2018

STATE OF UTAH, Plaintiff/Appellee, v. ERNEST CLAYTON HARPER, Defendant/Appellant. : Brief of Appellee

Utah Court of Appeals

PUBLIC

Case No. 20180024-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

ERNEST CLAYTON HARPER,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for stalking, a second-degree felony, in the Third Judicial District, Salt Lake County, the Honorable Katherine Bernards-Goodman presiding

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INTRODUCTION

Ernest Clayton Harper pleaded guilty to stalking. The plea agreement provided, "The State agrees to a two-step 76-3-402 reduction if I comply 100% with all terms and conditions of AP&P probation." Harper moved to withdraw his guilty plea after he found out that AP&P was going to recommend prison. Harper argued that his plea was unknowing and involuntary because he was pressured into pleading due to his mental condition, and his attorney at the time told him he was guaranteed probation.

Harper has changed tack on appeal, arguing that the prosecutor promised to recommend probation but breached that agreement. Alternatively, he argues that the language of the plea agreement misled him

into thinking the prosecutor was going to recommend probation. He also argues that if the prosecutor did not intend to recommend probation, Harper's counsel was ineffective for not making the prosecutor correct his contrary "false statement" in the plea agreement.

This case also involves a consolidated appeal with another stalking case of Harper's. But Harper has withdrawn his claim of error in the other case. Harper suggests that severance of the two appellate cases is necessary because of a supposed jurisdictional defect in that other case. While the Court may sever the cases, severance is not necessary because any jurisdictional problem would be limited to the specific case in which it arises.

While there is no jurisdictional problem in the appeal Harper has abandoned, this Court does *not* have jurisdiction in the appeal that Harper has *not* abandoned. Harper filed a timely motion to withdraw his guilty plea, but he did not challenge his plea on the bases he now raises. This Court has held that the Plea Withdrawal Statute bars appellate consideration—even for plain error or ineffective assistance—of challenges not specifically raised below.

If this Court disagrees that Harper's challenges are unpreserved, it should affirm the district court's denial of his motion to withdraw his plea. Harper has not established that his plea was unknowing or involuntary.

Because the language of the plea agreement is ambiguous, Harper had to present extrinsic evidence of the parties' intent. He presented no evidence to establish that the prosecutor agreed to recommend probation or that Harper genuinely and legitimately thought that the prosecutor had done so.

STATEMENT OF THE ISSUES

1. Is severance of the consolidated appeal necessary?

Standard of Review. Because this issue arises for the first time on appeal, addresses the authority of the appellate court, and does not ask this Court to review any (in)action by the district court, no standard of review applies.

2. Does this Court have jurisdiction to address challenges to Harper's guilty plea that he did not raise in his timely motion to withdraw that plea?

Standard of Review. Same as for Issue 1.

3. If this Court has jurisdiction, did the district court act within its discretion when it concluded that Harper had not shown that his plea was unknowing or involuntary?

Standard of Review. A court's denial of a motion to withdraw a plea is reviewed for abuse of discretion. *State v. Magness*, 2017 UT App 130, ¶16, 402 P.3d 105.

4. If this Court has jurisdiction, has Harper proved that counsel was ineffective for not requiring the prosecutor to clarify during the plea colloquy that the plea bargain did not contain a promise to recommend probation?

Standard of Review. No standard of review applies to a claim of ineffective assistance brought for the first time on appeal. *State v. Bunker*, 2019 UT App 118, ¶8, --- P.3d ----.

STATEMENT OF THE CASE

This consolidated appeal involves two cases against Ernest Clayton Harper in which the district court imposed prison sentences during a global sentencing.

The First Case

In case 131401036 (the first case), Harper pleaded guilty to one count of third-degree felony stalking for violating a civil stalking injunction obtained by his now ex-wife. R*036*:4, 38, 50.[1] The probable cause statement accompanying the information stated that the same day his ex-wife received the injunction, Harper texted her and sent a topless picture of her to her

[1] The State cites the record using the last three digits of the trial court case number in italics, with a colon preceding the page number in the case record. Thus, "R*036*:4" refers to page 4 in the record of the first case (case 131401036).

family members and employer and posted it online. R*036*:2–3. After pleading guilty, Harper was placed on probation. R*036*:81.

The First Appeal of the First Case

Harper appealed after the court sentenced him to probation, with the appellate case designated as 20140030-CA. R*036*:92, 111–12. But on appeal, Harper did not challenge his sentence; rather, he challenged his plea despite not having moved to withdraw his plea before his sentence was announced. R*036*:396–97. This Court summarily dismissed the appeal for lack of jurisdiction. R*036*:396–97.

Revocation of Probation in the First Case

Twenty-one months after sentencing, Harper admitted that he violated the terms of his probation by contacting his ex-wife, but the court continued probation. R*036*:207, 336. About a year and a half later, Harper's probation officers arrested him for suspected custodial interference when he did not return his son to Harper's ex-wife. R*036*:480. As he was transported to jail, Harper kicked one officer several times and head-butted another. R*036*:480. Harper later admitted he violated his probation by committing attempted assault by a prisoner. R*036*:714, 720–21. The court revoked Harper's probation and imposed the original 0 to 5-year prison sentence. R*036*:604–05.

The Second Appeal of the First Case

Harper appealed from the order revoking his probation and imposing the original prison sentence, with the appellate case designated as 20180250-CA. R*036*:615, 631. This is one of the appeals at issue here.

The Second Case

In case 161911938 (the second case),[2] the probable cause affidavit averred that Harper sent hundreds of texts to an ex-girlfriend over a three-week period and threatened to send nude pictures of her to her employer to get her fired; he also went to his ex-girlfriend's apartment complex after management had told him not to return, and he would not leave when they told him to. R*938*:2.[3]

Harper was charged with criminal trespass, a class B misdemeanor, and stalking, originally filed as a third-degree felony and later amended to a second. R*938*:1–2, 78. With the assistance of counsel (plea counsel), Harper

[2] Although the global sentencing involved resolution of more than two cases against Harper, the State uses the "first" and "second" designations for ease of reference.

[3] This occurred while Harper was still on probation in the first case, about a year after the court had continued probation and about eight months before Harper assaulted the probation officers. R*036*:431, 480. The court entered an order to show cause in the first case based on the allegations in the second case, but with the parties' agreement the court held the matter pending resolution of the second case. R*036*:437, 452, 458.

pleaded guilty to stalking as a second-degree felony. R*938*:160, 166. In exchange, the trespassing charge was dropped and the State agreed to recommend release to Adult Probation & Parole supervision "pending sentencing." R*938*:160. The plea statement also said, "The State agrees to a two-step 76-3-402 reduction if I comply 100% with all terms and conditions of AP&P probation." R*938*:160. But Harper volunteered at the hearing that he "realize[d] that the penalty of this guilty plea could … put [him] in prison." R*938*:597. And during the subsequent colloquy Harper confirmed that he understood when the court said it could sentence him to prison even though "[s]omething less may be recommended." R*938*:602. The court accepted the plea, ordered Harper's release, and directed AP&P to complete a presentence investigation (PSI) report. R*938*:604–05.

[redacted]. The motion did not state a basis for withdrawal. R*938*:184. Represented by new counsel (withdrawal counsel), Harper later filed another motion to withdraw the plea in which he argued that his plea was involuntary because of his emotional instability at the time, and it was unknowing because his plea counsel's advice had misled him. R*938*:306–07.

Harper provided a declaration stating that his plea counsel "told me I'll get probation" and that Harper "did not know that by pleading guilty, I could be sent to prison." R*938*:309. He added, "I did not know that AP&P would recommend prison." R*938*:309.

At the hearing on the motion to withdraw the guilty plea, Harper's withdrawal counsel acknowledged that Harper understood the court could impose imprisonment, but he argued that Harper "expected that he would get probation." R*938*:632. He pointed to Harper's emotional instability and the statement of his plea counsel "that he would get probation if he pled as charged." R*938*:631–33. Harper's withdrawal counsel also pointed to the language of the plea agreement, which said the State would agree to a two-step reduction "if I comply 100% with all terms and conditions of AP&P probation." R*938*:160, 631–32, 635–36, 639. His withdrawal counsel argued that, at least to a non-lawyer, that language "clearly would imply" that "the State is agreeing that he will receive probation." R*938*:631–32. His withdrawal counsel stated that Harper would not have had "a problem with the plea" if AP&P and the prosecutor recommended probation. R*938*:636. But he claimed that given the language of the plea agreement and his plea counsel's "statement that he would get probation," Harper "was misled" into pleading

guilty. R*938*:636, 639. His withdrawal counsel made no proffer of what Harper actually understood the language of the plea agreement to mean.

The prosecutor proffered that "we never talked about probation being agreed upon," and he emphasized that it would have been in the plea statement if it was part of the agreement. R*938*:635.

The district court found that Harper understood that prison was a possibility when he pleaded guilty and that there was no basis for Harper thinking "he had a guarantee of probation." R*938*:639. The court noted that it had told Harper he could be sentenced to prison, and the court found it "very difficult to think" that Harper's plea counsel "would have ever told him that there wasn't a possibility of prison and that what the sentence was would be up to the judge." R*938*:638. The court denied the motion, explaining that "find[ing] out he has a prison recommendation" was not a valid basis to withdraw a plea. R*938*:638.

Sentencing on the Second Case

After the district court denied Harper's motion to withdraw his plea, but before sentencing, Harper—who was still represented by counsel at the time—sent the court a dozen letters or pro se motions addressing his plea. R*938*:339–51, 357, 370, 381–85, 433, 439–51, 455, 458–60, 488–98, 506, 510, 514–16. In them, Harper acknowledged that the court would decide what sentence

to impose, but he argued that he had "sign[ed] a deal for probation with the prosecutor"; Harper asked either for the prosecutor to "keep the deal it made" or for the court to allow withdrawal of the plea if the prosecutor was going to "recommend prison." R*938*:339–51, 357, 370, 381–85, 433, 439–51, 455, 458–60, 488–98, 506, 510, 514–16.

Harper was represented by new counsel at sentencing (sentencing counsel), and she argued for probation. As part of that argument, she pointed to the language of the plea agreement about a 402 reduction. R*938*:736. Stating that she had "no idea how an argument could be made that this didn't agree to probation," Harper's sentencing counsel asserted that such language "would never be part of a potential prison sentence recommendation," or at least would be a "very confusing" way to word an agreement that allowed for a prison recommendation. R*938*:736. Still, his sentencing counsel did not argue that the prosecutor was bound to recommend probation or that the prosecutor breached any such agreement, nor did she ask the court to reconsider its denial of Harper's motion to withdraw his plea.

The prosecutor argued for imprisonment. R*938*:751–52. The court imposed a 1 to 15-year sentence. R*938*:549–50.[4]

[4] This sentence was imposed at the same hearing in which the court revoked Harper's probation on the first case. R*938*:549–50.

Appeal of the Second Case

Harper timely appealed from the final order in his second case, with the appellate case designated as 20180024-CA. R*938*:571, 575.[5] Upon Harper's motion, this Court consolidated this appeal with his second appeal of the first case (20180250-CA), with the consolidated appellate case designated as 20180024-CA. R*036*:639.

SUMMARY OF ARGUMENT

As an initial matter, Harper argues that this Court must sever the appeals in the first and second cases, presumably because he believes there is a jurisdictional defect in the appeal of the first case. While the Court may sever the cases, doing so is not necessary. There is no jurisdictional defect in the first case, and Harper has abandoned his challenge in that case anyway. The Court need only affirm.

In the second case, Harper argues for the first time on appeal that the plea agreement included a promise that the prosecutor would recommend probation and the prosecutor was required to fulfill that promise. Harper claims that the breach rendered the plea unknowing and involuntary.

[5] Harper had earlier filed a notice of appeal from a non-final order in the second case, with the appellate case designated as 20170662-CA. R*938*:355, 590. This Court dismissed the appeal for lack of jurisdiction. R*938*:590–91. That earlier appeal is not at issue here.

Alternatively, Harper argues that he was misled into understanding that the prosecutor would recommend probation, and that if the prosecutor never intended to do so, Harper pleaded guilty without understanding the actual value of the bargain he made. Finally, Harper argues that if there was no promise to recommend probation, his plea counsel was ineffective for not objecting to the prosecutor's contrary, "false" statement in the plea agreement and demanding during the plea colloquy that the prosecutor correct or clarify it.

This Court does not have jurisdiction over any of the challenges in Harper's second case. As this Court held in *State v. Badikyan*, a timely motion to withdraw a guilty plea is insufficient to confer appellate jurisdiction over challenges that are not raised in the motion. All of Harper's appellate challenges are new. His trial motion focused on his own mental condition and his misunderstanding that he was *guaranteed* probation, based on the language of the plea agreement and his plea counsel's assurances. Harper never alerted the district court to his argument that he thought he was entitled to a probation *recommendation* from the State. And he never presented any evidence about what he believed the prosecutor had promised to do. Finally, Harper essentially concedes that he did not raise his claim that his

plea counsel should have demanded that the prosecutor clarify or correct the statements in the plea agreement.

