

2003

Utah v. Gordon Lee Walls : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

BRIEF OF APPELLEE

APPEAL FROM ORDER DENYING DEFENDANT'S MOTION TO
WITHDRAW A GUILTY PLEA TO MURDER, A FIRST DEGREE
FELONY, IN VIOLATION OF UTAH CODE ANN. § 75-5-203 (Supp.
2001), IN THE SECOND JUDICIAL DISTRICT COURT IN AND
FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE
PAMELA G. HEFFERNAN, PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the denial of defendant's motion to withdraw his guilty plea to murder, a first degree felony. This Court has jurisdiction pursuant to the "pour-over" provisions of Utah Code Ann. § 78-2a-3(2)(j) (Supp. 2002).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

- I. Should this Court reach defendant's claims that his plea was taken in violation of rule 11 where defendant did not raise those claims in his motion to withdraw before the trial court?¹**

No standard of review applies to this issue.

¹Defendant raises a rule 11 claim challenging his competency in Point I of his brief. He raises a rule 11 claim challenging the value of the State's promise in Point II of his brief. To avoid repetition, the State addresses both these claims in Point I of its brief.

Also, although defendant in Point I arguably does not present a constitutional claim challenging his competency that is distinguishable from his rule 11 claim, defendant does cite to due process and constitutional law to support his overall argument. The State therefore treats defendant's competency argument as raising both a rule 11 (addressed in Point I of the State's brief) and a constitutional claim (addressed in Point II of the State's brief).

II. Should this Court reach defendant's constitutional claim that he was incompetent to plead guilty where defendant fails to marshal the evidence supporting the trial court's competency finding?

This Court “review[s] a trial court’s denial of a motion to withdraw a guilty plea under an “abuse of discretion” standard, incorporating the “clearly erroneous” standard for the trial court’s findings of fact made in conjunction with that decision.” *State v. Visser*, 2001 UT App 215, ¶ 7, 31 P.3d 584 (quoting *State v. Holland*, 921 P.2d 430, 433 (Utah 1996)), *cert. denied*, 40 P.3d 1135 (Utah 2001). “The determination of whether a defendant is competent to proceed . . . is a mixed question of fact and law.” *State v. Robertson*, 932 P.2d 1219, 1223 (Utah 1997). However, “[t]he trial court’s factual findings in support of its determination of malingering and its accompanying credibility determinations are subject to a clearly erroneous standard of review.” *Id.*

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 77-13-6 (1999) and Rule 11, Utah Rules of Criminal Procedure, are relevant to this appeal and are reproduced at Addendum A.

STATEMENT OF THE CASE and STATEMENT OF THE FACTS

The crime.² In the afternoon of June 11, 2001, defendant’s mother, Mary Scott, was watching her soap operas when an old friend, Jake Roberts, came by with a bottle of whiskey (R. 185:43). Mary and Jake were drinking and talking when Mary’s live-in boyfriend, Craig Tillet, entered the living room from their apartment’s only bedroom (R.

²Because no trial was held in this case, the facts of the crime are taken from the preliminary hearing transcript and defendant’s plea hearing.

185:44, 46). Within a short while, Craig got mad at Mary and started calling her names and “slimeballing” her (R. 185:44, 52). Jake then offered Mary some marijuana, and the two of them smoked some (R. 185:44). Mary soon fell asleep on the living room couch (R. 185:45).

A short while later, Mary was awakened by noise from the bedroom where defendant and Craig were arguing and threatening each other (R. 185:45-46). Mary, who had previously had trouble with defendant, told them to stop arguing or she was going to call the police (R. 185:46, 48, 53).

Shortly thereafter, defendant came into the living room yelling and throwing things (R. 185:47). After briefly stopping at the bathroom, defendant then ran out the back door (R. 185:46, 48). Mary went back to sleep (R. 184:47).

Mary was later awakened by her dog, who was scratching at the bedroom door (R. 185:47). As Mary opened the door to let the dog in, Mary noticed Craig lying on the floor next to the bed (R. 185:47). When Mary tried to wake Craig, she noticed blood on him (R. 185:47). As she continued to try to wake him, she turned his head and saw more blood (R. 185:48). Mary then called 911, reported that Craig was on the floor with blood all around him, and told the dispatcher that she thought her son did it (R. 185:18-19, 48). Mary explained that her son “gets real violent when he is drinking” and that he “is the only one who could have done this” (R. 185:22).

Defendant was arrested later that evening (R. 185:22). In his left back pocket, police found Craig’s wallet (R. 185:70).

While awaiting trial, defendant told an inmate that he and Craig had been arguing that night, that he had kicked Craig several times in the head, and that, although he knew Craig was dying, he did not call the police because he didn't want to get in trouble (R. 185:97-98, 104-05).

Craig died from injury to the brain secondary to a lack of oxygen to the brain (R. 185:30). The precipitating event was multiple blunt force injuries to the head combined with a state of intoxication (R. 185:30-31). Craig sustained abrasions on his upper left forehead and an abrasion and laceration above the right eyebrow (R. 185:34). In addition, both the back and front of both of Craig's ears were bruised (R. 185:34). Craig also had bruises on the back of his head near the upper part of his neck, on both his arms, and over his left chest (R. 185:34).

Once Craig's head was shaven, bruise patterns became visible (R. 185:35-36). Several of those patterns matched the soles of the shoes defendant was wearing when he was arrested (R. 185:24, 27, 36).

The plea. On June 15, 2001, defendant was charged with murder, a first degree felony (R. 10-11). After a preliminary hearing, defendant was bound over on that charge (R. 78).

On March 26, 2002, defendant pleaded guilty to murder as charged (R. 99; R. 186:2-14). As part of that plea, defendant signed a statement in support of his plea (R. 102-08). In exchange for defendant's plea, the State agreed to send a letter to the Board of Pardons requesting that defendant serve between ten and twelve years of the statutory

five-years-to-life prison term (R. 186:2). The trial court told 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" (R. 186:7). Defendant replied, "Yeah, I've been told that" (R. 186:7). The court then stated, "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). Defendant responded, "Yeah, I know" (R. 186:8). Finally, before accepting defendant's plea, the following ensued:

Court: And are you supposed to be taking any kind of drugs that you're not taking?

Defendant: Well, they—they're supposed to be giving me Thorazine, but I told them I didn't want to take it.

Court: Okay.

Defendant: And Haldol.

Court: How—how are—how is your mental state today? Are you thinking clearly?

Defendant: Yeah.

Court: Have you understood everything I've told you today about your rights?

Defendant: Yes.

Court: Okay. And has—has Thorazine been prescribed to you by a physician?

Defendant: In the jail.

Court: At the jail.

Defendant: Yeah.

Court: Okay.

Defendant: So I guess it's a physician.

Court: And for what purpose was that given?

Defendant: I don't remember.

Court: You don't—you're not sure?

Defendant: (Shakes head.)

Court: Okay.

Defense Counsel: For the record, Your Honor, I've talked to Mr. Walls extensively twice over the last couple of weeks and he has shown that he has understood what we've talked about and we've engaged in reasonable discussions. He's understood and asked relevant questions.

Court: Okay. And, again, have you understood everything today I've told you?

Defendant: Yes.

(R. 186:9-10).

During the plea hearing, defendant responded appropriately to every question asked by the court (R. 186:2-13, 15). On multiple occasions, defendant expressly told the court that he understood what he was pleading to, the sentence which applied to his crime, and the rights he was giving up as a result of his plea (R. 186:2-8, 10). Once, after nodding to the judge in response to a question and being told that he had to respond out loud, defendant followed the court's direction, verbalizing his answer (R. 186:2-3).

The motion to withdraw. Within thirty days of his plea and prior to his sentencing, defendant moved pro se to withdraw his plea, alleging ineffective assistance of counsel (R. 111, 118). The State objected to defendant's motion, arguing that defendant had entered his plea knowingly and voluntarily after indicating he was satisfied with counsel (R. 120). Defendant was subsequently appointed new counsel (R. 112).

