

Randall K. Spencer (6992)
FILLMORE, SPENCER LLC
Attorneys for Defendant
3301 North University Avenue
Provo, Utah 84604
Tel: (801) 426-8200
Fax: (801) 426-8208
Email: rspencer@fslaw.com

Susanne Gustin (5962)
Attorney for Defendant
WELLS FARGO CENTER
299 South Main Street, Suite 1300
Salt Lake City, UT 84111
Tel: (801) 535-4343
Fax: (801) 536-3300
Email: defendmenow@aol.com

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

STATE OF UTAH,	Plaintiff,	REPLY MEMORANDUM IN SUPPORT OF MOTION TO ARREST JUDGMENT OR FOR A NEW TRIAL
vs.		CASE NO. 121402323
MARTIN J. MACNEILL,	Defendant.	JUDGE: DEREK P. PULLAN

Defendant, MARTIN MACNEILL, through his attorneys of record, RANDALL K. SPENCER and SUSANNE GUSTIN, submit the following memorandum in support of Martin MacNeill's motion to arrest judgment or, in the alternative, for a new trial ("Motion to Arrest").

INTRODUCTION

The State's 129 page responsive memorandum, excluding exhibits, seems calculated to

confuse the simple issue that it failed to disclose exculpatory information, in direct violation of an order of this Court, with the obvious intent of endeavoring to reduce the risk of acquittal at the trial in this matter. Contrary to the State's voluminous pleading, the basic facts that support MacNeill's motion are simple and undisputable.

STATEMENT OF FACTS

1. On October 8, 2013, this Court heard oral arguments on Defendant's motion to exclude the testimony of inmate witnesses including Jason Poirier, Michael Buchanan (Inmate #1), and others. Defendant argued in his pleadings that the State was concealing benefits offered to inmate witnesses. *See* 9/13/13 Memorandum in Support of Motion to Exclude Testimony of Jason Poirier at p. 17.
2. On October 8, 2013, the Court denied Defendant's motions, but ORDERED the State to make the following disclosures: "The state is instructed to disclose in writing all the benefits promised, expressed or implied in exchange for Jason Poirier's testimony and the federal inmates testimony." *See* Exhibit 1—October 8, 2013, Signed Minute Entry, page 2.
3. On October 15, 2013, the State of Utah purportedly complied with the Court's order and filed "Plaintiff's Notice of Benefits Offered or Provided to Jailhouse Informants." *See* Exhibit 2. On page 5 of Exhibit 2, the State addresses the benefits offered to Michael Buchanan who is referenced as Inmate #1:

...Inmate #1's professed motivation for disclosing Defendant's statements to police was, "I just, to me I don't want it to happen to his girlfriend, because if he did it once, he'll do it again."

The State of Utah has no authority over federal inmates and had nothing to offer Inmate #1 in exchange for his cooperation in the investigation and his testimony at trial.

There is no agreement to exchange Inmate #1's testimony for consideration from the State of Utah. Nothing has been given him, and ***there are no promises outstanding.*** (If Inmate #1 were to request a recommendation from Investigator Robinson or the prosecution, that request would be honored. ***To date, however, he has not made any requests for any consideration.***)

(Emphasis Added)

4. During Defendant's trial, Buchanan testified that the prosecution team's statement in Exhibit #2 was correct, and that he had not made any request for any consideration, and that the prosecution's disclosure was completely accurate. *See Buchanan Trial Testimony Transcript ("BTTF") at pp. 22-23.*

5. The Utah County Attorney's Office (UCAO) did not request a side-bar or make any attempt to correct Buchanan's testimony. UCAO employees Chad Grunander, Sam Pead, Jared Perkins, and Jeff Robinson were all present in the courtroom during Buchanan's testimony.

6. During re-direct examination, the UCAO reinforced Buchanan's testimony and elicited testimony from him again that he had not been given "any deal" from investigator Robinson, the State prosecutors, or federal prosecutors for his testimony. *See Id.* at p. 106.

7. As discussed in MacNeill's initial memorandum, shortly before Buchanan testified, MacNeill's counsel obtained recorded telephone calls Buchanan made from the federal prison during August, 2013. In those telephone calls, Buchanan repeatedly references his belief that he will be home by Christmas. When MacNeill's counsel attempted to get Buchanan to admit that he was planning to be released from jail as a direct result for testifying against MacNeill, Buchanan replied: "When I say 'around Christmas,' I'm referring to the 18 and 1 because that's what my lawyer told me." *See BTTF p. 57, ln. 17-18; p. 59, 15-17; p. 90 ln. 25 to p. 91, ln. 1-6;*

p. 105, ln. 3-22.

8. When MacNeill's counsel confronted Buchanan with additional statements he made in August that seemingly indicated that he was seeking a deal in exchange for his testimony, Buchanan said that such statements were referencing his belief in August, not his current belief: "Like I said, that was in August. That was, you know, before I—well, yeah, August. That was before I, you know, found out that I couldn't." *Id.* at p. 99, ln. 10-12.

9. Buchanan's belief about whether he could possibly get out on the "18 to 1" motion or in exchange for testifying against MacNeill was a material disputed issue at trial.

10. After the trial, Defendant was able to obtain recorded phone conversations containing exculpatory information that the UCAO possessed and failed to disclose. This was despite the Court's specific order requiring disclosure of all "benefits promised, expressed or implied" to the inmate witnesses. *See Exhibit 1.*

11. After the trial, MacNeill's counsel was also able to obtain email communication between Buchanan and the UCAO. A specific email communication on September 1, 2013 between Buchanan and the UCAO clarified Buchanan's state of mind that the 18 to 1 motion was dead: "looks like the release thing is dead in the water. the (*sic.*) courts reversed the decision that I was going to get my action on...." *See Exhibit 3* (9/1/13 Email from Buchanan to UCAO investigator Robinson).

12. The UCAO admitted to Buchanan in August of 2013 that it knew the defense had requested it to turn over email communications regarding MacNeill. During trial, MacNeill's counsel questioned Buchanan about a recorded conversation between himself and UCAO

investigator Robinson wherein Robinson stated that he did not want to email Buchanan because the defense has requested disclosure of his emails; therefore, Robinson preferred phone calls. *Id.* at p. 86, ln. 7-9.

13. On or about December 17, 2012, MacNeill filed his first motion in relation to the UCAO's failure to comply with its discovery obligations. Subsequently, the UCAO represented that it had hired a third party to audit its files to retrieve all discoverable emails. Prior to trial, the UCAO provided MacNeill's counsel with a box of printed emails. The September 1, 2013 email between Robinson and Buchanan was never disclosed by the UCAO to MacNeill's counsel. In its response, the UCAO prosecutors claim that they did not know about the email even though the UCAO investigator is the one who received it. *See* UCAO Response Memorandum Opposing Defendant's Motion to Arrest Judgment or For a New Trial ("UCAO Response") at p. 14, ¶23.

14. After MacNeill filed this Motion to Arrest, and after the UCAO knew it was caught violating the Court's order and Defendant's due process rights, the UCAO submitted an affidavit from the UCAO's chief investigator, Jeff Robinson which states in relevant part:

On or about September 27, 2013,...I called [Elizabeth Ford] (Buchanan's Federal Public Defender) at *Inmate #1's request*. During a phone conversation with Ms. Ford, she asked me if I would be willing to write a letter in Inmate #1's behalf, if I was satisfied with his testimony after the trial, and for his willingness to testify in the MacNeill case. I told Ms. Ford I was willing to do that....I explained to Inmate #1 that our office had no power or authority to offer him leniency on his federal case due to his cooperation, but that *I would write a letter on his behalf for his willingness to come forward with evidence in this case and for his cooperation.*

See Exhibit K to 1/31/14 Memorandum Opposing Defendant's Motion to Arrest Judgment or for a New Trial at ¶¶2 & 4 (Emphasis added) attached hereto as Exhibit 6.

