

2002

Utah v. Gustavo Mora : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	BRIEF OF APPELLANT
Plaintiff/Appellee,	:	
 v.	:	
	:	Case No. 20020095-CA
GUSTAVO MORA,	:	
	:	
Defendant/Appellant.	:	

APPEAL FROM THE THIRD DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
THE HONORABLE MICHAEL K. BURTON, PRESIDING

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :

Plaintiff/Appellee, : **BRIEF OF APPELLANT**

vs. :

GUSTAVO MORA, : Case No.

Defendant/Appellant. :

JURISDICTION

This is an appeal of right of a final conviction of a first degree felony made pursuant to Section 77-18a-1, Utah Code Annotated. The Supreme Court initially had jurisdiction pursuant to Section 78-2-2(3)(i), Utah Code Ann., but transferred the case to this Court. This Court has jurisdiction pursuant to Section 78-2(a)-3(2)(j), Utah Code Annotated.

ISSUES PRESENTED, STANDARD OF REVIEW AND WHERE RAISED

Issue: Whether the defendant knowingly and voluntarily entered a plea of guilty to the charge of when the trial judge failed to comply with Rule 11. Review of a trial court's denial of a motion to withdraw a guilty plea is done under an abuse of discretion standard. *State v. Blair*, 868 P.2d 802, 805 (Utah 1993).

The defendant raised the issue below by filing a motion to withdraw his guilty plea within the thirty-day time limit. A full hearing was held on the issue on November 24, 2001 before the Honorable Michael K. Burton, Third District Judge. Transcript of Hearing is attached as Exhibit "A".

STATEMENT OF THE CASE

1. The Defendant, Gustavo Mora, was charged with Aggravated Robbery, a first degree felony, and Theft from a Person, a second degree felony, for the hold-up of an Econolodge in Salt Lake County on October 11, 2000.
2. The Defendant was also facing charges of two unrelated Aggravated Robbery Charges.
3. The Defendant entered a guilty plea to Aggravated Robbery, a first degree felony, along with a weapons enhancement, on April 20, 2001 before the Hon. David S. Young. Pertinent portions of the plea colloquy are as follows:

THE COURT: You're charged with an aggravated robbery, that on or about October 11, 2000, that you, with the use of a dangerous weapon, by force or fear—I don't know the name of the complaining witness. Can you give me more about the circumstances?

MR. BIGGS: Your Honor, I put in the factual bases as follows: On October 11, 2000, in Salt Lake County, I took personal property from the victim, and I had—and possessed a gun that got the victim to give me the money. (Plea Transcript p. 20). Plea transcript is attached as Exhibit "B".

The Court went on to tell the defendant that there would be no trial, to which the defendant responded, "no trial". (Plea Transcript p. 22). The colloquy continued:

THE COURT: Right. And if there were a trial we would call an impartial jury. Every one of the jurors would have to agree before you could be convicted. We would, in the course of the trial, call witnesses, the state would. And with Mr. Biggs' assistance, you could cross-examine the state's witnesses. You could compel witnesses to testify in your behalf. You could testify yourself or you could remain silent. If you remain silent, no presumption as to your guilt could be drawn by that silence. Do you understand each and all of these rights would be waived by this plea?

THE DEFENDANT: Yes, I do. (Plea Transcript p. 22).

The judge continued on page 23 of the transcript to advise Mr. Mora of his appeal rights he was waiving and that a motion to withdraw his plea must be made in 30 days. Mr. Mora also said he was satisfied with the advice of his attorney, Mr. Biggs. (Plea Transcript p. 23).

4. Mr. Mora filed a timely motion to withdraw his guilty plea.
A hearing on that motion was heard by the Hon. Michael K. Burton on November 24, 2001. Judge Burton concluded that Mr. Mora's plea was knowing and voluntary and therefore denied his motion to withdraw his guilty plea.
5. Mr. Mora filed an appeal to the Supreme Court on January 11, 2002.

SUMMARY OF ARGUMENT

The trial court failed to fully inform Mr. Mora of the rights he was waiving by pleading guilty. The court made a glaring omission: it did not inform Mr. Mora of the elements of aggravated robbery and how those elements related to the conduct charged in the information. Because the oral colloquy was insufficient, Mr. Mora did not freely and voluntarily waive his right to a trial on his charges. As such, the defendant's rights guaranteed in the due process clauses of the Utah and United States Constitutions have been violated.

ARGUMENT

POINT I: THE REQUIREMENTS OF RULE 11 WERE NOT STRICTLY FOLLOWED DURING THE ENTRY OF MR. MORA'S PLEA.

Rule 11(e) of the Utah Rules of Criminal Procedure, § 77-35-11 governs the entry of a guilty plea by a defendant. It states in pertinent part:

- (e) The court may refuse to accept a plea of guilty or no contest and shall not accept such a plea until the court has made the findings:
 - (2) That the plea is voluntarily made;
 - (3) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;
 - (4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements;
 - (5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences; and
 - (6) Whether the tendered plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached.

Due process requires that a defendant knowingly and voluntarily waive his rights associated with a trial when entering a guilty plea. Unless there has been strict compliance with Rule 11(e) of the Utah Rules of Criminal Procedure, the defendant's due process rights under *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969) have been violated. The remedy is that the defendant be allowed to withdraw his guilty plea and set his case for trial. *State v. Gibbons*, 740 P.2d 1309, 1312 (Utah 1987).

In *Gibbons*, the Utah Supreme Court held that it is not sufficient that a defendant has filled out a "change of plea form" and has gone over the rights enumerated therein with his attorney: "Rule 11(e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11(e) requirements are complied with when a guilty plea is entered. The basis for that duty is found in *Boykin v. Alabama*." *Id.* Thus, it is necessary for the *trial court* to go over each and every requirement of 11(e) with the defendant and explain each right he waives. The trial court in Mora partially complied with Rule 11 when taking Mr. Mora's plea, but failed to comply in several areas.

The court failed to state the elements aggravated robbery and how Mr. Mora's conduct related to those elements. The trial court in the *Gibbons* case held that Mr. Gibbons' plea was not knowingly and voluntarily entered, and stated, "because a guilty plea is an admission of all of the elements of a formal criminal charge, it cannot truly be voluntary unless the defendant possesses an understanding of the law in relation to the facts . . . The judge must determine 'that the conduct which the defendant admits

constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.’ *Id.* at 1313.

In Mora’s case, the trial judge failed to fully state the elements of aggravated robbery¹. He said, “you’re charged with aggravated robbery, that on or about October 11, 2000, that you, with the use of a dangerous weapon, by force or fear—I don’t know the name of the complaining witness”. (Transcript p. 20).

The trial court also failed to discuss the factual basis of the charge and how that related to the elements of aggravated robbery. Mr. Biggs merely said, “your honor, I put in the factual basis as follows: On October 11, 2000, in Salt Lake County I took personal property from the victim, and I had—possessed a gun that got the victim to give me the money.” *Id.* Not only is this rendition of the factual basis inadequate—leaving out place of offense, name of victim—but the trial judge did not follow up and inquire if Mr. Mora understood how this factual basis related to the elements of aggravated robbery. This alone is sufficient to render Mr. Mora’s plea involuntary, yet the trial court failed in other areas as well in taking the plea:

- 1. Mr. Mora was not informed that the state bears the burden of proving each element of aggravated robbery beyond a reasonable doubt.**
- 2. Mr. Mora was not informed that his guilty plea was an admission to all of the elements of aggravated robbery.**

¹ The defendant, a party to the offense, intentionally or knowingly used force or fear of immediate force against another in the course of committing a theft; and in the course of committing said robbery used or threatened to use a dangerous weapon. U.C.A. § 76-6-302 (1953 as amended).

3. **Mr. Mora was not informed that his plea to aggravated robbery could result in consecutive imposition of a sentence with his California charges.**
4. **Mr. Mora's state of mind was not inquired about during the plea colloquy—whether threats or promises had been made to get him to plead guilty; whether he was under the influence of a substance that would affect his reasoning; or whether he was suffering from a mental impairment that may affect a knowing and voluntary plea to aggravated robbery.**

POINT II: IT IS NOT SUFFICIENT THAT A DEFENDANT HAS PREPARED
A PLEA AFFIDAVIT PRIOR TO ENTERING THE PLEA.

