

2003

Utah v. Gordon Lee Walls : Brief of Appellant

Utah Court of Appeals

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STATE OF UTAH,)	
)	
Plaintiff/Appellee,)	
)	
vs.)	
)	
GORDON LEE WALLS,)	Case No. 20030139-CA
)	
Defendant/Appellant.)	

APPEAL FROM A CONVICTION BASED UPON A PLEA OF GUILTY BY THE DEFENDANT FOR MURDER, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §76-5-203 IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH. THE PLEAS OF GUILTY WERE TAKEN BEFORE THE HONORABLE PAMELA G. HEFFERNAN ON THE 26TH DAY OF MARCH 2002.

Attorney for Plaintiff/Appellee

Attorney for Defendant/Appellant

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)
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GORDON LEE WALLS,) Case No. 20030139-CA
)
Defendant/Appellant.)

BRIEF OF APPELLANT

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee	:	
vs.	:	
GORDON LEON WALLS	:	Case No. 20030139
Defendant/Appellant	:	

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction based upon a plea of guilty by the defendant to the charge of Murder, a first-degree felony. The plea of guilty was taken before the Honorable Pamela G. Heffernan on the 26th day of March 2002.

STATEMENT OF ISSUES ON APPEAL AND STANDARD OF REVIEW

POINT I

**DID THE TRIAL COURT ERR IN DENYING THE
DEFENDANT’S MOTION TO WITHDRAW HIS GUILTY
PLEA?**

PRESERVATION IN THE TRIAL COURT: *This issue was preserved for appeal* by the timely filing of a motion to withdraw his plea (R. 118), and hearings and a ruling on that motion.(R. 183, 184)

THE STANDARD OF REVIEW: The Court reviews “a trial court's denial of a motion to withdraw a guilty plea under an abuse-of-discretion standard.” *State v.*

Blair, 868 P.2d 802, 805 (Utah 1993).” The Court applies “the clearly erroneous standard for the trial court’s findings of fact made in conjunction with that decision.” *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999) “However, the ultimate question of whether the trial court strictly complied with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness.” *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999) (See also *State v. Thurman*, 911 P.2d 371, 372 (Utah 1996).

POINT II

DID THE TRIAL COURT COMMIT PLAIN ERROR IN FAILING TO INSURE THAT A PROPER RULE 11 DETERMINATION OF VOLUNTARINESS WAS MADE?

PRESERVATION IN THE TRIAL COURT: *This issue was not fully preserved for appeal* despite the timely filing of a motion to withdraw his plea (R. 118), and hearings and a ruling on that motion.(R. 183, 184), since the issue of the plea bargain was not addressed in the motion.

THE STANDARD OF REVIEW: Since the issue was not addressed in the Defendant’s motion for a new trial, the plain error standard applies. “To establish plain error, a defendant must show: (1) an error did in fact occur, (2) the error should have been obvious to the trial court, and (3) the error is harmful. *State v. Bradley*, 2002 UT App 348 (See also *State v. Ellifritz*, 835 P.2d 170, 174 (Utah Ct.App. 1992) and *State v. Olsen*, 860 P.2d 332, 334 (Utah 1993). “However, the

ultimate question of whether the trial court strictly complied with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness.” *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999) (See also *State v. Thurman*, 911 P.2d 371, 372 (Utah 1996))

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UTAH CODE ANNOTATED

Section 76-5-203. Murder

(1) As used in this section, "predicate offense" means:

(a) violation of Section 58-37d-4 or 58-37d-5, Clandestine Drug Lab Act;

(b) child abuse, under Subsection 76-5-109(2)(a), when the victim is younger than 18 years of age;

(c) kidnapping under Section 76-5-301;

(d) child kidnapping under Section 76-5-301.1;

(e) aggravated kidnapping under Section 76-5-302;

(f) rape of a child under Section 76-5-402.1

(g) object rape of a child under Section 76-5-402.3;

(h) sodomy upon a child under Section 76-5-403.1;

(i) forcible sexual abuse under Section 76-5-404;

(j) sexual abuse of a child or aggravated sexual abuse of a child under Section 76-5-404.1;

- (k) rape under Section 76-5-402;
- (l) object rape under Section 76-5-402.2;
- (m) forcible sodomy under Section 76-5-403;
- (n) aggravated sexual assault under Section 76-5-405;
- (o) arson under Section 76-6-102;
- (p) aggravated arson under Section 76-6-103;
- (q) burglary under Section 76-6-202;
- (r) aggravated burglary under Section 76-6-203;
- (s) robbery under Section 76-6-301;
- (t) aggravated robbery under Section 76-6-302; or
- (u) escape or aggravated escape under Section 76-8-309.

(2) Criminal homicide constitutes murder if:

- (a) the actor intentionally or knowingly causes the death of another;
- (b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;
- (c) acting under circumstances evidencing a depraved indifference to human life, the actor engages in conduct which creates a grave risk of death to another and thereby causes the death of another;
- (d) (i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense; and
- (ii) a person other than a party as defined in Section 76-2-202 is

killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense;

(e) the actor recklessly causes the death of a peace officer while in the commission or attempted commission of:

(i) an assault against a peace officer under Section 76-5-102.4; or

(ii) interference with a peace officer while making a lawful arrest under Section 76-8-305 if the actor uses force against a peace officer;

(f) commits a homicide which would be aggravated murder but the offense is reduced pursuant to Subsection 76-5-202(3); or

(g) the actor commits aggravated murder but special mitigation is established under Section 76-5-205.5.