On August 6, 2002, a hearing was held on defendant's motion (R. 181). At that time, defense counsel indicated that "I think one of the big issues on this thing is not only the counsel issue, but more importantly, . . . whether or not he had the capability to . . . knowingly and voluntarily and intelligently enter into the plea negotiations on this matter" (R. 181:6). Defense counsel then asked that the court appoint two alienists to determine whether defendant was competent when he entered his plea on March 26 (R. 181:6). The State indicated it did not object to counsel's request (R. 181:7). Rhett Potter, a licensed clinical social worker, and Dr. Rick Hawks, a licensed psychologist, were appointed as alienists (R. 179; R. 183:13, 29).

On November 20, 2002, and on January 28, 2003, the trial court held additional hearings on defendant's motion (R. 183, 184). At both hearings, defense counsel told the court that "the Rule 11 colloquy [in connection with defendant's plea] was done adequately and, in fact, even more than . . . adequately" and that he found nothing improper in former counsel's representation of defendant in connection with defendant's plea (R. 183:10; R. 184:45-48). Counsel's only concern was whether defendant was competent at the time he entered his plea (R. 184:45-48).

In his written evaluation, Rhett Potter noted that defendant was “oriented to person, time, place, and situation” (R. 179:Potter’s Rep. at 1). Moreover, defendant “seemed to be of normal intelligence” and “he expressed himself adequately . . . [with] an adequate grasp of language” (*Id.*). Potter noticed “no indications of hallucinations, delusions, tangential thought, or loose associations,” and found “no thought process disorders” with defendant (*Id.*).

Although Potter noted that defendant claimed he was hearing voices, Potter concluded that defendant’s symptoms were “atypical in my experience with people who have auditory hallucinations” (R. 179:Potter’s Rep. at 2). Thus, Potter “doubt[ed] the veracity of [defendant’s] claims,” noting that “[t]hey seem to be a convenient explanation/excuse for [defendant’s] behavior” and “are probably a manipulative device” used by defendant (*Id.*).

Finally, Potter noted that defendant’s “[r]ecent and remote memory were intact” and that defendant’s “letters to the Court and to his defense attorney show a good grasp of the charges, the judicial process, and alternative defenses” (*Id.*). Potter then concluded that “there is no mental disorder to impact the nature and quality of the defendant’s relationship with counsel” (*Id.* at 3). Moreover, in Potter’s “professional opinion . . . , [defendant] was mentally competent at the time he entered his plea of guilty” (*Id.*).

Consistent with Utah Code Ann. § 77-15-5(4)(a) (1999), Potter found that defendant was:

- i. capable to comprehend and appreciate the charges or allegations against him;
- ii. able to disclose to counsel pertinent facts, events, and states of mind;

- iii. able to comprehend and appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against him;
- iv. able to engage in reasoned choice of legal strategies and options;
- v. able to understand the adversary nature of the proceedings against him;
- vi. able to manifest **appropriate** courtroom behavior;
- vii. able to **testify** relevantly, if applicable.

(R. 179:Potter's Rep. at 2-3).

Potter testified before the trial court on November 20, 2002 (R. 183). At that time, Potter clarified that his evaluation was to determine whether defendant was currently competent (R. 183:26). If the issue had been defendant's competency at the time he had entered his plea, Potter would have conducted the same interview but may have reviewed the plea video and talked with defense counsel and the prosecutor (R. 183:26-27).

Still, Potter re-iterated much of the information in his report. Most importantly, Potter found no incompetency issues with defendant (R. 183:18-19). Rather, it "seemed to me he was tracking appropriately, that he understood what the charges were, he understood the possible penalties" (R. 183:17). Potter testified that an incompetent person would not track that well (R. 183:17). The fact that defendant's remote and recent memory seemed good further supported Potter's conclusion, although Potter noted that he did not do any psychological testing on defendant (R. 183:22).

Finally, Potter reiterated that although voices and schizophrenia are often related, the way defendant described the voices "did not seem consistent with the way that auditory hallucinations work with a person who has schizophrenia" (R. 183:20).

Moreover, Potter found no diagnosis of schizophrenia in any of the prior treatment programs in which defendant had been involved for alcohol abuse (R. 183:25).

Furthermore, even if defendant was suffering from some kind of schizophrenia, that did not mean he could not competently enter a plea (R. 183:21). Indeed, if defendant suffered from schizophrenia to the extent that he required medication and, as was the case here, defendant was not taking his medication at the time of his plea, the judge would “have some question about whether or not this person was actually able to make that plea or not” (R. 183:28).

Dr. Hawks prepared two reports evaluating defendant. The initial report was prepared on October 10, 2002 (R. 179:Hawks’ 1st Rep. at 3). The second report, prepared after more investigation and monitoring, was prepared on January 6, 2003 (R. 179:Hawks’ 2nd Rep. at 3).

In his first report, Hawks stated that defendant “appeared to exhibit schizophrenic-like symptoms e.g. flat affect, mental confusion, thought blocking, etc.” (R. 179:Hawks’ 1st Rep. at 5). Hawks further noted that defendant “did appear credible in his presentation and seemed to be suffering from a serious mental illness” (*Id.*) (emphasis omitted). Consistent with Utah Code Ann. § 77-15-5(4)(a), Hawks found:

- i. [that defendant] did not appear to comprehend or to appreciate the charges or allegations against him;
- ii. [that defendant] did not demonstrate an ability [to] disclose to counsel pertinent facts, events, and states of mind;
- iii. [that defendant] did not adequately comprehend or appreciate[] the range and nature of possible penalties;
- iv. [that defendant] did not portray the ability to engage in reasoned choice of legal strategies and options;

- v. [that it was] unclear if defendant understood the adversary nature of the proceedings against him;
- vi. [that defendant was] likely to manifest appropriate behavior; and
- vii. [that defendant] might not be likely to testify relevantly.

(R. 179:Hawks' 1st Rep. at 4-5).

Still, Hawks noted that defendant "was *not* cooperative with completing all the necessary tests to make a differential diagnosis" (R. 179:Hawks' 1st Rep. at 5).

Moreover, "in this examiner's opinion malingering (faking mentally ill) has not been sufficiently ruled-out" (*Id.*). Thus, "[i]t is this examiner's opinion a more careful evaluation should be conducted at the Utah State Hospital to more accurately determine [defendant's] mental condition" (*Id.*).

At the November 20 hearing, Hawks testified that defendant appeared to have problems in almost all areas of competency (R. 183:30). However, Hawks noted that information he received from some of his collateral contacts, such as personnel from the jail, undermined this conclusion (R. 183:31). Moreover, defendant refused to complete some of the testing that would have been useful for a more definitive evaluation (R. 183:31-33). Finally, at least one of the tests Hawks conducted on defendant contained no kind of validity scale; thus, defendant could easily lie if he wanted to appear incompetent (R. 183:42, 55). Consequently, Hawks testified, he was "worr[ied] about [his] opinions" (R. 83:34).

Lastly, Hawks clarified that his examination involved defendant's present competency. Additional testing and research would be necessary before Hawks could

offer an opinion as to defendant's competency at the time he entered his plea (R. 183:49, 54). Still, Hawks noted that, if defendant knew enough to file a motion to withdraw his plea within thirty days of entering it, that would suggest that defendant had some knowledge of courtroom proceedings and that he was understanding the judge at the time of his plea (R. 183:39-40). In addition, if defendant wrote the withdrawal motion on his own, that would support a conclusion that he was more likely malingering than mentally ill (R. 183:58). Hawks concluded that reviewing the plea videotape would be useful in making that determination (R. 183:59).

