

2005

## Utah v. Tamra Rhinehart : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

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**THE STATE OF UTAH,**

Plaintiff/Appellee,

v.

**TAMRA RHINEHART,**

Defendant/Appellant.

---

Case No. 20050635

REPLY BRIEF OF APPELLANT

This is an appeal from a sentence of life in prison without the possibility of parole, which entered following Ms. Rhinehart's guilty plea to aggravated murder, a capital felony, in violation of Utah Code Ann. § 76-5-202(1)(f), in the First Judicial District Court of Cache County, State of Utah, the Honorable Gordon Low, Judge, presiding.

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ARGUMENTS

I. THIS COURT HAS JURISDICTION TO REMEDY A GUILTY PLEA ENTERED AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The State does not contest that Rhinehart's guilty plea was constitutionally involuntary and taken in violation of Ut. R. Crim. P. 11. Its sole contention is that this Court is without jurisdiction to remedy the illegal guilty plea at this juncture, because trial counsel for Rhinehart failed to move to withdraw the plea under Utah Code Ann. § 77-13-6, raising a jurisdictional bar to Rhinehart's claims of ineffective assistance of counsel in the entry of her plea. State's brief at 12-19.

The cases upon which the State relies for its jurisdictional argument are not controlling because they do not hold that a timely motion under 77-13-6 is a jurisdictional prerequisite to a 23B motion or claim of ineffective assistance in the entry of a plea on direct appeal. See State v. Merrill, 2005 UT 34, ¶¶ 17-19, 114 P.3d 585 (rejecting appeal

from a jurisdictionally out-of-time motion to withdraw, involving no apparent motion for 23B remand or claim of ineffective assistance); State v. Reyes, 2002 UT 13, 40 P.3d 630 (rejecting claim of plain error in entry of plea on jurisdictional grounds for lack of motion to withdraw; involving no apparent claim of ineffective assistance or motion for 23B remand); State v. Mullins, 2005 UT 43, 116 P.3d 374 (holding that entry of conviction implicitly denied timely motion to withdraw plea and that courts had no jurisdiction to address subsequent untimely motions; involving no apparent 23B remand or claim of ineffective assistance); State v. Nicholls, 2006 UT 76, 40 P.3d 630 (rejecting challenge to guilty plea brought through Ut. R. Crim. P. 22 (e) motion to correct an illegal sentence; involving no apparent 23B motion and claims of ineffective assistance in brief challenged underlying conviction and were improperly brought under rule 22(e)); State v. Abeyta, 842 P.2d 993, 995 (Utah 1993) (*per curiam*)(refusing to apply 30 day time limit for withdrawal of pleas retroactively, involving no apparent claim of ineffective assistance or 23B motion).

In its brief, the State appends records from other cases, and asks this Court to take judicial notice of those records. See State's brief at 10 n.5, 16 n.6, and addenda C and D. It appears that it may be inappropriate to take judicial notice of these records, which were not ever placed in evidence. See, e.g., Menzies v. Galetka, 2006 UT 81, 2006 WL 3690665 (indicating that positions of attorney general's office in other cases were evidence outside the record which the Court generally does not consider on appeal); State

v. Shreve, 514 P.2d 216, 217 (Utah 1973) (refusing to take judicial notice of court records from other cases not admitted in evidence).

While the State notes that this Court upheld § 77-13-6 against constitutional challenges in State v. Merrill, 2005 UT 34, ¶ 41, 114 P.3d 585, State's brief at 18, neither Merrill nor the State's brief here addresses the constitutional infirmities posed by the State's interpretation of 77-13-6 in this case, as disqualifying appellants with claims of ineffective assistance in the entry of pleas from relief on direct appeal and from the 23B remedy, both of which are available to all other appellants with claims of ineffective assistance. See Rhinehart's opening brief at 16-17. Nor does the State explain why section 77-13-6 should be read as permitting a lawyer who was ineffective in the entry of a guilty plea to insulate herself from counsel-aided scrutiny on direct appeal and/or under Rule 23B.

This Court should address Rhinehart's claims of ineffective assistance in the entry of her plea on direct appeal. See State v. Marvin, 964 P.2d 313 (Utah 1998)(Court ordered a 23B remand to inquire into claims of ineffective assistance in the entry of the plea, despite the absence of a timely motion to withdraw);<sup>1</sup> State v. Taylor, 947 P.2d 681

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<sup>1</sup>Marvin is now read as limited by State v. Reyes, 2002 UT 13, 40 P.3d 630, wherein this Court rejected a claim of plain error and exceptional circumstances in the entry of a plea for lack of a timely motion to withdraw, and in so doing distinguished State v. Marvin, *supra*, explaining that the version of 77-13-6 in effect at that time was viewed as a preservation statute, rather than as a jurisdictional one. Reyes at ¶ 4, citing Marvin, 964 P.2d at 318. Page 318 of Marvin actually does not cite to or discuss 77-13-6, nor does any other portion of the Marvin decision. Accord State's brief at 17. Reyes

(Utah 1997)(on direct appeal, Court ordered 23B remand to address claims of ineffective assistance in the entry of the plea).