But if this Court concludes that Harper preserved his challenges, it should reject them because Harper did not present evidence to prove that his plea was unknowing or involuntary. No evidence establishes that the prosecutor promised to recommend probation, and the prosecutor's proffer directly refutes any assertion of such a promise. Harper had the burden to prove his claim, and he failed to do so.

Furthermore, even if there were a promise to recommend probation, at most that would entitle Harper to resentencing before a different judge where the prosecutor makes the recommendation. But even so, the State would be excused from performing that obligation because Harper's subsequent criminal activity amounted to a breach of an implied promise to not change the circumstances under which the parties reached their agreement.

The evidence is also insufficient to show that Harper was genuinely and legitimately misled by the language in the plea agreement. On the record Harper created below, Harper cannot show an abuse of discretion in the district court's denial of his motion to withdraw his plea.

Finally, if this Court has jurisdiction over Harper's ineffective-assistance claim, it should dismiss the claim as inadequately briefed.

ARGUMENT

I.

Any jurisdictional defect in either appeal affects only that appeal; this Court has jurisdiction in the first case and should affirm because Harper has abandoned his appellate challenge.

Harper suggests that this Court should vacate its order consolidating the appeals in the first and second cases.[6] Br.Aplt.5. Harper seems to imply that doing so is necessary "in order for this Court to separately rule" on the merits of his appeal in the second case. Br.Aplt.5. The logic of Harper's argument seems to be that (1) this Court dismissed Harper's first appeal in the first case for lack of jurisdiction; (2) that jurisdictional ruling "is controlling" in the second appeal of the first case; and (3) any jurisdictional defect in the first case necessarily infects the second case as well. Br.Aplt.5.

This Court may vacate its consolidation order, but doing so is not necessary to reach the merits of either the first or second appeal. There is no jurisdictional defect in the first case. Harper's second appeal of the first case—which he now abandons—is jurisdictionally distinct from his first appeal of

[6] Although Harper's brief says he "moves to vacate the prior order of consolidation," Harper has not filed a motion to vacate. Br.Aplt.5. But that would not prevent the Court from doing so on its own motion.

the first case. But even if there were a jurisdictional defect in his first case, it could not affect this Court's authority to rule on the issues in the second case.

In the first appeal of the first case, this Court dismissed for lack of jurisdiction under the Plea Withdrawal Statute, Utah Code §77-13-6, because Harper challenged the validity of his guilty plea on appeal but he had not filed a timely motion to withdraw his guilty plea in the first case. R*036*:396–97.

Harper's second appeal in the first case does not challenge the validity of his guilty plea. Rather, it ostensibly challenges the probation revocation in the first case. Br.Aplt.5. This Court would have jurisdiction to address any post-plea orders that Harper challenges in his first case, including the revocation of his probation. *See NPEC LLC v. Miller*, 2018 UT App 85, ¶¶4–10, 427 P.3d 357 (per curiam) (concluding that law of the case barred consideration of issues in second appeal that did not "challenge actions occurring after the dismissal of his first appeal"); *State v. Scott*, 2017 UT App 103, ¶¶8–9, 400 P.3d 1172 (concluding that court had jurisdiction to address sentence but not guilty plea).

But Harper has now withdrawn his challenge to the district court's probation revocation in the first case. Br.Aplt.5. He concedes that the probation revocation "cannot be legitimately deemed to be legally

unreasonable or excessive under governing law." Br.Aplt.5. Where Harper has abandoned his challenge to the probation revocation, the proper ruling in the first case is not dismissal for lack of jurisdiction, but affirmance.

Even so, any possible jurisdictional problem in the first case does not require severing the two cases on appeal. Any preclusive effect that this Court's prior dismissal had can at most affect the first case. Consolidation on appeal does not erase the distinct identities of multiple cases. *See Pulham v. Kirsling*, 2019 UT 18, ¶¶22, 45, 443 P.3d 1217 (analyzing limits on appellate jurisdiction over one appeal separate from substantive issues in second consolidated appeal); *State v. Earl*, 2015 UT 12, ¶13, 345 P.3d 1153 (affirming "the decisions in both of the consolidated cases" and remanding for further consideration). Just as the jurisdictional limits of the Plea Withdrawal Statute are applied to specific issues raised within one case and not necessarily the entire case, *see Scott*, 2017 UT App 103, ¶¶8–9, any jurisdictional defect in the first case based on the Plea Withdrawal Statute cannot reach the second case, even if the two are consolidated for purposes of appeal.

Although this Court lacks jurisdiction over the appeal in the second case, as argued below in Point II, the jurisdictional defect in Harper's appeal does not stem from this Court's earlier order in the first case. Because this Court has jurisdiction over the second appeal from the first case, and because

Harper has withdrawn his challenge to the district court's probation revocation, this Court should simply affirm the district court's order in the first case.

II.

This Court does not have appellate jurisdiction over Harper's challenges to his guilty plea in the second case because the appeal involves new challenges not raised in his motion to withdraw.

Harper presents two arguments in his appeal on the second case. First, he argues that the prosecutor either agreed to recommend probation and breached that promise; or he misrepresented that he would recommend probation, leading Harper to miscalculate the value of the State's concessions and thus rendering his plea unknowing or involuntary. Br.Aplt.3, 6–15, 17–24. Second, Harper argues that—if the prosecutor had not promised to recommend probation—Harper's plea counsel was ineffective for not demanding at the plea colloquy that the prosecutor clarify or correct the "false" statement in the plea agreement that he would recommend probation. Br.Aplt.3, 15–16, 23–29.

Neither challenge is preserved, and under the Plea Withdrawal Statute, this Court lacks jurisdiction over challenges to a guilty plea that are not raised before sentence is announced. This Court has applied that rule even when a

defendant timely moves to withdraw his guilty plea but, like Harper, challenges the plea on grounds that differ from those raised on appeal.

In *State v. Rettig*, 2017 UT 83, 416 P.3d 520, the supreme court held that the Plea Withdrawal Statute imposes "*both* a rule of preservation and a jurisdictional bar on appellate consideration of *matters not properly preserved*." *Id.* ¶27 (second emphasis added). If the matter is not properly preserved, appellate courts lack jurisdiction to consider it, even through plain-error review or an ineffective-assistance challenge. *Id.* ¶¶27, 44, 47–51, 61. And in *State v. Allgier*, 2017 UT 84, 416 P.3d 546, the supreme court explained that the Plea Withdrawal Statute's rule of preservation requires a challenge to be *specifically* raised. *Id.* ¶25. It "require[s] that an issue be 'presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.'" *Id.* The test is not just whether a motion was timely, but "whether an issue was specifically raised in the district court in a timely fashion and whether evidence or relevant legal authority was introduced to address the issue." *Id.* "The Plea Withdrawal Statute requires a defendant to take each of these steps to withdraw a plea of guilty or no contest." *Id.*

Although *Rettig* and *Allgier* involved appellate review where there was no valid motion to withdraw the pleas, this Court held in *State v. Badikyan*, 2018 UT App 168, 436 P.3d 256, *cert. granted*, 437 P.3d 1247, that under *Rettig*

and *Allgier* a timely motion is not sufficient to grant appellate jurisdiction over challenges not raised in that motion. *Badikyan*, 2018 UT App 168, ¶¶18–22; *see also* Utah Code Ann. §77-13-6(2)(c) (West 2017) ("*Any challenge* to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78B, Chapter 9, Postconviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure." (emphasis added)).

Although Harper timely moved to withdraw his plea, he did not challenge his plea on the bases he now raises. In his motion, Harper argued that he did not "appreciate[e] the full consequences of his guilty plea" for two reasons: he was emotionally unstable because he faced the prospect of losing custody of his son, and his attorney advised him that he would get probation if he pleaded guilty. R*938*:307, 309. Harper thus claimed that he "did not know" that he "could be sent to prison." R*938*:309. He cited cases in his motion discussing mental condition and its effect on voluntariness. R*938*:306–07.

Harper never argued in his motion or during oral argument on that motion that the plea agreement actually contained an enforceable agreement that the prosecutor would recommend probation. R*938*:306–07, 631–40. During oral argument, Harper's withdrawal counsel did argue that the language of the plea agreement suggested that a non-attorney would have

understood the plea agreement to mean that "the State is agreeing that he *will receive* probation." R*938*:631–32 (emphasis added). But he used that language to reinforce his argument that Harper's plea counsel misled him, particularly in light of Harper's mental state at the time. R*938*:631–33, 639.

And Harper's withdrawal counsel phrased the argument in terms of Harper thinking he was guaranteed probation—not in terms of a promised recommendation that the sentencing court had discretion to disregard. *See* R*938*:631 (acknowledging that "we understand" that the court had discretion in sentencing but arguing that "the problem is … that he was informed by his attorney … that *he would get probation* if he pled" (emphasis added)); R*938*:632 ("[T]he State is agreeing that *he will receive probation*." (emphasis added)); R*938*:632 ("And he was relying on his attorney's representation that *he will be given probation*." (emphasis added)); R*938*:632 "[Y]ou wouldn't put down a two-step reduction if he complies with probation if there wasn't certainly an inference *it was expected that he would get probation*." (emphasis added)); R*938*:632 ("[W]hat was in his mind at the time … was the representation by this attorney that in exchange for pleading … *you will get probation* … ." (emphasis added)); R*938*:639 ("[H]e was entering a plea based on the statement that *he would get probation*." (emphasis added)).

The district court naturally understood these repeated references as an argument that Harper thought he was guaranteed probation. It rejected Harper's argument, stating that it did not understand why Harper "would think he had a guarantee of probation" when the court told him otherwise during the plea colloquy and Harper reiterated at the time that he understood. R*938*:639. The court also stated that disliking a sentencing recommendation was not a valid basis for withdrawal of a plea. R*938*:638.

A guarantee of probation is not the same thing as a promise that the prosecutor would recommend probation. Rule 11 of the Utah Rules of Criminal Procedure provides an avenue for parties to commit the court to a particular sentence. After reaching a tentative agreement, the parties may disclose that agreement to the court before entry of a plea. Utah R. Crim. P. 11(i)(2). "The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved." *Id.* And if the judge later changes her mind, she must give the defendant a chance to withdraw his plea. Utah R. Crim. P. 11(i)(3). That process is wholly distinct from a typical sentencing recommendation, which the court is not bound to accept. Utah R. Crim. P. 11(h)(2).

If Harper was really arguing that the prosecutor had promised to recommend probation, or that Harper was misled into thinking he had,

Harper did not present that argument "in such a way that the trial court ha[d] an opportunity to rule on that issue.'" *Allgier*, 2017 UT 84, ¶25. Harper never asked for an evidentiary hearing to create a record of what the prosecutor promised. He never proffered his own testimony or his plea counsel's testimony that they understood the prosecutor had promised to recommend probation. He never requested a ruling interpreting the language of the plea agreement or making findings about the reasonable expectations of the parties *about what the State promised to do*. He never cited any cases dealing with the interpretation of plea agreements, breach of plea agreements, or whether a defendant understood the value of the promises made to him. And on appeal, Harper never tries to challenge the district court's finding on the claim he presented below—that Harper was guaranteed probation or at least thought that he was.

Because no "evidence or relevant legal authority was introduced to address the issue" Harper raises on appeal, he did not preserve his challenge. *Allgier*, 2017 UT 84, ¶25; *see also Salt Lake City v. Josephson*, 2019 UT 6, ¶12, 435 P.3d 255 ("The party must put forth enough evidence that 'the issue [is] sufficiently raised to a level of consciousness before the trial court.'" (alteration in original)).

Harper's failure to preserve is even clearer on his second challenge—that his plea counsel was ineffective for not insisting during the plea colloquy that the prosecutor correct the statement in the plea agreement. Harper never raised this objection below. Indeed, Harper effectively concedes that he did not preserve this claim, arguing it through the lens of ineffective assistance. Br.Aplt.1. 3, 24–29. But under *Badikyan*, Harper's concession means this Court has no jurisdiction to consider the new appellate challenge even under an ineffective-assistance rubric. *Badikyan*, 2018 UT App 168, ¶¶18–22.

Harper does make passing references in his appellate brief to this claim as if it were preserved. Br.Aplt.15, 23. But he cites no place in the record where this issue was preserved and presents it in his issue statement as an unpreserved claim. Br.Aplt.1–2. Harper's motion to withdraw his guilty plea and his arguments on that motion never addressed allegedly false statements by the prosecutor or argued that the prosecutor was required to correct any false statements.

Because Harper did not preserve the challenges to his plea that he now raises on appeal, this Court lacks jurisdiction. *Allgier*, 2017 UT 84, ¶25; *Rettig*, 2017 UT 83, ¶¶26–27; *Badikyan*, 2018 UT App 168, ¶¶18–22. This Court should therefore dismiss the appeal in the second case for lack of jurisdiction.