After Hawks' testimony, defense counsel asked the court to have Hawks complete the additional testing and review necessary to determine defendant's competency at the time of his plea (R. 183:61). The trial court agreed with counsel's suggestion (R. 183:63-64). In addition, the court ordered that a third alienist be appointed (*Id.*).

Dr. Hawks' second report was prepared in response to the trial court's order. Unlike for his first report, this time Hawks reviewed the videotape of defendant's plea hearing and numerous grievances defendant had filed while he was incarcerated, including four he wrote during the same month he entered his plea (R. 179: Hawks' 2nd Rep. at 3, 11; R. 184:12-13, 14, 16). In addition, Hawks interviewed defendant two more times and then observed him without his knowledge while he was outside his cell one day using the phone and communicating with other inmates or jail personnel (R. 179:Hawks' 2nd Rep. at 3; R. 184:7, 17). Finally, Hawks interviewed numerous medical and non-

medical jail staff concerning defendant's conduct over the course of his incarceration (R. 179:Hawks' 2nd Rep. at 4; R. 184:8).

Based on these extended observations, Hawks concluded that defendant was competent when he entered his plea on March 26, 2002 (R. 179:Hawks' 2nd Rep. at 4).

Consistent with Utah Code Ann. § 77-15-5(4)(a), Hawks found:

- i. Mr. Walls appeared to comprehend and appreciate the charges and allegations against him;
- ii. Mr. Walls demonstrated an ability to disclose to counsel pertinent facts, events, and states of mind;
- iii. Mr. Walls adequately comprehended and appreciated the range and nature of possible penalties;
- iv. Mr. Walls portrayed the ability to engage in reasoned choice of legal strategies and options;
- v. Mr. Walls understood the adversary nature of the proceedings against him;
- vi. Mr. Walls manifested **appropriate** courtroom behavior; and
- vii. If necessary, Mr. Walls was likely to testify relevantly.

(R. 179:Hawks' 2nd Rep. at 4-5; R. 184:10-11).

Hawks concluded that "on March 26, 2002, [defendant] was *not* experiencing any significant mental illness or mental defect," although he "probably does have some underlying mild to moderate mental defect and/or disorder" (R. 179:Hawks' 2nd Rep. at 5). Moreover, Hawks noted that defendant's "behavior during the evaluation process including written tests was *not* consistent with behavior described by others," and that his "behavior on the IQ test (Severely mentally retarded) was *not* consistent with behavior observed by this evaluator" (R. 179:Hawks' 2nd Rep. at 10). Hawks concluded that defendant "has been *exaggerating* his emotional and intellectual problems" and his symptoms of mental illness (*Id.* at 5, 10; R. 184:13).

On January 28, 2003, Hawks provided testimony explaining his second report. As he had done in his report, Hawks explained that, in addition to doing additional testing on defendant, Hawks consulted collateral sources to determine defendant's competency on the day he entered his plea (R. 184:8-14). Whereas for his last report Hawks relied primarily on his interviews with defendant and the results of a few tests conducted on defendant, this time Hawks compared defendant's conduct during his interviews and defendant's test results with information derived from the plea video, from jail personnel, from his own observations of defendant outside his cell during his free time, and from the grievances defendant wrote while incarcerated (R. 184:8-14). The information Hawks obtained from these other sources—that defendant could use the telephone; could communicate intelligently with other inmates and jail personnel; could recall incidents that had or were happening; and could articulate grievances, for example—was dramatically different from how defendant presented himself during the interviews and through his tests, one of which measured his intellectual age as 5.3 years old (R. 184:8-14, 16-19). These dramatic differences convinced Hawks that defendant was malingering, i.e., that he was exaggerating any mental illness he had (R. 184:13).

The third alienist appointed was Beverly O'Connor, a clinical neuropsychologist (R. 184:26). As part of her evaluation, O'Connor met with defendant twice, and reviewed the first report Dr. Hawks had prepared, as well as Mr. Potter's report (R. 179:O'Connor's Rep. at 1-2). O'Connor noted in her report that, during her interviews, defendant's "speech was often poorly articulated," and she "frequently had to have him

repeat himself because he was so difficult to understand” (*Id.* at 2-3). In addition, defendant “appeared to have some difficulty comprehending the interview questions accurately at times” (*Id.*). Further, defendant reported both that he heard voices that upset him sometimes and “also reported some visual hallucinations” (*Id.*). Finally, O’Connor noted that, on a test designed to measure defendant’s overall level of intellectual functioning, defendant showed “severe problems with verbal intellectual abilities” and “some difficulty with complex attention and concentration” (*Id.* at 4).

Based on her observations, O’Connor concluded that defendant suffered from either a delusional disorder or a schizophrenic disorder that “likely causes him to have an inability to have a rational or factual understanding of the proceedings against him or of the punishment specified for the offense charged” (*Id.* at 6, 7). O’Connor also determined that defendant’s “mental illness combined with his cognitive impairments result in an inability to consult with his counsel or participate in the proceedings against him with a reasonable degree of rational understanding,” let alone “engage in any fully reasoned choice of legal strategies and options” (*Id.* at 6, 7). Moreover, defendant “does not appear to appreciate and comprehend the full nature of the charge against him,” and “it is questionable if he will be able to disclose to his counsel pertinent facts, events, and states of mind during the incidents that resulted in the charges” (*Id.* at 6). Based on her observations, O’Connor concluded that defendant “was most likely [i]ncompetent at the time he both entered his plea and withdrew his plea” (*Id.* at 9). O’Connor also noted that “the possibility of malingering cannot be totally ruled out” (*Id.*). However, she suspected

defendant did not have “enough . . . intellectual ability or psychological sophistication to malingering in an effective or convincing manner” (*Id.*).

O’Connor’s testimony at the January 28 hearing was much more equivocal on defendant’s competency than was her report. Agreeing that her report indicated defendant might be malingering, O’Connor offered that she “ha[s] a lot of questions about this defendant” (R. 184:27).

She also testified that, although she had not read Dr. Hawk’s second report prior to doing her evaluation, what he had done there—talking with other people to find out what defendant was like in his day-to-day living—was a good idea (R. 184:28-29). She also would have found it useful to review the grievances defendant had written and to watch defendant during his free periods, as Dr. Hawks had done (R. 184:29-30).

O’Connor explained that she was not aware defendant had written any grievances and did not know she could request to observe defendant outside of her interviews (R. 184:29-30); however, where her concern was that defendant had a probable mental illness, a low verbal IQ, and verbal comprehension difficulties, that information would have helped her more accurately determine defendant’s verbal skills as well as whether defendant was faking his condition (R. 184:30-31, 35-36). O’Connor acknowledged that, although her opinion was that defendant was not faking anything while he took the tests, it was possible that he was distorting his problems (R. 184:33-34).

O’Connor concluded her testimony by stating, “I did have concerns [regarding whether defendant was faking things] and that’s why I recommended that he be put

somewhere where he can be observed more closely . . . — and that’s basically some of what Dr. Hawks did. He had a chance to set up some kind of a way to where he could observe [defendant] . . . [w]ithout him knowing” (R. 184:37).

After the January 28th hearing, the trial court ruled:

After reviewing everything and after listening to everything, I’ve come to the conclusion that, in fact, Mr. Walls was competent to enter his plea, that he did knowingly and voluntarily enter his plea. If in fact he had been at the level of a five year old, I do not believe—in my—my assessment and given my experience, hav[ing] taken hundreds of these pleas, I think I would have at least been able to assess whether he was functioning at that low level of intellect. That strikes me as being very significant.

. . . In fact, I believe one portion of the plea Mr. Gravis volunteered information that he’d been talking with him and that Mr. Walls had been asking appropriate questions and that he assessed him to be fine. And that was voluntary on his part just simply because I guess Mr. Walls started making some comments during the plea, which I believe I followed up on and which he followed up on himself and responded to.

So I don’t know that the fact that this wasn’t noticed earlier is anything other than it wasn’t there to be noticed probably, as much as anything. . . .