At the hearing on the defendant's motion to withdraw his plea, the state argued that although Judge Young did not strictly comply with Rule 11(e), the judge "substantially complied" with the rule and that was sufficient according to *State v. Penman*, 964 P.2d 1157 (Utah App.1998). (Motion Transcript p. 12). It was sufficient, Ms. Wissler argued, because defendant had read and signed a plea agreement prior to his colloquy with the court. (Motion Transcript, p. 13) This argument, especially as applied to Mr. Mora, fails for several reasons.

It is true that "strict compliance can be accomplished by multiple means so long as *no requirement of the rule is omitted and so long as the record reflects that the requirement has been fulfilled.*" *Penman* at 1160, quoting *State v. Maguire*, 830 P.2d


216 (Utah 1991). The district court judge need not recite verbatim every statement in the defendant's plea affidavit, but the record must reference that plea affidavit on important points. For example, it would be sufficient if Judge Young had asked Mr. Mora if he had read and understood the part of the plea affidavit that lists the elements of aggravated robbery and the facts that support that charge. Not only did the court fail to do that, the *court never asked Mr. Mora if he had read the plea affidavit let alone if he understood it*. *Penman* requires at least that much. There is nothing in the plea colloquy that suggests that Mr. Mora has read the plea affidavit or reviewed it with his attorney.

Because the plea affidavit was never incorporated by reference during the plea colloquy and Mr. Mora was not asked if he understood the English language, was under the influence of drugs, was mentally impaired, or if he had been threatened or promised anything in exchange for the plea, it cannot be determined if Mr. Mora's plea was freely and voluntarily made. The caselaw is clear that it is not sufficient that a defendant merely fill out a plea affidavit and submit it to the court. The trial judge has the burden of determining if the change of plea is made freely and voluntarily, and that can only be done during the plea colloquy—by inquiring into the defendant's state of mind and whether he understands all portions of the plea affidavit. That was not done in Mr. Mora's case.

CONCLUSION AND REMEDY SOUGHT

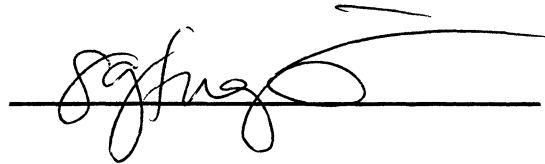
Based upon the foregoing, Mr. Mora's plea to aggravated robbery was not knowingly and voluntarily entered. Accordingly, this Court should reverse the judgment of the district court.

RESPECTFULLY SUBMITTED this 22 day of May, 2002.


SUSANNE GUSTIN-FURGIS
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed/delivered a copy of the foregoing to J.
FREDERIC VOROS, JR., Assistant Attorney General, Heber M. Wells Building, 160
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23rd day of May, 2002.



CONFIDENTIAL

STATE OF UTAH,)
)
)
PLAINTIFF,) Case No. 001917882
)
vs.) Transcript of:
)
GUSTAVO MORA) MOTION HEARING
)
Defendant.)
)

**SCOTT M. MATHESON COURTHOUSE
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* * *

1 Salt Lake City, Utah; Wednesday, October 24, 2001; P.M.

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

3 THE COURT: The parties are present. Mr. Mora is
4 with us. We don't have to pay tribute because we're onto the
5 court reporter.

6 I guess, Ms. Gustin-Furgis, you're up.

7 MS. GUSTIN-FURGIS: Okay. Well, your Honor, I'm
8 assuming that you received both of our memos?

9 THE COURT: I received and looked at those, uh-huh.

10 MS. GUSTIN-FURGIS: Okay.

11 THE COURT: I've had a chance, I think, to read the
12 transcript of the plea, as well.

13 MS. GUSTIN-FURGIS: Okay. Great. Well, I think the
14 case law is pretty clear that in a change of a plea that it is
15 up to the trial court to go over all of the rights with the
16 defendant. If that's not complied with, then the defendant has
17 a right to withdraw his plea, and that was not accomplished in
18 this case. And I know Ms. Wissler, in her memo, stated that
19 the fact that a statement of defendant was filled out and
20 presumably gone over with Mr. Biggs without agreement, that
21 that is sufficient. But I think Gibbons state's otherwise.

22 Gibbons quotes Rule 11(e), squarely places on the
23 trial court the burden of ensuring the constitution and Rule
24 11(e) requirements are complied with when a guilty plea is
25 entered. So it's necessary for the trial court to go over each

1 and every requirement of Rule 11(e), and I know that
2 Ms. Wissler states in her memo that that doesn't have to be a
3 time-consuming mechanical oral recitation during the plea
4 colloquy; which is true. But, still, all of those rights have
5 to be covered by the trial court and it does not have to take
6 that long, and that was not done in this case.

7 Gibbons squarely deals with the issue that occurred
8 in this case, and that is that the court failed to go over the
9 elements of aggravated robbery and also failed to explain the
10 relationship between that offense and the conduct that Mr. Mora
11 was charged with.

12 THE COURT: Didn't they say that they all looked at
13 the video tape? Mora seems to know there is a video of him
14 admitting the offense.

15 It seems to me Judge Young asked Mr. Biggs -- I'm
16 just thinking out loud. Seems like Judge Young, going along,
17 he says starting at the elements he's asking for the name of
18 the victim. Mr. Bigs says, well, I put it down as thus and
19 such and we have looked at the video tape.

20 MS. GUSTIN-FURGIS: Uh-huh.

21 THE COURT: Showed Mr. Mora doing that. How do you
22 plead? Mr. Mora said, well, to that, yeah. Which is video
23 taped. Doesn't he say something to that effect?

24 MS. GUSTIN-FURGIS: I don't know if Mr. Mora said
25 anything about the video tape. Mr. Biggs may have looked at

1 the video tape.

2 Did you ever look at the video tape?

3 THE DEFENDANT: No. I just heard when he asked him a
4 few things about a picture and he said, no, that person didn't
5 have no -- didn't have a few things on him, and then they
6 showed him the picture, and he said, yes, I'm sorry. It's a
7 mistake. He did have a cap on him.

8 MS. GUSTIN-FURGIS: I guess that's on page twenty of
9 the transcript.

10 THE COURT: I thought there was something like that.

11 MS. GUSTIN-FURGIS: Okay. It says, this particular
12 case, your Honor, was on a video tape which I have observed and
13 that's exactly what occurred. Well, Mr. Biggs may have
14 observed it, but it doesn't say anything about Mr. Mora
15 observing that video tape.

16 THE COURT: It does not. That's true. The defendant
17 said --

18 "Judge: Okay. Did you do that?

19 "The Defendant, Mr. Mora: I plead guilty to that.

20 "Okay. You acknowledge you did that?

21 "Yes. I plead guilty to that one right there, the
22 first degree."

23 You think there's some more different element?

24 MS. GUSTIN-FURGIS: Well, I just think -- I just
25 think it's insufficient. The Judge starts out saying you're

1 charged with an aggravated robbery, that on or about
2 October 11th that you, with the use of a dangerous weapon, by
3 force or fear. I don't know the name of the complaining
4 witness. He kind of drops the ball there, and then Mr. Biggs
5 interjects, well, I put in the factual basis as follows: on
6 October 11th, 2000, in Salt Lake County I took personal
7 property from the victim and I had -- and possessed a gun that
8 got the victim to give me the money. I mean there's no --

9 THE COURT: Tell me a little bit more what Judge
10 Young could have said.

11 MS. GUSTIN-FURGIS: I think that the judge at least
12 has to state more of the elements that as Mr. Mora, as a party
13 to the offense, intentionally or knowingly used force or fear
14 of immediate force against another in the course of committing
15 a theft, and in the course of committing said robbery used or
16 threatened to use a dangerous weapon. I mean it can't -- I
17 think it's too brief. And then also Mr. Biggs' recitation of
18 the factual basis is inadequate as well. He's got to go more
19 into -- you know, not necessarily naming the victim, but where
20 this occurs. Can't just say on October 11 he took personal
21 property from the victim. That is inadequate. He needs to
22 state where it was, was it at a 7-Eleven? Was it out on
23 Redwood Road? 5400 South? State Street? You know, where?