II. THE BINDOVER ORDER FAILED TO ESTABLISH DISTRICT COURT JURISDICTION BECAUSE IT WAS INFECTED BY THE VIOLATION OF RHINEHART'S RIGHTS TO CONFRONTATION AND UNSUPPORTED BY SUFFICIENT EVIDENCE.

The State argues that Rhinehart's guilty plea waived and cured any pre-plea defects, including the denial of Rhinehart's rights to confrontation at the preliminary hearing, and to sufficient evidence to justify the bindover. State's brief at 19-30. The State claims that this Court has no jurisdiction to consider whether her plea was involuntary and must presume its validity in this context, because trial counsel did not timely file a motion to withdraw the plea. State's brief at 19-21 and n.9, citing State v. Triptow, 770 P.2d 146, 149 (Utah 1989).

This Court often considers the validity of guilty pleas which are indirectly at issue on appeal in the absence of motions to withdraw them. See, e.g., State v. Von Ferguson, 2007 WL 57119 (holding that misdemeanor conviction for which jail time was imposed or suspended could not be used for enhancement if plea was entered without counsel or a valid waiver thereof); State v. Triptow, 770 P.2d 147, 149 (Utah 1989) (recognizing that invalidity of prior guilty pleas may undermine application of habitual criminal statute).

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does not involve a claim of ineffective assistance and is thus not controlling in any event.

While it is certainly true that pleas are presumed voluntary in the absence of contrary evidence, see State's brief at 21 n.9, accurately citing Triptow for this proposition, the State has not refuted Rhinehart's arguments that the existing record establishes the involuntary and unknowing nature of her plea. Compare Rhinehart's opening brief at 4-9 (establishing involuntary guilty pleas with existing record) with State's brief at 1-50.

It is important to note that the entry of a valid guilty plea does not waive all pre-plea defects, but only those directly pertinent to the issue of guilt or innocence. Those defects which pertain to the fundamental power of the state or court to prosecute or convict are not waived. See, e.g., Menna v. New York, 423 U.S. 61, 62 n.2 (in holding that guilty plea did not waive claim of double jeopardy, the Court explained its line of cases on the waiver effect of guilty pleas as limiting the waiver effect to issues which are rendered moot by proof of factual guilt). In the instant matter, Rhinehart is claiming that the insufficient evidence and denial of her right to confrontation at the preliminary hearing foreclosed the district court's legal ability to preside over Rhinehart and her felony case. This is not an issue which is subject to waiver, even if her plea were knowing and voluntary. Cf. Menna, supra.

The State claims that the entry of Rhinehart's plea could and did waive and cure any defects in Rhinehart's preliminary hearing, which the State argues is not essential to a district court's subject matter jurisdiction over a felony case. State's brief at 21-30.

Utah law has been abundantly and consistently clear for years that “a preliminary hearing is essential to a court’s jurisdiction over a felony,” State v. Marshall, 2005 UT App 269, 2005 WL 1405321, that a district court’s original jurisdiction over a felony case and over a defendant is properly invoked only a bindover order following preliminary hearing, State v. Humphrey, 823 P.2d 464, 465-66, 468 and n.2 (Utah 1991), and that a district court has no right to try a defendant who has not been properly bound over following preliminary hearing, State v. Freeman, 71 P.2d 196, 199 (Utah 1937).

Article I § 13 of the Utah Constitution has always expressly recognized that the right to a preliminary hearing may be waived by the accused. See id. Waiver is defined as “‘an intentional relinquishment or abandonment of a known right or privilege.’ Courts should ‘indulge every reasonable presumption against waiver,’ , and they should ‘not presume acquiescence in the loss of fundamental rights[.]’” Barker v. Wingo, 407 U.S. 516, 525-26 (1972).

The record in this case does not reflect a waiver of the right to a preliminary hearing, but instead demonstrates that Rhinehart consistently fought for her right to a full and fair preliminary hearing during that hearing, in moving to reopen that hearing for cross examination, in repeatedly moving to quash the bindover in district court, in seeking interlocutory appeal to this Court from the denial of the motion to quash, and in seeking *certiorari* in the United States Supreme Court (e.g. R. 5/10/2004: 6, 34; R. 5/10/2004: 42, R. 254-55, 303-04, 309-10, 325-361, 550-553, 765-98, 841-44, 1319). The entry of the

guilty plea does not reflect Rhinehart's intentional relinquishment of her known right to a proper preliminary hearing, a right that was not mentioned during the plea colloquy or in the plea form. See Wingo, supra, 407 U.S. at 525-26 (recognizing that waiver may not be inferred from silence). Particularly given the unresolved ambiguities regarding the extent to which the entry of the plea waived her rights to appeal, see Rhinehart's opening brief at 6-7, the record counsels against a finding of waiver of Rhinehart's rights to a proper preliminary hearing.