15. In addition to what UCAO investigator Robinson disclosed in his affidavit, recorded

telephone calls obtained by MacNeill's counsel from the Utah County Jail after MacNeill's trial demonstrate additional discovery violations. Between October 24, and October 30, 2013, UCAO investigator Robinson spoke with Buchanan at the Utah County Jail. No police report was generated regarding the conversation, and no information was disclosed by UCAO prior to the conclusion of the trial documenting the exculpatory information communicated between Robinson and Buchanan. In an October 30, 2013 conversation between Buchanan and his mother while Buchanan was still held at the Utah County jail and prior to his testimony, Buchanan said, "I finally got to talk to Jeff the other day...he said I'll be going to court on Thursday or Tuesday....Jeff said *he's going to write the letter to my lawyer and stuff so, he said everything is good.*" See Exhibit 4, Partial Transcript and CD of Michael Buchanan Utah County Jail Calls. The conversation Buchanan referenced with UCAO investigator Robinson is exculpatory because it evidences an express or implied benefit promised by the UCAO to Buchanan, whom it anticipated calling as a witness. It also demonstrates another occasion of Buchanan "asking" for consideration in exchange for his testimony.

16. Buchanan was the only witness for the State that could provide "direct evidence" regarding the acts the State claims occurred on the morning of April 11, 2007 which led to Michele's death.

17. In the State's closing argument, it spent a considerable amount of time discussing and relying on Michael Buchanan's allegations of what he claims MacNeill told him, and continued to perpetuate its misrepresentations to the Court, defense, and the jury. At trial, the prosecution claimed that the limited impeachment information MacNeill's counsel had from August, 2013

did not impeach Buchanan regarding receiving a benefit in exchange for his testimony:

“The defense challenged [Buchanan] about getting something in return for his testimony. ***There's nothing that state investigators, state prosecutors can give this individual.***”

“...he testified it didn't look like anything was gonna work out; that he wasn't going to get something in exchange for his testimony because it's a state case and not a federal case.... He talked about the risks of coming forward, being killed or stabbed, beaten up. One of the other inmates talked about being raped as a consequence of coming forward, being labeled a “snitch,” in the federal system. Not only was he—is he not getting anything for his testimony, ladies and gentleman, he's suffering a significant detriment to come forward and tell the truth.[Buchanan] talked about how he's got another couple years on his sentence. He thinks it's part of his rehabilitation, do the right thing and come forward. See Exhibit 5, CD of State's Closing Argument, Time stamp 1:14:00-1:15:14, and partial transcript.

18. Six days after the trial concluded, on November 15, 2013, the UCAO wrote the “Rule 35” letter on Buchanan’s behalf affirming that he was a “very important witness” and “highly recommend[ing] and encourage[ing] leniency be shown to Mr. Buchanan....” *See Exhibit A to UCAO Response attached hereto as Exhibit 7 for convenience.*

19. Two and a half weeks later, on December 4, 2013, United States District Judge Leon Jordan signed an order releasing Michael C. Buchanan, Jr. from prison and vacating the remaining 25 ½ months of his federal sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. *Id.* at Exhibit G attached hereto as Exhibit 8 for convenience.

20. Rule 35 of the Federal Rules of Criminal Procedure is titled, “Correcting or Reducing a Sentence,” and allows for an inmate’s sentence to be reduced more than a year after the original sentencing date only upon the inmate providing substantial assistance to the government. The rule is not restricted to assistance provided only to the “United States Government.” Buchanan’s

substantial assistance was the cooperation he provided in the MacNeill case evidenced by the November 15, 2013 letter. *Id.* at Exhibit F.

21. Rule 35 does not allow for inmates to have their sentences reduced for any reason other than providing substantial assistance to the government (in other words, the assertion that Buchanan's safety was called into question because of defense counsel's inadvertent use of Buchanan's name is not a basis for Rule 35 relief).

22. The UCAO's withholding information it was required to disclose pursuant to Article I, §7 of the Utah Constitution, the 5th & 14th Amendments to the United States Constitution, Rule 16 of the Utah Rules of Criminal Procedure and at least Rules 3.3, 3.4(a) & 3.8(d) of the Utah Rules of Professional Conduct related to disputed material facts at trial; was exculpatory; prejudiced MacNeill, and was done by the UCAO to avoid an acquittal at trial.

23. The UCAO ignored other orders of this Court. On October 18, 2013, the Court signed an order memorializing a conversation between counsel, which MacNeill's counsel believes was on October 17, 2013. In the October 18, 2013 order, the Court recognized that "the purpose of the exclusion [of witnesses] under Rule 615 is 'preventing witnesses from changing their testimony based on other evidence adduced at trial (e.g., other witnesses' testimony)." See October 18, 2013 Order at p. 1. The court recognized that by allowing electronic media coverage of the trial in real time, witnesses did not have to be in court to watch other witness testimony. *Id.* Therefore, the Court entered the following orders:

1. All fact witnesses shall be excluded from the courtroom while under trial subpoena.
2. All fact witnesses shall not watch or listen to television, radio, or internet news

coverage of the trial while under trial subpoena.

3. The parties shall inform their respective fact witnesses of this exclusion order.
4. Any fact witness who wilfully violates this order shall be subject to contempt sanctions.

24. As set forth in MacNeill's primary memorandum, Michael Buchanan's recorded prison phone calls demonstrate that he repeatedly violated the Court's October 18, 2013 order by watching portions of the trial as well as television news coverage of the trial, and received information from family members who were watching the trial, both before and after the Court signed the October 18, 2013 order.

25. Jeff Robinson's affidavit demonstrates that the UCAO ignored the Court's order and did not notify Buchanan to refrain from watching television coverage related to the trial until October 23 or 24th, 2013. *See Jeff Robinson Affidavit, Exhibit K to the UCAO Response at ¶11.*

26. During arguments in support of MacNeill's motion to exclude inmate witnesses on October 8, 2013, MacNeill's counsel informed the court that Barbara Gonzalez, attorney for inmate Jason Poirier, said that in relation to negotiations for consideration to Poirier the UCAO did not want to create a circumstance where it appeared Poirier was being given a benefit for his testimony. The UCAO's admissions in relation to Poirier is consistent with its conduct in relation to Buchanan wherein it misrepresented facts to the Court and defense counsel to appear not to be giving Buchanan anything in relation to his testimony.

27. Rule 25(a) of the Utah Rules of Criminal Procedure grants the Court the power to order an information or indictment dismissed.

28. Utah Code §78A-2-201 grants this Court authority to compel compliance with its orders and order sanctions as justice requires for violations of its orders.

ARGUMENT

I. MACNEILL'S MOTION TO ARREST OR FOR A NEW TRIAL IS PROCEDURALLY PROPER

The plain language of Rule 23 of the Utah Rules of Criminal procedure allows the Court to arrest judgment for “other good cause” and “unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried.” *Id.* Courts should give effect to the plain language of the rules. *See Hartford Leasing Corp. v. State*, 888 P.2d 694, 697 (Utah App. 1994). Under the plain language of Rule 23, this Court has discretion, for good cause, to arrest judgment and dismiss or to arrest judgment and grant a new trial.