And I’m also relying on Dr. Hawks’ follow-up information of getting some information from collateral sources who are in a position to actually see his behavior on an ongoing basis. And what I’m seeing here are just a lot of inconsistencies in the way he presents himself. . . .

But the most telling thing is what he’s like when he doesn’t think anybody is watching or analyzing him. And that is when the jailers are able to observe his behavior and use of the phone, his complaints, his cognitive processing in even being able to complain or assess—you know, telling them what the situation is that he’s complaining about. All those things add up to me to be

inconsistency to the point of preponderating toward malingering in this case.

And I don't come to this conclusion lightly because, frankly, I—I'm like any one of you here that if someone is not able to enter a plea or has done it incompetently then there are other mechanisms that we have to— have to exhaust to either get them to the point where they can be competent or — or otherwise review it. But I don't think that's the situation here.

And so for all those reasons I'm going to find that the plea was competent, was knowingly and voluntarily entered.

(R. 184:51-53).

The trial court did not enter a formal order denying defendant's motion. Instead, the trial court proceeded to sentence defendant to serve five-years-to-life in prison and to pay restitution for his crime (R. 162-63; R. 184:57-58).

Defendant timely appealed from that final judgment (R. 165). The supreme court subsequently transferred the matter to this Court for disposition. *See* April 14, 2003 Order.

SUMMARY OF THE ARGUMENT

Issue I. Defendant raises two claims that the trial court erred under rule 11 in finding that his plea was voluntary. However, neither of these claims were raised below. Although this Court has previously held that such claims can be reached under the plain error doctrine, this Court should overrule that precedent as lacking analytical support and contrary to the plain language of the plea statute. It should then reject defendant's claims as not properly before this Court.

Alternatively, this Court should reject defendant's claims as invited error where defendant repeatedly told the lower court during discussions on his motion to withdraw that the court's "rule 11 colloquy was done adequately and, in fact, even more than . . . adequately."

Finally, defendant's claims fail on their merits. First, the evidence before the trial court at the time of defendant's plea did not indicate any competency issue. Thus, the trial court did not plainly err in accepting defendant's plea without ordering a competency proceeding. Second, at the plea hearing, defendant affirmatively indicated his understanding that a letter from the State concerning defendant's sentence was not binding on the parole board. Because defendant was aware of the value of the State's promise to send the letter, the trial court did not plainly err in accepting defendant's plea based on that promise.

Issue II. Defendant claims that the trial court erred in denying his motion to withdraw his guilty plea because there is "doubt as to the Defendant's mental state" at the time he entered his plea. However, defendant fails to marshal the evidence supporting the trial court's malingering finding. Thus, defendant's claim fails.

ARGUMENT

I. THIS COURT SHOULD NOT REACH DEFENDANT'S CLAIMS THAT HIS PLEA WAS TAKEN IN VIOLATION OF RULE 11 WHERE DEFENDANT DID NOT RAISE THOSE CLAIMS IN HIS MOTION TO WITHDRAW BEFORE THE TRIAL COURT

Defendant claims that the trial court erred in denying his motion to withdraw his guilty plea because his plea was not voluntary under Rule 11. Aplt. Br. at 17, 23.

Defendant claims first that his plea was not voluntary under rule 11 because he was not competent at the time he entered it. Aplt. Br. at 17. He claims second that his plea was not voluntary under rule 11 because the State's promise to write a letter to the Board of Pardons had minimal value, and the trial court "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." Aplt. Br. at 23 (citation and internal quotation marks omitted).

This Court should reject defendant's rule 11 claims as not properly before this Court. Alternatively, this Court should reject these claims as invited errors.

A. Defendant's rule 11 claims are not properly before this Court.

This Court has previously held that it can consider challenges to a plea hearing raised for the first time on appeal from the denial of a motion to withdraw under the plain error doctrine. *See* pp. 22-26 *infra*. Because that holding lacks analytical support and is inconsistent with the plain language of Utah Code Ann. § 77-13-6 (the plea statute), this Court should overrule it. After doing so, this Court should reject defendant's rule 11 claims, raised for the first time on appeal, as not properly before this Court.

Importantly, in making the argument set forth below, the State does not argue that a defendant can never raise a plain error claim on appeal from the denial of a motion to withdraw. Rather, the State argues only that such plain error claim must relate to the conduct of the motion court in addressing the claims raised in the defendant's motion—such as when the motion court proceeds with a pro se defendant without inquiring as to whether the defendant has waived his right to an attorney. The plain error

doctrine cannot be manipulated by a defendant to raise new challenges to the trial court's conduct at the plea hearing where, under the plea statute, defendant was required to raise those claims before the motion court.

1. *Stare decisis.*

The doctrine of stare decisis, ““under which the first decision by a court on a particular question of law governs later decisions by the same court, is a cornerstone of Anglo-American jurisprudence that is crucial to the predictability of the law and the fairness of adjudication.”” *State v. Menzies*, 889 P.2d 393, 399 (Utah 1994) (quoting *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993)). The doctrine therefore imposes strict requirements on courts to follow the dictates of previously established law. *See id.* at 399 & n.3. However, “the doctrine is neither mechanical nor rigid as it relates to courts of last resort.” *Id.* at 399.

“Those asking [this Court] to overturn prior precedent have a substantial burden of persuasion.” *Id.* at 398; *see also Wheeler v. McPherson*, 2002 UT 16, ¶ 12 n.3, 40 P.3d 632. They can succeed only if this Court becomes ““clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.”” *Menzies*, 889 P.2d at 399 (quoting John Hanna, *The Role of Precedent in Judicial Decision*, 2 Vill.L.Rev. 367, 367 (1957)); *see also Wheeler*, 2002 UT 16, ¶ 12 n.3; *City of Hildale v. Cooke*, 2001 UT 56, ¶ 36, 28 P.3d 697.

Still, “[w]hen precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule’s creator to destroy it.” *Menzies*, 889 P.2d at 399 (quoting *Francis v. Southern Pac. R.R.*, 333 U.S. 445, 471 (1948) (Black, J., dissenting)). Similarly, the “[s]tare decisis effect of [a] case is substantially diminished by the fact that the legal point therein was decided without argument.” *Id.* (quoting 20 Am.Jur.2d *Courts* § 193 (1965)).

This Court’s decisions reaching claims raised for the first time on appeal from the denial of a motion to withdraw lack analytical support. Moreover, they are inconsistent with the plain language of the plea statute. Consequently, this Court should overrule those decisions.

2. The lack of analytical support for this Court’s precedent allowing appellate courts to reach new claims raised for the first time on appeal from the denial of a motion to withdraw a plea detracts from its stare decisis force.

The State has found no Utah Supreme Court case considering a claim raised for the first time on appeal from the denial of a motion to withdraw a guilty plea. *State v. Marvin*, 964 P.2d 313, 319 (Utah 1998), did hold that an appellate court could reach a claim challenging a plea “for the first time on appeal if plain error or exceptional circumstances exist” where defendant had not filed a motion to withdraw. However, at the time, the statute governing motions to withdraw pleas contained no time limit for filing them. Thus, the supreme court could have easily determined that any decision by it not to reach the issue on appeal would merely mean that the issue would reappear after defendant raised the issue in a subsequent motion to withdraw. That interpretation is

consistent with the supreme court's recent discussion of *Marvin*, in which the court held that *Marvin* no longer applies now that the plea statute limits the time for filing motions to thirty days. *See State v. Reyes*, 2002 UT 13, ¶ 4, 40 P.3d 630.