III.

If this Court has jurisdiction over Harper's second case, it should affirm because Harper has failed to carry his burden of proving that his plea was unknowing or involuntary.

If the Court agrees that Harper's appellate challenges are not preserved, then under *Badikyan* it cannot address them even for plain error or ineffective assistance. If, however, the Court believes that Harper's challenge below was sufficient to give the district court an opportunity to rule on the issues he now asks this Court to address, then this Court may address them on their merits. But even if this Court gets to the merits, Harper's arguments for withdrawing the plea lack record support.[7]

[7] The supreme court granted a writ of certiorari to review *Badikyan*. But "'[t]he fact that certiorari was granted ... does not deprive [the opinion] of precedential value.'" *Estrada v. Mendoza*, 2012 UT App 82, ¶7 n.4, 275 P.3d 1024 (omission and second alteration in original). In the event that the supreme court were to overturn *Badikyan* before this Court disposes of Harper's appeal, that may allow this Court to reach unpreserved challenges to Harper's guilty plea through plain error or ineffective assistance. But apart from his claim that his plea counsel should have insisted on the prosecutor correcting the plea statement, Harper has not presented any justification for reaching his unpreserved challenges. Harper would not be entitled to review of his other challenges even for plain error or ineffective assistance. *See, e.g.*, *State v. Rhinehart*, 2007 UT 61, ¶21, 167 P.3d 1046 (refusing to consider unpreserved issue when appellant did not brief any justification for reaching it).

A defendant may withdraw a guilty plea only on "a showing that it was not knowingly and voluntarily made." Utah Code Ann. §77-13-6(2)(a). Harper argues that his plea was unknowing and involuntary for two alternative reasons. First, he argues that the plea agreement obligated the prosecutor to recommend probation, and the prosecutor's prison recommendation breached the agreement and rendered Harper's plea unknowing or involuntary. Br.Aplt.11, 16. Second, Harper argues that at the very least, the language in the plea agreement misled him into thinking the prosecutor had promised to recommend probation, thus causing Harper to misunderstand the value of the plea bargain. Br.Aplt. 3, 9–13, 16–24.

The record does not support either of Harper's alternative claims. It was Harper's burden to prove that his plea was unknowing or involuntary. Any deficiency in the record must be held against Harper. First, Harper did not establish that the prosecutor agreed to recommend probation. But even if it did, Harper would not be entitled to withdraw his plea—at most he would

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For the same reason, this Court need not stay this case or certify it to the supreme court pending that court's disposition of *Badikyan*. Either Harper sufficiently presented his claims and this Court may reach them, or he did not and he has forfeited them by not arguing plain error or ineffective assistance. (As for Harper's single ineffective-assistance claim, it is inadequately briefed, as demonstrated in Point IV below, and thus does not present the kind of significant issue that justifies certification.)

be entitled to resentencing, though even that remedy is unavailable because Harper's continuing criminal conduct excused the prosecutor from any obligation to recommend probation. Second, Harper did not establish that he was misled into thinking the prosecutor had promised to recommend probation. He presented no evidence of any misrepresentation and no evidence that Harper actually thought the prosecutor had promised to recommend probation.

But if this Court disagrees and believes that there is some evidence to support Harper's position, the most it can do is remand for the district court to make credibility and other findings to resolve any conflict in the evidence.

A. The record does not demonstrate that the prosecutor promised to recommend probation; in any event, the prosecutor's prison recommendation would not entitle Harper to withdrawal of his plea.

Harper repeatedly refers in his brief to an "agreement for probation." Br.Aplt.10, 11, 12, 13, 14, 15. The State interprets this as an argument that the prosecutor agreed to recommend probation. Harper argues that "the State was obligated to keep its word," and that its failure to do so entitles Harper to withdraw his plea. Br.Aplt.11, 16.

But Harper assumes that the plea agreement contains a promise that the prosecutor would recommend probation. He has never proved that key

fact. In any event, he would not be entitled to withdraw his plea even if the prosecutor had promised to recommend probation.

1. Harper did not prove that the plea agreement contained a promise to recommend probation.

Harper relies on the language of the plea agreement to argue that the prosecutor agreed to recommend probation. But the language is ambiguous, so Harper must rely on extrinsic evidence to interpret the agreement. Because Harper presented no extrinsic evidence to the district court that could have established that key point, this Court must affirm.

The plea statement says, "The State agrees to a two-step 76-3-402 reduction if I comply 100% with all terms and conditions of AP&P probation." R*938*:160. Harper points out that the language does *not* say that "'if he gets probation'" the State will recommend a two-step reduction. Br.Aplt.10. But Harper glosses over something else the language does not say: The plea statement does *not* say that the State will recommend probation. It does not even use Harper's more amorphous phrase, "agree[] to probation." Br.Aplt.10, 11, 12, 13, 14, 15.[8]

[8] Even if the plea statement had used the phrase "agree to probation," that could mean five different things: agree to have the court commit to a sentence of probation under rule 11(i); agree to recommend probation; agree to not oppose Harper's request for probation; agree to not oppose a probation recommendation from AP&P; or agree to recommend probation if AP&P recommended probation.

Because there is no express agreement to recommend probation, Harper's argument must depend on an implied promise to recommend probation. But it is at least equally valid to read the promise to be no more than that the State would agree to a two-step reduction if the court had decided to grant probation.[9]

If Harper means an agreement to seek to commit the court, he has not challenged the district court's finding that Harper had no guarantee of probation and that Harper understood he had no guarantee. Any such claim thus fails at the outset. *See, e.g.*, *State v. Clopten*, 2015 UT 82, ¶45, 362 P.3d 1216 (refusing to address argument where defendant asked the appellate court "to review a decision the trial court did not make" but "failed to challenge the decision the trial court did make"). Such a claim would also fail because Harper has not explained why his after-the-fact declaration should be enough to overcome the "'strong presumption of verity'" given to his "'[s]olemn declaration in open court'" that he understood the court was free to sentence him to prison. *See Arriaga v. State*, 2018 UT App 160, ¶15, 436 P.3d 222, *cert. granted*, 437 P.3d 1247 (Utah 2019); *accord State v. Archuleta*, 2019 UT App 136, ¶20, --- P.3d ----.

. If Harper means an agreement to not oppose Harper's request for probation, the analysis in this case would functionally be no different than if dealing with an agreement to affirmatively recommend probation.

[9] The reference to a two-step reduction does not by itself establish that the prosecutor was committed to probation as opposed to prison. The statute allows for a two-step reduction even for defendants sentenced to prison. Utah Code Ann. §76-3-402(1), (3) (West 2015). The plea statement thus makes one thing clear: If the court decided to sentence Harper to prison, the prosecutor was not obligated to agree to a two-step reduction.

Harper tries to buttress his interpretation of the language by arguing that it "makes no sense" for the prosecutor to agree to release Harper pending sentencing if the prosecutor's "true intentions" were to argue for a prison sentence. Br.Aplt.10. But there is nothing inconsistent with the prosecutor agreeing to release pending sentencing but not binding himself to recommend probation. In fact, that course is imminently reasonable. Harper's release gave Harper an opportunity to prove that he was a good candidate for probation—a test that Harper ultimately failed when he assaulted his probation officers while on release. Thus, the provision recommending release pending sentencing does nothing to remove the ambiguity in the plea agreement. Both interpretations are reasonable.

"Plea agreements are generally interpreted using principles of contract law."[10] *State v. Samul*, 2018 UT App 177, ¶14, 436 P.3d 298. "[A] contractual term or provision is ambiguous if 'it is capable of more than one *reasonable* interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies.'" *Brady v. Park*, 2019 UT 16, ¶54, --- P.3d ----. "[W]here a contractual term or provision is ambiguous as to what the parties

[10] There is "no constitutional right to plea bargain." *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). But if a prosecutor chooses to offer one, and a defendant accepts it by pleading guilty, the parties "essentially" have a contract. *Puckett v. United States*, 556 U.S. 129, 137 (2009).

intended, the question becomes a question of fact to be determined by the fact-finder" "by considering extrinsic evidence of the parties' intent." *Id.* ¶53. Thus, "[t]he underlying purpose in construing a contract is to ascertain the intentions of the parties and to identify what the parties reasonably understood to be the terms of the agreement." *State v. Terrazas*, 2014 UT App 229, ¶27, 336 P.3d 594 (citation and internal quotation marks omitted).

This Court has noted that ambiguities in plea agreements are construed against the government. *Samul*, 2018 UT App 177, ¶13 n.2. That rule represents a modification of the basic interpretive rule of contracts that ambiguities are to be construed against the drafter. *See State v. Patience*, 944 P.2d 381, 387 (Utah Ct. App. 1997) (noting that there are some "limits to the contract analogy," including "'holding the government to a greater degree of responsibility than the defendant ... for imprecisions or ambiguities in plea agreements'"). But construing a contract against the drafter—or, in the case of a plea agreement, against the State—is a tie-breaker rule that is to be applied only *after* looking to extrinsic evidence to ascertain the parties' intent. *See Brady*, 2019 UT 16, ¶56 ("In the rare case where the extrinsic evidence 'does not reveal the intent of the parties,' a district court should then, and only then, 'resolve the ambiguity against the drafter.'" (footnote omitted)); *Wilburn v. Interstate Elec.*, 748 P.2d 582, 585–86 (Utah Ct. App. 1988) ("[T]he

doctrine of construing ambiguities in a contract against the drafter functions as a kind of tie-breaker, used as a last resort by the fact-finder after the receipt and consideration of all pertinent extrinsic evidence has left unresolved what the parties actually intended."). Otherwise, courts risk overriding the actual intent of the parties.

Harper does not point to any *relevant* extrinsic evidence. Indeed, he presented none below. He argues that this Court should simply accept his "unopposed affidavit." Br.Aplt.24. But Harper's declaration says nothing about whether the prosecutor promised to recommend probation. Instead, he said only that he "thought that I would be placed on probation," that his plea counsel "told me I'll get probation," that Harper "did not know that by pleading guilty, I could be sent to prison," and that Harper "did not know that AP&P would recommend prison." R*938*:309.

Nothing in that proffer says that either Harper or his plea counsel understood the language of the plea statement to contain a promise that the prosecutor would recommend probation. In fact, it suggests the opposite. Harper proffers that he understood that he would actually get probation. But a promise to merely recommend probation necessarily includes the possibility that Harper would not get it—precisely the opposite of what Harper declared he understood the agreement to be.

In fact, the prosecutor proffered at the hearing on Harper's motion to withdraw his plea that "we never talked about probation being agreed upon." R*938*:635. The prosecutor added that if there had been an agreement for probation, "[i]t would have been in the plea form that we agree that he gets probation *and* a 402 [reduction] upon successful completion." R*938*:635 (emphasis added). So the only proffer of relevant extrinsic evidence in the record defeats Harper's claim.

Perhaps recognizing that no extrinsic evidence supports his interpretation of the plea agreement, Harper faults the State for having "neglected to have [Harper's plea counsel] testify" about the plea negotiations. Br.Aplt.24. But Harper bore the burden of proving that his plea was unknowing or involuntary, so any record deficiency must be held against Harper, not the State. *State v. Ruiz*, 2012 UT 29, ¶¶36–37, 282 P.3d 998 ("[O]n a presentence motion to withdraw, the burden of proof is on the defendant, who must show that his or her plea was not knowingly and voluntarily made."); *see also State v. Archuleta*, 2019 UT App 136, ¶23, --- P.3d ---- (concluding that defendant failed to meet his burden when he presented no "'objective evidence'"—only "'self-serving statements'" that were contradicted by his statements during plea colloquy); *State v. Powell*, 2015 UT App 250, ¶¶6–8, 361 P.3d 143 (concluding defendant failed to meet his

burden when evidence he presented was "thin, at best" and was contradicted by other evidence in the record); *State v. Collins*, 2015 UT App 214, ¶9, 359 P.3d 664 (concluding that defendant fell "far short of carrying his burden" when he pointed to evidence that he was confused about the details of his plea during his plea withdrawal hearing, but no evidence that he was confused at the time he entered his plea).

When the party that has the burden of proof in the district court fails to put on evidence to support his claim, this Court must affirm the denial of the claim. *See State v. Topanotes*, 2003 UT 30, ¶11, 76 P.3d 1159 (stating that remand for further factual development is inappropriate where party with burden of proof has failed to put on evidence to meet that burden); *State v. Hechtle*, 2004 UT App 96, ¶17 n.4, 89 P.3d 185 (same). *See also State v. Alexander*, 2012 UT 27, ¶¶68–69, 279 P.3d 371 (Lee, J., concurring in part and dissenting in part) (stating that lack of evidence supporting motion to withdraw plea should be resolved against defendant, who bears burden of proof). *But see Alexander*, 2012 UT 27, ¶55 (majority opinion) (concluding that "record nonetheless demonstrates that Mr. Alexander's plea was not knowingly and voluntarily made").