(3) Murder is a first-degree felony.

(4) (a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:

(i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or

(ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) Under Subsection (4)(a)(i) emotional distress does not include:

(i) a condition resulting from mental illness as defined in Section 76-2-305; or

(ii) distress that is substantially caused by the defendant's own conduct.

(c) The reasonableness of an explanation or excuse under Subsection

(4)(a)(i) or the reasonable belief of the actor under Subsection (4)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(d) This affirmative defense reduces charges only as follows:

(i) murder to manslaughter; and

(ii) attempted murder to attempted manslaughter.

Section 77-15-1- Incompetent person not to be tried for public offense.

No person who is incompetent to proceed shall be tried for a public offense.

Section 77-18-5

Reports by courts and prosecuting attorneys to Board of Pardons and Parole. In cases where an indeterminate sentence is imposed, the judge and prosecuting attorney may, within 30 days, mail a statement to the Board of Pardons and Parole setting forth the term for which the prisoner ought to be imprisoned together with any information which might aid the board in passing on the application for termination or commutation of the sentence or for parole or pardon.

Section 77-27-5- Board of Pardons and Parole authority.

(1)(a) The Board of Pardons and Parole shall determine by majority decision when and under what conditions, subject to this chapter and other laws of the state, persons committed to serve sentences in class A misdemeanor cases at penal or correctional facilities which are under the jurisdiction of the Department of Corrections, and all felony cases except treason or impeachment or as otherwise limited by law, may be released upon parole, pardoned, restitution ordered, or have their fines, forfeitures, or restitution remitted, or their sentences commuted or terminated.

Utah Rules of Criminal Procedure; Rule 11(e)

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

(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.

STATEMENT OF THE CASE

The Defendant was originally charged in an information filed June 15, 2001 with the offense of Murder, a first degree felony, in violation of Utah Code Ann.

§ 76-5-203 (R. 10). On June 15, 2001 the Defendant made an initial appearance and the information was read (R. 16). On August 27, 2001 , the preliminary hearing was held, and the Defendant was bound over for arraignment. (R. 78) The case was eventually set for trial, which was scheduled for a five-day jury trial to begin on April 22, 2002. The Defendant ultimately entered a plea of guilty to the offense of Murder, a first degree felony as charged, before the Honorable Judge Pamela Heffernan on March 26, 2002.(R. 99)

On April 25, 2002, the Defendant filed a pro se motion to withdraw his guilty plea,(R. 111) and after several delays the case was set for hearings and a determination on the motion. On January 28, 2003, Judge Heffernan denied the Defendant's motion,(R. 184) and sentenced the Defendant to an indeterminate term of 5 years to life in the Utah State Prison. The prison term was commenced on that

day. (R. 184/57) The Defendant has received an original hearing date before the Board of Pardons in June 2016.

This judgment and conviction was entered on February 18, 2003, and the Defendant filed his notice of appeal on February 20, 2003.(R. 170)

STATEMENT OF THE FACTS

The Defendant was originally charged in an information dated June 15, 2001, with the offense of Murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (R. 10).

After several court appearances the Defendant entered into plea negotiations, and on March 26, 2002, the Defendant entered a plea of guilty as charged to Murder, a first-degree felony.(R. 186/13) The sole plea negotiation was “the State has agreed to recommend to the parole board that he serve a period of time of incarceration between 10 and 12 years.” (R. 186/2)

At the time of the entry of the guilty plea, the trial court conducted a Rule 11 colloquy. Attorney Martin Gravis represented the Defendant at the hearing. (R.186/2) The Defendant stated that he had talked to Mr. Gravis and if he had “any problems understanding [the plea] or need[ed] to talk to Mr. Gravis about anything, [he] just need[ed] to let [the court] know that”. (R. 186/4)

The trial court then went though the Defendant’s rights, including the right against compulsory self-incrimination, the right to a speedy trial before an

impartial jury, the presumption of innocence, and the right to have the State pay to subpoena any witnesses the Defendant desired for his defense. (R. 186/4,5) The court further advised the Defendant of his right to confront the witnesses against him, and the right not to testify at trial, and that his decision not to testify could not be used against him. (R. 186/5) The court advised the Defendant that the State had the burden of proof, and would be required to prove beyond a reasonable doubt each element of the.(R. 186/6) The court then went through the elements of the offenses to which the Defendant was pleading guilty. (R. 186/6) The court advised the Defendant that by pleading guilty he would be waiving these rights. (R. 186/5)

The trial court then went through the possible maximum sentences on the charge to which the Defendant was pleading guilty, (R. 186/7) The court told the Defendant “You should also be aware that just because the State writes a letter to the parole authority doesn’t mean they have to follow their recommendation.” To which the Defendant answered, “Yeah, I’ve been told.” (R. 186/7) The court further advised the Defendant “ So you shouldn’t rely on anything that the State has indicated they may or may not do in entering this sentence because you could serve a lot longer than what they’re going to recommend” (R. 186/7,8) The court advised the Defendant that he had 30 days to withdraw his guilty plea, and that by pleading guilty he had very limited appeal rights. (R. 186/8) The court established that he was pleading guilty of his “own free will and choice” and that he was not

under the influence of anything that would affect his ability to enter a knowing guilty plea. (R. 186/8-10) The Defendant did tell the court that he was supposed to be taking the prescription drug of Haldol and/or Thorazine, but that he was not taking those medications. (R. 186/9,10) The court then asked the prosecutor to give a factual basis for the plea, to which the prosecutor gave an adequate factual basis.