While a unanimous jury verdict reflecting proof beyond a reasonable doubt in some cases may be viewed as mooted technical concerns about proof under the lesser standard required to justify a bindover order following preliminary hearing, e.g., State v. Humphrey, 823 P.2d 4646, 467 n.6 (Utah 1991), there was no unanimous jury verdict in this case, but only the involuntary and unknowing entry of a guilty plea. See Rhinehart's opening brief at 4-10.

Moreover, the preliminary hearing in this capital and then-death penalty case did not suffer from some minor technical insufficiency, but instead consisted almost entirely of constitutionally unreliable evidence in the form of hearsay from accomplices Nicholls and Goalen, who were never subjected to cross-examination and whom Rhinehart was never allowed to confront. See Rhinehart's opening brief at 21-26. Utah cases demonstrate that even unanimous jury verdicts are not viewed as mooted or curing preliminary hearing errors of this procedural and substantive magnitude. See, e.g., State

v. Ortega, 751 P.2d 1138, 1139 (Utah 1988) (reversing conviction following verdict of guilt, where there was apparently no claim of insufficient evidence to sustain that verdict, because the preliminary hearing evidence and bindover were wholly insufficient to establish district court jurisdiction over crime of conviction, but instead focused on a different criminal transaction).

The State contends that Rhinehart's sole complaint about her preliminary hearing was the denial of her federal constitutional right to confrontation, and then in a footnote characterizes Rhinehart's claimed violations of her state constitutional and statutory rights to confrontation as an "off-handed" and ill-explained suggestion. State's brief at 30 and n. 11.

Rhinehart's state constitutional and statutory rights to confrontation, guaranteed by Article I §§ 7 and 13 of the Utah Constitution and Utah Code Ann. § 77-1-6(1)(d) are clearly invoked on page 19 of Rhinehart's opening brief, as is the established case law, State v. Jensen, 96 P. 1085, 86 (Utah 1908); and Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945). Rhinehart has candidly acknowledged conflicting provisions of law, the 1995 amendment to Article I § 12, and Utah R. Evid. 1102 and Utah R. Crim. P. 7, and has suggested that the conflicting provisions should be stricken as unconstitutional, or resolved by this Court in a manner consistent with Rhinehart's state constitutional and statutory rights to confrontation, and with Sixth Amendment cases such as Gerstein v. Pugh, 420 U.S. 103 (1975), and Crawford v. Washington, 541 U.S. 36 (2004). See



Rhinehart's opening brief at 31.

Because the State has not refuted the state constitutional and statutory arguments, or addressed these controlling provisions and interpretations of state constitutional law, this Court may and should reverse the conviction and bindover order based solely on the violation of Rhinehart's state constitutional and statutory rights to confrontation at the preliminary hearing. See Gallivan v. Walker, 2002 UT 89, ¶ 64, 54 P.3d 1069 (noting that while the Court would discuss precepts of federal constitutional law, the decision turned on state law).

In addressing the Sixth Amendment claim, the State relies on dicta in Mancusi v. Stubbs, 408 U.S. 204, 211 (1972);<sup>2</sup> Pennsylvania v. Ritchie, 480 U.S. 39, 52-53 (1987)

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<sup>2</sup>The holding of Mancusi was that the federal habeas court should defer to the state court's determination of unavailability of a witness whose statement was admitted at the habeas petitioner's trial. See Mancusi, 408 U.S. at 212-13. The portion of Mancusi upon which the State relies is an extended quotation of Barber v. Page, 390 U.S. 719 (1968), wherein the Court held that the defendant's trial right to confrontation was violated by the admission of the preliminary hearing testimony of a co-defendant who did not testify at trial, despite the fact that there was no showing of unavailability. See Mancusi, 408 U.S. at 211. In the portion of Barber quoted in Mancusi, the Court explained that the Confrontation Clause violation in the defendant's trial would not have been ameliorated even if his lawyer had cross-examined the co-defendant at the preliminary hearing, given that preliminary hearings normally do not explore the merits of a case as thoroughly as does a trial, and given that one of the functions of the confrontation right at trial is to permit the jury to assess the credibility of the witness who is subject to confrontation. Mancusi at 211, quoting Barber, 390 U.S. at 725-26. Mancusi is not fairly read as holding that there is no right to confrontation at the type of preliminary hearing necessary to invoke the trial courts' original jurisdiction and jurisdiction over the defendant under Utah law, see Humphrey, Marshall and Freeman, supra.

(plurality);<sup>3</sup> and State v. Pledger, 896 P.2d 1226, 1229 n.4 (Utah 1995),<sup>4</sup> for the proposition that the State feels Gerstein makes “quite clear” – that there is no right to confrontation in Utah preliminary hearings. State’s brief at 30-31.