Harper does *not* rely on the many letters and pro se motions he submitted to the court to establish the meaning of the plea agreement. But

even if he had, it would be insufficient. After the court denied Harper's motion to withdraw his plea, Harper told the court in several letters and pro se filings that the prosecutor made "a deal for probation." *See, e.g.*, R*938*:339. But these documents do not constitute record evidence. "When a defendant is represented by counsel, he generally has no authority to file pro se motions, and the court should not consider them." *State v. Wareham*, 2006 UT App 327, ¶33, 143 P.3d 302 (internal quotation marks omitted); *accord State v. Finlayson*, 2014 UT App 282, ¶21 n.10, 362 P.3d 926.

In any event, "a deal for probation" is not necessarily an agreement to recommend probation. If anything, it is more consistent with Harper's declaration—that he understood that he had a deal that would guarantee probation. *See* Utah R. Crim. P. 11(i). But the district court found that Harper had no guarantee of probation and that he understood as much. R*938*:639.

Further, Harper was represented by new counsel during sentencing. His sentencing counsel was aware of these letters and was aware that Harper wanted the district court to reconsider its denial of his motion to withdraw his plea. R*938*:685–87, 734, 753. Yet his sentencing counsel chose not to file a motion to reconsider or to present any additional evidence to the court. And although she argued that the language of the plea agreement suggested an agreement for probation or was at least "very confusing," Harper's

sentencing counsel never argued that the prosecutor's prison recommendation breached the plea agreement and entitled Harper to some remedy. R*938*:736. Harper has not argued that his sentencing counsel was ineffective. Given the "strong presumption" of reasonable representation, *Strickland v. Washington*, 466 U.S. 668, 689 (1984), this Court should assume that Harper's sentencing counsel could find no factual basis to support a claim that the prosecutor actually promised to recommend probation. The best she could do on this point was appeal to the confusing language to argue for leniency.

In short, the language of the plea agreement is ambiguous. It does not state that the prosecutor will recommend probation and can reasonably be read as containing no such implicit promise. Because it is ambiguous, Harper had to present extrinsic evidence to the district court to establish that the plea agreement contained a promise to recommend probation. He did not. Because he failed to prove that the plea agreement contained a promise to recommend probation, he has failed to prove that the prosecutor breached any promise by recommending prison.

2. Even if the prosecutor promised to recommend probation, Harper would not be entitled to withdraw his plea.

But even if Harper had made the necessary factual showing below, he

is not entitled to withdraw his plea on this basis for two reasons. First, for any breach of a plea agreement, Harper is entitled only to specific performance—resentencing before a different judge where the prosecutor makes the promised recommendation. Second, Harper is not even entitled to specific performance because his subsequent criminal activity excused the prosecutor from any obligation to recommend probation—Harper's subsequent criminal activity hindered the government and breached an implied promise not to change the circumstances that formed a basis of the agreement.

a. Withdrawal of a guilty plea is not available as a remedy for any breach of a plea agreement.

The State's breach of any agreement entitles Harper only to specific performance, not withdrawal of his plea. When a defendant pleads guilty in exchange for a sentencing recommendation, the prosecutor's promise "must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). Agreeing to recommend one thing but instead recommending another amounts to a breach of the plea agreement. *See id.* at 258–59.

If there is a breach and the defendant objects, the United States Supreme Court has held that state trial courts have the discretion to choose between two remedies based upon the circumstances of the case: (1) plea withdrawal; or (2) specific performance—that is, resentencing in front of a

different judge at which the prosecutor makes the agreed-upon recommendation. *Id.* at 263.

Though the Supreme Court held that the Constitution affords defendants *a* remedy when a prosecutor breaches the sentencing promise, the Court did not specify that they have a right to *a particular* remedy. In practice, resentencing is preferred by far. 21 Am.Jur.2d *Criminal Law* §§655–56 (Westlaw 2014) (citing cases). And the Supreme Court has never prohibited the states from regulating those remedies. In Utah, the legislature has limited the availability of plea withdrawal to situations where the plea was unknowing and involuntary. Utah Code Ann. §77-13-6(2)(a); *Alexander*, 2012 UT 27, ¶23.

Breach of a plea agreement does not render a plea unknowing or involuntary. *Puckett v. United States*, 556 U.S. 129, 137–38 (2009). As the Supreme Court explained, "it is entirely clear that a breach does not cause the guilty plea, when entered, to have been unknowing or involuntary. It is precisely because the plea was knowing and voluntary (and hence valid) that the Government is obligated to uphold its side of the bargain." *Id.* And because breach cannot render a plea unknowing or involuntary, breach cannot serve a basis for withdrawal of the plea under Utah law. *See* Utah Code Ann. §77-13-6(2)(a).

This Court has held that trial courts have discretion to choose the remedy for a breach of a plea agreement. *State v. Smit*, 2004 UT App 222, ¶¶9–17, 95 P.3d 1203 (applying *Santobello*). But it reached that conclusion in a case that was governed by a prior version of the Plea Withdrawal Statute, which allowed for withdrawal upon a showing of good cause. *See* Utah Code of Criminal Procedure Amendments, ch. 290, §1, 2003 Utah Laws 1321 (amending Utah Code §77-13-6, effective May 5, 2003, to change the required showing for withdrawing a plea from good cause to unknowing and involuntary); *Smit*, 2004 UT App 222, ¶4 (indicating that Smit's sentencing took place in 2002). It also reached that conclusion before the United States Supreme Court clarified that a breach of a plea agreement does not render a plea unknowing or involuntary. *See Puckett*, 556 U.S. at 137–38 & n.1 (disavowing, in 2009, prior cases that suggested a breach would render a plea unknowing or involuntary). And more recently, this Court has held that when a defendant alleges breach of a plea agreement but fails to comply with the requirements of the Plea Withdrawal Statute, "the only alternative remedy available" is specific performance, not withdrawal. *State v. Saenz*,

2016 UT App 95, ¶7, 373 P.3d 220 (addressing scenario where breach was alleged in untimely motion to withdraw plea).[11]

If the prosecutor promised to recommend probation, then at most Harper is entitled to resentencing before a different judge where the State recommends probation. Harper never asked for this remedy from the district court, and he does not ask for this remedy on appeal.

b. The State was excused from any obligation to recommend probation because of Harper's subsequent criminal activity.

Even so, Harper is not entitled to resentencing because the State is excused from any obligation to recommend probation due to Harper's assault of his probation officers between the plea hearing and sentencing.

Harper claims that even "If"[12] he committed a new offense after the plea agreement, the prosecutor was obligated to honor his promise or "undo

[11] After holding in *Saenz* that the Plea Withdrawal Statute limits the trial court's discretion to choose between remedies for a breach, the Court in a subsequent case repeated the general principle that trial courts have discretion to choose the remedy. *See State v. Samul*, 2018 UT App 177, ¶17, 436 P.3d 298. But that reference was dicta and should be disavowed to the extent it conflicts with *Saenz*, the Plea Withdrawal Statute, and United States Supreme Court precedent.

[12] Harper refuses to acknowledge that he did commit a new offense after pleading guilty. Br.Aplt.10, 16. Yet Harper admitted to the district court that he violated his probation in the first case by committing attempted assault by a prisoner. R*036*:480, 714, 720–21.

or modify the plea." Br.Aplt.16. He argues that any response to a new offense had to be pursued in a separate proceeding because the plea agreement said nothing about allowing the prosecutor to "change its mind if situation XYZ arises." Br.Aplt.16.

Harper cites no authority for his argument that any subsequent criminal activity has no bearing on the State's obligations in the plea agreement. In fact, substantial authority supports the opposite position: Subsequent criminal activity excuses the State from any obligation to recommend probation.

"[W]hen a defendant, as a result of 'plea bargaining,' enters a plea of guilty in exchange for the prosecutor's promise to recommend probation, there is an implied promise by the defendant that the circumstances under which the bargain was made will remain substantially the same." *State v. Pascall*, 358 N.E.2d 1368, 1369 (Ohio Ct. App. 1972). "The commission of a crime subsequent to entering a plea agreement and before sentencing is a change in circumstances amounting to a breach of that implied promise and is sufficient to excuse the state from fulfilling its promised recommendation." *State v. Tyler*, 84 P.3d 567, 570 (Idaho Ct. App. 2003). "To require the prosecutor to fulfill his promise, or to permit the defendant to withdraw his plea, would, in effect, reward the defendant for his unlawful conduct."

Pascall, 358 N.E.2d at 1369. *See also United States v. Delacruz*, 144 F.3d 492, 494–95 (7th Cir. 1998) (excusing prosecutor from sentencing recommendation because defendant breached plea agreement by fleeing jurisdiction and engaging in further criminal conduct); *State v. Corwin*, 93 P.3d 745, 2004 WL 1609124 at *1–2 (Kan. Ct. App. 2004) (per curiam) (unpublished) (excusing prosecutor from sentencing recommendation because defendant committed additional felonies after pleading guilty); *In re A.R.E.G.*, 543 N.E.2d 589, 589–91 (Ill. Ct. App. 1989) (excusing prosecutor from obligation to recommend lighter disposition because juvenile engaged in additional delinquent behavior between adjudication and disposition). *Cf. Patience*, 944 P.2d at 387 (stating that defendant's breach of plea agreement authorizes state to rescind plea agreement).

It does not matter that the defendant's obligation is implied rather than express. *United States v. Hallahan*, 756 F.3d 962, 973 (7th Cir. 2014); *United States v. David*, 58 F.3d 113, 115 (4th Cir. 1995); *Tyler*, 84 P.3d at 570; *Pascall*, 358 N.E.2d at 1369. And when a defendant breaches a plea agreement, he is not entitled to withdraw from that agreement. *Hallahan*, 756 F.3d at 973; *United States v. Gregory*, 245 F.3d 160, 165–66 (2d Cir. 2001); *Pascall*, 358 N.E.2d at 1369. *But see State v. Zuniga*, 2002 WI App 233, ¶11, 652 N.W.2d 423 (rejecting excuse analysis and concluding that proper remedy under

Wisconsin law is vacating plea agreement and guilty plea). "'[A] classic rule of contract law, is that a party should be prevented from benefitting from its own breach.'" *Hallahan*, 756 F.3d at 973 (alteration in original). "Otherwise, a party would have the power to escape an unwanted contractual obligation simply by breaching another provision of the contract under which it arises." *Id.*

Although most courts view this problem through the lens of changed circumstances, hindrance provides another basis for excusing the State from recommending probation. "[E]very contract contains an implied condition that each party will not unjustifiably hinder the other from performing." 23 *Williston on Contracts* §63:26 (4th ed.). The United States Supreme Court recognized the potential applicability of this doctrine to cases like this. In *Puckett v. United States*, the government agreed to argue for a three-level sentencing reduction based on acceptance of responsibility. *Puckett*, 556 U.S. at 131. But when Puckett committed another crime before sentencing, the government opposed any sentencing reduction. *Id.* at 132. Although the government conceded on appeal that it had breached the plea agreement, the Court noted that an argument that "ongoing criminal conduct hindered performance … might have convinced us had it been pressed." *Id.* at 140 n.2.

When the State recommends probation, it implicitly warrants to the district court that the defendant is an appropriate candidate for probation. When the defendant commits further criminal activity after the State agrees to recommend probation and before sentencing, the defendant has unjustifiably and substantially hindered the State's ability to fulfill its obligation. At the very least, the defendant has breached the agreement by changing the circumstances in a material way, fundamentally altering a key consideration that the State's promise was based on—the defendant's criminal history and risk assessment. When Harper assaulted his probation officers after pleading guilty in the second case, the State was excused from recommending probation in the second case—to the extent it ever promised to do so.

C. Harper has not proven that he was misled into genuinely and legitimately thinking the prosecutor had promised to recommend probation.

Harper argues that even if the prosecutor had not promised to recommend probation, the language in the plea agreement misled Harper into thinking the prosecutor had, thus causing Harper to misunderstand the value of the plea bargain. Br.Aplt. 3, 9–13, 16–24.

Again, Harper has failed to point to any evidence that could establish his claim that the prosecutor misled Harper into thinking the prosecutor had promised to recommend probation.

To be voluntary, a plea must be entered "without undue influence, coercion, or improper inducement." *State v. Forsyth*, 560 P.2d 337, 338–39 (Utah 1977). Thus, a defendant may establish that a plea was involuntary if it was induced by a "'misrepresentation'" that "*at the time of contracting*" the prosecutor intended not to perform. *Puckett*, 556 U.S. at 138 n.1.

To be knowing, a plea must be made "with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). The attendant circumstances and likely consequences of which the defendant must be aware include "'the actual value of any commitments made to him by the court, prosecutor, or his own counsel.'" *Id.* at 755.[13]

[13] Courts and litigants often use *knowing* and *voluntary* interchangeably. *See, e.g.*, *United States v. Ruiz*, 536 U.S. 622, 629 (2002). While there may be some overlap in the concepts, knowingness generally relates to the facts and law of which a defendant must be aware to intelligently plead. *See Bousley v. United States*, 523 U.S. 614, 618 (1998). On the other hand, voluntariness refers to the requirement that the plea not be the product of state coercion or improper inducement. *Forsyth*, 560 P.2d at 338–39.