The trial court, in asking the Defendant if he had in fact done the things the prosecutor claimed stated “No, Mr. Tillet kept attacking me”, and “Mr. Tillet attacked me twice that night. The first time I didn’t kick him in the head or nothing. Then later that evening then [sic] he attacked me again. That’s when he got kicked in the head.” (R. 186/12)

The court then went through an expiation agreement (statement in advance of plea) that the Defendant had signed. It was established that the Defendant did not read the document, but that the Defendant’s attorney Mr. Gravis had read it to him, “not exactly word for word, but pretty much.” (R. 186/13) The court acknowledged that “I don’t think it’s going to do a whole lot of good unless it was read word for word, but I think I’ve covered his rights sufficiently anyway.” (R. 186/14)

On April 25, 2002, the Defendant filed a pro se motion or letter to withdraw his guilty plea,(R. 111) and on April 30th 2002 the court requested that the public defenders file a formal motion. (R. 181/2) At the next hearing on August 6, 2002 the defense requested that an alienist be appointed to assess the Defendant’s mental

status, specifically, his ability to have knowingly entered his plea of guilty, and the court appointed two alienist to explore this issue. (R. 181/4-12) The court then continued the case until November 20, 2002 for a hearing as to the Defendant's competence to enter a plea. At that hearing two witnesses were called, Mr. Rhett Potter, a Licensed Clinical Social Worker, and Dr. Rick Hawks, a psychologist.

Mr. Potter interviewed the defendant and found "Bottom line on it was that seemed to me he was tracking appropriately, that he understood what the charges were, he understood the possible penalties." (R. 183/17) He testified that the Defendant told him that he heard voices, which had told him to enter the guilty plea, but Mr. Potter stated, "With the information that he gave me about the way the voices were ostensibly acting at that point in time did not seem consistent with the way that auditory hallucinations work with a person who has schizophrenia." (R. 183/20) Mr. Potter stated that at the time of the interview that he "felt him to be competent" but that he didn't make a specific finding of competence for the period of March 26, 2002. (R. 183/25)

Dr Rick Hawks also evaluated the Defendant for mental competency. He testified that it was possible that the Defendant was faking mental illness. (R. 183/32) He also found originally that the Defendant may have so mental illness, including schizophrenia, but could not make such a finding, or rule such a diagnosis out. (R. 183/32,33) Furthermore, he did not do an analysis of the

Defendant's mental state as of the date of the plea, and therefore the court continued the hearing, appointed another psychologist, and instructed both to determine the Defendant's mental competency as of the date of the plea. (R. 183/63-67)

After additional examinations Dr. Hawks produced an amended report, and testified on Jan28, 2003 that at the time of the plea the Defendant "appeared to comprehend and appreciate the charges and allegations against him." (R. 184/10) He demonstrated the ability to disclose to counsel pertinent facts, events, and states of mind," (R. 184/10) and was able to "adequately [comprehend] and [appreciate] the range and nature of possible penalties." (R. 184/10) He understood the adversary nature of the proceedings against him" and manifested appropriate courtroom behavior on March 26 [2002]" (R. 184/10,11) Dr. Hawks testified that the Defendant did have a mental illness in the "schizophrenic spectrum", "a psychotic thought disorder, perhaps." (R. 184/15)

Dr. Beverly O'Connor, a neuropsychologist was then called to testify. She testified that although it was possible the Defendant was faking a mental illness, she thought he was trying to cooperate, and not faking a mental illness. (R.184/27,33) Dr. O'Connor opined that on March 26, 2002 the Defendant was not competent, due to three factors. She stated, "I felt like he had a mental illness – a probable mental illness that was either some kind of delusional disorder, or a

paranoid schizophrenia, combined with a low verbal IQ, combined with verbal comprehension difficulties.” (R. 184 / 35)

The court then ruled, “Mr. Walls was competent to enter his plea, that he did knowingly and voluntarily enter his plea.” (R. 184/51), and that the preponderance of the evidence indicated that the Defendant was malingering. (R. 184/53) The court then sentenced the Defendant to an indeterminate term in the Utah State Prison of 5 years to life, with a recommendation of credit for time served. The prison term was commenced on that day. (R. 184/57)

SUMMARY OF ARGUMENTS

The Defendant entered a plea of guilty pursuant to plea negotiations on March 26, 2002. At the time of the entry of his pleas of guilty, the Defendant was present in court and the trial court commenced a Rule 11 (Utah Rules of Criminal Procedure) colloquy. The Defendant was suffering from a mental illness, for which prescription medication had been prescribed, but which the Defendant was not taking. The Defendant was suffering from “a probable mental illness that was either some kind of delusional disorder, or a paranoid schizophrenia, combined with a low verbal IQ, combined with verbal comprehension difficulties.” (R. 184 / 35) Although the court made a finding that the defendant was competent to enter his plea, the evidence would suggest that there were questions as to the Defendant’s mental ability to enter the plea, and therefore the Defendant was

entitled to have his timely filed motion to withdraw his plea granted. The trial court denied this motion. Furthermore, the Defendant pled guilty pursuant to a plea negotiation in which the only “bargain” the Defendant was offered, that the prosecution would recommend to the Board of Pardons that he serve 10 to 12 years, was an illusory promise that both the prosecution and defense counsel would know had no effect on the Defendant’s prison sentence.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT’S MOTION TO WITHDRAW HIS GUILTY PLEA