Relief pursuant to Rule 23, as explained in its plain language, is not limited to the circumstance of insufficiency of evidence. A number of Utah cases have applied Rule 23 in consideration of other good cause to arrest judgment. In *State v. Owens*, 753 P.2d 976 (UT App. 1988), the defendant filed a motion to arrest or in the alternative for a new trial, as MacNeill has done, due to prosecutorial misconduct. The trial court in *Owens* elected to grant a new trial, and the Utah Court of Appeals found that Owens’ motion was proper. *Id.* at p. 978. In *State v. Garcia*, 504 P.2d 1015, 1016 (Utah 1972) the trial court arrested judgment related to the prosecutorial conduct of allowing a co-defendant to plead to a misdemeanor offense; in *State v.*

Burk, 839 P.2d 880, 882 (Utah App. 1992) the court, in relation to a Rule 23 motion, considered improper juror contact with witnesses, improper admission of evidence, and violations of the exclusionary rule; in *State v. Gentry*, 747 P.2d 1032, 1034-35 (Utah 1987) the court considered but refused to arrest judgment due to juror confusion and clerical errors on the verdict form; in *State v. Butler*, 07 UT App 396, 2007 WL 4443007 (unpublished) the court considered and rejected claims of ineffective assistance of counsel in relation to a Rule 23 motion; and in *State v. Harry*, 873 P.2d 1149 (Utah App. 1994) the court considered and rejected a claim of ineffective assistance brought in a motion to arrest or in the alternative for a new trial.

An alternative motion to arrest judgment and dismiss or for a new trial is the proper procedure in this case because the ultimate conviction and sentence should not enter until the Court has heard and resolved on the merits the issues of prosecutorial misconduct in violation of MacNeill's due process and fundamental fairness rights. The trial court should correct errors at the earliest possible juncture in furtherance of justice and fairness. See *State v. Beck*, 2007 UT 60, ¶8, 165 P.3d 225.

The UCAO's explicit and deliberate violation of the Court's order regarding disclosure of all benefits promised, expressed or implied to inmate witnesses; the prosecutions intentional violation of its discovery obligations; the prosecutions suborning of perjured testimony; the prosecution's misrepresentations to the jury; and the prosecutions willful violation of the Court's order excluding witnesses from the courtroom is good cause to support arrest of judgment and dismissal or new trial.

II. THE UCAO ENGAGED IN EGREGIOUS MISCONDUCT, JEOPARDY HAS ATTACHED, AND THE COURT SHOULD ARREST JUDGMENT AND DISMISS THIS CASE

A. The UCAO Engaged in Egregious Misconduct

On October 15, 2013, the UCAO filed a formal pleading with the court stating that it did not make any promises to inmate #1, and he did not even ask for any benefit in relation to his testimony against MacNeill. *See Exhibit 2* (UCAO 10/15/13 disclosure). Buchanan testified at trial that the UCAO 10/15/13 disclosure was correct. *See BTTT* at p. 22-23. Buchanan testified that his expectation of release in December 2013 was due to his “18 to 1” motion. (*See ¶8 of Facts above*). On September 1, 2013, the UCAO received an email from Buchanan stating that the case he was relying on to be released was reversed, and he wouldn’t be getting out on the 18 to 1 motion. *See Exhibit 3*. The prosecution’s response to its failure to disclose this exculpatory information is that the UCAO attorneys did not know about the information known to the UCAO investigator. *See. UCAO Response* at p. 14. The claimed ignorance of the UCAO attorneys is irrelevant because knowledge of the UCAO investigator is imputed to the UCAO attorneys. *See State v. Pliego*, 1999 UT 8, ¶13, 974 P.2d 279.

When Buchanan testified at trial, the UCAO did not alert the Court that Buchanan was lying about the fact that he had asked for a Rule 35 letter (notably, the UCAO did not disclaim knowledge of this fact in its Response). The UCAO also did not alert the Court that Buchanan was lying when he testified that he still believed he would be released due to his 18 to 1 motion—rather than as a benefit for testifying against MacNeill (the UCAO attorneys disclaimed knowledge of the 9/1/13 email in its Response, but UCAO investigator Robinson who was in the

Court during Buchanan's testimony had actual knowledge of the email). The UCAO perpetuated its fraud on the Court, the defense, and the jury in its closing argument when it ratified Buchanan's assertion that he was not getting any benefit, and that the UCAO could not give him any benefit. The UCAO did not inform the Court that its 10/15/13 pleading was false as it has now admitted in Robinson's affidavit (Exhibit K to UCAO Response—affirming that at least on 9/27/13 Buchanan asked through his attorney for a benefit related to his testimony and the UCAO promised to write the Rule 35 letter), and in Robinson's visit with Buchanan at the Utah County Jail in October 2013. *See Exhibit 4*--recorded phone calls during the last week of October 2013 confirming Robinson visited Buchanan and Buchanan again asked Robinson about the Rule 35 letter, and Robinson again promised on behalf of the UCAO to send it after the trial.

In *United States v. Bagley*, 473 U.S. 667, 678-83 (1985) the United States Supreme Court eliminated any analytical difference between impeachment evidence and other exculpatory evidence; it all must be disclosed. *Id.* A prosecutor's use of false testimony or failure to correct a false impression requires reversal “if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *State v. Gordon*, 886 P.2d 112, 116 (UT App. 1994) (citations omitted). Additionally, a due process violation occurs when the State suppresses information that (1) remains unknown to the defense throughout trial, and (2) there is a reasonable probability of a different result had the information been disclosed. *State v. Bisner*, 2001 UT 99, ¶33, 37 P.3d 1073 (citations omitted). The UCAO's false representations in its 10/15/13 disclosure, suborning of Buchanan's perjury, and false representations about Buchanan not receiving any benefit for his testimony during closing argument meet the *Gordon* and *Bisner*

factors.

The fact that the UCAO held Buchanan out as its “number 1” witness before trial and as a “very important” witness after trial, and touted him as unimpeached during its closing argument, supports the conclusion that there is a reasonable likelihood and a reasonable probability that the UCAO’s failure to disclose benefits promised to him and his false testimony may have affected the judgment of the jury. Though MacNeill did learn some impeachment information about Buchanan a few days before he testified, Buchanan largely disputed it and the UCAO sat silent while Buchanan continued to lie about not expecting any benefit for his testimony and affirmatively represented during closing argument that Buchanan was being truthful. The issue of whether MacNeill’s counsel could have somehow learned about the exculpatory information is moot where the UCAO knew of the information, failed to disclose it, and falsely represented to the Court and MacNeill’s counsel that there were not promises made to Buchanan and that he had not even asked for consideration.

Buchanan was the only witness in the five week trial that provided any direct evidence of what the State believes happened to Michele on April 11, 2007. Given the utter lack of any other direct evidence of murder, it is incredulous to assert that a jury verdict may not have been affected by the following: (1) the knowledge that Buchanan did *seek* a benefit after August, 2013 for his testimony, (2) that he was *promised* a Rule 35 letter, (3) that he *falsely testified* at trial about seeking a benefit and his expectations regarding his 18:1 motion, (4) that the UCAO filed a *false pleading* regarding benefits promised to Buchanan, (5) that the UCAO suborned Buchanan’s perjury, and (6) that the *UCAO falsely represented Buchanan’s testimony* during

closing argument. The UCAO's gross misconduct not only casts doubt on the jury verdict, it also rocks the integrity of the Utah criminal justice system. The Court must not stand by and ignore the UCAO's open defiance of our State and federal Constitutions and the Court's specific orders. There is a reasonable probability that the UCAO's misconduct may have affected the jury verdict, and the Court should declare a mistrial and arrest judgment.