Nonetheless, this Court has previously reached such plain error issues, even when defendant's claims do not attack the motion proceeding but instead attempt to smuggle in previously unclaimed errors in the plea hearing. *See, e.g. State v. Dean*, 2002 UT App 323, ¶¶ 8-9, 57 P.3d 1106 (rejecting State's argument that issues on appeal from denial of motion to withdraw should be limited to issues raised below), *cert. granted*, 64 P.3d 586 (Utah 2003); *State v. Hittle*, 2002 UT App 134, ¶ 5, 47 P.3d 101 (reaching claim for first time on appeal where timely motion to withdraw filed below), *cert. granted*, 59 P.3d 603 (Utah 2002); *State v. Tarnawiecki*, 2000 UT App 186, ¶ 11, 5 P.3d 1222 (reaching rule 11 claim for first time on appeal even though untimely motion to withdraw deprived trial court of jurisdiction), *overruled by State v. Reyes*, 2002 UT 13, ¶ 4, 40 P.3d 630 (holding appellate court lacked jurisdiction to consider plain error challenge to plea where no timely motion to withdraw filed); *State v. Ostler (Ostler I)*, 2000 UT App 28, ¶ 8, 996 P.2d 1065 (reaching rule 11 claim for first time on appeal even though untimely motion to withdraw deprived trial court of jurisdiction), *affirmed on other grounds by State v. Ostler (Ostler II)*, 2001 UT 68, 31 P.3d 528 (affirming based on conclusion that motion to withdraw was timely filed in trial court; not reaching propriety of court of appeals' plain error decision); *State v. Pharris*, 798 P.2d 772, 774 (Utah App. 1990) (reaching

unpreserved claim for plain error where defendant filed a timely motion to withdraw); *State v. Valencia*, 776 P.2d 1332, 1334 (Utah App. 1989) (per curiam) (same).

However, the analytical bases in these cases for reaching such unpreserved claims is not strong. For example, in *Valencia*, this Court decided to reach the plain error issue with no analysis of the propriety of that action except a citation to *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). *See Valencia*, 776 P.2d at 1334 (“‘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.’”) (quoting *Boykin*, 395 U.S. at 242).

Boykin, however, was a direct appeal in a capital murder case in which the reviewing court was mandated by statute “to comb the record for any error prejudicial to the appellant, even though not called to [the court’s] attention in brief of counsel.” *Boykin*, 395 U.S. at 241 (citation and internal quotation marks omitted); *see also State v. Honie*, 2002 UT 4, ¶ 67, 57 P.3d 977 (holding that because of special nature of death penalty, court can reach issue on appeal not raised below or briefed by parties; however, court’s authority does not abrogate defendant’s burden to preserve and brief issues), *cert. denied*, 537 U.S. 863 (2002); *State v. Tillman*, 750 P.2d 546, 552-53 (Utah 1987).

Because no such statute or case law exists in appeals from motions to withdraw, *Boykin* provides no support for the *Valencia* court’s decision to apply the plain error doctrine to claims that were not raised before the trial court in a timely motion to withdraw.

Pharris then relied on *Valencia* and *State v. Gibbons*, 740 P.2d 1309, 1311 (Utah 1987). *See Pharris*, 798 P.2d at 774. *Valencia*, as previously discussed, provides only weak support for that holding. *Gibbons* provides none. In *Gibbons*, the defendant had not filed a motion to withdraw his plea, and thus had not raised his claims below, but instead apparently challenged his plea on direct appeal from his conviction. *See Gibbons*, 740 P.2d at 1311. The State argued that the court should not reach the defendant's unpreserved claims even under the plain error doctrine. *See id.* The court in fact accepted the State's position. *See id.* Instead of reaching the defendant's claims, the supreme court noted that the plea statute then in effect "sets no time limit for filing a motion to withdraw the plea" and then remanded the matter to the trial court "to enable defendant to file a motion to withdraw his guilty pleas." *Id.* The *Gibbons* court noted: "This disposition is . . . consonant with the policy of allowing trial judges to have the opportunity to address an alleged error." *Id.* at 1312.

In *Ostler I*, this Court relied on *Marvin*, 964 P.2d at 318, and *State v. Price*, 837 P.2d 578, 580 (Utah App. 1992), to hold that it had jurisdiction to consider a plain error claim on appeal even absent a timely motion to withdraw. *See Ostler*, 996 P.2d at 1068. As already discussed, the supreme court has since held that *Marvin* was decided when the plea statute contained no time limitation for filing motions to withdraw and that *Marvin* no longer applies now that the plea statute limits the time for filing motions to withdraw to thirty days. *See State v. Reyes*, 2002 UT 13, ¶ 4, 40 P.3d 630. Although *Price* discussed a claim raised for the first time on appeal, it later decided that discussion was

unnecessary because defendant's motion to withdraw was not filed within the statutory time limit. *See Price*, 837 P.2d at 583-84. Finally, the plain error part of *Ostler* was overruled in *Reyes*, 2002 UT 13, ¶ 4, which held that an appellate court cannot use plain error to reach a claim over which the trial court lacked jurisdiction due to the failure to file a timely motion to withdraw.

Because *Tarnawiecki* relied solely on *Ostler I*, *Tarnawiecki* provides no greater insight as to the propriety of using plain error to reach a claim raised for the first time on appeal in this context. *See Tarnawiecki*, 2000 UT App 186, ¶ 11. Nor does *Hittle*, which cited *Tarnawiecki* and then unrelated general case law defining plain error. *See Hittle*, 2002 UT App 134, ¶ 5.

Finally, *Dean* did not cite to any of this case law to justify its decision to reach a plain error claim. Rather, *Dean* reached the defendant's plain error claim merely by concluding that because *Reyes*—which held that an appellate court cannot reach a plain error claim when a defendant has not filed a timely motion to withdraw—is distinguishable, it “does not preclude this court from reviewing [the defendant's] plain error argument.” *Dean*, 2002 UT App 323, ¶ 9.

Thus, although this Court has repeatedly reached challenges to the plea taking that are raised for the first time on appeal from the denial of a motion to withdraw, neither this Court nor the supreme court has ever seriously analyzed the propriety of that result, particularly in light of the plain language of the plea statute and case law interpreting it. Consequently, the stare decisis value of this precedent is, at best, weak. *Cf. Menzies*, 889

P.2d at 399 (noting “[s]tare decisis effect of [a] case is substantially diminished by the fact that the legal point therein was decided without argument”) (citation omitted); *id.* (noting “[w]hen precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule’s creator to destroy it”) (citation omitted). An analysis of the plea statute and case law addressing its purposes demonstrates that such precedent is in fact clearly erroneous and should be overruled. *See id.*

3. Precedent allowing appellate courts to reach claims raised for the first time on appeal from the denial of a motion to withdraw a plea is inconsistent with the plain language of the plea statute; thus, this Court should reject it.

This Court’s “primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve.” *State v. Burns*, 2000 UT 56, ¶ 25, 4 P.3d 795; *see also Brixen & Christopher Architects, P.C. v. State*, 2001 UT App 210, ¶ 14, 29 P.3d 650. In doing so, this Court “assume[s] that ‘each term in a statute was used advisedly.’” *Stephens v. Bonneville Travel, Inc.*, 935 P.2d 518, 520 (Utah 1997) (citations omitted). In addition, “statutory term[s] should be interpreted and applied according to [their] usually accepted meaning, where the ordinary meaning of the term[s] results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction of the express purpose of the statute.” *State v. Coonce*, 2001 UT App 355, ¶ 9, 36 P.3d 533 (citations omitted).

Utah's plea statute provides:

- (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 good cause shown and with leave of the court.
 - (b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.
- (3) This section does not restrict the rights of an imprisoned person under Rule 65B, Utah Rules of Civil Procedure.

Utah Code Ann. § 77-13-6(1999).³

Under the plain language of this statute, a defendant may challenge his guilty or no contest plea in two ways: either as part of his criminal case by filing a motion to withdraw, or as a collateral challenge by filing a petition for post-conviction relief. *See* Utah Code Ann. § 77-13-6(2), (3) (1999).