Thus, a defendant may establish that his plea was unknowing if "he was *misinformed* as to the true nature of the charge against him" or other attendant circumstances or likely consequences of his plea, *see Bousley v. United States*, 523 U.S. 614, 619 (1998) (emphasis added), and as a result the defendant was "genuinely and legitimately confused," *State v. Copeland*, 765 P.2d 1266, 1274–75 (Utah 1988).[14] "If a prosecutor makes misstatements and the defendant relies upon the misstatements, a substantial question arises as to whether [the d]efendant knowingly and voluntarily entered into a plea." *State v. Magness*, 2017 UT App 130, ¶22, 402 P.3d 105.

For example, in *Magness*, this Court held that the defendant was entitled to withdraw his plea where the prosecutor promised to recommend probation as long as the victim did not ask for a prison sentence, and the prosecutor mistakenly said at the time of the plea that the victim did not at that time plan to ask for a prison sentence. *Id.* ¶¶7, 25–28.

But this Court also cautioned that if the defendant "simply miscalculated the likelihood" of a certain outcome without any misstatement

[14] A showing that the defendant was misled or misinformed may not always be required to show that a plea was unknowing. *See Copeland*, 765 P.2d at 1274–76. But Harper has based his claim that he did not understand the true value of the plea agreement solely on the premise that he was misled. Br.Aplt.6–24.

by the prosecutor that induced that miscalculation, "a basis for withdrawing the guilty plea would likely not exist." *Id.* ¶29. When a defendant has been informed of the likely consequences and the commitments made, and then with the assistance of counsel decides to plead guilty, it is not enough to show that the defendant miscalculated or misjudged the likelihood of a particular sentence. *See United States v. Ruiz*, 536 U.S. 622, 630–31 (2002); *Bousley*, 523 U.S. at 619; *Parker v. North Carolina*, 397 U.S. 790, 797–98 (1970); *McMann v. Richardson*, 397 U.S. 759, 769–71 (1970); *Brady*, 397 U.S. at 756–57.

"[T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments." *McMann*, 397 U.S. at 769. "[T]he Constitution … does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea … despite various forms of misapprehension under which a defendant might labor." *Ruiz*, 536 U.S. at 630. Thus, a defendant cannot show that his plea was unknowing when he "did not correctly assess every relevant factor entering into his decision," or when "his calculus misapprehended … the likely penalties attached to alternative courses of action." *Brady*, 397 U.S. at 756–57. "[A] mere subjective belief of a defendant as to potential sentence, or hope of leniency, *unsupported by any promise from the prosecutor* or indication by the court, is

insufficient to invalidate a guilty plea as involuntary or unknowing." *State v. Garfield*, 552 P.2d 129, 131 (Utah 1976) (emphasis added).

Harper argues that he was misled by the written plea agreement. Br.Aplt.3, 9–13, 16–24. He does not argue that he was misled by the court or by defense counsel.[15] And he does not point to anything other than the written plea agreement as the source of any misinformation. Rather, he claims that the prosecutor made a "false" promise, promising to recommend probation while his "true intentions" were always to argue for imprisonment. *See* Br.Aplt.3, 9–13. He thus argues that he was "misled" into pleading guilty by the prosecutor's "bait-and-switch," making his plea involuntary. Br.Aplt.11, 13. He also appears to argue that even if the prosecutor did not lie, the statement in the plea agreement was still misleading and caused Harper to miscalculate the value of the bargain he had received, thus making his plea unknowing. Br.Aplt.16–24.

Harper has pointed to no evidence to support his allegations that the prosecutor intentionally misled him. The allegations are baseless. This Court should reject out of hand any claim that Harper's plea was induced by a promise that the prosecutor had no intention of keeping.

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[15] Harper argued below that his counsel misled him. R*938*:307, 309. But he has abandoned any such claim on appeal.

To the extent Harper also argues that the prosecutor misled him—inadvertently or unintentionally—by the wording of the plea agreement, Harper has not proven that Harper was genuinely and legitimately misled by any such misstatement.

Even assuming that the ambiguity in the statement, coupled with the prosecutor's proffer that there was no agreement for probation, were enough to establish that the prosecutor misstated his intent by agreeing to the language in the plea agreement, Harper also had to prove that he was "genuinely and legitimately confused" about the terms of the agreement as a result. *Copeland*, 765 P.2d at 1274–75. Harper proffered nothing below to establish that he actually thought the prosecutor had agreed to recommend probation. As discussed, Harper's declaration stated that he thought he would be placed on probation and that his plea counsel told him as much. But Harper never declared that he believed the prosecutor had promised to recommend probation. During the hearing, his withdrawal counsel never proffered anything to indicate that Harper genuinely and legitimately believed the prosecutor had agreed to recommend probation. And for the reasons stated in Point III.A.1 above, Harper's letters and pro se motions are insufficient to establish that he genuinely and legitimately believed the prosecutor had promised to recommend probation. If those documents and

the facts behind them supported a finding that Harper's plea was unknowing, Harper's sentencing counsel would have asked the court to reconsider its ruling.[16]

Harper has not pointed to any evidence to show that his expectation that he would get probation for pleading guilty was anything other than an ordinary "misapprehension" of the likelihood of a particular outcome. *Ruiz*, 536 U.S. at 630. Harper and his plea counsel "simply miscalculated the likelihood" of probation, without any misrepresentation by the prosecutor. *Magness*, 2017 UT App 130, ¶29. That is *not* enough to prove that his plea was unknowing or involuntary. *Ruiz*, 536 U.S. at 630–31; *Bousley*, 523 U.S. at 619; *Parker*, 397 U.S. at 797–98; *McMann*, 397 U.S. at 769–71; *Brady*, 397 U.S. at 756–57.

In short, Harper did not create a record below to show that the prosecutor misled him and that Harper genuinely and legitimately, but mistakenly, believed the prosecutor had agreed to recommend probation. Because Harper did not meet his burden below, this Court should affirm.

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[16] As explained above, the letters and motions refer to an agreement or deal for probation. If Harper meant that he thought the parties had agreed to ask the court to commit itself to a probation sentence through rule 11(i), the district court's unchallenged finding that Harper understood he was not guaranteed probation forecloses that argument.

D. At most, Harper would be entitled to a remand for further fact findings.

If this Court believes there is some evidence to support either a claim that the plea agreement contained an enforceable promise to recommend probation, or the prosecutor misled Harper into thinking as much, this Court may at most remand for further fact findings by the district court.[17]

If there is any evidence to support Harper's challenges, it does not cut solely in his favor. The prosecutor proffered that there was no agreement for probation. R*938*:635. And as shown, there is no existing proffer to support Harper's assertions that there was a promise to recommend probation. Even Harper's repeated references in his letters and pro se motions to an agreement for probation—which could mean several different things—are suspect. That proffer was made after the court denied Harper's motion to withdraw. *Cf. Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) ("Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look

[17] If this Court believes that remand is necessary, and if it also agrees with the State that the prosecutor was excused from any promise to recommend probation, then the Court should limit any remand to the question of whether Harper was genuinely and legitimately misled by the language in the plea agreement.

to contemporaneous evidence to substantiate a defendant's expressed preferences.").

So the best Harper could hope for is a remand to take evidence on whether there was an agreement that the prosecutor would recommend probation or whether Harper genuinely and legitimately thought there was as a result of the language in the plea agreement. That may very well require resolving conflicting evidence, including determining witness credibility. "[I]t is not the function of an appellate court to make findings of fact because it does not have the advantage of seeing and hearing witnesses testify." *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979). As noted, when a contract is ambiguous, "the question becomes a question of fact *to be determined by the fact-finder*." *Brady*, 2019 UT 16, ¶53 (emphasis added).

Because the district court has yet to hear evidence on what the parties agreed to or thought they agreed to, and has yet to make fact findings on the key issues in this case, this Court may not reverse and direct the district court to allow Harper to withdraw his plea; at most the Court may remand for the district court to make the required findings. *See Copeland*, 765 P.2d at 1273–76

(remanding for findings on plea withdrawal motion); *Garfield*, 552 P.2d at 130–31 (same).[18]

IV.

If this Court has jurisdiction over Harper's ineffective-assistance claim, it should reject the claim as inadequately briefed.

Harper argues that if the prosecutor never promised to recommend probation, he was required to correct the contrary, "false" statement in the plea agreement and that Harper's plea counsel was ineffective for not demanding at the plea colloquy that the prosecutor do so. Br.Aplt.15, 23–29.[19]

Harper has not adequately briefed his claim. He does not explain how his plea counsel was deficient or how any deficient performance prejudiced him. Nor has he made a record sufficient to establish ineffective assistance.

---

[18] The State maintains that the district court did not make findings because Harper never asked it to and never offered the requisite evidence to support the arguments he now makes—thus illustrating the lack of preservation that deprives this Court of jurisdiction. Alternatively, the State contends that the district court did not make findings because Harper did not carry his burden of presenting relevant evidence to allow the court to do so. Only if this Court disagrees with both positions should it remand for further findings and credibility determinations.

[19] This Court cannot, consistent with *Badikyan*, address the merits of an ineffective-assistance claim raising a challenge not raised in Harper's motion to withdraw his guilty plea. *Supra* Point II. However, the State addresses Harper's ineffective-assistance claim out of an abundance of caution. The Court may reach this claim only if the supreme court were to overrule *Badikyan* while this case is pending. *See Estrada*, 2012 UT App 82, ¶7 n.4 (stating that cert. grant does not deprive case of precedential value).

To prove that his plea counsel was ineffective, Harper must prove both that his plea counsel performed deficiently and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687–89, 694 (1984). This is a "heavy burden," *id.* at 687–89, and "never an easy task," *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

Deficient performance requires proof that Harper's plea counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687–88. Counsel is always "strongly presumed to have rendered adequate assistance." *Id.* at 690. To show otherwise, Harper must prove that "no competent attorney" would have proceeded as his plea counsel did. *Premo v. Moore*, 562 U.S. 115, 124 (2011). To show prejudice, Harper must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Harper does not explain how his plea counsel was deficient. Harper argues that the prosecutor was obligated to correct any misstatements in the plea agreement, and Harper cites *Napue v. People of State of Illinois*, 360 U.S. 264 (1959), in support. Br.Aplt.15, 23–29. In *Napue*, the Supreme Court held that the State must correct "false evidence" when it appears. 360 U.S. at 269.

Although Harper spends several pages in his brief explaining why the prosecutor supposedly violated *Napue*, Harper gives scant treatment to the controlling issue on appeal—why his plea counsel was deficient for not raising the issue. Harper concludes that his plea counsel "rendered ineffective and deficient performance when he failed to point out and/or clarify the lack of probation representation in the plea form to the court and the prosecution." Br.Aplt.27–28. But a single sentence asserting that counsel was deficient for not raising the issue is inadequate to carry Harper's burden of proof on appeal. "This is merely rephrasing that which must ultimately be shown to satisfy the … the *Strickland* test … ." *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993). That "is clearly insufficient to affirmatively demonstrate" deficient performance. *See id.; see also State v. Roberts*, 2015 UT 24 ¶18, 345 P.3d 1226 (stating that an appellant who does not support his argument with authority or analysis will ordinarily fail to meet his burden).

The question on appeal is not whether the prosecutor violated *Napue*, but whether all reasonable attorneys would have recognized and raised a *Napue* claim. *See McMann*, 397 U.S. at 770–71 (deficient performance analysis turns "not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases"); *State v. Vallejo*, 2019

UT 38, ¶¶69–70 & n.13, --- P.3d ---- (addressing whether counsel's performance was reasonable without addressing whether objection would have succeeded). Harper has done nothing to meet that standard.

For example, Harper has not explained why all reasonable attorneys would have recognized the statement in the plea agreement as a "false statement." As explained in Point III.A.1 above, the statement in the plea agreement can reasonably be read as *not* promising to recommend probation. If a reasonable attorney could interpret the statement that way, then counsel could reasonably decide there was no false statement to correct. "The presence of ambiguity defeats [Harper's] argument that his counsel was ineffective." *Samul*, 2018 UT App 177, ¶¶15–16 (rejecting claim that counsel was ineffective for not alleging breach of plea agreement, because plea agreement was ambiguous).