24 THE COURT: It could have been many places.

25 MS. GUSTIN-FURGIS: Exactly. And then --

1 THE COURT: I guess that's true. I don't mean to
2 laugh.

3 MS. GUSTIN-FURGIS: I know. But then the judge also
4 has to discuss with the defendant how his conduct on
5 October 11th relates to the charges and if he understands that
6 relationship and why he has been charged that way, which was
7 not done. And I think that is the most glaring omission in
8 Mr. Mora's plea, but also other things weren't talked about
9 with Mr. Mora. He was not informed that the State bears the
10 burden of proving each element of aggravated robbery beyond a
11 reasonable doubt. He wasn't informed that his plea was an
12 admission to all of the elements of aggravated robbery. I
13 mean, he states in general, well, I plead guilty to that and
14 I'm not admitting that his -- that it was sufficient, what he
15 went over. He didn't go over the elements of aggravated
16 robbery, in my opinion, but just saying, well, he pled guilty
17 to that is not enough. He has to be -- he has to be informed
18 that he is admitting to each element of aggravated robbery, not
19 just the charge in general.

20 THE COURT: How about performance? Wouldn't the form
21 that he signed cover those few shortcomings?

22 MS. GUSTIN-FURGIS: No, it doesn't. And Gibbens
23 states that it's up to the trial court to go over that because
24 otherwise you don't know what happened with Mr. Biggs and
25 Mr. Mora. Did he go over the plea form completely? Did he

1 understand what was going on? And that's why the burden is
2 placed squarely on the trial court to go over these rights with
3 him. And I think, especially in a case like this, I mean, you
4 know, we have, you know, misdemeanors all the time, trespassing
5 and, you know, we kind of flip through these things, but this
6 is an aggravated robbery charge that is carrying a life top.
7 And, you know, the burden is great and the burden is great on
8 the trial court to make sure that Mr. Mora understands what
9 he's doing when he's giving up these rights. And it would
10 just -- Rule 11 was not complied with in this case.

11 And I just want to point out one more thing. You
12 asked about if the plea form was sufficient. Says Rule 11
13 squarely places on trial courts the burden of ensuring that
14 constitutional and Rule 11 requirements are complied with when
15 a guilty plea is entered. The basis for that duty is found in
16 Boykin versus Alabama. What is at stake for an accused facing
17 punishment demands the utmost solicitude of which courts are
18 capable in canvassing the matter with the accused to make sure
19 he has full understanding of what the plea connotes and of its
20 consequence.

21 I'm reading from State versus Gibbons. That is 740,
22 P.2d, 1309.

23 And then also Gibbons states the judge must
24 determine that the conduct which the defendant admits
25 constitutes the offense charged in the indictment or

1 information or an offense included therein to which the
2 defendant has pleaded guilty. There is no adequate substitute
3 for demonstrating in the record at the time the plea is entered
4 the defendant's understanding of the nature of the charge
5 against him. And so the fact that he filled out a plea
6 statement is not adequate.

7 THE COURT: Fair enough. Thank you.

8 MS. GUSTIN-FURGIS: Thank you.

9 THE COURT: Ms. Wissler?

10 MS. WISSLER: Your Honor, I'll be brief.

11 I agree with defense counsel's analysis of the
12 Gibbons case, but unfortunately she ignores the case law that
13 was decided thereafter, and that includes the Penman case which
14 is a 1998 case out of Utah Supreme Court which specifically
15 talks about situations in which there are alleged violations of
16 Rule 11. In the Penman case and others decided before it the
17 Utah Supreme Court has very clearly indicated that when
18 analyzing adequacy of a plea of guilty that the court is
19 permitted to and encouraged to look not only at the actual
20 colloquy itself but any other documents or any other things
21 that may be part of the record. There's no dispute, Judge,
22 that this plea form is part of the record in this case.
23 There's no dispute that it was referred to during the plea
24 colloquy, that Judge Young made reference to it on a number of
25 occasions, that the defendant intentionally and knowingly,

1 voluntarily signed that form and that he acknowledged knowing
2 what its contents were.

3 The form itself, Judge, if I could invite the
4 Court's attention to page two, adequately sets forth the
5 amendment of aggravated robbery with respect to the location of
6 the offense and the victim that is not an element of the
7 offense, and if one could look at it similarly to jury
8 instructions, if we were, for example, instructing a jury in
9 this particular offense the victim's name and the location is
10 not an element of the offense. The elements are when did it
11 occur and is it Salt Lake County that grant the court
12 jurisdiction over the particular offense, the date of the
13 offense and the jurisdictional requirements are met in the plea
14 form itself, on October 11, 2000, in Salt Lake County, that's
15 the first element left of the offense, the jurisdiction of the
16 court. I took personal property from the victim, well, that's
17 what aggravated robbery is, taking personal property by force
18 or fear, and I possessed a gun that got the victim to give me
19 the money. That's exactly what it is, Judge, that's the
20 element of aggravated robbery, I had a gun and I used that gun
21 to intimidate these people to create fear in these people to
22 give me money. The names of the victims and exact location of
23 offense are not elements of the crime of aggravated robbery,
24 and so it's simply not in fact correct that those two things
25 are required to be part of the plea form. Every other

1 deficiency, Judge, that's alleged to have occurred during the
2 change of plea in this case is covered by the plea form, every
3 single -- every single deficiency that is alleged is part of
4 this plea form. Specifically, Judge, I'm referring to page
5 six -- there are no page numbers on this. My fax number page
6 six of the defendant's memorandum right above the conclusion
7 where he sets forth what he characterizes as insufficiency of
8 the plea, item number one, Mr. Mora was not informed that the
9 State bears the burden of proving each element of aggravated
10 robbery beyond a reasonable doubt, absolutely, Judge, that's
11 not correct. The plea form itself discusses the burden of proof
12 on page three of the plea form, paragraph eight, there is a
13 very clear paragraph which indicates who has the burden of
14 proof in this case and that is the State. In fact, there is
15 also a paragraph where he indicates he pleads guilty to each
16 and every element of aggravated robbery. And that's on pages
17 two and three of the plea form. The aggravated -- the
18 consecutive sentence there is a paragraph that deals with
19 consecutive sentences, and in fact that's on page four and five
20 of the plea form, and those are things again that Mr. Mora
21 acknowledged. With respect to number four which is the state
22 of mind there is a specific paragraph that addresses state of
23 mind and that's on page six of the plea form, paragraph 21.

24 I would further indicate, Judge, that this defendant
25 was shackled and he was unshackled for purposes of signing the

1 plea form, that he did so voluntarily in open court and the
2 judge made reference to that. He was asked whether he was
3 satisfied with the advice of his attorney. He indicated that
4 he was, and I would further indicate, Judge, that at the very
5 conclusion of the change of plea after he admitted to the
6 elements of aggravated robbery and Judge Young substantially
7 complied with Rule 11 he also indicated that -- Mr. Mora that
8 he didn't have any questions. He was invited by Judge Young to
9 ask any questions of the court, of his attorney prior to
10 signing his signature on the change of plea indicating his
11 willingness and his voluntariness in terms of entering the plea
12 and he indicated he didn't have any questions.

13 THE COURT: Where do you get that? I'm sorry.

14 MS. WISSLER: I'm on page 23 --

15 THE COURT: Twenty-three of --

16 MS. WISSLER: -- of the plea transcript and I'm
17 referring to line 16 and -- about 16 through 23 where there's a
18 discussion between the court and defendant as to whether or not
19 he is satisfied with his attorney, his attorney's advice and
20 whether or not he has any questions of the attorney or the
21 court prior to signing his name to the form. At the time he
22 entered the plea he did not indicate he had any questions. He
23 didn't indicate he had any difficulty in terms of his
24 attorney's advice.