Gerstein and the other federal authorities are often misread by Utah courts as though they hold that there is no Sixth Amendment right to confrontation at preliminary hearings, see, e.g., State v. Rhinehart, 2006 UT App 517, ¶¶ 12-14, 2006 LW 3842100 (relying on the same authorities for the same erroneous proposition).<sup>5</sup> Gerstein is actually

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<sup>3</sup>In Pennsylvania v. Ritchie, the Court held in a case involving allegations of child sexual abuse that a trial court’s *in camera* review of the child’s personal records for potential exculpatory evidence was adequate, and that defense counsel was not entitled to review the records personally. Id. A plurality of the Court held that this procedure did not violate the defendant’s confrontation rights, which applied at trial to insure an adequate opportunity for a defendant to challenge his accusers, and would not be extended to a general rule of pretrial discovery. Id. at 52-53.

<sup>4</sup>In Pledger, this Court declined to determine whether hearsay or reliable hearsay was properly admitted at the preliminary hearing, because there was sufficient evidence to justify the bindover order in that case even if all hearsay were not considered. 896 P.2d at 1228-29. In a footnote referring to an argument that the Court should overrule State v. Anderson, 612 P.2d 778 (Utah 1980), which guarantees the right to confrontation at preliminary hearings, and adopt the federal rule, the Pledger Court apparently misread Gerstein v. Pugh, 420 U.S. 103 (1975), as though it stated a federal rule which withholds the right to confrontation from the type of preliminary hearings employed in Utah to invoke the district court’s jurisdiction in felony cases charged by information and without a grand jury indictment. See Pledger, 896 P.2d at 1228 and n.4.

<sup>5</sup>Rhinehart also relies on two state cases to support its conclusion that there is no federal confrontation right at the preliminary hearing, People v. Felder, 129 P.3d 1072, 1073 (Colo. Ct. App. 2005), and State v. Woinarowicz, 720 P.2d 635, 641 (N.D. 2006). Felder does not discuss Gerstein, or preliminary hearings of the type at issue here. Rather, it relies on cases such as Pennsylvania v. Richie, and Barber v. Page, *supra*, to hold that the right of confrontation does not apply in a pretrial suppression hearing. 129 P.3d at 1073-74. In Woinarowicz, the court relied on federal precedents expressly

the federal case which is closest to being on point, and actually supports the opposite conclusion, that the federal confrontation right does apply at the type of preliminary hearing at issue here. Gerstein held that the Confrontation Clause does not apply to pretrial detention hearings, which are not considered substantial steps in a criminal prosecution, and which are not adversarial and do not require the appointment of counsel. See id., 420 U.S. 103, 111-125. In so holding, the Gerstein Court expressly

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recognizing that suppression hearings do not require the same procedural protections afforded at trial, in holding that the right to confrontation does not extend to pretrial suppression motions. 720 N.W.2d at ¶¶ 8-12. The Woinarowicz court did not address Gerstein, or the procedural protections necessary to a preliminary hearing of the sort at issue here. See id.

The erroneous nature of the Rhinehart decision is demonstrated by footnote 3, which states:

Our conclusion is strengthened by the fact that the Federal Rules of Evidence, which are constrained by the limits of the Constitution, *see* Fed.R.Evid. 802, expressly allow for the introduction of hearsay at preliminary hearings. *See id.* 1101(d) (“The rules [of evidence] do not apply [at] Preliminary Examinations in Criminal Cases.”).

Rhinehart, 2006 UT App 517, ¶ 14 n.3.

While the federal rules are indeed “constrained by the limits of the constitution,” the language of the rules is not co-extensive with constitutional protections, and the language of the rules thus does not determine the applicability of the Confrontation Clause or constitutional law. See, e.g., California v. Green, 399 U.S. 149, 155-56 (1970). The fact that Federal Rule of Evidence 1101 indicates that the rules of evidence do not apply at preliminary examinations does not stand as persuasive or supporting authority for Rhinehart’s holding that there is no right to confrontation at Utah preliminary hearings, because the preliminary hearings held in Utah to invoke the district courts’ jurisdiction over felony cases are fundamentally different from preliminary hearings in the federal system, which employs the grand jury and indictment process, rather than the type of preliminary hearings routinely used in Utah felony cases. See, e.g., Gerstein (distinguishing federal preliminary (detention) hearings from preliminary hearings such as occur in Utah in felony cases to invoke district court jurisdiction).

distinguished the types of preliminary detention hearings at issue in that case from those at issue here, preliminary hearings wherein the Government establishes whether there is sufficient evidence to justify a trial absent an indictment by a grand jury. Gerstein, 420 U.S. at 120. In the latter type of hearing, the Court recognized that confrontation and the full panoply of procedural rights properly apply. “When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination.” Id. In accordance with Gerstein, this Court should recognize that the preliminary hearing which occurred in this case fell far short of that required by the Sixth Amendment Confrontation Clause. See id.

