ruled. I've made that ruling, and so I'm ready to proceed with
5 sentencing.

6 I know we have been set for sentencing several times
7 on this matter, and I would note we've heard from the victim in
8 the case. However, I'm not sure whether we've ever gotten to
9 the point of any errors or omissions in the pre-sentence report
10 that need to be addressed.

11 MR. PARSONS: We have not actually had the opportunity
12 -- if it please the Court, William Parsons, your Honor, on
13 behalf of the defendant -- we have not had the opportunity
14 of making the statement in behalf of the defendant. At this
15 particular point in time I would like to have the opportunity
16 to do so.

17 THE COURT: All right, thank you, but any errors or
18 omissions that you were (inaudible) --

19 MR. PARSONS: There are a couple of minor errors, but
20 nothing of significance in the pre-sentence report that we wish
21 to address.

22 THE COURT: All right, thank you.

23 MR. PARSONS: I would inquire of the Court, has the
24 Court had the opportunity of the -- reviewing the defense based
25 report that we have produced?

1 THE COURT: I have.

2 MR. PARSONS: Thank you very much.

3 THE COURT: Thank you.

4 MR. PARSONS: With that in mind, your Honor, if I may
5 proceed?

6 THE COURT: Yes.

7 MR. PARSONS: Thank you. The defendant is 55 years
8 of age, your Honor. He was born and raised in the Salt Lake
9 valley. He's been a welder all of his life. He owns his own
10 home. He has two children. He has three grand children. He
11 has no prior felonies. He has no assault or sex offense record
12 of any character whatsoever.

13 Since this offense occurred, he has completed two-and-
14 a-half years of therapy with Dr. Mahea, who is a qualified sex
15 therapist in the community. He, in addition to that, has 220
16 hours of Great Life Training and has been an instructor himself
17 in the Great Life program.

18 He has completed psycho-sexual evaluations including
19 the plethysmograph and the polygraph, and all tests at the
20 behest and under the direction of Dr. Mahea indicate that he
21 has not only interested in only sexually appropriate behavior,
22 both age and sexually context, with no apparent interest in
23 deviation of any character.

24 Alcohol testing monitor has been on this gentleman
25 for over two-and-a-half years, and there have been no alcohol

1 consumed by him since the date of the incident, which was
2 almost three years ago. As both reports produced indicate,
3 there are alcohol circumstances associated with this incident,
4 and his alcohol-free status is very telling of his commitment
5 to not engage in any misconduct of any character in the future.

6 The defense based sentencing report gives a recommend-
7 ation of 36 months of probation, 270 days of County Jail time,
8 with 6 days credit. As indicated in our sentencing report,
9 it is incredibly likely that this defendant will never appear
10 before the Court again with regards to anything of this char-
11 acter. He has practically no risk of a repeat offense, accord-
12 ing to Dr. Mahea's report.

13 Now, of course, those are not words not Dr. Mahea's
14 specifically, but the report essentially suggests exactly as
15 I've indicated. The point is, your Honor, is is that we find
16 before you a young man who has -- who has engaged in misconduct
17 that is egregious, significantly egregious, and yet he has
18 taken full responsibility for it, has acknowledge his role,
19 has acknowledged his culpability, has acknowledged that it
20 was wrong, and has assumed the necessary steps for purposes
21 of changing all of his lifestyle behavior that would prevent
22 him from engaging in anything of this character in the future.

23
24 I heartily recommend that the Court consider the 270
25 days of jail time that is involved in the defense based sent-

1 encing report, with credit for the 6 days. I recognize that
2 the AP&P report recommends a commitment of a 1 to 15, second-
3 degree felony.

4 I also recognize that both the defense based and the
5 AP&P reports indicate that he is in the moderate risk category;
6 but the extenuating circumstances that we have suggested to the
7 Court would tend to appropriately sway the Court toward the
8 probation. With that we would submit. Thank you very much.