25 In cases, Judge, decided after the Gibbons case

1 which cite the Gibbons case, and which reinterpret the
2 requirements of Rule 11 indicate very clearly that the oral
3 colloquy between the court and defendant during a change of
4 plea is not the only record of that change of plea and that's
5 not the only thing that this court should consider in
6 determining whether the plea was properly entered and should be
7 withdrawn. It's -- for this court to look not only to the oral
8 recitation of the Rule 11 requirements, but also to the plea
9 form which the defendant does not dispute that he signed, he
10 does not dispute that he signed it voluntary, he did not
11 indicate any threats or coercion were made against him and
12 doesn't indicate so now. Judge, there simply were not any
13 errors sufficient to rise to the level where the case law
14 interpreting Rule 11 and the Gibbons case would permit the plea
15 be withdrawn in this case. This was rather painstaking and I'm
16 sure the court could glean, although, you didn't participate in
17 the change of plea, but this was a change of plea that took
18 some time and there was a lot of banter back and forth between
19 the court and defendant about what was going to go on and
20 whether sentencing would occur that day or whether there was
21 going to be a presentence report, and the defendant was quite
22 adamant about taking the plea and despite being encouraged in
23 fact by the trial court to take the case to trial he
24 specifically declined. He said, no, it's in my best interest.
25 I'm going to do this. And it's a generous plea bargain. He

1 understood it. He understand it at the time he entered the
2 plea and the State's position is that the plea was completely
3 adequate and it should be upheld, Judge, and that's State's
4 position.

5 THE COURT: Thank you.

6 MS. GUSTIN-FURGIS: Your Honor, could I -- can I
7 respond?

8 THE COURT: Do you want to take a minute to talk to
9 your client?

10 MS. GUSTIN-FURGIS: Yes, if I could just take --

11 THE COURT: I don't have any problem with that. Do
12 you want us to leave or --

13 MS. GUSTIN-FURGIS: Or we can step in here.

14 THE COURT: Whatever you like.

15 (Ms. Gustin-Furgis and the defendant go into the
16 holding cell area to confer out of the presence of
17 the Court.)

18 THE COURT: Back with Mr. Mora.

19 MS. GUSTIN-FURGIS: Your Honor, just a couple of
20 things.

21 The other thing that wasn't reviewed with Mr. Mora
22 was his state of mind. It was not inquired into during the
23 colloquy, whether threats or promises had been made to get him
24 to plead guilty, whether he was under the influence of some
25 substance that would impair his reasoning. I think it's pretty

1 clear. Ms. Wissler said that there was a lot of bantering back
2 and forth during this plea colloquy, and there was. And I
3 think that indicates -- and it wasn't about elements, and it
4 wasn't about reasonable doubt, and it wasn't about --

5 THE COURT: Something to do with California.

6 MS. GUSTIN-FURGIS: Exactly. And I think that
7 reflects Mr. Mora's state of mind and the fact that he was
8 concerned about this and Mr. Mora told me that Mr. Biggs had
9 promised him that -- you know, that he took him back in the
10 holding cell and said you'll just have to plead guilty to this.
11 It doesn't matter because you're going to do 25 years on the
12 Mora case.

13 THE COURT: On the Mora --

14 MS. GUSTIN-FURGIS: I'm sorry. On the California
15 case.

16 And that's the exact reason why we need to have the
17 trial court inquire into these things, because you don't know
18 what the attorney is telling the client. And I think that's
19 reflected in the change of plea. He was very concerned about
20 this. Mr. Biggs told me that this would run concurrent with
21 California. And that's what the bantering was about. And so,
22 that I think Mr. -- Judge Young needed to inquire into what was
23 said to Mr. Mora about this California situation more clearly
24 because it clearly appears from the record that he was
25 threatened or he made promises that certain things would

1 happen, and that was not inquired into.

2 For Ms. Wissler to say that, well, you know, that's
3 up to the defendant in terms of he was asked a question, well,
4 do you have any questions of your attorney, Mr. Mora isn't
5 trained in the law. He doesn't -- you know, there are lots of
6 things in that plea form that just saying do you have any
7 questions of your attorney is not going to say, well, could you
8 please go over with me the burden of proof again and how that
9 relates to, you know, the elements of my -- you know, the
10 charge and my conduct.

11 Ms. Wissler also stated that the date and the time
12 and the place of the offense are not elements of the offense,
13 but that's not my argument. Two things have to be gone over in
14 this plea colloquy; number one, the elements, and number two,
15 his conduct that gives rise to a violation of those elements.
16 And that was not done and that's where it becomes important as
17 to where the offense occurred, what time the offense occurred,
18 what date the offense occurred, did it occur in Salt Lake
19 County. So he's not just pleading guilty like, well, I plead
20 guilty, and he's thinking in his mind, well, I did do a robbery
21 in Midvale, you know, the same day. That's where those
22 requirements become important, and those things were not gone
23 over with Mr. Mora.

24 Also, Penman, which Ms. Wissler brings up, states --
25 does not overrule Gibbons. It just says that strict compliance

1 with Rule 11 can be accomplished in multiple means so long as
2 no requirement of the rule is omitted, and the record reflects
3 that requirement has been fulfilled. And so a lot of times
4 judges will say, well, Mr. Mora, you've gone over the plea
5 agreement, and it talks about the elements in that plea
6 agreement. Did you read the plea agreement? Do you understand
7 that? That is incorporating the plea agreement into the
8 colloquy, and I think that's what the court means, but it
9 doesn't mean that the defendant has filled out a plea form, can
10 just stand up here and say I plead guilty. Otherwise that
11 would happen routinely if the statement of defendant were
12 sufficient, and Gibbons says it is not sufficient and that it's
13 up to the trial court to incorporate specific portions of that
14 plea colloquy -- or plea agreement into the colloquy to make it
15 part of the record, and that's what Penman states.

16 And, therefore, your Honor, I don't think there has
17 been even partial compliance. I think that the judge failed in
18 many respects in this case and I think that he should be
19 entitled to withdraw his plea.

20 MS. WISSLER: Judge, may I respond to one thing real
21 quick?

22 THE COURT: Yeah.

23 MS. WISSLER: Well, I think that to suggest that
24 Mr. Mora was somehow coerced by Mr. Biggs in terms of this
25 California thing, there simply is no support in the record on

1 that point, Judge. On pages six through nine Judge Young takes
2 great pains to talk to Mr. Mora about exactly what was
3 represented to him with respect to the California situation,
4 and Mr. Biggs, on the record, indicates I said in my opinion
5 California and Utah would speak and California would say we're
6 going to have him for 25 years to life, you've got him six to
7 life, we'll take him, and Utah would agree with that. I told
8 him I wasn't guaranteeing that, that you couldn't guarantee
9 that, that based on my experience that's what would happen.
10 Okay. Do you understand that, Mr. Mora? That's the
11 explanation. Do you understand what he just said? Yes. Okay.
12 What he's saying, there's no way that Utah can control
13 California and no way that California can control Utah. They
14 each have independent convictions. And then Mr. Mora goes on
15 to say that he understood that most likely he was going to do
16 five to life or seven or ten and then California would come and
17 pick him up. He knew exactly what was going on. He knew he
18 would spend time in Utah before California went to pick him up.
19 He absolutely knew that was going to happen. The arguments
20 occurred when we started talking sentencing, and I refer the
21 Court to page 12. Mr. Mora had his heart set on going to
22 prison that day. He indicated repeatedly that he didn't like
23 the county jail. He wanted to leave the day of the change of
24 plea to go to the Utah State Prison, and on page 12 there is
25 extensive conversation about that, and the court ultimately

1 accommodated Mr. Mora and said, okay, if that's what you want
2 I'll impose sentence today. I'll send you to prison and we'll
3 get a post-sentence report. That's exactly what occurred.
4 That's what he wanted. That's what happened. I think the
5 court in this particular case bent over backward to, A,
6 indicate to Mr. Mora that this court did not have any control
7 over California and vice versa, no promises were made --
8 despite what counsel has now represented. The record is
9 patently clear that no promises were made whatsoever with
10 respect to what was going to happen to his California parole
11 situation, and in fact he got exactly what he wanted. He got
12 sentenced the same day as the change of plea, which is
13 extraordinarily unusual in a first-degree gun-enhanced felony;
14 he got to go to prison that same day. That's exactly what
15 occurred, Judge. He has his cake and eat it too. He got to
16 enter a plea on a very generous plea bargain agreement and he
17 got to go to prison that same day, which is exactly what he
18 wanted. The fact that he's now upset because he's going to
19 spend significant time in Utah before he goes to California is
20 simply not cause when one indicates from the record that he was
21 advised of the possibility of that up front, and that's why the
22 State believes that this new motion is not well taken and it
23 should be denied.