The State does not contest that the statements of Nicholls and Goalen are constitutionally and presumptively unreliable, but instead claims that the argument was inadequately briefed by counsel for Rhinehart. State’s brief at 31 n.13. The statements of Nicholls and Goalen are summarized in detail with record citations on pages 21-24 of Rhinehart’s opening brief. The law characterizing such hearsay statements of accomplices as constitutionally and presumptively unreliable is very straightforward and simple, in recognizing that because people in this position have a recognized need to curry favor with authority by inculcating others, their statements are presumptively unreliable, and are excluded unless the declarants are subject to confrontation. See Bruton v. United States, 391 U.S. 123, 126-28 (1968); Lee v. Illinois, 576 U.S. 530, 545

(1986); Lilly v. Virginia, 527 U.S. 116, 130-31 (1999), and Crawford v. Washington, 541 U.S. 36, 63-65 (2004), discussed in Rhinehart's opening brief, at pages 24 and 26 and n. 26. Because counsel for Rhinehart has not dumped the burden of research or analysis on this Court, but has instead succinctly stated the argument which the State has not refuted, the Court should apply the law as set forth in Rhinehart's brief. In the event the Court would like a supplement to the fifty page opening brief on any point of law or fact, counsel for Rhinehart will speedily supply a brief of the length the Court will entertain on any point of law or fact.

III. REVERSAL IS REQUIRED BECAUSE RHINEHART DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HER RIGHT TO A JURY IN THE PENALTY PHASE.

The State claims that counsel for Rhinehart argued as though the issue concerning the waiver of her right to a jury at sentencing were properly preserved, until Point VI of the brief. State's brief at 35. Actually, counsel for Rhinehart acknowledged in her statement of the issues that the claim was raised for the first time on appeal, Rhinehart's opening brief at 2, never argued as though it were properly preserved in Point III or anywhere else in the brief, and expressly argued that this Court should address the merits of the claim under the plain error, ineffective assistance of counsel, or exceptional circumstances doctrine in Point VI of the brief. See id.

The State's claim that counsel for Rhinehart inadequately briefed the exceptions to

the waiver rule does not identify one element missing from Rhinehart's thorough discussion of the elements she must show to justify relief from the waiver doctrine under the governing authorities, and the State's own discussion of the requisite elements and pertinent authorities is far less detailed than Rhinehart's. See State's brief at 36-37, 41, with Rhinehart's opening brief at 46-47. The State's criticisms of counsel's application of the law to the facts and of counsel's prejudice argument apparently overlook counsel's three page assessment of the application of the law and the prejudice from the errors that were plain at the time the trial court and trial counsel made the errors under the controlling law discussed in earlier points in the brief. Compare State's brief at 36-37 with Rhinehart's opening brief at 47-50. In the event the Court would like a supplement to the fifty page opening brief on any point of law or fact, counsel for Rhinehart will speedily supply a brief of the length the Court will entertain on any point of law or fact.

The State argues that there is no presumption against waiver of Rhinehart's right to a jury at sentencing, because Rhinehart has no constitutional right to a jury at sentencing. State's brief at 38. The State's argument is premised on State v. Daniels, 2002 UT 2, ¶ 34, 40 P.3d 611, and on Libretti v. United States, 516 U.S. 29, 49 (1995). In the paragraph the State relies on in Daniels, this Court held that the non-unanimous verdict permitted by statute for a jury's decision of life without parole did not violate Article I § 10 of the Utah Constitution, which guarantees unanimous jury verdicts, because sentences were decided by judges at the time that Article I § 10 was enacted. See id. As discussed

in Rhinehart's opening brief, this Court may wish to reconsider Daniels in light of Appendi v. New Jersey, 530 U.S. 466 (2000), and its progeny, and State v. Lopes, 1999 UT 24, 980 P.2d 191. See Rhinehart's opening brief at 35-40.

In the course of holding that a district court need not make independent findings of fact to sustain a defendant's concessions on forfeiture issues, Libretti states, "Our cases have made abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed." Id. at 49. However, this dictum in Libretti is no longer good law under Appendi and its progeny, which now recognize the criminal defendant's constitutional right to a jury's determination of any factual finding necessary to a sentence exceeding the statutory maximum which a judge would otherwise be empowered to impose. See Point IV of Rhinehart's opening brief, at pages 36-39. Because the life without parole decision the jury would have made turned on a finding of appropriateness that increased Rhinehart's potential sentence from one of 20 years to life to one of life without parole, she did have a constitutional Sixth Amendment right to a jury's determination, and the presumption against waiver of fundamental rights applies. See Barker v. Wingo, *supra*.