B. JEOPARDY HAS ATTACHED AND THE CASE SHOULD BE DISMISSED

The Utah Supreme Court has held that the Utah Constitution often provides greater due process protections to Utah citizens than the federal constitution even though the language is identical. *Brigham City v. Stuart*, 2005 UT 13, ¶¶ 10-11, 122 P.3d 506, *rev'd* 547 US 398 (2006). The Utah Supreme Court further held that state protections should be interpreted first and independent of federal opinions, and that federal constitutional interpretations should be given no more deference than sister state analysis. *State v. Tiedemann*, 2007 UT 49, ¶33, 162 P.3d 1106. Similar to the New Mexico Supreme Court's holding in *State v. Breit*, 930 P.2d 792 (N.M. 1996), Article I, §§ 7 & 12 of the Utah Constitution prohibit the State from twice putting MacNeill in jeopardy when the cause of the mistrial was willful prosecutorial misconduct intended to reduce the risk of MacNeill being acquitted at his trial.

In contrast to *Breit*, the United States Supreme Court has interpreted the federal constitution to prohibit a re-trial due to prosecutorial misconduct only if the prosecutor intended to provoke a mistrial. *See Oregon v. Kennedy*, 456 U.S. 667, 679 (1982); *U.S. v. Jorn*, 400 U.S. 470, 484-85 (1971). The federal rule ignores the troubling circumstance when a prosecutor willfully engages in misconduct to better its case--hoping not to be caught. *Breit*, 930 P.2d at

806. The Utah Supreme Court, when interpreting the federal constitution, has followed federal precedent. See *State v. Trafny*, 799 P.2d 704, 709 (Utah 1990); *State v Jones*, 645 P.2d 656, 657 (Utah 1982); and *State v. Ambrose*, 598 P.2d 354, 357 (Utah 1979). Interpretation of Article I, §§ 7 & 12 in relation to prosecutorial misconduct causing a mistrial and the application of jeopardy, appears to be one of first impression in Utah. The New Mexico Court's interpretation of its similar state constitution in *Breit*, 930 P.2d 792 adopting a "willful disregard" standard is consistent with the Utah Supreme Court's declaration that the Utah Constitution often offers greater protection than its federal counterpart in order to protect compelling rights of Utah citizens. *Brigham City*, 2005 UT 13, ¶¶ 10-1. The *willful disregard* standard "recognize[s] that under the [state constitution], the bar to double jeopardy may be triggered by prosecutorial misconduct other than the intentional provocation of a mistrial." *Breit*, 930 P.2d at 804. The federal rule would only trigger double jeopardy if prosecutorial misconduct was actually intended to trigger a mistrial and does not include the circumstance where a prosecutor willfully disregards the risk of a mistrial in relation to its misconduct. See *Oregon v. Kennedy*, 456 U.S. at 679.

Declining to follow the logic from *Breit* in the present case would allow the UCAO to willfully engage in misconduct to better its case, and hope not to get caught; and if they do get caught, under the federal standard, the worst consequence is a new trial. If they don't get caught under the federal rule, the UCAO beats the system. The New Mexico court's analysis in *Breit*, is more in line with Utah Constitutional interpretation balancing the administration of justice and protecting the fundamental rights of its citizens. *State v. DeBooy*, 2000 UT 32, ¶12, 996 P.2d 546

and *Tiedeman*, 2000 UT at ¶49 (both cases held that the Utah Constitution is appropriately interpreted more expansively when necessary to protect the rights of Utah's citizens).

The due process rights at issue in the present case are arguably more serious violations than those in *DeBooy* and *Tiedeman*. In relation to disclosure of exculpatory evidence in the possession of the State, the prosecutor is the gate keeper. In most circumstances, a defendant in a criminal case will never know when a prosecutor has breached its obligation to disclose exculpatory information. In this case, the UCAO, knowing that Buchanan had asked for a "Rule 35" letter, and knowing that it had promised to write the letter after the trial, and knowing that the Court had ordered disclosure of all benefits, "expressed or implied," rationalized withholding this information from the defense. In its Response, the UCAO continues the incomprehensible argument that it did not improperly withhold information about Buchanan's request for the Rule 35 letter and the UCAO's promise to provide it. *See* Response at p. 121, 122, 123 & 126. It argues the propriety of its conduct despite Robinson's affidavit declaring that he was writing the "Rule 35" letter "on [Buchanan's] behalf for his willingness to come forward with evidence in this case and for his cooperation." *See* Exhibit K to State's Response at ¶¶ 2 & 4.

The UCAO attempts to argue that it did not have a duty to disclose its promise to Buchanan because it could not be a final "deal" until after the trial when the federal prosecutor and federal judge considered the letter and determined whether the government assistance was sufficient to justify Buchanan's request to commute his sentence. *Id.* Prosecutors who are so skilled in rationalizing away their disclosure duties under State and federal Constitutional principles and direct orders from this court are exactly the type from whom Utah citizens must be

protected. Article I, §§7 & 12 of the Utah constitution is MacNeill's and other similarly situated citizens' protection.

If Article I, §§7 & 12 of the Utah Constitution were interpreted consistent with the federal constitution, the UCAO's conduct would be tolerated because the worst punishment would be a new trial--but only if they got caught. The enormous financial cost, prolonged incarceration, and other harms to defendants would be ignored. Similar to the greater protections under the Utah Constitution adopted in *DeBooy*, *Tiedemann*, and other Utah cases, this Court should recognize that the Utah Constitution must be interpreted consistent with the rationale of the *Breit* decision by the New Mexico Supreme Court and prohibit prosecutors from willfully violating a defendant's due process and fundamental fairness rights with impunity.

Willful prosecutorial misconduct necessitating a mistrial, invokes double jeopardy protections under Articles I, §§7 & 12 of the Utah Constitution, and the Court should declare a mistrial and dismiss this case.

III. ALTERNATIVELY, THE UCAO'S MISCONDUCT REQUIRES A NEW TRIAL

In December of 2010, the Utah Court of Appeals issued its opinion in the case of *State v. Doyle*, 2010 UT App 351. At the trial court level, *Doyle* involved the same law firms as the present case—the Utah County Attorney's Office and Fillmore Spencer LLC. During *Doyle*'s trial, defense counsel discovered that the UCAO failed to disclose a benefit provided by the UCAO to one of its witnesses. The court of appeals found that the UCAO committed a number of discovery and ethical violations. *Id.* at ¶11. However, the court determined that the trial court did not abuse its discretion in denying *Doyle*'s motion for a new trial because she learned of the

misconduct before the end of the State's case in chief; had an opportunity to impeach the witness; and failed to timely raise the discovery violation. *Id.* at ¶10.¹

MacNeill's case is materially different than *Doyle*. MacNeill did not learn of the unethical conduct forming the basis of this motion until after the trial; the UCAO continued to argue false testimony and facts, that it either knew to be false or had imputed knowledge of falsity, throughout its closing argument; the UCAO's conduct was in violation of the Utah and Federal Constitution, Utah Rules of Criminal Procedure and Professional Conduct, and was in direct violation of this Court's October 8, 2013 order; and the false testimony and exculpatory information related to the State's "number 1", "very important" witness. Therefore, if the Court does not find that jeopardy has attached, the Court should exercise its discretion to arrest judgment and declare a mistrial, and grant MacNeill a new trial.

The UCAO spent about 80% of its Response erroneously arguing that MacNeill had a duty, and failed to marshal evidence most favorable to the State. The requirement to marshal evidence is designed to facilitate efficient appellate review, and to protect our appellate courts from being overburdened with the time-consuming job of reviewing the records independently in search of evidence to sustain the lower court's findings. *State v. Larsen*, 828 P.2d 487, 491 (Utah App. 1992). At the trial court level, motions are being heard before the Court which heard all of the evidence at trial. Each party has the opportunity to highlight that evidence which supports its position. There is no marshaling duty imposed at the trial court level. *Id.* It does not require

¹ Though Doyle's case was decided three years before MacNeill's trial, the UCAO was not deterred by the Court's finding that it unethically withheld exculpatory information and subject Utah State Bar discipline. The possibility of ethical discipline is not an adequate measure to police the UCAO conduct.

marshaling all of the evidence in this case to recognize that misrepresentations and failures to disclose by the UCAO and perjury by the only witness providing “direct evidence” may have had an impact on the jury verdict requiring declaration of a mistrial.