If the challenge is made collaterally, the breadth of the challenge is defined by the rules applicable to post-conviction petitions. *See* Utah Code Ann. § 77-13-6(3).

If the challenge is made as part of the criminal case, the challenge “must be in the context of a motion to withdraw a guilty plea, the denial of which can be appealed.” *Summers v. Cook*, 759 P.2d 341, 344 (Utah App. 1988). That context is defined by section 77-13-6(2).

³Section 77-13-6 was substantially amended effective May 5, 2003. *See* Utah Code Ann. § 77-13-6 (Supp. 2003). However, the substantive changes in the amended statute do not alter the analysis that follows.

As set forth above, section 77-13-6(2)(a) provides that “[a] plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.” Utah Code Ann. § 77-13-6(2)(a). Section 77-13-6(2)(b) then provides that a request to withdraw a plea “is made by motion and shall be made within 30 days after the entry of the plea.” *Id.* § 77-13-6(2)(b).

Read together, the plain language of these provisions establishes three principles applicable to challenges to pleas made “in the context of a motion to withdraw.” *Summers*, 759 P.2d at 344.

First, defendant must begin the process by filing a motion *in the trial court* within thirty days of his plea. *See* Utah Code Ann. § 77-13-6(2)(b); *see also Reyes*, 2002 UT 13, ¶ 3; *Abeyta*, 852 P.2d at 995; *Price*, 837 P.2d at 583.

Second, defendant’s motion must show *to the trial court* that good cause exists for his plea to be withdrawn. *See* Utah Code Ann. § 77-13-6(2)(a); *see also State v. Brocksmith*, 888 P.2d 703, 704 (Utah App. 1994) (holding plea statute imposes upon defendant a “burden to show good cause” before a trial court must consider withdrawal of his plea); *State v. Mildenhall*, 747 P.2d 422, 424 (Utah 1987) (“Defendant has failed to show good cause why the [trial] court should have exercised its discretion to allow withdrawal of the plea.”).

Finally, “withdrawal of a guilty plea is a privilege, not a right, that is left to the *trial court’s* sound discretion,” *Brocksmith*, 888 P.2d at 704 (emphasis added); *see also*

Utah Code Ann. § 77-13-6(2)(a); *Mildenhall*, 747 P.2d at 424; *State v. Gallegos*, 738 P.2d 1040, 1041 (Utah 1987).

Each of these requirements is consistent with the well-established principle that appellate courts “will not interfere with a trial judge’s determination that a defendant has failed to show good cause unless it clearly appears that the trial judge abused his discretion.” *State v. Mildenhall*, 747 P.2d 422, 424 (Utah 1987).

Nothing in the plain language of the plea statute allows a defendant to forego filing a motion in the trial court and instead first challenge his plea on appeal. *See* Utah Code Ann. § 77-13-6(2)(b); *see also Reyes*, 2002 UT 13, ¶ 3; *Abeyta*, 852 P.2d at 995; *Price*, 837 P.2d at 583.

Similarly, nothing in the plain language of the plea statute allows a defendant to file a motion in the trial court, have that motion denied because it did not demonstrate good cause, and then use that denial as a means to raise new claims on appeal that were never presented to the court below. *See* Utah Code Ann. § 77-13-6(2)(a); *Brocksmith*, 888 P.2d at 704 (Utah App. 1994). In fact, such result is anathema to the plain language of the statute.

As this Court recognized in *Summers*, the purpose of requiring a defendant to first move in the trial court is to “giv[e] the court who took the plea the first chance to consider defendant’s arguments.” *Summers*, 759 P.2d at 342; *see also Gibbons*, 740 P.2d at 1312 (holding, under statute allowing filing of motion at any time, that remand to trial court to

consider claim raised for first time on appeal was proper as “consonant with the policy of allowing trial judges to have the opportunity to address an alleged error”).

That purpose is destroyed if a defendant may raise new challenges to his plea for the first time on appeal. Indeed, by allowing a defendant to forgo presenting claims to the trial court and nonetheless have them heard on appeal, this Court has done nothing less than rewritten the plea statute *both* to relieve the defendant of his statutory duty to show good cause in his trial court motion since he can raise new claims on appeal, *and* to impose upon trial courts a sua sponte duty to conduct a plenary review of the circumstances of defendant’s plea or risk being overturned on bases never presented to it. *See* Utah Code Ann. § 77-13-6(2)(a). Neither of these results is consistent with the statute’s plain language. *See id.*

Consequently, for the same reason appellate courts cannot consider a claim raised for the first time on appeal where a defendant *has not* filed a timely motion to withdraw, *see Reyes*, 2002 UT 13, ¶ 3; *Abeyta*, 852 P.2d at 995; *Price*, 837 P.2d at 583, appellate courts should not reach a claim raised for the first time on appeal where a defendant *has* filed a timely motion to withdraw. In both cases, defendant has failed to bring his claim before the trial court in the manner prescribed by statute. In both cases, defendant should be precluded from having that claim addressed for the first time on appeal.

Because this Court’s precedent holding that it can reach a claim for the first time on appeal from the denial of a motion to withdraw is not well-supported analytically, and because that precedent is inconsistent with the plea statute, this Court should overrule it.

Instead, this Court should hold, consistent with the plea statute, that only claims raised before the trial court in a timely motion to withdraw will be considered on appeal from denial of that motion.

4. Under a proper interpretation of the plea statute, defendant's rule 11 claims, raised for the first time on appeal, are not properly before this Court.

Defendant in this case filed a motion to withdraw. That motion, however, did not include either of the rule 11 claims now raised on appeal. Consequently, this Court should reject those claims as not properly before this Court.

B. Even if this Court concludes defendant's rule 11 claims are properly before this Court, this Court should reject them as invited error.

Defendant claims for the first time on appeal that the trial court erred in finding his plea voluntary under rule 11 because “[d]efendant was suffering from a significant mental illness, and was not taking his prescribed medication at the time the plea was taken.” Aplt. Br. at 17. Defendant also claims for the first time on appeal that the trial court erred in finding his plea voluntary under rule 11 because the court “did not make an adequate record to ensure that the [d]efendant did in fact understand the nature and value of any promises made to him.” Aplt. Br. at 23 (internal quotation marks and emphasis omitted). Even if these claims are properly before this Court, they should be rejected as invited errors.

Rule 11, Utah Rules of Criminal Procedure, provides that “[t]he court . . . may not accept [a guilty] plea until the court has found . . . the plea is voluntarily made.” Utah R. Crim. P. 11(e)(2).

The general rule in criminal cases is that “a contemporaneous objection or some form of *specific* preservation of claims of error must be made a part of the trial court record before an appellate court will review such claim[s] on appeal.” *State v. Johnson*, 774 P.2d 1141, 1144 (Utah 1989) (quoting *State v. Tillman*, 750 P.2d 546, 551 (Utah 1987)); *see also State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. This preservation rule “applies to every claim . . . unless a defendant can demonstrate that ‘exceptional circumstances’ exist or ‘plain error’ occurred.” *Holgate*, 2000 UT 74, at ¶ 11.

Moreover, if defendant led the trial court into the error he now claims on appeal, his claim will not be reached by this Court even for plain error but, instead, will be rejected as invited error. *See State v. Brown*, 948 P.2d 337, 343 (Utah 1997) (holding that, “[i]f a party through counsel . . . has led the trial court into error, [this Court] will then decline to save that party from the error”) (quoting *State v. Bullock*, 791 P.2d 155, 158 (Utah 1989)) (emphasis omitted); *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993).

Defendant made no claim in his motion to withdraw before the trial court that the court had erred under rule 11 in finding that he was entering his plea voluntarily (R. 181:13; R. 183:10; R. 184:45-48). To the contrary, defendant repeatedly told the trial court that its colloquy at the plea hearing satisfied the requirements of rule 11 and that he found no error during the plea proceedings (R. 183:10; R. 184:45-48). Under such

circumstances, defendant invited any error in the trial court's failure to find a rule 11 error in those proceedings.