In arguing that the plea colloquy adequately reflects a proper waiver of Rhinehart's jury, the State does not resolve the conflicts in the colloquy and plea form regarding the nature of the penalty phase hearing, which was at times described as though it would be like a full-blown trial, and which was at times described as though it would simply be a

perfunctory imposition of sentence by a judge (R. 3/18/2005: 27, R. 1695-96). A waiver of a jury in the former type of hearing would appear significant to a lawyer or lay-person, whereas a waiver of a jury in the latter type of hearing would appear insignificant to a lawyer or lay-person. The ambiguity is significant and forecloses a valid waiver of the right to a jury trial. See State v. Hassan, 2004 UT 99, ¶ 12, 108 P.3d 695.

The State does not identify anything in that transcript or plea form which is fairly read as Rhinehart's knowing or voluntary relinquishment of the jury-decided penalty phase contemplated by statute, in exchange for the sentencing hearing she received, wherein the trial court stated that he would disregard most of the witnesses who would testify at the penalty phase, and would in fact make the sentencing the decision on the basis of hearsay documents – the preliminary hearing transcript, Rhinehart's plea affidavit, and the reports of Dr. Mark Cunningham, Dr. Vicky Gregory and mitigation expert Jan Dowling (T. 4/28/2005: 30).

Assuming *arguendo* that Rhinehart did eventually receive an “adversarial” hearing before the court, as the State claims, State's brief at 39, this fact would not establish a knowing waiver, where at the time of the purported waiver, Rhinehart was given conflicting information on what the sentencing hearing would be – either something similar to a trial, or a simple and perfunctory imposition of sentence by a judge (R. 3/18/2004: 27). If she had received an adversarial hearing, this would not establish her knowing waiver of the right to require the government to convince ten people instead of



one that life without parole was the appropriate sentence on the basis of the evidence that was presented in open court with defense counsel present to challenge the evidence for admissibility.

The State argues that trial counsel made a valid tactical decision in advising Rhinehart to waive the jury, because the sentencing judge would be trusted to “filter” out victim impact and other inflammatory evidence. State’s brief at 40. The State’s record citation is not to the plea hearing, wherein Rhinehart purportedly waived the jury, but is to the sentencing hearing, wherein defense counsel and the court agreed that the court would independently filter for admissibility the hearsay documents upon which the sentence would truly be based, after the *pro forma* presentation of live testimony from witnesses which the judge agreed not to consider, at the ostensible penalty phase hearing (R. 4/28/2005 11-32). This discussion between counsel and the court is not fairly read as counsel properly advising Rhinehart to waive the jury, and does not contribute to a meaningful waiver of the jury.

The State does not contest Rhinehart’s claim that her loss of her right to a jury decision in her capital penalty phase absent a valid waiver constitutes a rare procedural anomaly and manifest injustice which merits this Court’s review under the exceptional circumstances doctrine. See Rhinehart’s opening brief at 47, 50. Accordingly, this Court should address and remedy the error.

#### IV. THE LIFE WITHOUT PAROLE STATUTE IS UNCONSTITUTIONAL.

The State does not refute any of Rhinehart's constitutional challenges to the life without parole statute, and does not contend that the statute is constitutional. Rather, the State claims that Rhinehart has failed to show plain error and ineffective assistance in order to avoid the effects of the waiver doctrine. State's brief at 41-44.

Contrary to the State's contention that a statute cannot be held unconstitutional under the plain error doctrine unless there is a specific appellate decision holding the specific statute unconstitutional, State's brief at 42-43, the case law on plain error requires a showing of "settled law" on the point of error. See, e.g., State v. Ross, 951 P.2d 236, 239 (Utah App. 1997). The appellate decisions demonstrating the obviously unconstitutional nature of the life without parole statute apply simple and familiar precepts of constitutional law, and were all in effect well before the trial in this case, and the trial court's failure to apply them to the statute was obviously erroneous. See Rhinehart's opening brief at 29-40. Any Utah judge presiding over a capital penalty phase should be familiar with the statute, and no competent attorney can review that statute without recognizing its unconstitutionality. See id.

All members of the Utah State Bar, including our judges, are sworn to uphold the constitutions. See Preamble to the Utah Rules of Professional Conduct (quoting the oath taken by all members of the Utah State Bar to "support, obey and defend the Constitution of the United States and the Constitution of Utah."). Our district courts are expected to