24 THE COURT: What did you mean about -- just
25 curiosity -- post-sentence report?

1 MS. WISSLER: Mr. Mora --

2 THE COURT: Asking for something.

3 MS. WISSLER: Mr. Mora was angry because Judge Young
4 indicated to him that he would not sentence him that same day.

5 THE COURT: Right.

6 MS. WISSLER: And there's discussion about that, and
7 Judge Young says, well, let me tell you there's a problem that
8 you may not understand. Whenever anyone is sent to prison --
9 on page eight -- we get what is called a presentence
10 investigative report. We don't have anything of that nature in
11 Utah. And so on pages eight, nine, ten, and so forth, they go
12 through this discussion about the presentence investigation
13 process and Mr. Mora says I don't want to do that. I don't
14 want to wait 45 days in the county jail for a report. I want
15 to go to prison today. If you won't let me go to prison today,
16 I don't want to go there. I want to be out of the county jail.
17 I don't like it. So Judge Young talked to a representative of
18 Adult Probation and Parole who happened to be sitting in the
19 courtroom -- and this, again, is on page --

20 THE COURT: What I'm not catching is post-sentence,
21 is something going to happen?

22 MS. WISSLER: Well, at some point, Judge, once this
23 issue is resolved my understanding is that AP&P is going to
24 send somebody out to the prison to do what's called a
25 post-sentence report.

1 THE COURT: I see.

2 MS. WISSLER: And that then goes to the Board of
3 Pardons and they use that report to determine how much time
4 Mr. Mora will serve in the Utah State Prison.

5 THE COURT: Okay. Anything else, Ms. Gustin, you
6 want to add? It's your motion. You get the least word.

7 MS. GUSTIN-FURGIS: Yeah. Just very briefly
8 responding to that.

9 I don't think any of that is very relevant. We're
10 talking about what was happening when he was entering a plea.
11 Whether he gets his cake and eats it too is not an issue in
12 this case. The judge still didn't inquire into what -- if
13 there were any threats or promises made to Mr. Mora to get him
14 to change his plea. And it didn't necessarily have to just
15 relate to his California sentence, but any promises or any
16 threats, and that was not inquired into.

17 THE COURT: All right. I think in this case the
18 state of mind that has been referred to is pretty clear, as I
19 read the transcript, and portions of it have been referred
20 today in today's major argument that he was clear in mind. I
21 appreciate Judge Young does not make a formal finding, well,
22 you aren't under the influence of any substance, you have a
23 clear mind; but it's clear to me that in reading this colloquy
24 that that is what occurred, that Mr. Mora And Judge Young were
25 corresponding, talking together, tracking each other. I think

1 it's a conclusion that his state of mind was clear.

2 Now the promises issue. I appreciate that Judge
3 Young didn't say formally what promises may or may not have
4 been made, but it's clear to me, again, from reading the record
5 that the issue of promises was discussed with Mr. Mora. He
6 knew clearly that nobody could promise him anything. So I
7 think, as I read the form that Mr. Mora signed, as I read the
8 colloquy, that all the requirements of Rule 11 have been
9 complied with and I will deny Mr. Mora's motion to withdraw his
10 plea, no good cause having been shown.

11 So I guess, Ms. Wissler, you have to prepare an
12 order to that effect.

13 MS. WISSLER: I will, Judge.

14 THE COURT: Thanks.

15 MS. GUSTIN-FURGIS: All right. Thank you, your
16 Honor.

17 (Proceedings in the above-entitled matter were
18 concluded.)

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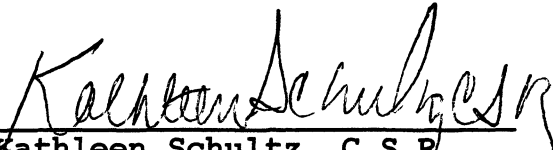
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C E R T I F I C A T E

I, Kathleen Schultz, an Official Court Reporter for the Third Judicial District Court in and for Salt Lake County, State of Utah, do hereby certify that I reported the above-entitled matter on October 24, 2001, and that the preceding pages 1 through 22, inclusive, comprise a true and correct Reporter's Transcript of Proceedings.

Dated this 7th day of November, 2001.


Kathleen Schultz, C.S.R.
Official Court Reporter

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1
2 Salt Lake City, Utah; Friday, April 20, 2001; A.M.

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

4 THE COURT: Mr. Biggs, what's your matter?

5 MR. BIGGS: Good morning, your Honor. Can we take
6 Gustavo Mora? He's in custody. It's numbers nine, ten, and
7 twelve.

8 THE COURT: All right.

9 MR. BIGGS: It's a pretrial conference.

10 MS. WISSLER: Your honor --

11 THE COURT: I beg your pardon. I did not hear.

12 MS. WISSLER: Sirena Wissler, your Honor.

13 THE COURT: Thank you. All right. The cases before
14 the court next are State versus Gustavo Mora, 001917882,
15 001918102, and 001918169. Likewise, these -- at least the last
16 matter is a first-degree felony. In fact the others are. So
17 this matter is being recorded by a court reporter and the video
18 record has been terminated.

19 Mr. Biggs, tell me what is anticipated today.

20 MR. BIGGS: Your Honor, we have reached an agreement
21 in these three cases.

22 THE COURT: All right.

23 MR. BIGGS: Here is the agreement, your Honor. Just
24 exactly as you stated them, the court numbers, I put them in
25 the Statement of Defendant, Certificate of Counsel, and Order.

1 THE COURT: Okay. Now, let me ask you to pause
2 there. I'm going to need a Statement of Defendant in each
3 file. You know that.

4 MR. BIGGS: Do you want me to do three?

5 THE COURT: Well, I think I do so that each is
6 complete. Now, I'm not going to ask you to rewrite three.
7 What we could probably do is copy them, then highlight the
8 number for each one. But I want three signed.

9 MR. BIGGS: That's fine.

10 THE COURT: So I get three into the book.

11 MR. BIGGS: We'll do that.

12 THE COURT: Ms. Wissler, did you have a concern?

13 MS. WISSLER: Yes, your Honor. Just for
14 clarification, our understanding in this case is defendant will
15 only be entering the plea in one case and the other two will be
16 dismissed.

17 THE COURT: Oh, that will change the ruling. Okay.
18 I'm sorry. Tell me what the agreement is.

19 MR. BIGGS: Yes, your Honor. In 001917882 --

20 THE COURT: Okay. Let's just use the last three
21 digits. So 882.

22 MR. BIGGS: In 882 he will be pleading guilty as
23 charged in count one to an aggravated robbery with the use of a
24 gun and count two will be dismissed.

25 THE COURT: Okay.

1 MR. BIGGS: The other two files are going to be
2 dismissed.

3 THE COURT: All right. Okay. Then, I had a
4 misunderstanding at the beginning. That's fine. So it's
5 guilty as charged, first-degree felony, and there is an
6 enhanced penalty associated with this with a firearm. Is that
7 right?

8 MR. BIGGS: That's correct. There's a mandatory one
9 year and can be a zero to five.

10 THE COURT: Now, this is a first-degree felony so it
11 is a mandatory one year on the minimum. So it's six to life
12 rather than five to life.

13 MR. BIGGS: Correct.

14 THE COURT: Is that your understanding as well,
15 Mr. Mora?

16 THE DEFENDANT: No. I'm pleading guilty to a
17 five-to-life. That's all.

18 THE COURT: Right. Plus with the -- that's what
19 you're pleading guilty to, is a five-to-life, but there is a
20 firearm enhancement because there was a firearm used and that
21 adds a mandatory one year to that.