Consequently, defendant's claims fail.

C. Even if this Court reaches defendant's rule 11 claims, they fail on their merits.

As discussed above, defendant claims that the trial court erred in finding his plea voluntary under rule 11 because "[d]efendant was suffering from a significant mental illness, and was not taking his prescribed medication at the time the plea was taken." Aplt. Br. at 17. Alternatively, defendant claims that the trial court erred in finding his plea voluntary under rule 11 because the court "did not make an adequate record to ensure that the [d]efendant did in fact understand the nature and value of any promises made to him." Aplt. Br. at 23 (internal quotation marks and emphasis omitted). Neither of defendant's claims has merit.

Because defendant did not raise either of these claims below, neither succeeds unless defendant can establish plain error. *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346; *State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995); *State v. Jennings*, 875 P.2d 566, 570 (Utah App. 1994). To show plain error, defendant must demonstrate (1) that an error occurred; (2) that the error should have been obvious to the trial court; and (3) that the error was prejudicial. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

Rule 11, Utah Rules of Criminal Procedure, provides that "[t]he court . . . may not accept [a guilty] plea until the court has found . . . the plea is voluntarily made." Utah R. Crim. P. 11(e)(2).

1. Defendant's competency claim fails where the evidence before the trial court at the time of the defendant's plea did not indicate any competency issue.

Rule 11 only addresses the trial court's duties prior to accepting a plea. *See* Utah R. Crim. P. 11(e) (identifying what trial court must find prior to accepting plea). Thus, defendant's claim must be that the trial court erred in not finding defendant incompetent at the time he entered his plea.

However, absent a competency petition, “[a] trial court must hold a competency hearing [only] when there is ‘a substantial question of possible doubt as to a defendant’s competency at the time of the guilty plea.’” *State v. Arguelles*, 2003 UT 1, ¶ 49, 63 P.3d 731 (quoting *Jacobs v. State*, 2001 UT 17, ¶ 13, 20 P.3d 382 (quoting *State v. Holland*, 921 P.2d 430, 435 (Utah 1996))). Moreover, in reviewing whether a trial court erred in not holding such a hearing, this Court “‘consider[s] only those facts that were before the [trial] court when the plea was entered.’” *Jacobs*, 2001 UT 17, ¶ 18 (quoting *York v. Shulsen*, 875 P.2d 590, 595 (Utah App. 1994)) (second alteration in original); *see also* *Arguelles*, 2003 UT 1, ¶ 50.

Here, the only evidence before the trial court at the time of defendant's plea even hinting that defendant might have a mental problem was that he had been prescribed two medications while at the jail and that he was not taking either of them (R. 186:9). However, when asked by the court why the medication had been prescribed, defendant never mentioned a possible mental illness (R. 186:10). Instead, he merely replied that he could not remember (R. 186:10).

All the remaining evidence before the trial court at the time of defendant's plea overwhelmingly indicated defendant's competency. Defendant responded appropriately to every question asked by the court (R. 186:2-13, 15). On multiple occasions, defendant expressly told the court that he understood what he was pleading to, the sentence which applied to his crime, and the rights he was giving up as a result of his plea (R. 186:2-8, 10). In addition, once, after nodding to the judge in response to a question and being told that he had to respond aloud, defendant followed the court's direction, verbalizing his answer (R. 186:2-3). Finally, when the issue turned to the medication defendant had been prescribed, defense counsel interjected that he had "talked to Mr. Walls extensively twice over the last couple of weeks and he has shown that he has understood what we've talked about and we've engaged in reasonable discussions. He's understood and asked relevant questions" (R. 186:10).

In light of this evidence, there was no "substantial question of possible doubt as to . . . defendant's competency at the time of [his] guilty plea." *Arguelles*, 2003 UT 1, ¶ 49. Consequently, the trial court did not err under rule 11 in accepting defendant's plea without first ordering further evaluations on his competency. *See id.*

2. Defendant's illusory promise claim fails where defendant indicated he understood that the State's promise to send a letter to the parole board might have no impact on the parole board's sentencing determination.

Before accepting a plea, the trial court has a duty to ensure that the defendant "understand[s] the nature and value of any promises made to him.'" *State v. Copeland*, 765 P.2d 1266, 1274 (Utah 1988); *see also State v. Norris*, 2002 UT App 305, ¶ 11, 57

P.3d 238 (reversing denial of motion to withdraw plea where trial court’s “legal error exaggerated the benefits [defendant] would receive from pleading guilty”). The record here establishes that the trial court fulfilled that duty.

When the trial court learned that defendant had agreed to plead guilty in return for the State’s promise to send a letter to the parole board requesting that defendant serve only between ten and twelve years of the statutory five-years-to-life prison term (R. 186:2), the trial court informed defendant that the charge to which he was pleading carried an indeterminate sentence of five years to life in prison (R. 186:7). The court then specifically told 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” (R. 186:7). Defendant replied, “Yeah, I’ve been told that” (R. 186:7). The court then stated, “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). Defendant responded, “Yeah, I know” (R. 186:8).

This dialogue establishes that defendant understood both the nature and value of the State’s promise. Thus, contrary to defendant’s contention, the trial court “did . . . make an adequate record to ensure that the Defendant did in fact ‘understand the nature and value of any promises made to him.’” Aplt. Br. at 23 (citation omitted). That the prosecutor’s letter was not binding on the parole board does not render the State’s promise illusory. *Cf. State v. Thurston*, 781 P.2d 1296, 1302 (Utah App. 1989) (“Where [the] defendant is aware that there is no guarantee the court will agree to follow the

prosecutor's recommendation, there is no reason to set aside a guilty plea if the court did not follow the prosecutor's recommendation, even if the defendant is disappointed with the severity of the sentence."").

Consequently defendant's claim fails.

II. THIS COURT SHOULD REJECT DEFENDANT'S CONSTITUTIONAL CLAIM THAT HE WAS INCOMPETENT TO PLEAD GUILTY WHERE DEFENDANT FAILS TO MARSHAL THE EVIDENCE SUPPORTING THE TRIAL COURT'S MALINGERING FINDING

Defendant claims that the trial court abused its discretion in denying his motion to withdraw his guilty plea. *See* Aplt. Br. at 17. According to defendant, "[a]lthough [two of the examining alienists] believed that the Defendant was malingering, and [the third] conceded that the Defendant might be malingering, 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." Aplt. Br. at 18. This Court should reject defendant's claim because he has failed to marshal the evidence supporting the trial court's competency ruling.

"It is well established that due process requires that a defendant be mentally competent to plead guilty and to stand trial." *State v. Arguelles*, 2003 UT 1, ¶ 47, 63 P.3d 731; *see also Jacobs v. State*, 2001 UT 17, ¶ 12, 20 P.3d 382. "[I]n determining whether a defendant is competent to plead guilty, the trial court must consider whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the

proceedings against him.” *Arguelles*, 2003 UT 1, ¶ 48 (quoting *State v. Holland*, 921 P.2d 430, 433 (Utah 1996)); *see also* Utah Code Ann. § 77-15-2 (1999) (defining when defendant is “incompetent to proceed”).

“The determination of whether a defendant is competent to proceed . . . is a mixed question of fact and law.” *State v. Robertson*, 932 P.2d 1219, 1223 (Utah 1997).

However, “[t]he trial court’s factual findings in support of its determination of malingering and its accompanying credibility determinations are subject to a clearly erroneous standard of review.” *Id.*; *State v. Lafferty*, 2001 UT 19, ¶ 45, 20 P.3d 342.