But even if every reasonable attorney would have read the statement as promising to recommend probation, Harper has pointed to no record evidence to explain how his plea counsel, or any other reasonable attorney, would have known "at the time of the plea" that it was false—that the prosecutor did not intend to recommend probation. Br.Aplt.15. If the written plea agreement is read the way Harper insists, then the soonest any of Harper's counsel would have become aware that the prosecutor did not

intend to recommend probation would have been at the hearing on the motion to withdraw the plea, where the prosecutor stated that there was no agreement on probation. But by that point, the prosecutor had corrected any "false statement" by clarifying that there was no agreement on probation. R*938*:635. In other words, the prosecutor did exactly what Harper argues his plea counsel should have asked him to do, and at the soonest point that this record establishes that a reasonable attorney would have been alerted to the issue.[20]

Harper's prejudice argument is similarly truncated. Although he quotes extensively from *Lee v. United States*, 137 S. Ct. 1958 (2017), to demonstrate how prejudice should be analyzed in a plea context, he baldly asserts that "[h]ad prior counsel appropriately clarified the State's lack of probation recommendation in the plea agreement, … Harper would not have pleaded guilty and would have insisted on going to trial." Br.Aplt.29. Again,

[20] To the extent Harper argues that the prosecutor intended to recommend probation, that the language of the plea statement is "false" in that it does *not* contain a promise to recommend probation, and that his plea counsel should have asked the prosecutor to clarify the language to add a promise to recommend probation, *see* Br.Aplt.28, Harper has not shown that the record established the predicate fact that the prosecutor ever intended to recommend probation.

this is "merely rephrasing that which must ultimately be shown to satisfy the second prong of the *Strickland* test." *Fernandez*, 870 P.2d at 877.

Harper's declaration never states that he would have insisted on going to trial if only he knew that the prosecutor was not recommending probation. That is fatal to his claim. "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

His argument as to *why* he would have insisted on going to trial cannot substitute for a proffer that he in fact would have so insisted. *See id.* at 60 (rejecting petitioner's claim because he did not allege in his petition for habeas relief that he would have rejected plea and insisted on trial had counsel given him correct advice). But in any event, Harper's argument (elsewhere in his brief) as to why it would have made sense for him to insist on going to trial is contradicted by the record. Harper suggests that getting probation was "a determinative factor" in deciding to plead guilty. Br.Aplt.12. He thus analogizes to *Lee*, where the Supreme Court held that a defendant was able to show that going to trial would have been a rational choice because avoiding deportation "was *the* determinative factor for him" and trial gave him a slightly better chance of that. 137 S. Ct. at 1967–69. But

the question here is whether getting a *recommendation* for probation was *the* determinative factor. If actually getting probation was the determinative factor, as Harper suggests, then a promise that the prosecutor would merely recommend probation would not have been enough to induce Harper to plead guilty because the court could easily reject the recommendation.

Further, the record does not clearly establish that getting a promise to recommend probation—or even actually getting probation—was *the* determinative factor for Harper. Although his declaration states that he did not know that he could be sent to prison by pleading guilty, he also identified other considerations: his plea counsel allegedly told him he would "never see [his] son again unless [he] plead[ed]," and during the plea colloquy Harper said he wanted to plead because he wanted to be released from custody immediately, which was part of the plea agreement. R*938*:160, 309, 595. And although Harper's withdrawal counsel referred to Harper pleading "as charged," R*938*:631–32, a criminal trespass charge was dismissed as part of the plea agreement, R*938*:160. Harper cannot show on this record that getting a probation recommendation from the State was *the* determinative factor and that he would have insisted on going to trial if his plea counsel had clarified that the prosecutor was not promising to recommend probation. *See Hill*, 474 U.S. at 60 (rejecting petitioner's challenge to plea when he "alleged no special

circumstances that might support the conclusion that he placed particular emphasis on [the subject matter of his counsel's bad advice] in deciding whether or not to plead guilty").

Because this Court lacks jurisdiction over Harper's ineffective-assistance claim, because Harper has inadequately briefed his claim, and because he has not created a record to support his claim, this Court should dismiss the claim—even if it remands for factual development on Harper's other claims. Harper had the chance to create a record below. He had the chance to file a motion for remand under rule 23B, Utah Rules of Appellate Procedure. He should not get two bites at the apple.

CONCLUSION

This Court should affirm the first case because Harper has withdrawn his claim of error on appeal. The Court should dismiss the second case for lack of jurisdiction because Harper raises new challenges to his guilty plea on appeal. But if this Court concludes that it has jurisdiction, it should affirm because Harper failed to prove that his plea was unknowing or involuntary.

Respectfully submitted on August 9, 2019.

SEAN D. REYES
Utah Attorney General

/s/ William M. Hains
WILLIAM M. HAINS
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 13,316 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ William M. Hains
WILLIAM M. HAINS
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on August 9, 2019, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

Ronald Fujino
Law Office of Ronald Fujino
195 East Gentile Street #11
Layton, Utah 84041
counsel356@msn.com

I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ *Lee Nakamura*

Addenda

Addendum A

Statutes and Rules

Utah Code Section 77-13-6. Withdrawal of plea (West 2017)

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2) (a) 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.

(b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.

(c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78B, Chapter 9, Postconviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

Utah R. Crim. P. 11. Pleas (2016)

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

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

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

(2) the plea is voluntarily made;

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

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

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

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

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

(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(8) the defendant has been advised that the right of appeal is limited.

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

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

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g) If the defendant pleads guilty, no contest, or guilty and mentally ill to a misdemeanor crime of domestic violence, as defined in Utah Code Section 77-36-1, the court shall advise the defendant orally or in writing that, as a result of the plea, it is unlawful for the defendant to possess, receive or transport any firearm or ammunition. The failure to advise does not render the plea invalid or form the basis for withdrawal of the plea.

(h) (1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved or rejected by the court.

(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(i) (1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(j) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(k) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann. § 77-16a-103.

(l) Compliance with this rule shall be determined by examining the record as a whole. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded. Failure to comply with this rule is not, by itself, sufficient grounds for a collateral attack on a guilty plea.

Addendum B

Sentence, Judgment, Commitment

(R*938*:549-50)

The Order of the Court is stated below:
Dated: December 22, 2017
05:09:19 PM

At the direction of:
/s/ KATIE BERNARDS-GOODMAN
District Court Judge

by
/s/ KATIE JOHNSON
District Court Clerk

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

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 161911938 FS
ERNEST CLAYTON HARPER,	:	Judge: KATIE BERNARDS-GOODMAN
Defendant.	:	Date: December 21, 2017

Custody: Salt Lake County Jail

PRESENT
Clerk: katiej
Prosecutor: DEESING, ANDREW K
Defendant Present
The defendant is in the custody of the Salt Lake County Jail
Defendant's Attorney(s): CARA M TANGARO

DEFENDANT INFORMATION
Date of birth: October 27, 1971
Sheriff Office#: 294536
Audio
Tape Number: W43 Tape Count: 1017-1136

This case involves domestic violence.

CHARGES
1. STALKING - 2nd Degree Felony
Plea: Guilty - Disposition: 04/14/2017 Guilty
2. CRIMINAL TRESPASS - Class B Misdemeanor
Plea: Not Guilty - Disposition: 04/14/2017 Dismissed w/ Prejudi

HEARING

Defendant transported from ADC. Defense addresses the Court regarding a resolution of all cases. Defendant enters an admission to allegation 2 in the affidavit. Defense

addresses the Court regarding the status of case 151908678 and order to show cause in case 131401036 and gives argument on the guilty plea being enters as to a lesser charge on 161911938. State argues for guilty plea to the current charge.
10:38 AM
Ms. Lorie Hobbs, attorney for victim, addresses the Court regarding 131401036 and gives a brief history.
10:48 AM
All parties discuss the history of the cases. Victims address the court.
11:36 AM
The Court hereby orders defendant to serve 0-365 days jail with the option to serve at the Utah State Prison on case 151908678 and 171907138, 1-15 years at the Utah State Prison on case 161911938 and 0-5 years at the Utah State Prison on case 131401036 all to run concurrent to each other. The Court recommends the defendant receive credit for 283 days time served.

SENTENCE PRISON
Based on the defendant's conviction of STALKING 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.

COMMITMENT is to begin immediately.

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.

End Of Order - Signature at the Top of the First Page

Addendum C

Transcript of Argument &
Ruling on Motion to Withdraw Plea

(R*938*:629-40)

THIRD JUDICIAL DISTRICT COURT

FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, PLAINTIFF, VS. ERNEST CLAYTON HARPER, DEFENDANT.	Case Nos. 161911938 151908678 171907138 171907785 Transcript of: MOTION TO WITHDRAW PLEA

BEFORE THE HONORABLE KATIE BERNARDS-GOODMAN

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84114

AUGUST 11, 2017

TRANSCRIBED BY: Susan S. Sprouse, RPR, CSR

A P P E A R A N C E S

FOR THE PLAINTIFF:

Andrew K. Deesing
SALT LAKE COUNTY DISTRICT ATTORNEY'S OFFICE
111 East Broadway, #400
Salt Lake City, Utah 84111

FOR THE DEFENDANT:

Rudy Bautista
BAUTISTA BOOTH
215 South State Street, #600
Salt Lake City, Utah 84111

August 11, 2017

P R O C E E D I N G S

* * *

MR. BAUTISTA: Can you address the Ernest Harper matters?

THE COURT: No. 58, State of Utah versus Ernest Clayton Harper [inaudible]

All right. I have all the motions that have been filed regarding Mr. Harper's case, the motion to withdraw his plea and the State's response.

MR. BAUTISTA: Your Honor, and in response to the State, the most concerning issue in this matter is if you look at the statement of defendant that was filled out by Mr. Peterson signed by the State and in view part of the record [inaudible] guilty plea. It indicates in there that the State agrees to a two-step 76-3-402 reduction if I 100 percent -- if I comply 100 percent with all terms and conditions of AP&P probation. All we have here is we understand that sentencing is for the Court's determination and discretion.

But the problem is is that he was informed by his attorney to the courts that he was told that he would get probation if he pled as charged. He did plead as charged. And the problem is if you read the statement of defendant, it clearly would imply to someone, especially not legally trained, that the State is agreeing to a 402 -- two-step 402 reduction

as long as he complies with all the conditions of probation and advised the State is agreeing that he will receive probation. And that's the problem here.

We understand that at the time he entered his plea, that the Court did inquire with him and made sure that he understood that you decided the sentence. And he did it and replied that he did at that time.

In his affidavit he purports that he was so stressed out and so much under tension to get out of jail to take care of his son that he was concerned about that he in essence was willing to agree to anything. And he was relying on his attorney's representation that he will be given probation.

And in light of the statement of defendant that was signed by the defendant, written by his lawyer, you wouldn't put down a two-step reduction if he complies with probation if there wasn't certainly an inference it was expected that he would get probation.

If it had said if he's given the privilege of, probation or the State agrees to a two-step if he's given probation, that "if" language, unfortunately the language in there signed by Mr. Peterson and the State doesn't have an "if". And so since he's a lay person, and what we are trying to do is go through what was in his mind at the time, his mind at the time was the representation by this attorney that in exchange for pleading as charged, you will get probation and he

accepted that deal. And he was also told that he would be released pending sentencing. That part was complied with at the time.

So what we're asking the Court is notwithstanding the colloquy that was inside the court is to understand that he was under such duress and anguish. And AP&P has -- has documented that they are aware that he has either more health issues or serious personality disorder issues that have arisen from being a victim of crimes himself.

In light of the mental state that he was in at that time, of having -- wanting to get out of custody to take care of his son, the representations of his attorney supported by inference by the statement in it, we're asking the Court to allow him to withdraw his plea because it wasn't knowing and voluntarily done at the time in his mind. And so we'd submit it.

THE COURT: The State's response?

MR. DEESING: And Judge, we've briefed this fairly extensively. I delivered a copy to Your Honor's chambers yesterday, and we e-filed, I think, at some point yesterday. Attached to that is the transcript of the hearing. Admittedly, it's not an official transcript. It's one that we did internally within our office.

But if we look at the transcript of what actually occurred at the time he plead guilty, none of what Mr. Bautista

has represented seems to be backed up by this transcript. And I'm referring to the defendant's statement where after, after this -- after we told the Court that, look, this isn't something that appears that it's going to work, he clearly is minimizing his action -- and I'm on page 2 of the transcript -- he says, "Your Honor, right now I'm extremely nervous because I realize that the penalty of this could put me in prison and I'm obviously not trying to go that -- go there. I do realize that, Your Honor."

So if he'd been promised probation by his attorney in the back, why in the world would he come up here thinking that he was going to go to prison? It doesn't make any sense.

And this knowing and voluntary is very clear. It doesn't mean that he gets to come here today and say, look, I have PTSD, which when the AP&P officers who supervised him testified last week at the hearing for his assault on those two officers, when they took him into custody, neither one of those officers were aware of any sort of diagnosis form or otherwise.

So what he's provided to the Court is some sort of documentation from some sort of social worker at the jail that has somehow diagnosed him with PTSD. I'm not entirely sure how they do that or if they are even qualified to be doing that, but it's certainly not something that this court should be looking at when we're looking at whether or not the plea was knowing and voluntary.