9 THE COURT: Thank you.

10 MR. LONG: If I might just add, your Honor, that I've
11 known Bob for the last two-and-a-half years. When I first
12 met him it had been about a year, I think, since the incident
13 happened. I rec -- he said he hadn't had a drink since then.
14 So I suggested he put on a scram device, which he did, and he's
15 been wearing that for I guess in excess of two years.

16 We sent him up and he did a whole sexual -- psycho-
17 sexual evaluation with Dr. Mahea and has followed the treatment
18 regimen for the last two-plus years. Is that right?

19 MR. MAGNESS: Almost two-and-a-half years.

20 MR. LONG: So he's been very compliant. He went through
21 his Great Life training and bonded with a lot of people over
22 there, 220 hours. I think he'd like to say something to your
23 Honor before sentencing.

24 THE COURT: All right, do you want to do that now or
25 after the State?

1 MR. LONG: Go ahead and let the State --

2 THE COURT: Whatever -- whatever (inaudible).

3 MR. LONG: Let him go ahead.

4 MR. FLATER: Thank you, your Honor. I think the pre-
5 sentence report does a good job of identifying some of the
6 things that are very concerning in this case. The fact that
7 the defendant did not know the victim prior to this crime is
8 indicating as an aggravating factor and circumstance.

9 The fact that he took advantage of an unconscious and
10 particularly vulnerable individual and used that vulnerability
11 to satisfy his own sexual desire I think is significant and
12 extremely aggravating circumstances in this particular case.

13 The Court is aware and it's been the subject of much
14 discussion that the victim is requesting prison. Her request I
15 think is significant that she wants him to be in prison for as
16 long as she's really kind of suffered through and dealt with
17 the consequences of his actions; and suggested that a minimum
18 of two years of prison would be appropriate for what he did to
19 her is essentially the price to pay for the egregious behavior
20 that he engaged in.

21 I don't disagree with the pre-sentence report or the
22 victim. I think their recommendations are appropriate. I know
23 that there were initial negotiations that didn't involve me.
24 As the party I do believe that I am bound to honor the request,
25 but the State's prior position was we want to -- we want to

1 honor the wishes of the victim in this particular case. So I
2 think her recommendations and the recommendations in the pre-
3 sentence report are appropriate.

4 THE COURT: All right, thank you.

5 MR. LONG: I just might add that although she requested
6 two-and-a-half years in prison, the information we have on the
7 analysis is that the average first offender served 91 months on
8 a sex offense (inaudible) prison. But Mr. Magness would like
9 to say something on his own behalf.

10 THE COURT: All right, thank you.

11 MR. MAGNESS: I'm accountable, your Honor. I can't
12 believe I did such a stupid thing. I've been through 120 hours
13 of Great Life training. I realize I've given up all power
14 because I was pretending I was a victim. I'm compelled to do
15 well for family which I love, and they love me, and a career
16 as a welder that I've had since I was 12. If your Honor will
17 trust me, the results will speak for themselves.

18 THE COURT: Okay, that quote that you just used is
19 also in the pre-sentence report. Could you let me know what
20 that means? "I have thrown away all my power because I was
21 pretending I was a victim." I'm not exactly sure I understand.

22 MR. MAGNESS: I've given up all my power because I was
23 pretending I was a victim. I'm not --

24 MR. PARSONS: Simply assuming -- if I may, your Honor,
25 simply assuming responsibility completely, himself.

1 THE COURT: So just initially -- I guess I'm not under-
2 standing.

3 MR. PARSONS: If the Court had the -- should the Court
4 have had the privilege of receiving testimony, the Court would
5 have determined that at the time of the initial interviews by
6 the authorities there were conflicting statements made.

7 THE COURT: I'm aware of that. We actually had --

8 MR. PARSONS: That's what he's suggesting is --

9 THE COURT: All right, that he did take responsibility.

10 MR. PARSONS: He's taking -- yes, he's acknowledging
11 full responsibility at this time. Yes, ma'am.

12 THE COURT: All right, thank you. Anything -- anything
13 more I should know?

14 MR. MAGNESS: Nothing.

15 THE COURT: All right.

16 MR. MAGNESS: No, your Honor.

17 THE COURT: All right, well, we've met a number of
18 times through this. As you recall, the victim did testify at
19 a the two hearings previously when we were -- one of the times
20 that we were set for sentencing.