The UCAO’s attempt to marshal is best summed up in its own words: “the state presented overwhelming proof of *motive* to support its case that Defendant murdered his wife and replaced her with his paramour Gypsy Willis.” *See* UCAO Response at p. 128 (emphasis added). Motive is not an element of the charged criminal offenses. Proof that Michele died as a result of the act of another is an element, and none of the UCAO’s three expert pathologists could conclude that Michele’s death was murder as opposed to an accident or natural causes.

The only witness the UCAO presented that provided evidence of a murderous act on the morning of April 11, 2007, was Michael Buchanan. Even inmate Jason Poirier did not provide testimony of what act allegedly occurred on the morning of April 11, 2007. The UCAO withheld information that it had made a deal to write Buchanan a “Rule 35” letter; falsely represented to the Court that it had not promised him any benefit; falsely represented that Buchanan had not asked for any benefit related to his testimony when he had; and the UCAO allowed Buchanan to testify falsely at trial. Where the UCAO considered Buchanan its “number 1” and “very important” witness, it cannot argue in good faith that the UCAO’s failure to disclose benefits it offered Buchanan and that he lied during his testimony could not have reasonably affected the verdict. *Gordon*, 886 P.2d at 116; *Bisner*, 2001 UT at ¶33. Because the jury’s knowledge that the UCAO’s “very important” witness lied and the UCAO misrepresented the truth about Buchanan could have affected the verdict, MacNeill is entitled to a new trial. *Id.*

Though MacNeill does not have a marshaling requirement, by way of illustration, he pointed out in his initial memorandum that the UCAO marshaled its evidence in July of 2012 in a very lengthy affidavit to get a wiretap, and swore to the Court that it did not have proof beyond a reasonable doubt to prosecute this case. When later confronted with its statements by MacNeill, the UCAO attempted to justify its conduct by arguing that what it really meant was that it could not prosecute all of its case, such as charges against Gypsy Willis, but it did have proof beyond a reasonable doubt to prosecute part of its case—against MacNeill.

Similarly, now that the UCAO is caught in another misrepresentation, it asserts in its response that it did not fail to disclose “any benefit, expressed or implied” as ordered by the Court, because its promise to write a Rule 35 letter was not a “deal.” *See* UCAO Response at p. 99-109. The UCAO also claims that Buchanan did not lie and did not ask for anything because when he did ask for a Rule 35 letter from the UCAO (the government), it was not a “deal” because the United States Attorney’s Office was the entity that had to make the decision about a “deal” after the trial. *Id.* Like before, the UCAO’s parsing of words and circumstances is ignorant of the indisputable facts.

The US Attorney Office’s consideration of Buchanan’s Rule 35 motion was dependent on the substantial government assistance provided by Buchanan to the UCAO and evidenced by “the letter.” The UCAO cannot argue in good faith that it was not part of the “deal” given to Buchanan when it promised in September of 2013 to write the government assistance “Rule 35 letter,” regardless of the subsequent outcome at trial; ratified that promise in a meeting with Buchanan at the Utah County Jail in October 2013; failed to disclose to the Court or MacNeill’s

counsel its participation in the anticipated deal for Buchanan; wrote the Rule 35 letter 6 days after the trial ended; and two and a half weeks later, Buchanan's federal sentence was commuted.

The UCAO's "deal" with Buchanan was to write the Rule 35 letter which he needed in order to get his federal sentence reduced. Moreover, this Court ordered disclosure of all "benefits." If the UCAO claims that its agreement to write the Rule 35 letter was not a "deal," it cannot argue that it was not a "benefit" expressly or implicitly promised to Buchanan which this Court specifically ordered to be disclosed.

It is tragic enough when a person is wrongfully convicted when exculpatory evidence is known to a third party, but when the exculpatory evidence is actually in the possession of the prosecution team and withheld from the defense, it is an unquestionable due process violation requiring at least a new trial. *Doyle*, 2010 UT App 35; *State v. Hewitt*, 689 P.2d 22, 24 and nn. 1 and 2 (Utah 1984).

IV. CONCLUSION

The UCAO failed to disclose the September 1, 2013 email from Buchanan to Robinson explaining that his 18:1 motion was dead. Whether Buchanan's August telephone conversations about going home after MacNeill's trial related to the 18:1 motion or testimony against MacNeill, was a disputed issue at trial. Whether by actual knowledge or imputed knowledge, the UCAO allowed Buchanan to commit perjury by testifying that his belief that he would come home after Christmas was pursuant to the 18:1 motion. It is undisputed that at least UCAO Investigator Robinson, who was in the

Court when Buchanan testified, had actual knowledge of Buchanan's fabrications.

The UCAO ignored the Court's order regarding exclusion of witnesses by not advising Buchanan to refrain from watching the trial or news about the trial on the television.

The UCAO failed to disclose the fact that it had made a deal with Buchanan that after the trial, it would write a Rule 35 letter on his behalf which he could then use to file a motion to commute his sentence under Rule 35 of the Federal Rules of Criminal Procedure. The UCAO committed, in September of 2013 to write the Rule 35 letter whether they won or lost the trial. The UCAO suborned Buchanan's perjury when he testified that he was not seeking any benefit and had not even asked for consideration. The UCAO reinforced Buchanan's perjured testimony in re-direct examination and in closing argument.

Prosecutors are part of the judicial branch of government under the Utah Constitution. The Court cannot condone misconduct from a core pillar of government. Prosecutors are charged as ministers of justice rather than as advocates to win at all costs. *Doyle*, 2010 UT App at ¶12; *State v. Saunders*, 1999 UT 59, 992 P.2d 951,961. Though prosecutors may strike hard blows, they are prohibited from striking foul ones. *Id.* In MacNeill's case, the UCAO struck numerous foul blows in violation of this Courts specific orders; in violation of Rule 16 of the Utah Rules of Criminal Procedure; in

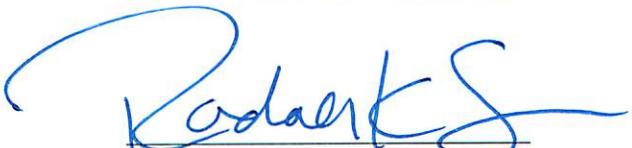
violation of Article I, §§7&12 of the Utah Constitution; in violation of the 5th & 14th Amendments of the US Constitution; and in violation of at least §§ 3.3, 3.4(a) & 3.8(d) of the Utah Rules of Professional Conduct.

Chief Judge Kozinski of the Ninth Circuit Court of Appeals, recently observed that there is an epidemic of prosecutorial misconduct infecting our country. *U.S. v. Olsen*, 704 F.3d 1172 (9th Cir. 2013) (*dissenting* opinion). The epidemic can only be cured by the Courts holding prosecutors accountable for misconduct. The UCAO's willful striking of repeated foul blows in this case necessitates application of the principle of double jeopardy guaranteed by Article I, §12 of the Utah Constitution. Judgment should be arrested, and the charges against MacNeill dismissed.

Alternatively, the myriad of UCAO's foul blows in this case at least requires that judgment be arrested, and a new trial ordered. Our criminal justice system would be the epitome of hypocrisy if the UCAO is endowed with the power to prosecute those it claims violate the laws of the State of Utah, but the UCAO is exempted from serious consequences for its conduct in violation of the constitution law, rules of procedure, and orders of this Court.