On March 26, 2002 the Defendant entered a guilty plea as charged to the first-degree felony murder charge. On or about April 15, 2002 the Defendant moved the trial court to allow him to withdraw that plea. The trial court thereafter held several hearing, including two days of evidentiary hearings on the Defendant’s motion, including the testimony of three alienists who testified as to the Defendant’s probable mental state at the time of the entry of plea. After those hearings, the trial court denied the Defendant’s motion to withdraw his plea.

The Court in the case of *State v. Blair*, 868 P.2d 802, 805 (Utah 1993) held that the appellate court reviews “a trial court’s denial of a motion to withdraw a guilty plea under an abuse-of-discretion standard.” The Court has further noted that

it applies “the clearly erroneous standard for the trial court’s findings of fact made in conjunction with that decision.” *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999) “However, the ultimate question of whether the trial court strictly complied with constitutional and procedural requirements for entry of a guilty plea is a question of law that is reviewed for correctness.” *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999) (See also *State v. Thurman*, 911 P.2d 371, 372 (Utah 1996)

The trial court therefore, must ensure that the Defendant’s plea has strictly met all the requirements of Rule 11, as well as meeting all constitutional requirements, and any failure in the process requires the granting of a subsequent motion by the Defendant to withdraw his plea. A trial court abuses its discretion by failing to grant the motion to withdraw the plea when a Rule 11 violation is present. In *State v. Mora*, 2003 UT App 117, ¶ 23 the court held:

We hold the trial court exceeded its discretion by denying Mora's motion to withdraw his guilty plea. The trial court that accepted the plea failed to strictly comply with rule 11 when it accepted Mora's guilty plea without correctly incorporating the affidavit into the record or establishing elsewhere on the record that Mora knew the State was required to prove him guilty beyond a reasonable doubt.

See also *State v. Dean*, 57 P.3d 1106 (Ut. Ct. App. 2002) where the Court reversed a denial of defendant’s motion to withdraw his plea where the trial court violated Rule 11 by failing to advise him of his speedy trial rights. The Court in *State v. Dean*, ruled that the failure to advise under Rule 11 constituted plain error.

In the present case, the Defendant timely filed a motion to withdraw his plea, based in part on Rule 11 violations of voluntariness. The Defendant was suffering from a significant mental illness, and was not taking his prescribed medication at the time the plea was taken making the issue of mental competence and therefore voluntariness an issue. The reviewing trial court made a ruling in violation of the strict compliance requirement of Rule 11, and therefore abused its discretion.

In the case of *Jacobs v. State*, 20 P.3d 382 (Utah 2001) the court, in denying a ten year post conviction habeas corpus petition noted that, "‘A mentally incompetent defendant can provide no defense, and proceedings against such a defendant do not comport with due process.’ *State v. Young*, 780 P.2d 1233, 1236 (Utah 1989) (citing *Dusky v. United States*, 362 U.S. 402 (1960)).” In the case of *York v. Shulsen*, 875 P.2d 590, 594 (Utah Ct. App. 1994) this Court held: “Due process requires that a defendant be competent to plead guilty. (citing *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L.Ed.2d 103 (1975))”

This concept is not only mandated by due process requirements, but is statutory as well. UCA §77-15-1 provides that, “[n]o person who is incompetent to proceed shall be tried for a public offense.”

In the present case, although the trial court held a hearing to determine competency, the court abused it’s discretion in denying the Defendant’s motion to withdraw his plea due to the Rule 11 voluntariness issue. Both psychologists

acknowledged that the Defendant most likely had a mental illness at the time of the plea. Dr. Hawks testified that the Defendant did have a mental illness in the “schizophrenic spectrum”, “a psychotic thought disorder, perhaps.” (R. 184/15) and Dr. O’Connor testified, “I felt like he had a mental illness – a probable mental illness that was either some kind of delusional disorder, or a paranoid schizophrenia, combined with a low verbal IQ, combined with verbal comprehension difficulties.” (R. 184 / 35)

Both psychologists understood that at the time of the entry of plea, the Defendant was prescribed but was not taking either of two medications (Haldol or Thorazine, (R. 186/9,10)) to treat a suspected mental illness.

Although Dr. Hawks, as well as Mr. Potter believed that the Defendant was malingering, (R. 183/32), and Dr. O’Connor conceded that the Defendant might be malingering, (R.184 / 27,33) there is sufficient doubt as to the Defendant’s mental state at the time of the guilty pleas to require the trial court to allow the Defendant’s motion to withdraw his plea.

POINT II

THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO INSURE THAT A PROPER RULE 11 DETERMINATION OF VOLUNTARINESS WAS MADE.