22 THE DEFENDANT: All right. All right. I'll plead
23 guilty to that, but I need to say a few words.

24 THE COURT: You can say whatever you like.

25 THE DEFENDANT: My lawyer is telling me that

1 California prison's going to come pick me up soon.

2 THE COURT: Okay.

3 THE DEFENDANT: You know, I want to hear that from
4 you.

5 THE COURT: I don't know that. I don't have any idea
6 about it.

7 THE DEFENDANT: So I don't understand.

8 MR. BIGGS: Your Honor, here's the situation.

9 THE COURT: Sure.

10 MR. BIGGS: Mr. Mora is facing these charges in Utah.

11 THE COURT: Right.

12 MR. BIGGS: He informs me that he is also on parole
13 in California, and California has indicated, through his parole
14 officer, that they are going to charge him with what's called a
15 three-strikes violation.

16 THE COURT: Habitual criminal.

17 MR. BIGGS: That's correct. That's a 25-year-to-life
18 in California. He wanted to know if California can come and
19 get him. I said in my opinion California and Utah would speak
20 and California would say we're going to have him for 25 years
21 to life, you've got him for six to life. We'll take him. And
22 Utah would agree with that. I told him that I wasn't
23 guaranteeing that, that you couldn't guarantee that, that based
24 upon my experience that's what would happen.

25 THE COURT: Okay. Do you understand that, Mr. Mora?

1 That is now the explanation. Do you understand what he has
2 just said? You have to answer out loud.

3 THE DEFENDANT: Yes.

4 THE COURT: Okay. What he's saying, there's no way
5 that Utah can control California and no way that California can
6 control Utah. They each have independent convictions.

7 THE DEFENDANT: So most likely I'm going to go do the
8 five to life in seven to ten years, and then they'll pick me
9 up, or what?

10 THE COURT: Well, that will be up to them to decide.

11 THE DEFENDANT: To who?

12 THE COURT: California. California can put a hold on
13 you and they can take you after you served your Utah time.
14 They could also say, okay, he's served six years in Utah, we're
15 going to terminate his parole unsuccessful. They could do
16 that.

17 THE DEFENDANT: All right. If I take this five to
18 life, the feds won't prosecute me on any gun charges; right?

19 THE COURT: I can't assure you of that. The feds can
20 decide whatever they're going to decide.

21 I'll tell you what, you can just go to trial. Do
22 you want to do that? Because you have got -- in fact, you have
23 got a first-degree felony here. You've got a first and a
24 second in one case. You've got a first and a -- two firsts in
25 another case, and you've got a first in a third case. You can

1 go to trial on all of these. Would you rather do that?

2 THE DEFENDANT: No. I'm just going to go ahead and
3 take the five to life.

4 THE COURT: It's not five to life. It's six to life.

5 THE DEFENDANT: Well, whatever it is.

6 THE COURT: Okay. So you're going to take one and
7 have the others dismissed. Is that what you want to do?

8 THE DEFENDANT: Yeah. They're going to send me out
9 to prison today, something like that?

10 MR. BIGGS: One other thing, your Honor. He's
11 requesting to be sentenced today. I told him that he has the
12 right to ask the court to do that, and he would prefer doing
13 that because he doesn't want to be in the county facility any
14 longer.

15 THE COURT: Let me tell you what -- there's a problem
16 you may not understand with respect to that. Whenever anyone
17 is sent to the prison we get -- before they're sentenced we get
18 what they call a presentence investigative report. Now, I
19 don't think we have ever had any report of that nature in Utah.

20 Is that correct, Mr. Biggs?

21 MR. BIGGS: That's correct.

22 THE COURT: So California has, basically, all your
23 criminal history and data. We probably have rap sheets and
24 information that is initially available, but we don't have all
25 the data here. If you go out to the prison today, then

1 somebody has to do what is called a post-sentence report for
2 the Board of Pardons, which is just the same as a presentence
3 report, only it is done after. So we have to get the report,
4 period. And it changes who does the reporting. My normal
5 preference is to use the presentence investigative people
6 because they do that report all the time.

7 (Defendant speaks inaudibly.)

8 THE COURT: Go ahead and speak up.

9 THE DEFENDANT: If I can't get sentenced today and
10 sent out to prison today, I'll go ahead and take all that to
11 trial because --

12 THE COURT: You can do whatever you like.

13 THE DEFENDANT: Because I want to go out to the
14 prison as soon as possible. I don't like that county jail. I
15 don't like to be there, you know. I just want to -- that's the
16 only reason I'm taking this, because I'm not comfortable being
17 in the county jail. I don't even like it while I'm living
18 there.

19 THE COURT: All you'll do -- the jail shouldn't have
20 anything to do it, and I'll tell you why. Because if you want
21 to just take the trial and try them all and run the risk of
22 being convicted of, I think, five first-degree felonies, which
23 could then been consecutive -- you know the sentence could
24 be -- what you're looking by this sentence, if I accept it, is
25 you're limiting me to only one sentence. But you could go

1 ahead and try them all, but you will stay in the county jail
2 the whole time you're trying them and then you'll still be in
3 the county jail for another six weeks to get a presentence
4 report. So there is no way you're getting out of the county
5 jail today by whatever decision you want to make. You don't
6 control the decision. Is that clear?

7 THE DEFENDANT: So it will take how long? If I was
8 to wait, it will take how long?

9 THE COURT: To try them?

10 THE DEFENDANT: No. So you could sentence me to five
11 to life?

12 MR. BIGGS: It takes 45 days.

13 THE COURT: If you plead today, I will order a
14 presentence report and it will take me, plus or minus, 45 days.

15 THE DEFENDANT: I'm going to take it all to trial.

16 THE COURT: Okay. If you don't plead today --

17 THE DEFENDANT: I'm not going to plead guilty. I'm
18 not guilty on nothing. I'm going -- I'm going back to the --

19 THE COURT: Okay.

20 THE DEFENDANT: I don't want to take it.

21 THE COURT: Just so you understand the deal. Okay?

22 THE DEFENDANT: Yes.

23 THE COURT: If you don't plead today --

24 THE DEFENDANT: I'm not going to plead. If I'm not
25 going to prison today, I don't want no deal, no nothing. I'll

1 just take it to trial.

2 THE COURT: Well, if you'll stop and listen to me for
3 a minute.

4 Do you understand that if you don't plead today that
5 what we'll do is we'll set three different trials?

6 THE DEFENDANT: That's what I want. That's what I
7 want.

8 THE COURT: They will be set in 30, 60, 90 days,
9 something like that.

10 THE DEFENDANT: It doesn't matter. I want to go
11 today. My mind is set to leaving today. That's what he's been
12 telling me. So if this ain't going to happen that way, the way
13 he told me, you'll be gone tomorrow, that's fine. You know,
14 I'm expecting that to happen today. If it can't happen that
15 way, I'm fighting everything, you know.

16 THE COURT: What's the State's decision?

17 MS. WISSLER: Judge, the State's position is that all
18 three cases are set for trial beginning May 3rd. I think the
19 problem is this is a situation for Mr. Biggs and I to get
20 together, make a decision as to which one of these cases should
21 be tried first. One has a codefendant represented by
22 Ms. Miller and she's not available the 3rd, 4th, and 8th of
23 May, so I don't believe we'll be in a position to try the case
24 where there is a codefendant. But I think, given Mr. Mora's
25 position today, I think we ought to be prepared to go forward

1 to try one of these cases May 3rd.

2 MR. BIGGS: May I suggest, your Honor, the case that
3 he was going to plead guilty to ending in 7882.

4 THE COURT: Okay. Let me also explain one other
5 thing to you, Mr. Mora. It's the Court's rule that if there
6 are -- if there is going to be a plea it needs to be decided at
7 the pretrial. This is an opportunity for you to get a lesser
8 total conviction than would happen potentially at trial. So
9 from here on, I won't accept a plea unless it's as charged on
10 all three cases. So I don't know what the evidence is, but you
11 just need to know this is your last chance to negotiate a
12 lesser resolution.

13 THE DEFENDANT: If I get sentenced today, like I
14 said, if you're going to sentence me --

15 THE COURT: You already told me.

16 THE DEFENDANT: No. I'm just saying that's what I
17 was told. You know, that's what I was told. So that's what I
18 have in my mind, that I'm going to prison today. That's what I
19 thought. So if it ain't going to happen that way, I'm going to
20 take everything to trial, you know.