recognize plainly unconstitutional statutes, and to raise the issue of constitutionality *sua sponte* in such cases. See State v. Laird, 601 P.2d 926, 926 n. 6 (Utah 1979) (in declining to revisit constitutionality of carnal knowledge statute, the Court recognized that it would not address the issue raised for the first time on appeal because the statute was not so plainly unconstitutional that the district court's failure to address it *sua sponte* constituted clear error). Our appellate courts likewise recognize plainly unconstitutional statutes in the absence of objections in the trial courts, and find them obviously unconstitutional by applying fundamental principles of state and federal constitutional law, without requiring a specific precedent previously striking the statutes. See, e.g., Salt Lake City v. Ohms, 881 P.2d 844 (Utah 1994) (addressing constitutionality of statute for the first time on appeal, apparently under exceptional circumstances doctrine, but finding the statute "plainly unconstitutional" under precepts of state constitutional law, in a case of first impression). Indeed, the Court has full authority to recognize the unconstitutionality of statutes *sua sponte*, even in the absence of precedent specifically on point with the statute at issue. See, State v. Copeland, 765 P.2d 1266, 1271-72 (Utah 1988)(striking statutes under state constitution *sua sponte* on appeal). Cf. Kaiserman Assocs. Inc. v. Francis Town, 977 P.2d 462, 464 (Utah 1998)(discussing inherent authority of appellate courts to notice and address issues of law, regardless of whether the parties raised or abandoned them).

The State's argument that a statute cannot be plainly or obviously unconstitutional

absent a specific appellate decision holding the specific statute unconstitutional misunderstands the nature of the plain error doctrine, which puts justice first, and permits appellate courts to remedy highly prejudicial errors, even when they are not obvious.

See State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 493 U.S. 814 (1989), discussed at page 46 and n.49 of Rhinehart's opening brief. As the Court explained in Eldredge,

[I]n appropriate cases we can exercise our discretion to dispense with the requirement of obviousness so that justice can be done, as when an error not readily apparent to the court or counsel proves harmful in retrospect.

... At bottom, the plain error rule's purpose is to permit us to avoid injustice.

Id.

The error involved in this case, wherein Rhinehart stands to spend the remainder of her life in prison without hope of parole on the basis of a statute which is obviously unconstitutional under so many fundamental constitutional precepts, is properly remedied under the plain error doctrine, because the statute is plainly unconstitutional, and because even if the unconstitutional nature of the statute were not apparent, the prejudice to Rhinehart in the absence of intervention by this Court justifies application of the doctrine.

See Eldredge, supra.

The State argues that Rhinehart's claim of ineffective assistance of counsel is foreclosed by trial counsel's strategy to avoid the death penalty by abstaining from challenging the life without parole statute. The State specifically theorizes that "[i]f

defendant had successfully challenged life without parole as a possible sentence, it is unlikely that the State would have been willing to withdraw the death penalty in exchange for her plea.” State’s brief at 43-44.

The State’s argument misreads the plea agreement and procedural history of the case. At the time that Rhinehart entered her plea, the State was bound to cease pursuing the death penalty in exchange for Rhinehart’s guilty plea to aggravated murder (R. 1698). Under the terms of the plea agreement, Rhinehart was fully entitled to seek a sentence of twenty to life with parole, and was not barred in any fashion from challenging the life without parole sentencing statute after entering her plea (R. 1698).

The State has not refuted Rhinehart’s argument that this Court should apply the exceptional circumstances doctrine to avoid the manifest injustice that would otherwise occur if Rhinehart were required to spend the remainder of her life in prison without parole on the basis of an unconstitutional statute. See Rhinehart’s opening brief at 47, 50. This Court should rule in accordance with the argument and strike the life without parole statute on constitutional grounds. See Salt Lake City v. Ohms, 881 P.2d 844 (Utah 1994) (applying exceptional circumstances doctrine to find statute unconstitutional, because the appellant could not have raised the issue in the trial court, but had to consent to the error below in order to get to the appellate court). In this case, it was certainly through no fault of Rhinehart’s that the statute was not challenged, and the fact that she nonetheless stands to spend the remainder of her life in prison without the possibility of parole justifies this

Court's application of the exceptional circumstances doctrine on her behalf. See id.

V. RHINEHART'S LIFE WITHOUT PAROLE SENTENCE MUST BE REVERSED BECAUSE IT HINGES ON PRESUMPTIVELY UNRELIABLE HEARSAY FROM WITNESSES RHINEHART WAS NEVER ALLOWED TO CONFRONT.

The State argues that the Court should not address Rhinehart's claim that her sentence hinges on presumptively unreliable witnesses whom she was never able to confront, because Rhinehart invited any error. State's brief at 44-50. The State theorizes that trial counsel made a valid tactical decision to avoid live witnesses at the sentencing hearing, who may have been more harmful to Rhinehart in person than they were in their written accusations, and argues that because this valid tactical decision precludes a finding of ineffective assistance, there can be no plain error. Id.<sup>6</sup>

The State's theory of a valid tactical decision relies on and quotes but does not account for trial counsel's statement to the trial court that "I think the statute provides

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<sup>6</sup>In support of this argument, the State appends the docket from a separate trial involving Rhinehart, to show that witnesses Goalen and Christianson were willing to testify against Rhinehart and in fact did so shortly before Rhinehart pled to aggravated murder. See State's brief at 49 and addendum B. It appears that the State's addendum contains records which were not presented in the trial court, and that this Court should not take judicial notice of these records or otherwise consider them, as they are outside the record on appeal. See, e.g., Menzies v. Galetka, 2006 UT 81, 2006 WL 3690665 (indicating that positions of attorney general's office in other cases were evidence outside the record which the Court generally does not consider on appeal); State v. Shreve, 514 P.2d 216, 217 (Utah 1973) (refusing to take judicial notice of court records from other cases not admitted in evidence).