The Defendant entered a plea of guilty to the charge of Murder, a first-degree felony, as charged in the original information. The plea negotiation process

resulted in only one promise or supposed benefit to the Defendant by entering into the plea. The Defendant was promised that the prosecution would write a letter to the Board of Pardons recommending that he serve a sentence of a maximum of 10 to 12 years on the charge. That single promise induced the Defendant to plead guilty, and that single promise was known by both the prosecution as well as defense counsel to have little or no effect on the Board of Pardons decision on the Defendant's parole date.

In the case of *State v. Pharris*, 798 P.2d 772, 774 (Utah Ct. App. 1990) the Court ruled that, “[b]oth the Utah Supreme Court and the Utah Court of Appeals have allowed a Rule 11 challenge to the voluntariness of a plea to be considered for the first time on appeal.” Further, in *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) the Supreme Court reversed a guilty plea holding: “It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary.” Although in the *Boykin* decision, the Court was presented with a plea to a then capital offense and the court taking the plea did not ask any questions regarding the plea, the fundamental principles are the same.

In the case of *State v. Bradley*, 2002 UT App 348 the Court ruled: “To establish plain error, a defendant must show: (1) an error did in fact occur, (2) the error should have been obvious to the trial court, and (3) the error is harmful. (See

also *State v. Ellifritz*, 835 P.2d 170, 174 (Utah Ct.App. 1992). In the case of *State v. Olsen*, 869 P.2d 1004, 1010 (Utah App. 1994) this Court held “Under [the plain error] standard, we will not reverse unless we determine that an error existed, and that the error was both obvious and harmful”. See also *State v. Ostler*, 996 P.2d 1065, 1068 (Utah Ct. App. 2000)¹ where the Court addressed the issue of plain error in a Rule 11 violation case, and stated:

To succeed on a claim of plain error, a defendant has the burden of showing "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993);

Further, in *State v. Ostler* the Court reversed the defendant’s conviction having found plain error in holding: “We hold that the trial court erred by failing to strictly comply with Rule 11(e). That error should have been obvious to the trial court and was prejudicial to defendant.” (*State v. Ostler* infra at 1072)

Utah appellate courts have consistently ruled that a Rule 11 violation constitutes plain error. In the case of *State v. Dean*, 57 P.3d 1106, 1109 (Utah Ct. App. 2002) the Court ruled:

Finally, the trial court's omission was harmful because the omission dealt with a substantial constitutional right. It is well established under Utah law that we will presume harm under plain error analysis when a trial court fails to inform a defendant of his constitutional rights under rule 11.

¹ Affirmed by the Utah Supreme Court without analysis, *State v. Ostler*, 31 P.3d 528 (Utah 2001)

See also *State v. Tarnawiecki*, 5 P.3d 1222, 1227 (Utah Ct. App. 2000) where the Court was presented with a case wherein the trial court failed to advise the defendant of her right to a “speedy trial before an impartial jury” during the Rule 11 colloquy. In that case the Court ruled that the error “should have been obvious to the trial court ... and [was] prejudicial and therefore harmful”. (Id at 1228)

Rule 11(e)(2) of the Utah Rules of Criminal Procedure provides in relevant part: “The court may not accept the plea until the court has found ... (2) the plea is voluntarily made”.

The Utah Supreme Court, in the case of *State v. Copeland*, 765 P.2d 1266, 1274 (Utah 1988) held “*Brady* and *Hammond*² require that in order for a plea to be voluntarily and knowingly made, the defendant must understand the nature and value of any promises made to him.” (emphasis added) In the *Copeland* decision, the Court remanded the case back to the trial court for further findings regarding the defendant’s mental state and his understanding of the plea negotiation promises. However, the Court noted:

There are several problems with the plea bargain entered into by defendant. First, it appears either that he misunderstood the promise the State made to him regarding its sentencing recommendation or that the promise was illusory. Second, and more serious, is the claim that defendant's understanding of the promise caused him to be misled

² *Brady v. United States*, 397 U. S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 742 (1970)
Hammond v. United States, 528 F.2d 15 (4th Cir. 1975)

about the sentencing options available to the court and therefore the value of the bargain into which he was entering. (Id. at 1274)

In the present case, the Defendant was clearly deceived by the plea negotiations. Admittedly, the trial court pointed out to the Defendant “You should also be aware that just because the State writes a letter to the parole authority doesn’t mean they have to follow their recommendation.” To which the Defendant answered, “Yeah, I’ve been told.” (R. 186/7 emphasis added) That caution by the trial court is insufficient, and in fact implies that there is significant benefit to the letter of recommendation.

In *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 742 (1970), the United States Supreme Court held:

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

The Utah Court of Appeals in the case of *State v. Norris*, 57 P.3d 238, 241 (Utah Ct. App. 2002) reversed a defendant’s conviction by guilty plea, when it determined:

Both the trial court and the State clearly promised Norris that he could pursue a claim for vindictive prosecution on appeal, but neither the court nor the State could fulfill that promise. The court's legal error exaggerated the benefits Norris would receive from pleading guilty.

Thus it misled Norris as to "the nature and value of [the] promise[] made to him." (Quoting *State v. Copeland* at 1274.)