Dated this the 2nd day of April, 2014.

FILLMORE SPENCER, LLC


Randall K. Spencer
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that I caused to be delivered a copy of the foregoing: Reply Memorandum in Support of Motion to Arrest Judgment or for a New Trial to the Utah County Attorney's Office, 100 East Center, Suite 2100, Provo, Utah, 84606, this 2 day of April, 2014.



Exhibit 1

10/8/13 Minute Entry Signed by Judge Pullan
Ordering Disclosure of All Benefits Promised,
Expressed, or Implied

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : ORAL ARGUMENT
vs. :
MARTIN JOSEPH MACNEILL, : Case No: 121402323 FS
Defendant. : Judge: DEREK P PULLAN
Custody: Utah County Jail : Date: October 8, 2013

PRESENT

Clerk: calliw

Prosecutor: SAMUEL S PEAD
M JARED PERKINS

Defendant

Defendant's Attorney(s): SUSANNE GUSTIN

DEFENDANT INFORMATION

Date of birth: February 1, 1956

Audio

Tape Number: 302 Tape Count: 8.09

CHARGES

1. MURDER - 1st Degree Felony
Plea: Not Guilty
2. OBSTRUCTING JUSTICE - 2nd Degree Felony
Plea: Not Guilty

HEARING

This matter comes before the court for an oral argument. The court rules on the Motion to Admit Victim's Non-Hearsay Communications and Hearsay Statements to Alexis Somers that was reserved at the previous hearing. The court grants the motion.

The state is to prepare an order.

Mr. Grunander states the parties have stipulated on the Motion in Limine RE: Dr. Judy Melinik's Comments and Opinion on the Reliability of Witnesses and Dr. Matthew C. Lee's Opinion on Whether the Victim was Murdered.

Mr. Grunander will put the stipulation into an order and submit it to the court.

Mr. Spencer addresses the Motion to Exclude Testimony of Witnesses Pursuant to Rules 401, 402, 403 & 404(B), 701, 702, 801 & 802 of the Utah Rules of Evidence. Mr. Pead responds.

The court rules are part of the statements and will address the others during the trial. The State is to prepare an order.

Mr. Pead addresses the Motion in Limine to Introduce Other Act Evidence. Mr. Spencer responds. The court gives findings and denies the motion. Mr. Spencer is to prepare an order.

Mr. Spencer addresses the Motion to Dismiss Obstructing Justice Charge Based on the Expiration of the Statute of Limitations. Mr. Pead responds. Mr. Spencer replies.

The court gives findings and denies the motion. The State is to prepare an order.

Ms. Gustin addresses the Motion in Limine to Exclude Testimony of Child Witness Ada MacNeill. Mr. Grunander responds. Ms. Gustin replies. Mr. Grunander replies.

The court gives findings and finds the child is competent to take the stand but reserves ruling on what testimony should be excluded or limited to at trial.

The testimony of Alexis and the investigating officers will need to be called before the child testifies. The State is to prepare an order.

9:51

Mr. Spencer addresses the Motion in Limine to Prevent Prosecution from Introducing Evidence Related to Prohibition of Certain Guests at Michele MacNeill's Funeral. Mr. Perkins responds.

Mr. Spencer replies. Mr. Perkins replies.

The court gives findings and Mr. Spencer is to prepare an order.

Mr. Spencer addresses the Motion to Release Mental Health Records of Rachel MacNeill. Counsel approach the bench for a conference. The State submits their argument on what has been filed.

The court orders Mr. Spencer to file a supplemental memorandum within 24 hours then the court will take this motion under advisement. The decision will be given at 8:00 on Oct. 15th. before jury selection begins.

Mr. Pead addresses the State's Notice of Intent and Motion in Limine to Introduce Intrinsic or in the Alternative Other Act Evidence. Mr. Pead responds. Mr. Spencer replies.

The court gives findings and denies the motion. Mr. Spencer is to prepare an order.

Mr. Spencer addresses the Motion to Exclude Testimony of Jason Poirier and the Motion to Exclude Testimony of Federal Inmates. Mr. Pead responds to the Jason Poirier motion and Mr. Perkins responds to the federal inmates motion. Mr. Spencer replies.

Mr. Grunander replies.

The court gives findings and denies the motion. The state is instructed to disclose in writing all the benefits promised, expressed or implied in exchange for Jason Poirier's testimony and the federal inmates testimony. The state is to prepare an order.

Mr. Spencer addresses the Motion to Exclude Testimony of Drs. Rollins and Dawson Pursuant to Rules 702 and 403 of the Utah Rules of Evidence. Mr. Perkins responds. Mr. Spencer replies. Mr. Perkins replies.

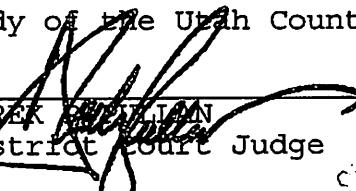
The court takes this matter under advisement.

Case No: 121402323 Date: Oct 08, 2013

CUSTODY

The defendant is present in the custody of the Utah County jail.

Date: 10/8/13


DEREK D. JOHNSON
District Court Judge

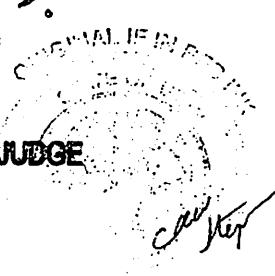

STAMP USED AT DIRECTION OF JUDGE

Exhibit 2

10/15/13 Notice of Benefits Filed by UCAO
Declaring that Inmate #1, Michael Buchanan
Was Not Promised Anything, and Did Not Ask

FILED U

OCT 15 2013

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

TIMOTHY L. TAYLOR #8001
Utah County Attorney
CHAD GRUNANDER # 9968
SAM PEAD #11945
JARED PERKINS #11246
Deputy Utah County Attorneys
100 East Center, Suite 2100
Provo, Utah 84606
Telephone: (801) 851-8026
Facsimile: (801) 851-8051
Email: dcourt@utahcounty.gov

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY

STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. MARTIN MACNEILL, Defendant.	PLAINTIFF'S NOTICE OF BENEFITS OFFERED OR PROVIDED TO JAILHOUSE INFORMANTS Case No. 121402323 Judge Derek Pullan
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Plaintiff, by and through Deputy Utah County Attorneys Chad Grunander, Sam Pead, and Jared Perkins, submits this Notice of Benefits Offered or Provided to Jailhouse Informants pursuant to the Court's order issued orally on October 8, 2013.

INMATE #2

Inmate #2 was incarcerated in federal prison in Texas when he volunteered information about Defendant's case to law enforcement. Investigator Jeff Robinson traveled to Texas to

INMATE #1 - MICHAEL BUCHANAN

Inmate #1 was incarcerated in a federal prison in Louisiana when he volunteered information about Defendant's case to law enforcement. Investigator Jeff Robinson interviewed him telephonically on May 29, 2013. This interview was audio recorded and reported by Investigator Robinson. Inmate #1's professed motivation for disclosing Defendant's statements to police was, "I just, to me I don't want it to happen to his girlfriend, because if he did it once, he'll do it again."

The State of Utah has no authority over federal inmates and had nothing to offer Inmate #1 in exchange for his cooperation in the investigation and his testimony at trial. There is no agreement to exchange Inmate #1's testimony for consideration from the State of Utah. Nothing has been given him, and there are no promises outstanding. (If Inmate #1 were to request a recommendation from Investigator Robinson or the prosecution, that request would be honored. To date, however, he has not made any requests for any consideration.)