If you listen to the hearing, and Your Honor was there, it's a very clear Rule 11 colloquy. Not only do we back up and say, look, we can give you a trial date on the 25th, he -- you then give him another opportunity, because it was so abundantly obvious that he wanted to plead guilty. And you had told him, "You just can't plead guilty to get out of jail." If you look at the transcript, we withdrew that recommendation prior to completing whereas we are no longer recommending that.

So even hearing that, that we're no longer recommending that he be released, he still asks to plead guilty.

So what -- what's in the plea form we see all the time. That if I'm given probation, it's a 402 reduction. That's fine. It's fairly common language.

We don't have testimony from Mr. Peterson, and I suppose we could wait and have him testify. I doubt he remembers exactly what was said back there because it just doesn't seem like he's going to remember an exact conversation. But I can represent that we never talked about probation being agreed upon. It would have been in the plea form that we agree that he gets probation and a 402 upon successful completion.

So we'd ask the Court to deny his motion to withdraw his guilty plea and sentence him today.

MR. BAUTISTA: The problem is, Your Honor, is that the plea form doesn't say, "If he gets probation." It says he

will get a two-step 402 reduction if he complies with probation. That kind of --

THE COURT: He understood that prison was a possibility. I told him I could sentence that and he said this could send me to prison.

MR. BAUTISTA: He understands that.

THE COURT: But I told him not to plead just to get out.

MR. BAUTISTA: Understand. But it's -- his -- his testimony by affidavit is that that, that was not his understanding at the time. That he was -- he was telling me what -- what needed to be done to get out of custody, take care of his son, and that he was -- and he wouldn't -- he hadn't a problem with the plea if AP&P had recommended probation. But where the recommendation of prison and the State recommending prison, it's made him get in a position where he's realized the mistakes that were entered upon and he was -- he's purporting that he was misled into that. And that's the problem we have.

In addition, his supervising agent, Agent Sutterfield, testified that he wasn't aware that his actual mental health diagnosis, whether it was bipolar, schizophrenic or such, but that he was aware that he had no health issues. And so they were -- AP&P was aware that there are issues there. Just he wasn't aware of the actual diagnosis.

THE COURT: Okay. My concern is you have evidence,

an affidavit from him, if we don't have testimony from Mr. Peterson --

MR. DEESING: What we have is the hearing, Judge. And the case law is pretty clear that this decision is very much in the district court's hands. It's up to you as to whether or not you feel that the Rule 11 colloquy was -- was appropriately given. And when we look at the case law on that Rule 11 colloquy, what the Supreme Court has said is when you go through Rule 11, most of these issues are foreclosed, because we've walked through all of this. So you've asked him all these questions.

The issue today is whether he understood the charges, which when we look at the transcript, it's abundantly clear that he understood them. He, in fact, explains the charges to you, which through his minimization of the charges, that's what leads us this down a bad path to begin with. He said, "Yeah, I understand that sometimes you can call somebody a jerk." He goes through that whole conversation.

So he understands his constitutional rights. You walked him through every one. Mr. Peterson walks him through everyone. We know that from the affidavit and the likely consequences of the plea. We have that in his own words.

So I didn't subpoena Mr. Peterson because we really don't need to know what's in Mr. Peterson's head because we have the transcript of the very hearing where the defendant

clearly understands what's going on. If this was a standard hearing where he just simply said yes or no to all of your questions, yeah, it may have been a little bit different situation. We may have had to have his attorney come and testify. Here, he is elaborating on the very rights that he needs -- that you need to explain to him.

THE COURT: Well, I find it very difficult to think that Mr. Peterson would have ever told him that there wasn't a possibility of prison and that what the sentence was would be up to the judge. I told him as well. I tried to get him to slow down and back up, to not do this just to get out and to understand that prison was a potential here.

And then we have a motion to withdraw the plea, which comes only after he finds out he has a prison recommendation, which is not a legitimate reason to withdraw a plea when you don't like the recommendation for the sentence. So I'm going to deny his motion to withdraw.

MR. BAUTISTA: If I may clarify a couple of points, Your Honor. He has informed me that he actually conveyed to Mr. Peterson prior to the presentence report when he was taken back in custody by AP&P, that he wanted to withdraw his plea at that time prior to it.

In addition, the concern I have with the State's position is if the standard is if Rule 11 has been complied with, then we are done, then the standard of whether his plea

was knowing and voluntarily made is disingenuous. If Rule 11 is a blanket protection; therefore, it was complied with before his plea must have been knowing and voluntarily done, then he -- to say that you have the right to petition for -- to withdraw your plea if you can show you did not do it knowing and voluntarily has no weight. It's a meaningless protection.

The concern here is that in essence he waived his constitutional rights. He waived a right to a trial and to not plead guilty, and he pled guilty as charged presumably for something in return. It's not normal for defendants to enter guilty pleas as charged with no consideration.

And the problem is the statement of defendant does say, it doesn't say "if". And so that supports his position that it was -- that he was entering a plea based on the statement that he would get probation.

In addition, by withdrawing his plea, it doesn't make him a free man, it just puts him back in the position beforehand, and the State can still proceed and prove him guilty beyond a reasonable doubt if they can do so.

THE COURT: Well, I don't understand why he would think he had a guarantee of probation when I told him you have the potential for one to 15 years at the Utah Prison, a $10,000 fine with a 98 percent surcharge, something less may be recommended but I could sentence to that maximum if I choose. Do you understand that? And he said, "I do, ma'am."

He also himself volunteered that he knew that this could put him in prison. To say now that he didn't understand prison was a possibility, I just find it difficult to believe. I see no reason to allow withdrawal of this plea at this time.

MR. BAUTISTA: Your Honor, in regards to sentencing, he asked me earlier this morning if he would be sentenced today if his motion was denied. I told him my understanding, it was for a motion hearing and motion hearing only. He said good because his mother and grandmother --

THE DEFENDANT: My surrogate sister -- my sister said they wanted to be here on my behalf, but they have no plans to be here because it's a motion hearing. My mom has passed away. So she can't be here except in spirit.

MR. BAUTISTA: We're asking if we may set sentencing over so that he can be in that position. And this is not his fault; it's mine, because I did tell him that I didn't think -- I thought we would be doing the motion and then setting it over.

THE COURT: We can set it over.

THE DEFENDANT: Thank you.

MR. DEESING: Judge, if we're going to set it over, we just simply ask we set it in a week. The victims are here. They've been here multiple times for sentencing. It's a continuation of victimizing these poor women is the State's position on it.

Addendum D

Statement of Defendant in Support of Guilty Plea

(R*938*:154-64)

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

EN EL TRIBUNAL JUDICIAL DEL TERCER DISTRITO
CONDADO DE SALT LAKE, ESTADO DE UTAH

STATE OF UTAH ESTADO DE UTAH	:	STATEMENT OF DEFENDANT IN SUPPORT OF GUILTY PLEA AND CERTIFICATE OF COUNSEL AFIRMACIÓN DEL ACUSADO EN APOYO A SU DECLARACIÓN DE CULPABILIDAD Y CERTIFICADO DEL ASESOR LEGAL
Plaintiff, VS Demandante	:	
Ernest Harper, Defendant Acusado.	:	Case No. 161911938FS No. de caso. _____

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

Yo, _____, por medio de la siguiente reconozco y certifico que he sido asesorado y que entiendo los siguientes hechos y derechos:

Notification of Charges
Notificación de Cargos

I am pleading guilty ~~(or no contest)~~ to the following crimes:
Me declaro culpable (o sin argumento) de los siguientes delitos:

	Crime & Statutory Provision Delito y provisiones estatutarias	Degree Grado	Punishment Min/Max and / or Minimum Mandatory Pena Min/Max y/o Mínimo Mandatorio
A.	Stalking (DV) with priors UCA 76-5-106.5	2° Felony	1-15 years in the Utah State Prison and/or a $10,000 Fine (plus 90%)
B.			
C.			
D.			

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)~~.

He recibido una copia (reformada) del Documento acusatorio en mi contra. Lo he leído, o me lo han leído y entiendo la naturaleza y los elementos del(os) delito(s) por el (los) cual(es) me declaro culpable (o sin argumento).

The elements of the crime(s) to which I am pleading guilty (or no contest) are:
Los elementos del (los) delito(s) por el (los) cual(es) me declaro culpable (o sin argumento) son:

In Salt Lake County, State of Utah, I knowingly engaged in a course of conduct directed at my (then) girlfriend and co-habitant and I should have known that my course of conduct would cause a reasonable person to suffer emotional distress, and at the time I had previously been convicted of a prior Felony Stalking offense in case 131401036, and a PIA stalking offense in case 151906678.

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)~~:

Entiendo que al declararme culpable estaré admitiendo que cometí el delito (los delitos) mencionado(s) anteriormente. (O, si me declaro sin argumento, no disputaré que cometí los delitos que anteceden). Yo estipulo y estoy de acuerdo (o si me declaro sin argumento, no disputo ni refuto) que los siguientes hechos describen mi conducta y la conducta de otras personas por las cuales soy responsable legalmente. Estos hechos proveen las bases para que el tribunal acepte mi declaración de culpabilidad (o sin argumento) y comprueba los elementos del delito (los delitos) por el cual (los cuales) me estoy declarando culpable (o sin argumento):

On 9/26/2016 in Salt Lake County, State of Utah, I sent my ex-girlfriend (co-habitant) a series of text messages that I should have known would cause emotional distress, after having been twice convicted of stalking offenses.

Waiver of Constitutional Rights
Renuncia de los derechos constitucionales

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:

Doy esta declaración voluntariamente. Entiendo que tengo los siguientes derechos bajo la constitución de Utah y de los Estados Unidos. También entiendo que si me declaro culpable (o sin argumento) renunciaré a los siguientes derechos

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.

Asesoramiento: Se que tengo el derecho de ser representado por un abogado y que si no puedo costear uno, se me asignará un abogado por parte del tribunal sin costo alguno para mí. Entiendo que posteriormente, si el juez determinara que soy solvente se me requerirá pagar por los servicios del abogado que me fue asignado.

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:

He (no he) renunciado a mi derecho de asesora miento legal. Si he renunciado a mi derecho de asesoramiento legal, lo he hecho a sabiendas, inteligente y voluntariamente por las siguientes razones:

_____

_____

_____

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).

Si yo he renunciado a mi derecho de asesoramiento legal, certifico que he leído esta afirmación y que entiendo la naturaleza y los elementos de los cargos y delitos por los cuales me declaro culpable (o sin argumento). También entiendo mis derechos en este caso y otros casos y las consecuencias de mi(s) declaración(es) de culpabilidad

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

Si no he renunciado a mi derecho de asesoría legal, mi abogado es _____. Mi abogado y yo hemos platicado a fondo de esta afirmación, mis derechos y las consecuencias de mi(s) declaración(es) de culpabilidad (o sin argumento)

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)~~.

Juicio por jurado. Sé que tengo el derecho a un juicio público y sin demora ante un jurado imparcial (sin prejuicio) y que estaré renunciando a ese derecho al declararme culpable (o sin argumento).

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.

Careo y contra interrogatorio de los testigos. Sé que si tuviera un juicio, a) Tendría el derecho de ver y observar a los testigos que testifiquen en mi contra y b) mi abogado, o yo si renunciara a mi derecho de abogado, tendrían la oportunidad de contra interrogar a todos los testigos que testifiquen en mi contra.

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.

Derecho de obligar a testigos. Sé que si tuviera un juicio, podría elegir llamar a testigos, y podría obtener comparendos requiriendo la asistencia y testimonio de esos testigos. Si no pudiera costear el pago de los testigos, el Estado cubriría las costas.

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.

Derecho a testificar y el privilegio en contra de la auto-incriminación. Sé que si tuviera un juicio, yo tendría el derecho de dar testimonio a mi favor. También sé que si no deseara testificar, nadie podría obligarme a dar testimonio o presentar pruebas en contra de mí mismo. También se que si yo eligiera no dar testimonio, al jurado se le indicaría que no podrían usar mi decisión en mi contra.

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.

Presunción de inocencia y responsabilidad de prueba. Sé que si no me declaro culpable (o sin argumento), se me presume ser inocente hasta que la fiscalía compruebe que soy culpable del (los) delito(s) imputado(s). Si elijo pelear los cargos en mi contra, solo necesito declararme "no culpable," y mi caso será fijado para juicio. En el juicio, la fiscalía tendría la responsabilidad de comprobar cada uno de los elementos del (los) cargo(s) más allá de una duda razonable. Si el juicio fuera ante un jurado, el veredicto deberá ser unánime, quiere decir que cada miembro del jurado tendrá que encontrarme culpable

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.

Entiendo que si me declaro culpable (o sin argumento), renuncio a la presunción de inocencia y admitiré que cometí el (los) delito(s) previamente mencionado(s).

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.