The Court held: "Thus, Norris's pleas were not made voluntarily with full knowledge of the consequences of pleading guilty." (Id. at 241)

In the present case, the trial court failed to strictly comply with the Rule 11 requirements during the taking of the Defendant's guilty plea. In harmony with the Utah Appellate Courts (*State v. Dean*, *State v. Tarnawiecki*, and *State v. Ostler* *infra*) any Rule 11 violation should have been obvious to the trial court. Furthermore, this Court has consistently held that a Rule 11 violation is presumed to be harmful. Therefore, all three prongs of "plain error" as reiterated in *State v. Bradley* *infra* have been met, and this Court should reverse the trial courts denial of the Defendant's motion to withdraw his guilty plea.

In the case at bar, the trial court failed to establish the basic requirement of Rule 11, in that the court did not ensure that the plea was voluntarily taken. Specifically, the court, knowing that the only concession to the Defendant in the plea to the crime as charged in the original information was the letter by the prosecution to the Board of Pardons, did not make an adequate record to ensure that the Defendant did in fact "understand the nature and value of any promises made to him." (*State v. Copeland* *infra* emphasis added) Furthermore, the trial court took a plea of guilty to a case in which the defendant "misunderstood the promise the State made to him regarding its sentencing recommendation or [did

not understand] that the promise was illusory.” (*State v. Copeland* *infra*) The trial court “exaggerated the benefits [the defendant] would receive from pleading guilty. Thus it misled [the defendant] as to ‘the nature and value of [the] promise[] made to him.’” (*State v. Norris* *infra*)

It has been long established that the even the trial court, let alone the prosecution, has no power to bind the Board of Pardons in their decision on parole dates of inmates. In the case of *Rawlings v. Holden*, 869 P.2d 958, 961 (Utah Ct. App. 1994) the court held: “In accordance with our sentencing scheme, the Utah Supreme Court has consistently held that ‘the power to reduce or terminate sentences is exclusive with the Board [of Pardons].’ (citing *McCoy v. Harris*, 108 Utah 407, 160 P.2d 721,(1945))” Further, UCA §77-27-5(1)(a) provides in relevant part:

The Board of Pardons and Parole shall determine by majority decision when and under what conditions, subject to this chapter and other laws of the state, persons committed to serve sentences in ... all felony cases ... may be released upon parole, pardoned, restitution ordered, or have their fines, forfeitures, or restitution remitted, or their sentences commuted or terminated.³

In the present case the trial court failed to properly inform the Defendant of the clearly established law regarding the effect of any recommendation to the Board of Pardons. By allowing the Defendant to assume that the prosecution’s 10

³ Defendant acknowledges that UCA § 77-18-5 provides for a prosecutor to provide written recommendations to the Board of Pardons within 30 days of sentence.

to 12-year maximum sentence recommendation would have any effect on the Board of Pardon's ultimate decision as to the Defendant's parole date, the trial court, in essence, participated in a illusory fiction that clearly played a role in the Defendant's decision to plead guilty. The trial court could have prevented this error by simply informing the Defendant that the effect of such a letter is minimal in the Board of Pardon's parole date decision.

The State may argue that even with the failure of the trial court to establish a legal factual basis for the plea, the conviction should stand on the grounds of harmless error. The Courts have held that an error in a Rule 11 colloquy is not harmless. In the recent case of *State v. Mora*, 2003 UT App 117, the court was presented with a guilty plea that was taken with a Rule 11 colloquy that was defective in that the court failed to inform the defendant "the State must prove him guilty beyond a reasonable doubt"⁴. (Id. at ¶22) Given that failure only, the Court reversed his conviction on the grounds that the Court presumed harm because, "by not knowing which rights a defendant is waiving, the defendant cannot make a fully informed decision." *State v. Hittle*, 47 P.3d 101, 104 (Utah Ct. App. 2002). "If the defendant is not fully informed of his rights prior to pleading guilty, then the

⁴ In *State v. Mora*, (Infra) the Court found the Rule 11 colloquy defective even where there was an affidavit in advance of plea signed by the defendant but not properly incorporated into the record.

guilty plea cannot be voluntary. We cannot accept an involuntary guilty plea and still claim to have done justice." (*State v. Mora* at ¶22)

There exists a fundamental unfairness when a defendant is told that there is a benefit to a prosecutor's recommendation to the Board of Pardons, when in fact that promise, although given, is of minimal effect. Unfortunately, in the case at bar, the trial court participated in this fallacy, and in fact gave the illusory "plea bargain" further credence by stating "just because the State writes a letter to the parole authority doesn't mean they have to follow their recommendation". (R. 186/7 emphasis added) While recognizing that the trial court did inform the Defendant that he may in fact serve more time than would be recommended by the prosecution, the fact that the court treated this recommendation as an "agreement" (R. 186/2) gives the illusion that the plea bargain is in fact a bargain.

The Defendant should be allowed to withdraw his guilty plea and face this charge due to his misunderstanding of the effect of the prosecutor's recommendation. The Defendant's statements at the time of entry of the plea indicated that he may have a valid defense of self-defense, and he relinquished that defense under the impression that he was getting some benefit from the prosecutor's agreement. The Board of Pardons gave the Defendant no benefit from the prosecutor's letter, and this Court should not allow a guilty plea to stand when it was obtained under a misunderstanding by the Defendant.

CONCLUSION

Based upon the failure of the trial court to properly advise the Defendant of his rights, specifically failing to make a proper finding of competence for the plea pursuant to the Rule 11 requirements, and based upon the fact that the plea was entered under an illusory promise, the Defendant respectfully requests this court reverse the Defendant's conviction and remand for further proceedings.