21 THE COURT: That's just fine.

22 THE DEFENDANT: You know, I don't have -- I don't
23 have no other, you know, answer to that, you know. I don't got
24 nothing to say.

25 THE COURT: What's the reason that you think it's so

1 important for you to go to prison today?

2 THE DEFENDANT: I need -- because I don't want --
3 look, I'm from L.A. county jail, you know. I don't like this
4 county jail, you know. I'd rather be in prison. I'd rather be
5 in prison 50 years than to be in that county jail another day.
6 That's just the way I feel, you know. I would rather do fifty
7 years in that prison. That's why I was taking a five-to-life.
8 Only for that reason, that I was going out to that prison
9 today, not tomorrow, today. That's what I thought. That's
10 what he told me. That's why I said I'll take the five to life.

11 THE COURT: Well, let me ask AP&P. Who does the
12 presentence reports and who does the post-sentence reports? Is
13 there any difference in those that I should be concerned with?

14 AP&P REPRESENTATIVE: No, your Honor. There
15 shouldn't be at all. It wouldn't really matter if you do a
16 sentence. We refer it and we have agents at the prison that
17 would do the post-sentence follow-up report.

18 THE COURT: Okay. I will tell you that I would
19 probably, if I had my preference, Mr. Biggs, I'd probably just
20 as soon try all of these and deal with them thereafter, if that
21 were my choice.

22 MR. BIGGS: I understand. It's to my client's
23 benefit to take this offer.

24 THE DEFENDANT: I want to take it.

25 MR. BIGGS: To my client's benefit to be sentenced

1 today, and I would ask the court -- even though it is not your
2 normal routine, that you sentence him today to the state prison
3 on the six years to life.

4 THE COURT: There -- it sounds to me like there are
5 some reasons why I might like to have the ability to consec a
6 couple of these. I would like to know what the real facts are.

7 MR. BIGGS: Well, your Honor, what he's pleading
8 guilty to is -- I understand, and if he were to go to trial and
9 be convicted, you would have that option.

10 THE COURT: Right.

11 MR. BIGGS: That's the reason we want him to plead
12 today, because basically he's pleading to a first-degree felony
13 with the use of a gun, which we know is going to be six years
14 to life, and that's what we anticipate. That's what he knows
15 he is going to go out to prison on, and that's what we're
16 asking the Court to do today.

17 THE COURT: Does the State have any further
18 information?

19 MS. WISSLER: Your Honor, I -- just simply to remind
20 the court that the enhancement that is at issue in this case
21 carries, of course, the mandatory one-year consecutive, but
22 also, statutorily, there is the possibility of a discretionary
23 additional zero to five on top of that.

24 THE COURT: How can I do that, if I sentence today?

25 MS. WISSLER: That is just at the court's discretion.

1 You're entitled by statute, the way the gun enhancement is
2 written, to impose an additional zero to five weapon
3 enhancement just to reflect the --

4 THE COURT: Is there any allegation weapons were used
5 in the other charges?

6 MS. WISSLER: Yes.

7 THE COURT: A gun?

8 MS. WISSLER: Yes.

9 MR. BIGGS: One was a knife.

10 MS. WISSLER: But one was a gun.

11 THE COURT: It looks to me like one may have been a
12 screw driver on the aggravated robbery. Let me see. What's
13 the other.

14 MS. WISSLER: The other was a gun.

15 THE COURT: Okay. Well, you tell me what do you want
16 to do? I'm probably not going to send you to prison today, and
17 if I do, if I accept the plea I'll probably give you five
18 years' enhancement for firearms, which will give you a
19 ten-to-life sentence.

20 THE DEFENDANT: I'll take the six to life, your
21 Honor, you know.

22 THE COURT: Okay. I'll give you six to life under
23 this condition, that I wouldn't send you today. I'm going to
24 get a presentence report because I'm going to look at it.

25 THE DEFENDANT: No, no, no. See, I want to leave

1 today. I want --

2 THE COURT: Okay. Let's just try the cases. You
3 will not hereafter be allowed to plead to anything less.

4 THE DEFENDANT: What do you mean about ten to life?

5 THE COURT: You see, what you're trying to do,
6 Mr. Mora, you're trying to tell me what I'm going to sentence
7 you on.

8 THE DEFENDANT: No. I never told you -- I never told
9 you to do nothing, your Honor.

10 THE COURT: Just stop and listen to me for a minute.
11 I have the right to sentence you, if you plead guilty on a
12 five-to-life, I can sentence you in not less than two days,
13 which means today, or after a report. There is a one --
14 minimum number one-year enhancement for a firearm, which makes
15 that five to life, six to life, but that is -- there's also
16 discretion in sentencing that that could be a minimum of up to
17 five years added. So it could be ten to life.

18 THE DEFENDANT: All right. Give me --

19 THE COURT: Now, you're trying not to give me the
20 opportunity to learn about the facts of the other cases. If
21 you are convicted on all of these cases, I can sentence you
22 consecutive on every one of them, one after the other. So the
23 minimum times can be five to life or six to life, six to life,
24 six to life. So that's 18 plus or minus years to life. I
25 can -- and you're giving me the impression that you're not to

1 be a trustworthy man and you're giving me the impression that
2 you ought to spend a lot of time in prison. Now, if you want
3 to be a little more cooperative and give me the opportunity to
4 look at the presentence report before I sentence you, then I
5 would feel better about giving you something within ten to life
6 or five to life or six to life.

7 THE DEFENDANT: So --

8 THE COURT: I'd feel better about that, but I don't
9 feel good about you coming in here and telling me what you're
10 going to get.

11 THE DEFENDANT: No, I never said what I'm going to
12 get. I'm just going by what my lawyer is telling me.

13 THE COURT: Okay. I know your lawyer. I know what
14 they're telling you, and I know what you're willing to listen
15 to. You seem not willing to listen to a lot.

16 THE DEFENDANT: I'm listening.

17 THE COURT: Let me ask you this. Do you want to
18 accept the plea, five to life with a mandatory one-year gun
19 enhancement and a presentence report before sentencing? Or do
20 you want to take them all to trial?

21 THE DEFENDANT: Give me the ten, the ten that you
22 said, the way you explained it. Give me the ten years so I can
23 leave today. It doesn't matter if you add another four years
24 to it. It doesn't matter. Give me the ten years, but sentence
25 today so it will be the way you said at first.

1 THE COURT: So give you the maximum that I could if I
2 accepted the plea.

3 THE DEFENDANT: No. You know what? I'm taking this
4 to trial. You know, I'm taking it to trial because now you
5 want to give me the max, you know.

6 THE COURT: That's all I can. That's what you're
7 saying. Give you the maximum that I can if I accept your plea.

8 THE DEFENDANT: How much is it?

9 THE COURT: Well, that's ten to life if I accept your
10 plea. If I don't accept your plea -- and I don't feel
11 comfortable about that because I don't know the factual
12 background. But that's ten to life, or you can take them all
13 to trial. You know what the evidence is.

14 THE DEFENDANT: It ain't really nothing. You know
15 what? I'm going to California, do 25 to life. It doesn't
16 matter what you give me. I'm never -- I'm never going to get
17 out from over there, you know.

18 THE COURT: Okay.

19 THE DEFENDANT: That's why it doesn't matter to me if
20 I take ten years to life; it doesn't matter. I'll take them
21 because I'm going to this prison, and from here, whenever I get
22 out, I'm going over there and they're going to give me 25 to
23 life, and I know it, you know, because I really have a lot of
24 strikes, you know, and I know I got to go fight more charges
25 over there.

1 THE COURT: Well, what do you want to do about that
2 sentence on behalf of Mr. Mora. Ten to life?

3 MR. BIGGS: Yes.

4 THE COURT: What's the State's position?

5 MS. WISSLER: Judge, actually the firearm enhancement
6 provides that it would be six to life plus a consecutive zero
7 to five. So the Board of Pardons takes jurisdiction after he
8 serves the mandatory six and it is up to the Board of Pardons
9 to decide how much of the zero to five he serves. So it could
10 be something less than ten to life.