Apelación. Sé que bajo la Constitución de Utah, si fuera condenado por un jurado o juez, tendría el derecho de apelar mi condena y sentencia. Si no pudiera costear las costas de la apelación, el Estado cubriría esas costas. Entiendo que al declararme culpable (o sin argumento) renuncio a mi derecho de apelar mi condena. Entiendo que si deseo apelar mi sentencia debo presentar notificación de mi apelación dentro de treinta días después de asentada mi sentencia

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

Sé y entiendo que al declararme culpable, renuncio y cedo todos mis derechos estatutarios y constitucionales previamente explicados.

Consequences of Entering a Guilty ~~(or No Contest)~~ Plea
Consecuencias de dar una declaración de culpabilidad (o sin argumento)

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.

Penas potenciales. Sé la pena máxima que se podría imponer por cada delito del cual me estoy declarando culpable (o sin argumento). Sé que al declararme culpable (o sin argumento) de un delito que lleve consigo una pena obligatoria, me estaré sujetando a servir la pena obligatoria por ese delito. Sé que mi sentencia puede incluir un término en la prisión, una multa o ambos

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.

Se que aunado a una multa, se impondrá un noventa por ciento (90%) en recargos. También se que se me podría ordenar reintegrar a cualquier víctima de mis delitos, incluyendo reintegro que se deba por cargos que sean desestimados como parte del trato declaratorio.

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.

Términos de prisión consecutivos/simultáneos. Sé que si hubiera más de un delito involucrado, las penas podrían ser impuestas una después de la otra (consecutivamente), o podrían ser servidas al mismo tiempo, (simultáneamente). Sé que se me podría cobrar una multa adicional por cada delito por el cual haya dado mi declaración. También sé que si estoy bajo libertad provisional o preparatoria, ó si estoy esperando recibir sentencia por algún otro delito por el cual haya sido condenado o me haya declarado culpable (o sin argumento), mi(s) declaración(es) de culpabilidad (o sin argumento) que doy ahora podrían resultar en la imposición de sentencias consecutivas. Si el delito por el cual me estoy declarando culpable sucedió cuando me encontraba preso o bajo libertad preparatoria, se que la ley requiere que el tribunal imponga sentencias consecutivas a menos que el tribunal falle y haga constar en el acta que las sentencias consecutivas serían inapropiadas.

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:

Trato declaratorio. Mi(s) declaración(es) de culpabilidad (o sin argumento) es (son) el resultado de un trato declaratorio que he hecho con el abogado fiscal. Todas las promesas, deberes y provisiones de este trato declaratorio, si hubiera alguno, se encuentran en su totalidad en esta afirmación, incluyendo aquellas explicadas a continuación:

I plead guilty to Count I in my Amended Information. Count II is dismissed. An APFP presentence report is ordered and I am released today to APFP supervision pending sentencing. The State agrees to a two-step 76-3-402 reduction if I comply 100% with all terms and conditions of APFP probation.

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.

El juez de primera instancia no está obligado. Sé que cualquier cargo, o concesión de sentencia o recomendación de libertad condicional, o sentencia suspendida, incluyendo una reducción de los cargos para el dictado de la sentencia, que haya sido hecho o solicitado ya sea por el abogado de defensa o el fiscal no son obligatorias para el juez. También se que cualquier idea expresada ante mi concerniente a lo que se piensa que el juez pueda hacer no son obligatorias para el juez.

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.

Inmigración/Deportación: Entiendo que si no soy ciudadano de los Estado Unidos, mi(s) declaración(es) del día de hoy podría, o ciertamente me sujetará a deportación bajo las leyes y reglamentos de inmigración de los Estado Unidos, o de otra manera afectarán negativamente mi estado migratorio, que podría incluir el impedir mi reingreso a los Estados Unidos. Entiendo que si tengo preguntas acerca del efecto que tendrá mi declaración de culpabilidad en mi estado migratorio, debo consultar con un abogado de emigración.

Defendant's Certification of Voluntariness
Certificación de voluntariedad del acusado

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.

Estoy dando esta declaración por mi propia y libre voluntad. No se han utilizado fuerza ni amenazas o coacción de ningún tipo para convencerme de declararme culpable (o sin argumento). No se me ha hecho ninguna promesa con excepción de aquellas que se encuentran en esta afirmación.

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.

He leído esta afirmación, o me la ha leído mi abogado, entiendo sus contenidos y adopto cada afirmación aquí contenida como mía propia. Sé que soy libre de cambiar o borrar cualquier afirmación contenida en este documento pero no deseo hacer ningún cambio porque todas las afirmaciones en este son correctas.

I am satisfied with advice and assistance of my attorney.
Estoy satisfecho(a) con el asesoramiento y servicio de mi abogado(a).

I am 45 years of age. I have attended school through the 12th 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.

Tengo ___ años de edad. He asistido hasta el ____ grado escolar. Puedo leer y entender el idioma inglés. Si no entiendo el inglés, se me ha proporcionado un intérprete. No me encontraba bajo la influencia de ningún estupefaciente, medicina, o embriagante que pudiera impedir mi sano juicio cuando decidí declararme culpable. En este momento no me encuentro bajo la influencia de ningún estupefaciente, medicina, o embriagante que pueda impedir mi sano juicio.

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.

Me considero de mente sana, capaz de discernir y entender este procedimiento y las consecuencias de mi declaración. Estoy libre de cualquier enfermedad mental, defecto o impedimento que me evite entender lo que estoy haciendo o que evite que dé mi declaración a sabiendas, inteligente y voluntariamente.

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.

Entiendo que si quisiera retirar mi(s) declaración(es) de culpabilidad (o sin argumento), debo presentar una petición escrita para retirar mi(s) declaración(es) antes que se pronuncie la sentencia. Entiendo que para una Declaración en suspenso, la petición para retirarme del trato declaratorio debe ser hecha dentro de treinta días de mi declaración de culpabilidad o sin argumento. Solamente se me permitirá retirar mi declaración de culpabilidad si demuestro que no fue dada a sabiendas y voluntariamente. Entiendo que para disputar mi(s) declaración(es) de culpabilidad después de recibida la sentencia deberé hacerlo bajo la Ley de Remedios Post-condenatorios Título 78, Capítulo 35a, y la Regla 65C del las Reglas del Procedimiento Penal de Utah.

Dated this 14 day of April, 20 07

Fechado este día ____ de _____ del 20____.

DEFENDANT'S SIGNATURE
FIRMA DEL ACUSADO

Certificate of Defense Attorney
Certificado del abogado defensor

I certify that I am the attorney for Ernest Harper, 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.

Certifico que soy el abogado de _____, el acusado previamente mencionado, y que se que él/ella ha leído la afirmación o que yo se la he leído a él/ella; He hablado con él/ella de esta afirmación y me parece que él /ella entiende completamente el significado de su contenido y es competente física y mentalmente. A mi leal saber y entender, después de una investigación apropiada, los elementos del(los) delito(s) y la sinopsis de los hechos de la conducta penada del acusado son correctos; Esto, junto con los otros comentarios y aseveraciones hechos por el acusado en el afidávit previo son correctos y verdaderos.

ATTORNEY FOR DEFENDANT
Bar No. 5130
ABOGADO DEL ACUSADO
No. del colegio de abogados _____

Certificate of Prosecuting Attorney
Certificado del abogado fiscal

I certify that I am the attorney for the State of Utah in the case against Ernest Harper, 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.

Certifico que soy el abogado representando al Estado de Utah en el caso en contra del acusado _____. He repasado esta Afirmación del acusado y encuentro que los hechos en los que se basa la conducta penal del acusado constituyen el delito y son verdaderos y correctos. No se ha ofrecido al acusado ningún incentivo, amenaza o intimidación para alentar su declaración. Las negociaciones para la declaración se encuentran en su totalidad en esta afirmación y en el Trato declaratorio adjunto, se han suplementado en el acta ante el tribunal. Hay causas razonables para creer que la evidencia respaldará la condena del acusado por el (los) delito(s) por el (los) cual (cuales) da su(s) declaración(es) y que la aceptación de la(s) declaración(es) servirá los intereses del público.

_____
PROSECUTING ATTORNEY
Bar No. 12490
ABOGADO FISCAL
No. del colegio de abogados _____

Order
Orden

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.

Basado en los hechos previamente presentados y en la certificación del(a) acusado(a) y su asesor jurídico, y basado en las afirmaciones dadas ante el tribunal, el juez como testigo de las firmas falla que la(s) declaración(es) de culpabilidad (o sin argumento) del acusado ha (han) sido dada(s) libre, a sabiendas y voluntariamente

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.

POR LO TANTO SE ORDENA que la(s) declaración(es) de culpabilidad (o sin argumento) del acusado presentada en esta Afirmación, sea aceptada y asentada.

Dated this 14 day of April, 2017.

Fechado este día _____ de _____ del 8____.

_____
District Court Judge
JUEZ DEL TRIBUNAL DE DISTRITO

Addendum E

Motion to Withdraw Guilty Plea &
Declaration of Ernest Clayton Harper

(R*938*:306–11)

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Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ERNEST CLAYTON HARPER, Defendant.	**MOTION TO WITHDRAW GUILTY PLEA** Case No. 161911938 Judge Katie Bernards-Goodman

Ernest Harper, by and through counsel, Rudy J. Bautista, respectfully moves this Court to withdraw his guilty plea to Count 1, Stalking, a second-degree felony, tendered on April 14, 2017.

Utah law permits a defendant to withdraw a plea of guilty "upon leave of the court and a showing that it was not knowingly and voluntarily made . . . before sentence is announced." Utah Code Ann. § 77-13-6(1). Whether the withdrawal is permitted is "within the sound discretion of the trial court." State v. Gallegos, 738 P.2d 1040, 1041 (Utah 1987). However, such motions should "be liberally granted." Id. at 1042.

In cases determining whether a confession is voluntary or coerced, Utah courts have considered the defendant's "mental condition a more significant factor in the 'voluntariness' calculus." State v.

Rettenberger, 1999 UT 80, 984 P.2d 1009, 1014 (Utah 1999) (quoting Colorado v. Connelly, 479 U.S. 157, 164 (1986)). The Utah Supreme Court has thus set forth that, in such an analysis of voluntariness, "courts must also consider such factors as the defendant's mental health, mental deficiency, emotional instability, education, age, and familiarity with the judicial system." Rettenberger, 984 P.2d at 1014 (citing Clewis v. Texas, 386 U.S. 707, 712 (1967) (education); Culombe v. Connecticut, 367 U.S. 568, 602-03 (1961) (mental deficiency); Spano v. New York, 360 U.S. 315, 322 (1959) (emotional instability); Fikes v. Alabama, 352 U.S. 191, 193 (1957) (mental health)).

In his Declaration, Mr. Harper details that he suffers from PTSD and depression, and has panic attacks when confronted with stress. See also Mental Health Treatment Plan, dated July 12, 2017, filed as non-public information. Mr. Harper is also currently facing the possibility of losing custody of his son. Under these stressful circumstances, Mr. Harper's emotional instability prevented him from knowingly and voluntarily appreciating the full the consequences of his guilty plea, especially also taking into account his interpretation of his attorney's advice at the time.

For the foregoing reasons, defendant respectfully requests this Court withdraw his guilty plea made on April 14, 2017.

DATED this 8th day of August, 2017.

/s/ Rudy J. Bautista
Rudy J. Bautista
Attorney for Mr. Harper

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that a true and correct copy of the **MOTION TO WITHDRAW GUILTY PLEA** was e-filed, on this 8th day of August, 2017 to the following:

Salt Lake County District Attorney's Office
111 East Broadway, Suite 400
Salt Lake City, Utah 84111

/s/ Shamim Monshizadeh

Rudy J. Bautista (8636)
BAUTISTA, BOOTH & PARKINSON, PC
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Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ERNEST CLAYTON HARPER, Defendant.	**DECLARATION OF ERNEST CLAYTON HARPER** Case No. 161911938 Judge Katie Bernards-Goodman

I, Ernest Clayton Harper, hereby declare, as follows:

1. I am the defendant in the above-numbered case.
2. On April 14, 2017, I pleaded guilty to count 1, stalking, a second-degree felony.
3. I thought that I would be placed on probation, and maybe some jail.
4. I did not know that by pleading guilty, I could be sent to prison. I did not know that AP&P would recommend prison.
5. Michael Peterson, my attorney at the time, told me I'll get probation and I should plead because of that.
6. Mr. Peterson also told me I would never see my son again unless I plead.

7. I have panic attacks when confronted with overwhelming stress. I also have PTSD and depression.

8. I am terrified of losing my son. I believe my wife wants me to go to prison so that she can take my son away from me.

I declare under penalty of perjury that the foregoing is true and correct, and would be my testimony if I were testifying in a court of law.

Dated this 8th day of August, 2017.

/s/ Ernest Clayton Harper
Ernest Clayton Harper
Defendant

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that a true and correct copy of the **DECLARATION OF ERNEST CLAYTON HARPER** was e-filed, on this 8th day of August, 2017 to the following:

Salt Lake County District Attorney's Office
111 East Broadway, Suite 400
Salt Lake City, Utah 84111

/s/ Shamim Monshizadeh