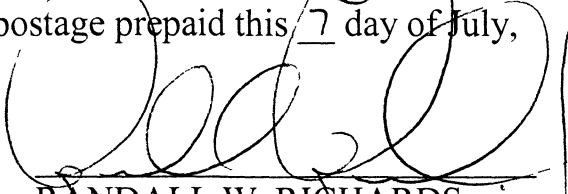
DATED this 7th day of July, 2003.



RANDALL W. RICHARDS
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant to Mark Shurtliff Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6th Floor PO Box 140854 SLC, Utah 84114-0180, postage prepaid this 7 day of July, 2003.



RANDALL W. RICHARDS
Attorney at Law

ADDENDUM

ADDENDUM A



BEFORE THE BOARD OF PARDONS OF THE STATE OF UTAH

UTAH STATE OBSCIS NO. 80346

Consideration of the Status of WALLS, Gordon Leon PRISON NO. 34293

The above-entitled matter came on for consideration before the Utah State Board of Pardons on the 18th day of March, 2003, for:

SCHEDULING ORIGINAL HEARING

After a review of the submitted information and good cause appearing, the Board makes the following decision and order:

RESULTS

Schedule for an Original Hearing in
06/2016.

Crime	Sent Case No.	Judge	Expiration
MURDER	5-L 011902755	HEFFERNAN	LIFE

This decision is subject to review and modification by the Board of Pardons at any time until actual release from custody.

In order of the Board of Pardons of the State of Utah, I have this date
18th day of March, 2003, affixed my signature as Chairman for and
behalf of the State of Utah, Board of Pardons.

M. R. Sibbett, Chairman

ADDENDUM B

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

2002 MAR 27 A 9:10

SECOND DISTRICT COURT

STATE OF UTAH

Plaintiff,

vs.

GORDON L. WALLS,

DEFENDANT.

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

: Case No. 011902755

: JUDGE PAMELA HEFFERNAN

:

MAR 27 2002

I, Gordon L Walls, hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights;

NOTIFICATION OF CHARGES

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

	CRIME & STATUTORY PROVISION	DEGREE	PUNISHMENT MIN/MAX AND/OR MINIMUM MANDATORY
A.	<u>Murder</u>	<u>1st-Degree</u>	<u>5-years to life U S P &/or</u>
		<u>Felony</u>	<u>\$10,000.00 fine</u>
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 the crime(s) to which I am pleading guilty (or no contest).

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

That I Gordon L. Walls on or about June 11, 2001, (a) intentionally or knowingly cause the death of Craig Tillet; and/or (b) intending to cause serious bodily injury to Craig Tillet committed an act clearly dangerous to human life that caused the death of Craig Tillet; and/or (c) acting under circumstances evidencing a depraved indifference to human life engaged in conduct which created a grave risk of death to Craig Tillet and thereby caused the death of Craig Tillet

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)-

That I beat up the victim Craig Tillet and kicked him in the head causing his death

WAIVER OF CONSTITUTIONAL RIGHTS

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

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

I (have not) 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

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

If I have **not** waived my right to counsel, my attorney's are Stephen A. Laker & Martin V. Gravis, My attorneys and I have fully discussed this statement, my rights, and the consequences of

my guilty (or no contest) plea(s)

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

CONFRONTATION AND CROSS-EXAMINATION OF WITNESSES. I know that if I were to have a jury trial, a) I would have the right to see and observe the witnesses who testified against me and b) my attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me

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

RIGHT TO TESTIFY AND PRIVILEGE AGAINST SELF-INCRIMINATION I know that if I were to have a jury trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, *no* one could make me testify or make me give evidence against myself. I also know that if I chose not to testify, the jury would be told that they could not hold my refusal to testify against me

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

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

APPEAL. I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty (or no contest)

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

CONSEQUENCES OF ENTERING A GUILTY (OR NO CONTEST) PLEA

POTENTIAL PENALTIES. I know the maximum sentence that may be imposed for each crime to which I am pleading guilty (or no contest). I know that by pleding guilty (or not contest) to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

I know that in addition to a fine, an eighty-five percent (85%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

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

PLEA BARGAIN: My guilty (or no contest) plea(s) (is) the result of a plea bargain between myself and the prosecuting attorney. All the promises, duties, and provisions of the plea bargain, if any, are fully contained in this statement, including those explained below:
The State agrees to affirmatively recommend to the parole board that the defendant's term of incarceration be for a period of 10 to 12 years rather the normal period for the charge the defendant has pled guilty to. (Upon the understanding of Defense Counsel, the Prosecuting attorney and myself is normally 23 years.)

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 prosecution 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.

DEFENDANT'S CERTIFICATION OF VOLUNTARINESS

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

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

statements are correct.

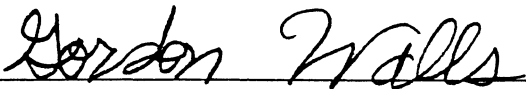
I am satisfied with the advice and assistance of my attorney.

I am 29 years of age. I have attended school through the 11th 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 judgement when I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgement.

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

I understand that if I want to withdraw my guilty (or no contest) plea(s), I must file a written motion to withdraw my plea(s) within 30 days after I have been sentenced and final judgement had been entered. I will only be allowed to withdraw my plea if I show good cause. I will not be allowed to withdraw my plea after 30 days for any reason.