Consequently, where, as here, defendant is essentially challenging the trial court’s malingering finding, he “bears the burden of marshaling all the evidence in favor of the factual finding that he was malingering and then demonstrating that, even viewing the evidence in the light most favorable to the court below, that evidence is insufficient to support the court’s finding.” *Robertson*, 932 P.2d at 1223-24; *see also Arguelles*, 2003 UT 1, ¶¶ 67, 68; *Lafferty*, 2001 UT 19, ¶ 45.

In this case, the only evidence defendant marshals in support of the trial court’s malingering finding is that “Dr. Hawks, as well as Mr. Potter believed that the Defendant was malingering (R. 183/23), and Dr. O’Connor conceded that the Defendant might be malingering (R. 184/27, 33).” *Aplt. Br.* at 18. Although this evidence alone is sufficient to support the trial court’s malingering finding, defendant’s marshaling falls far short of presenting to this Court all the evidence underlying the alienists’ conclusions that further

support that finding. For example, defendant fails to marshal the following supporting evidence:

1. That, during the plea hearing, defendant responded appropriately to all questions asked by the trial court, spoke coherently, and indicated he understood everything that was happening (R. 186:2-13, 15).
2. That, during the same month in which defendant entered his plea, defendant filed four grievances with the jail which showed an ability to recall incidents and articulate dissatisfaction in a manner inconsistent with incompetency (R. 179:Hawks' 2nd Rep. at 4, 11; R. 184:8-14, 16-19).
3. That, according to Rhett Potter, defendant's "[r]ecent and remote memory were intact" and defendant's "letters to the Court and to his defense attorney show a good grasp of the charges, the judicial process, and alternative defenses" (R. 179: Potter's Rep. at 2).
4. That, according to Mr. Potter, defendant's claim of hearing voices was inconsistent with schizophrenia and "seem[ed] to be a convenient explanation/excuse for [defendant's] behavior," "a manipulative device" used by defendant (R. 179:Potter's Rep. at 2; R. 183:20).
5. That, according to Mr. Potter, if defendant was truly suffering from schizophrenia at the time of his plea to the extent he required medication, and, as was the case here, defendant was not taking his medication at that time, the judge would "have some question about whether or not this person was actually able to make that plea or not" (R. 183:28).
6. That Dr. Hawks' initial evaluation of defendant as incompetent was based almost exclusively on defendant's performance on certain tests, at least one of which contained no internal validity scale (R. 183:30, 42, 55). Moreover, because defendant refused to complete additional testing that would have allowed for a more definitive evaluation and because the results of defendant's tests did not conform to information Dr. Hawks received from collateral contacts at

the jail, Dr. Hawks was “worr[ied] about [the accuracy of his initial] opinions” (R. 183:31-33, 34).

7. That, after evaluating defendant further, Dr. Hawks concluded that, although defendant’s “behavior on the IQ test” suggested he was “[s]everely mentally retarded” with an intellectual age of 5.3 years old, those results were “*not* consistent with behavior described by others” who observed defendant at the prison, or with Dr. Hawks’ own observations of defendant—when defendant didn’t know it—which showed an ability to interaction, communicate, and function that indicated defendant “was *not* experiencing any significant mental illness or mental defect” (R. 179:Hawks’ 2nd Rept. at 3, 4, 5, 7, 10; R. 184:8-14, 16-19).
8. That, according to Dr. Hawks, defendant “has been *exaggerating* his emotional and intellectual problems,” and was in fact malingering (R. 179:Hawks’ 2nd Rept. at 5, 10; R. 184:13).
9. That, although Ms. O’Connor’s report indicated a conclusion that defendant was not competent when he entered his plea, her report also noted that “the possibility of malingering cannot be totally ruled out” and that further observation of defendant was recommended (R. 179:O’Connor’s Rep. at 9; R. 184:37).
10. That Ms. O’Connor testified that she reached her conclusions after meeting with defendant twice and reviewing Mr. Potter’s report and Dr. Hawks’ initial report, and that further observations of defendant and his writings—like those conducted by Dr. Hawks—would have helped her more accurately determine whether defendant was faking his condition (R. 184:29-31, 35, 37).

All this evidence supports the trial court’s finding that defendant was malingering.

See, e.g., Lafferty, 2001 UT 19, ¶¶ 48-50 (holding that trial court could properly give less credence to alienists who questioned defendant’s competency where their underlying analysis was weaker than other alienists and where court could also draw on its own prior

observations of defendant); *Robertson*, 932 P.2d at 1224 (holding “record reveals ample evidence supporting the trial court’s determination of malingering” where, although some alienists based their incompetency determinations on defendant’s “inability to express or understand verbal communications,” “[t]he record is replete with evidence of faking on this point”).

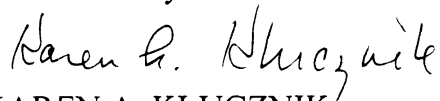
Because defendant does not marshal any of this evidence, let alone explain why this evidence is insufficient to support the findings underlying the trial court’s competency ruling, defendant’s challenge to that ruling fails.

CONCLUSION

Based on the foregoing, the State asks this Court to affirm defendant’s conviction and sentence.

RESPECTFULLY SUBMITTED 64 October 2003.

MARK L. SHURTLEFF
Utah Attorney General


KAREN A. KLUCZNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 14 October 2003, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this **BRIEF OF APPELLEE** to Randall W. Richards, attorney for appellant, at The Public Defender Association, Inc. of Weber County, 2568 Washington Boulevard, Suite 200, Ogden, Utah 84401.

Helen G. Hirsch

Addendum A

77-13-6. Withdrawal of plea.

- (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 good cause shown and with leave of the court.
(b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.
- (3) This section does not restrict the rights of an imprisoned person under Rule 65B, Utah Rules of Civil Procedure.

Rule 11. Pleas.

(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:

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

(e)(2) the plea is voluntarily made;

(e)(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;

(e)(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;

(e)(4)(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;

(e)(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;

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

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

(e)(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)(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 by the court.

(g)(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.

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

(h)(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.

(h)(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.

(i) 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.

(j) 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.

(Amended effective May 1, 1993; January 1, 1996; November 1, 1997; November 1, 2001; November 1, 2002.)

Advisory Committee Note. — These amendments are intended to reflect current law without any substantive changes. The addition of a requirement for a finding of a factual basis in section (e)(4)(B) tracks federal rule 11(f), and is in accordance with prior case law. *E.g.* *State v. Breckenridge*, 688 P2d 440 (Utah 1983). The rule now explicitly recognizes pleas under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), and sets forth the factual basis required for those pleas. *E.g.* *Willett v. Barnes*, 842 P2d 860 (Utah 1992).

The amendments explicitly recognize that plea affidavits, where used, may properly be incorporated into the record when the trial

The final paragraph of section (e) clarifies that the trial court may, but need not, advise defendants concerning collateral consequences of a guilty plea. The failure to so advise does not affect the validity of a plea. *State v. McFadden*, 884 P2d 1303 (Utah App. 1994), cert. denied, 892 P2d 13 (Utah 1995).

Amendment Notes. — The 2001 amendment substituted “sworn statement” for “affidavit” three times in the paragraph following Subdivision (e)(8).

court determines that the defendant has read (or been read) the affidavit, understands its contents, and acknowledges the contents. *State v. Maguire*, 830 P2d 216 (Utah 1991). Proper incorporation of plea affidavits can save the court time, eliminate some of the monotony of rote recitations of rights waived by pleading guilty, and allow a more focused and probing inquiry into the facts of the offense, the relationship of the law to those facts, and whether the plea is knowingly and voluntarily entered. These benefits are contingent on a careful and considered review of the affidavit by the defendant and proper care by the trial court to verify that such a review has actually occurred.

The 2002 amendment substituted “written statement” for “sworn statement” and twice deleted “sworn” before “statement” in the second-to-last paragraph in Subdivision (e).

Cross-References. — Inadmissibility of pleas, plea discussions or related statements, U.R.E. 410.

Time limit for filing motion to withdraw plea of guilty or no contest, § 77-13-6.