previously admitted testimony into the case.” (T. 4/28/2005: 32), quoted at page 46 of the State’s brief. This statement captures trial counsel’s misunderstanding that there is a statute which authorizes the admission of previously admitted testimony in a capital penalty phase, without regard to the capital defendant’s constitutional right to confrontation expressly recognized in State v. Carter, 888 P.2d 629, 642 (Utah), cert. denied, 615 U.S. 858 (1995). In Carter, this Court was interpreting the subsection of the capital sentencing statute to which Rhinehart’s trial lawyer was apparently referring, which authorizes courts to admit transcripts of testimony, exhibits and evidence from initial trial and penalty phase in the event of reversal on appeal and retrial (currently Utah Code Ann. § 76-3-207(6)).<sup>7</sup> The Court recognized in Carter that the statute could not be applied in derogation of the defendant’s right to confrontation, and that, given the need for reliability in capital sentencing proceedings, capital fact-finders must see the witnesses’ consciences sifted by cross-examination. Carter, 888 P.2d at 642.

The instant case was not a retrial following a reversal, so trial counsel was in obvious error in thinking that the subsection of the capital sentencing statute pertaining to that context applied here, in Rhinehart’s first and only penalty phase trial. Trial counsel’s statement similarly demonstrates a lack of awareness of Carter and Rhinehart’s right to confrontation in capital sentencing proceedings. Rather than demonstrating a valid

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<sup>7</sup>Section 76-3-207 is copied in its entirety in the addendum to Rhinehart’s opening brief.

tactical decision as the State claims, this record demonstrates objectively deficient performance by trial counsel in this capital case. See State v. Bullock, 791 P.2d 155, 158-59 (Utah 1989) (even what might be tactical decisions are reviewed for unreasonableness under the rubric of ineffective assistance of counsel). One of the most basic duties of a trial lawyer is to properly raise and preserve all issues in the lower court. See, e.g., State v. Smedley, 2003 UT App 79 at ¶ 10, 67 P.3d 1005. When a defense lawyer fails to assert beneficial, current law, this constitutes objectively deficient performance, which will not be excused by this Court with hypothetical tactical bases. See, State v. Moritzsky, 771 P.2d 688, 692 (Utah App. 1989) (trial counsel's failure to seek jury instruction reflecting current law beneficial to the client was objectively deficient oversight of the law, which could not conceivably have been valid trial strategy). See also ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.8 (explaining the duty to assert and preserve all legal claims).

Here, trial counsel were apparently not familiar with the statute governing the penalty phase that was about to occur, which statute in fact did not authorize the admission of the preliminary hearing transcript and documents in the penalty phase trial, and were apparently not familiar with the Carter decision entitling Rhinehart to confront the witnesses against her in the hearing which determined her fate for the rest of her life. Counsel's failure to know and assert the current and clear law cannot be viewed as a valid tactical strategy, but is instead properly characterized as ineffective assistance. See, e.g.,



Moritzky, supra.

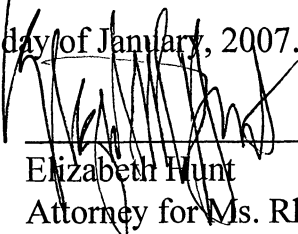
Because the State's claim of invited error hinges on its incorrect theory that trial counsel were operating pursuant to a sound trial strategy, this Court should reject the claim of invited error.

Because Rhinehart's fact finder has never heard from the witnesses whose written or transcribed allegations formed the basis for Rhinehart's sentence of life in prison without parole, this Court should reverse that sentence and remand this matter, at a minimum, for a penalty phase trial which comports with Rhinehart's fundamental constitutional rights to a jury trial, to confrontation, and to effective assistance of counsel.

### CONCLUSION


This Court should reverse Rhinehart's conviction and remand this matter to the magistrate for a new preliminary hearing. Alternatively, this Court should void Rhinehart's conviction for the involuntary entry of the plea, and order a new trial. Alternatively, the Court should strike the life without parole sentencing statute, and reduce Rhinehart's sentence to twenty years to life. Alternatively, this Court should order a new sentencing hearing with confrontation of witnesses.

Respectfully submitted this 16th day of January, 2007.

  
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Elizabeth Hunt  
Attorney for Ms. Rhinehart

CERTIFICATE OF DELIVERY

I hereby certify that I mailed/hand-delivered two true and correct copies of the foregoing Reply Brief of Appellant to Assistant Attorney General Laura B. Dupaix, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854 this 16th day of January, 2007.



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