JASON POIRIER

Jason Poirier was incarcerated in the Utah County Jail when he was interviewed in relation to Defendant's case on January 31, 2013. This interview was audio recorded and reported by Investigator Robinson. Mr. Poirier's professed motivation for cooperating with police was, "Basically, I mean, what I've heard I don't want him out on the streets. I don't want him to victimize another person like that. I mean, his wife, if he can kill his own wife he can kill a random person." When asked if he had any other reason, he said, "My morals that's about it."

At the time the Utah County Attorney was prosecuting Mr. Poirier for a violation of his probation in Fourth District case number 121400340 and for a recent felony theft charge in Fourth District case number 121403318. In telephone conversations between Mr. Poirier and his wife recorded while he was in jail, he discussed his hope that cooperation would lead to benefits in his cases. Whether that hope was realized depends on to whom the question is put.

The prosecution has acknowledged in a prior pleading and acknowledges here again that the prosecutor to whom cases 121403318 and 121400340 were reassigned, Sherry Ragan, considered Mr. Poirier's cooperation in this case, among other things, in arriving at the plea agreement that resolved this case on June 10, 2013. According to Ms. Ragan's case file notes, the prosecution reduced the third degree felony theft charge against Mr. Poirier to a class A misdemeanor, and Mr. Poirier pled guilty. He was sentenced to 18 months of court probation, to 90 days of jail with credit for 90 days served, the standard fine of \$760, a \$66 court security fee, and ordered to pay \$348 restitution. This sentence was run concurrent with the probation violation sanction in case 121400340, which order was the same. To the extent that Mr. Poirier's cooperation was consideration in exchange for benefits from the Utah County Attorney, that plea agreement finished it and there is no outstanding promise or agreement.

This resolution was not especially generous inasmuch as many similar cases have been resolved with like plea agreements by various prosecutors in the Utah County Attorney's Office without those defendants' cooperation in a major murder case. Ms. Gonzales of the Utah County Public Defender's Office, Mr. Poirier's counsel in these two cases, represented to the prosecution that she did not make any agreement with Ms. Ragan specifically in exchange for his testimony.

The plea agreement he was eventually given was based upon his coming forward as a witness in this case. Ms. Ragan's case file notes indicate that her approach was the same: Mr. Poirier's cooperation was one of several factors that the parties considered in reaching agreements to resolve the cases.

Mr. Poirier has represented to the prosecution that he hoped his cooperation would be sufficient to erase both of the cases entirely. He was disappointed in that hope, yet he is still willing to testify in this matter. If Mr. Poirier were to rescind his cooperation now and decide not to testify, the prosecution has no recourse against him either through pending charges, probation violations, or any other agreement. The prosecution has made no other or future promises to secure his testimony.

Police referred theft by deception charges against Mr. Poirier on December 21, 2012. That case was returned to the American Fork Police Department for further investigation on December 24, 2012, weeks before investigators or the prosecution knew Mr. Poirier had information about Defendant. The charges were rejected because the screening prosecutor, Christine Scott, concluded there was insufficient evidence against Mr. Poirier to proceed. To date, no additional police reports or evidence have been sent to Mrs. Scott requesting reconsideration, and past experience indicates that at this point it is unlikely that any will be received. If, however, the charges were re-submitted and prosecution on them was warranted, there is no agreement between the prosecution and Mr. Poirier precluding it.

Similarly, Defendant raised several alleged incidents of criminal behavior discussed by Mr. Poirier in recorded telephone calls. To date, the prosecution has not been made aware of any

State of Utah. Nothing has been given him, and there are no promises outstanding.

DATED this 14th day of October, 2013.



JARED PERKINS
Deputy Utah County Attorney
Attorney for Plaintiff
100 East Center Street, Suite 2100
Provo, Utah 84606

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2013, I faxed, emailed and mailed a true and correct copy of the foregoing to the following:

Randall K. Spencer
FILLMORE, SPENCER, LLC
3301 North University Avenue
Provo, Utah 84604
Fax: (801) 426-8208

also copy of the foregoing emailed and mailed to the following:

Susanne Gustin
WELLS FARGO CENTER
299 South Main Street, Suite 1300
Salt Lake City, Utah 84111
Fax: (801) 536-3300

JME/Bod
Legal Assistant

Exhibit 3

9/1/13 Email From Buchanan to Robinson
Stating That His Motion for Release is Dead

Date: 11/14/2013
Time: 02:12 PM

Federal Bureau of Prisons
TRULINCS
Message
Sensitive But Unclassified

Facility: BMA

Message

FROM: 31734074 BUCHANAN, MICHAEL C
TO: "Jeff Robinson" <jeffr@utahcounty.gov>
SUBJECT: RE: RE: hello
DATE: 09/01/2013 09:36 PM

looks like the release thing is dead i the water. the courts reversed the decision that i was going to get my action on. so it looks like you will have to have to come and get me. :(.....i am still ready and willing and i am happy to know that you will be able to keep us off of court tv. please continue to try and contact my lawyer, Beth Ford, or her investigator Steve. thank you very much and i am glad that you figured this system out because so many people have a hard time doing it. i look forward to keeping in touch.

Michael
-----Robinson, Jeff on 8/30/2013 2:36 PM wrote:

>

Hi Michael,

I just needed a new invitation which you sent so I could register on this system. Any news on a possible release? The judge recused himself in our case. A new one has been assigned but at this point we will start on Oct 16 instead of Oct 8. This means we will likely need you as a witness the first week of Nov. We are also confident we can keep you and all of our federal inmates off tv and the media. So you know I have not heard from the defender's office or an investigator. I will try and contact them on Monday.

Take Care,

Jeff

MICHAEL BUCHANAN on 8/30/2013 12:56:36 PM wrote
hey, raven told me that you were trying to get in touch with me. whats up?

Exhibit 4

Partial Transcript of Utah County Jail Phone
Calls From Buchanan to Family, and a CD of
All of the Calls

Michael Buchanan_Utah County Jail Calls

	<p>11:54- Mike: If it don't work, I'll probably get a calling card Wednesday. But I'm probably going to need you to put some more money on my books, this shit here is high. I'm talking, it's like double or triple the amount .</p> <p>12:06- Mom: I still gotta pay for supper. I already put \$80 on there, I ain't rich.</p> <p>M: Yeah, I know. I'm going to buy a phone card and stuff.</p> <p>Mom: (wants to get her money back for calls already paid)- But if you getting out, we don't want to do that right?</p> <p>Still discussing call issues.</p> <p>M: Daphne, I'm going to try and call you back later.</p> <p>D: Okay.</p> <p>M: I greatly appreciate it.</p>		
10/30/13 Call with Mom and Dad from the Utah County Jail	<p>2:00</p> <p>MB: I finally got to talk to Jeff the other day,</p> <p>D: Oh yeah?</p> <p>MB: yeah, and he said I'll be going to court on Thursday or Tuesday.</p> <p>M: Thursday of this week or Tuesday of next week?</p> <p>MB: Yeah, so I might need you to order me something to eat, they don't feed you worth a crap here. Oh God, the food is so little here.</p> <p>D: Oh yeah.</p> <p>MB: Yeah, it's excellent, but it's like a tv dinner for dinner, I'm talking one of the little kids cuisine things.</p> <p>M: Are you saying you need some a few dollars on your (inaudible)?</p> <p>MB: Yeah, so I can order me some soups and stuff, soups and cupcakes and soda.</p> <p>D: okay.</p> <p>MB: The water here is terrible too. It's worse than down there. And it's white, it's white- it's not clear. But everything else is good though.</p>	Mentions talking to Jeff, Jeff is writing letter to lawyer and stuff.	Track 5