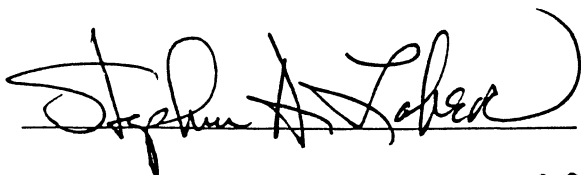
Dated this 26 day of March, 2002



GORDON L. WALLS
DEFENDANT


CERTIFICATE OF DEFENSE ATTORNEY

I certify that I am the attorney for Gordon L. Walls, 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.



STATE OF UTAH VS. GORDON L. WALLS
STATEMENT OF DEFENDANT IN SUPPORT OF
GUILTY PLEA & CERTIFICATE OF COUNSEL
CASE No. 011902755


STEPHEN A. LAKER
ATTORNEY FOR DEFENDANT
Bar No. 1870


MARTIN V. GRAVIS
ATTORNEY FOR DEFENDANT
Bar No. 1237

CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in the case against Gordon L. Walls, 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 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) for which the plea(s) is/are entered and that the acceptance of the plea(s) would serve the public interest.

DEE SMITH
PROSECUTING ATTORNEY
Bar No. 8685


WILLIAM F. DAINES
PROSECUTING ATTORNEY
Bar No. 0805

ORDER


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

STATE OF UTAH VS. GORDON L. WALLS
STATEMENT OF DEFENDANT IN SUPPORT OF
GUILTY PLEA & CERTIFICATE OF COUNSEL
CASE No 011902755

voluntarily made

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

Dated this 26 day of March, 2002



PAMELA HEFFERNAN
DISTRICT COURT JUDGE

ADDENDUM C

P R O C E E D I N G S

MR. GRAVIS: Mr. Walls here, Your Honor.

THE COURT: Okay. This is the State of Utah versus Gordon Walls, case number 11902755. This is on for -- it indicates a change of plea.

Is that correct, Mr. Gravis?

MR. GRAVIS: That is correct, yes, Your Honor. The defendant at this time will be entering a plea of guilty as charged. As part of the plea negotiation, the State has agreed to recommend to the parole board that he serve a -- a period of time of incarceration between 10 and 12 years.

THE COURT: Is that correct, Mr. Daines?

MR. DAINES: It is correct, Your Honor.

THE COURT: Now, with regard to any recommendations, Mr. Walls, that may be what the State is going to do and I think -- if -- if they've indicated that they are going to do that, they would be obligated to do that --

MR. DAINES: We would be.

THE COURT: -- as part of this agreement, but that doesn't involve the Court in any way. In other words, I will not be writing a letter in your behalf or indicating a concurrence with that recommendation. I likely won't write any letter. Okay?

THE DEFENDANT: (Nods head.)

THE COURT: Just so you know that I'm not involved

ADDENDUM D

1 **THE COURT:** Okay. If you plead guilty you're
2 admitting these elements and no proof will be presented.

3 Do you understand that?

4 **THE DEFENDANT:** Yeah, I know.

5 **THE COURT:** The charge carries with it up to a life
6 imprisonment, five years to -- five -- is it 15 to --

7 **MR. GRAVIS:** Five.

8 **MR. DAINES:** Five.

9 **THE COURT:** Five to life. That's right.

10 **MR. DAINES:** Indeterminate.

11 **THE COURT:** Indeterminate sentence. It would be
12 five years minimum to life in prison.

13 **THE DEFENDANT:** Yes, I know.

14 **THE COURT:** You should also be aware that just
15 because the State writes a letter to the parole authority
16 doesn't mean they have to follow their recommendation.

17 **THE DEFENDANT:** Yeah, I've been told.

18 **THE COURT:** Pardon me?

19 **THE DEFENDANT:** Yeah, I've been told that.

20 **THE COURT:** Okay. And what they will do is -- I --
21 I have no way of predicting that either. You understand?

22 **THE DEFENDANT:** Yes.

23 **THE COURT:** So you shouldn't rely on anything that
24 the State has indicated they may or may not do in entering
25 this sentence because you could serve a lot longer than what

1 they're going to recommend.

2 THE DEFENDANT: Yeah, I know.

3 THE COURT: Okay. You understand all that?

4 THE DEFENDANT: (Nods head.)

5 THE COURT: Yes?

6 THE DEFENDANT: Yes.

7 THE COURT: Okay. You have 30 days from the date
8 you're sentenced to move to withdraw your guilty plea. You
9 have 30 days from the date you're sentenced to file an
10 appeal. But once you've pled guilty, your appeal rights are
11 very limited after that.

12 Do you understand that?

13 THE DEFENDANT: Yes.

14 THE COURT: Is anyone forcing you to plead guilty?

15 THE DEFENDANT: No.

16 THE COURT: Are you doing this of your own free will
17 and choice?

18 THE DEFENDANT: Yeah.

19 THE COURT: Has anybody made any promises to you in
20 exchange for this plea, other than the State indicating
21 they'll write this letter making the statement --

22 THE DEFENDANT: No.

23 THE COURT: -- that they recommend a certain
24 amount -- number of years in prison?

25 THE DEFENDANT: No, nobody has.