11 THE COURT: Right.

12 MS. WISSLER: But our position, given what happened
13 today, is that the appropriate thing, that if Adult Probation
14 and Parole is willing to do a post-sentence report instead of a
15 presentence report, it has always been and will always be our
16 position with respect to Mr. Mora that he should go to prison.
17 The reason -- in fact, the only reason that an offer was made
18 in connection with these cases is because of the victims being
19 fearful and somewhat unwilling to come in. They have
20 participated in preliminary hearings, but we have had several
21 requests from victims, because of the fear factor, to resolve
22 these cases and that's why we resolved it.

23 THE COURT: All right. Do you want to resolve it
24 that way, Mr. Mora? Ten to life?

25 THE DEFENDANT: It's going to be six to life, right?

1 THE COURT: Right. Six minimum, and then the Board
2 of Pardons can decide whether to let you out within the next
3 five.

4 THE DEFENDANT: All right. I'll do it then.

5 THE COURT: Is that the deal you want?

6 THE DEFENDANT: Yeah, I'll take it.

7 THE COURT: Okay. Now, the first thing I want to
8 know is did you do the conduct that gives rise to the charge.

9 THE DEFENDANT: What?

10 THE COURT: You're charged with an aggravated
11 robbery, that on other about October 11th, 2000, that you, with
12 the use of a dangerous weapon, by force or fear -- I don't know
13 the name of the complaining witness.

14 Can you give me any more about the circumstances?

15 MR. BIGGS: Your Honor, I put in the factual bases as
16 follows: On October 11th, 2000, in Salt Lake County, I took
17 personal property from the victim, and I had -- and possessed a
18 gun that got the victim to give me the money.

19 This particular case, your Honor, was on a video
20 tape which I have observed and that's exactly what occurred.

21 THE COURT: Okay. Did you do that?

22 THE DEFENDANT: I plead guilty to that.

23 THE COURT: Okay. You acknowledge you did that?

24 THE DEFENDANT: Yes. I plead guilty to that one
25 right there, to the first degree.

1 THE COURT: Okay. All right. Let me ask you a
2 couple of questions. Mr. Mora, we've had a lengthy discussion
3 here about whether you could bring that matter to trial.

4 First, let me ask you, have ever been accused of a
5 criminal offense in Utah or California or anywhere that you did
6 take to trial?

7 THE DEFENDANT: I never took nothing to trial.

8 THE COURT: Okay. So your conviction in California
9 is based on a plea as well.

10 THE DEFENDANT: All plea bargains.

11 THE COURT: All plea bargains. Okay. And usually
12 with a plea bargain you get less than what you're charged with,
13 isn't that your understanding?

14 THE DEFENDANT: No. Right now under the conditions I
15 have from California it doesn't matter to me if you -- if it
16 was 20 years that we talked about, me and my lawyer --

17 THE COURT: Right.

18 THE DEFENDANT: If it was that, I know what I got to
19 do over there.

20 THE COURT: Right. Okay.

21 THE DEFENDANT: Now, it doesn't really matter how
22 much time I do here, you know, because I'm already stuck, you
23 know.

24 THE COURT: Yeah.

25 THE DEFENDANT: I'm already stuck. I accept it.

1 Now, I want to get this over with and go to prison and do my
2 time.

3 THE COURT: All right. But you know that you don't
4 have to plea; you can take the matter to trial. We talked
5 about that. If there were a trial we would call an impartial
6 jury, citizens to come in.

7 THE DEFENDANT: I know it's a trial, but, look, I'm
8 tired of that county jail. I been there six months. I don't
9 want to be there another date. That's why I'm taking this.

10 THE COURT: Okay. Listen for a minute more. You
11 have rights associated with a trial that you're waiving by
12 entering this plea. So there will be no trial. Do you
13 understand that?

14 THE DEFENDANT: No trial.

15 THE COURT: Right. And if there were a trial we
16 would call an impartial jury. Every one of the jurors would
17 have to agree before you could be convicted. We would, in the
18 course of the trial, call witnesses, the State would. And with
19 Mr. Biggs' assistance you could cross-examine the State's
20 witnesses. You could compel witnesses to testify in your
21 behalf. You could testify yourself or you could remain silent.
22 If you remain silent, no presumption as to your guilt could be
23 drawn by that silence. Do you understand each and all of these
24 rights would be waived by this plea?

25 THE DEFENDANT: Yes, I do.

1 THE COURT: Okay. You clearly understand the penalty
2 for this offense. We spent a lot of time talking for that.

3 THE DEFENDANT: I understand.

4 THE COURT: Talking about that.

5 THE DEFENDANT: I understand.

6 THE COURT: All right, then. And understand that
7 without a trial you're waiving also rights associated with
8 appeal. Obviously, the appeals court can't review a trial that
9 doesn't happen.

10 THE DEFENDANT: I know that.

11 THE COURT: You understand. Okay. And if you enter
12 your plea today you may withdraw, anytime within 30 days of
13 this date, for good cause shown; otherwise you'll be barred
14 from withdrawing your plea. Do you understand that?

15 THE DEFENDANT: Yes.

16 THE COURT: All right. Have you been satisfied with
17 the advice given to you by Mr. Biggs?

18 THE DEFENDANT: Yes, yes, I'm satisfied.

19 THE COURT: Do you have any questions of him or me?

20 THE DEFENDANT: I don't have no questions.

21 THE COURT: All right. Would you sign -- remove --
22 are you right handed?

23 THE DEFENDANT: I'm right handed.

24 THE COURT: Remove the hand restraints, please.

25 And sign of the Statement of Defendant.

1 The record may show the defendant, in open court,
2 has signed the Statement of the Defendant.

3 The Court will add its signature as his and as a
4 witness to the -- as a witness to his and respective counsel.

5 Now, I think today is the 20th day of April, so I
6 better change those dates. Let's see. The 20th there.

7 MR. BIGGS: I put the wrong date, your Honor?

8 THE COURT: You put the 24th, but I changed that. So
9 it's obviously done in open court.

10 All right. Now, then to the Information in case
11 882, aggravated robbery, first-degree felony, how do you plead,
12 guilty or not guilty?

13 THE DEFENDANT: I pled guilty.

14 THE COURT: All right. And count two is being
15 dismissed, right?

16 MS. WISSLER: That's correct, your Honor.

17 THE COURT: All right.

18 MS. WISSLER: That's the State's motion.

19 THE COURT: Based on the plea in 882, the Court will
20 dismiss the other cases, and they are 169 and 102.

21 MR. BIGGS: And, your Honor, for the record, although
22 we stated it before, Mr. Mora waives his right to the
23 preparation of a presentence report and is requesting the Court
24 to sentence him today.

25 THE COURT: Okay. The Court accepts that waiver.

1 I have previously asked you -- let me just have you
2 repeat -- to this offense you plead guilty, is that correct,
3 the aggravated robbery?

4 THE DEFENDANT: Yes.

5 THE COURT: Okay. I entered a plea of guilty. And
6 there is a mandatory enhancement, and the Court will add five
7 years mandatory enhancement, so it will be -- it's actually six
8 to life plus five-year mandatory enhancement. Right?

9 MS. WISSLER: It is a six-to-life plus a
10 zero-to-five, consecutive.

11 THE COURT: Okay. That's what I will do. Six to
12 life plus a zero to life consecutive, forthwith, Utah State
13 Prison, \$10,000 fine plus a surcharge, and you will be sent
14 immediately to prison and they will do a post-sentence report
15 for you.

16 MR. BIGGS: Your Honor, one last thing.

17 THE COURT: Yes.

18 MR. BIGGS: He has served 182 days and I would ask
19 credit for that time.

20 THE COURT: Giving credit for 182 days' time served.

21 MR. BIGGS: Thank you.

22 THE COURT: Good luck to you, Mr. Mora.

23 (Proceedings in the above-entitled matter were
24 concluded.)
25

C E R T I F I C A T E

I, Kathleen Schultz, an Official Court Reporter for the Third District Court in and for Salt Lake County, State of Utah, do hereby certify that I reported the above-entitled matter on April 20, 2001, and that the preceding pages 1 through 25, inclusive, comprise a true and correct Reporter's Transcript of Proceedings.

Dated on this 8th day of August, 2001.

A handwritten signature in cursive script, reading "Kathleen Schultz", is written over a horizontal line.

Kathleen Schultz, CSR