21 At that time (inaudible) numerous references to her
22 statements today that she wants Mr. Magness to go to prison
23 for the amount of time that she has suffered. I think the part
24 that we all need to keep in perspective and that she will learn
25 likely as well, that she likely will suffer a lot more than the

1 two-and-a-half years that she has suffered to date. So I think
2 using the two-and-a-half year number is really not helpful.

3 I appreciate all the hard work that you have committed
4 yourself to during this time period. However, I'm -- this is
5 unacceptable conduct, and the victim in this case has suffered
6 and will continue to suffer a great deal. So, sir, you are
7 before me on a second-degree felony, and for that you will be
8 sentenced to the Utah State Prison for 1 to 15 years.

9 Restitution is ordered. I don't know if we have
10 final restitution numbers. I know there's two different claim
11 numbers, but is that something that the State --

12 MR. FLATER: I'm not prepared to address a final amount
13 of restitution today. I would just ask the Court to keep that
14 matter open for a period of time so we can --

15 THE COURT: All right, we can try to address it here or
16 we can have the board address it. So I don't do --

17 MR. FLATER: I would just ask the Court to order resti-
18 tution as a condition of his sentence. Then we will submit all
19 of the information that we --

20 THE COURT: All right, thank you. So restitution is
21 ordered as well. Anything further?

22 MR. PARSONS: May Mr. Magness self-report on Friday at
23 5 o'clock?

24 THE COURT: No, he'll be taken into custody now.

25 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Wendy Haws, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these proceedings.

That I have been authorized by Beverly Lowe to prepare said transcript, as an independent contractor working under her license as a certified court reporter appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

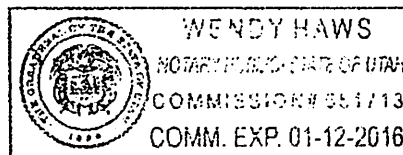
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 21st day of May 2015.

My commission expires:
January 12, 2016

Wendy Haws
Wendy Haws, CCT
NOTARY PUBLIC
Residing in Utah County



Signed: Beverly Lowe
Beverly Lowe, CCR/CCT

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	RULING/SENTENCING
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 131903746 FS
ROBERT MORGAN MAGNESS,	:	Judge: ELIZABETH A HRUBY-MILLS
Defendant.	:	Date: May 11, 2015

PRESENT

Clerk: katiem

Prosecutor: FLATER, AARON W
Defendant

Defendant's Attorney(s): LONG, LARRY N

DEFENDANT INFORMATION

Date of birth: August 2, 1959

Sheriff Office#: 92630

Audio

Tape Number: W35 Tape Count: 10:43-58

CHARGES

1. FORCIBLE SEXUAL ABUSE - 2nd Degree Felony

Plea: Guilty - Disposition: 01/05/2015 Guilty

HEARING

TIME: 10:43 AM

Defense addresses the Court regarding the ruling and possibly needing a special set sentencing and gives basis. State objects to a continuance and gives basis. Court denies the motion to continue the sentencing and clarify the ruling entered by the court on May 6, 2015. Mr. Parsons addresses the Court regarding the presentence report and gives a statement on behalf of the defendant. Mr. Long addresses the Court on behalf of the defendant. State addresses the Court. Defendant addresses the Court. Court admonishes the Defendant for his actions and behaviors. Court orders the defendant to serve 1-15 years prison forthwith. Court orders restitution with the amount to be determined.

SENTENCE PRISON

Based on the defendant's conviction of FORCIBLE SEXUAL ABUSE a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than

fifteen years in the Utah State Prison.

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

SENTENCE RECOMMENDATION NOTE

Court orders the defendant to serve 1-15 years prison forthwith.

Date: 5/13/15

Elizabeth A. Hulse
ELIZABETH A. HULSE
By *[Signature]* District Court Judge
STAMP USED AT DIRECTION OF JUDGE