Michael Buchanan_Utah County Jail Calls

	<p>3:00 MB: Hey Mom, M: Yeah? MB: Jeff said he's going to write the letter to my lawyer and stuff so, he said everything is good. M: Okay, good. MB: So that's good. You know, but yeah, M: Stephanie and Raven are really excited, they already sayin', they already say'n a big dinner. MB: Where at? M: At the house. All three of us are going to cook. (Discussing the menu for dinner when MB gets home, turkey, dressing, rolls, caramel cake.)</p>		
10/30/13 Call with Dad and Mom	Nothing important- Just to say hello. If he goes to court tomorrow, he'll call after.		Track 6
11/5/13 Day before Buchanan testifies Call with Mom	<p>1:40- Mom: So, inmate number 2 and inmate number 3 screwed up huh? MB: I don't know, I don't know nothing about it, don't say nothing about it. Mom: Oh. MB: I don't know, I don't know. Mom: Jeff on TV MB: Huh? Mom: Jeff on TV MB: For real, right now? Mom: He was a minute ago. MB: I just now got back from up there. Mom: Okay MB: They didn't do me today. Did they show him or could you hear him? Mom: Yes. And it all depends on inmate number 1, and that's</p>	Discussion of how "other inmates screwed up"- it "all boils down to inmate no. 1"	Track 7

Exhibit 5

Partial Unofficial Transcript of UCAO Closing
Argument Referencing Buchanan, and CD of
Entire Initial Closing from

[https://www.youtube.com/watch?v=G-](https://www.youtube.com/watch?v=G-KsvLK0NCc)
KsvLK0NCc

Partial Unofficial Transcript of Prosecution Initial Closing Argument Taken From Video Recording located at <https://www.youtube.com/watch?v=G-KsvLK0NCc>

“The evidence of the defendant’s motive to get rid of Michele because she was, ‘in the way,’ in his own words to an inmate, is overwhelming. (Time stamp: 1:02:52)

“That, coupled with the testimony you heard from inmate number one that, ‘she was in the way,’” (Time stamp: 1:21:02)

“You heard from my-- excuse me. You heard from-- inmate number one. Inmate number one came forward on his own back in May, contacted law enforcement authorities from Louisiana. He testified on the stand that he hadn’t had any contact or he didn’t even know the other federal inmates that had testified here. He talked about getting to know the defendant in an A+ computer class. That’s a fact that’s confirmed in the letters between Gypsy and Martin. He talked about how they became friendly. They used to walk the track together. When rumors surfaced from a Nancy Grace show, the defendant had killed his wife, he asked him. He said, “Hold on. I’ll tell you later.” And over the course of time, he had conversations with the defendant. Defendant told this inmate that his wife was in the way and wouldn’t let go. She was threatening to take the kids and house in a divorce. So he drugged her up with a bunch of oxys-- the Percoset is oxycodone-- he drugs her up with oxys and sleeping pills, the Ambien, helped her into the tub, held her head under the water and helped her out.

On cross-examination, this inmate was referred to his report or excuse me, not his report but his-- transcript of his interview with Detective Robinson in late May of this year. And in there, he talked about Michele taking the drugs, not knowing what she was taking. I can’t emphasize how significant that statement is, ladies and gentlemen. That’s a window into what Martin was telling this individual about the circumstances leading up to Michele’s death.

She didn’t know what she was taking. Why? Because she had the bandages over her face, over her eyes. How in the world is inmate number one gonna know that fact, that in drugging her up-- because in his report, he talks about drugging her up to get her to-- to die and on the day she died, drugs her up and puts her in the tub. How’s he gonna know about the bandages? He told this inmate it’d be hard to prove because they could say, “She took all those meds because of her surgery, fixed up a tub-- fixed up a bath and just nodded off.” It’s interesting that he would describe it that way because it-- fixing yourself up a tub and then just nodding off is not consistent with falling into the tub with your head down but it’s more consistent with fixing yourself a

normal bath and being in a normal position to take a bath.

The defense challenged him about getting something in return for his testimony. There's nothing that state investigators, state prosecutors can give this individual. I think it's clear from the record that was established that he was looking to get something for his testimony. Who wouldn't, quite frankly?

But he testified it didn't look like anything was gonna work out; that he wasn't going to get something in exchange for his testimony because it's a state case and not a federal case. And folks, he has information that he wouldn't otherwise be aware of. He's in Louisiana. He approaches us after he hears from another fellow inmate that was in Texarkana that Martin's been arrested and he's charged with his-- murders wife and he comes forward. He talked about the risks of coming forward, being killed or stabbed, beaten up. One of the other inmates talked about being raped as a consequence of coming forward, being labeled a, "snitch," in the federal system. Not only was he-- is he not getting anything for his testimony, ladies and gentlemen, he's suffering a significant detriment to come forward and tell the truth, to make the right decision.

Inmate number one talked about how he's got another couple years on his sentence. He thinks it's part of his rehabilitation, do the right thing and come forward. (Time Stamp 2:10:29 to 2:14:42)

Exhibit 6

1/29/14 Affidavit of Jeff Robinson

TIMOTHY L. TAYLOR #8001
Utah County Attorney
CHAD E. GRUNANDER #9968
SAM PEAD #11945
JARED PERKINS #11246
Deputy Utah County Attorney
100 East Center, Suite 2100
Provo, Utah 84606
Email: ucadm.Dcourt@state.ut.us
Phone: (801) 851-8026
Fax: (801) 851-8051

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. MACNEILL, MARTIN JOSEPH Defendant.	AFFIDAVIT OF JEFF ROBINSON IN SUPPORT OF STATE'S RESPONSE TO DEFENDANT'S MOTION TO ARREST JUDGEMENT OR FOR A NEW TRIAL Case No. 121402323 Judge Derek Pullan
--	---

STATE OF UTAH)
: ss.
COUNTY OF UTAH)

Bureau Chief Jeff Robinson hereby represents as follows:

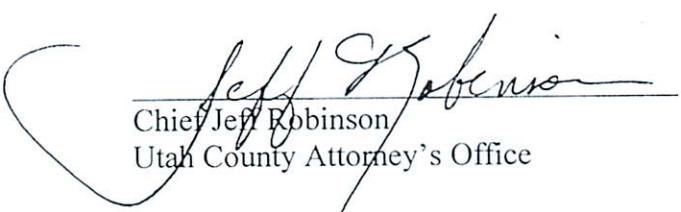
1. I am the Bureau Chief of the Utah County Attorney's Office Bureau of Investigations, and have been for approximately 12 years. I have worked as an investigator at the Utah County Attorney's Office for a total of 20 years. I was previously employed with the Utah County Sheriff's Office and worked as a patrol deputy and detective for four years. I was also previously employed with the Brigham Young University Police Department as a patrol officer for approximately four years. In the past 28 years I have been involved in the

investigation of crimes against property and persons. I am a certified peace officer in the State of Utah and a graduate of the FBI National Academy, Session 194. I have experience in investigating homicides, white collar crime, and conducting surveillance and covert investigations. I offer the following:

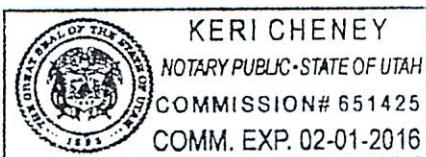
2. On or about September 27, 2013, I spoke with Elizabeth Ford, Federal Public Defender, for Inmate #1 (on September 3, 2013, I left Ms. Ford a voice mail). I called her at Inmate #1's request. During a phone conversation with Ms. Ford, she asked me if I would be willing to write a letter in Inmate #1's behalf, if I was satisfied with his testimony after the trial, and for his willingness to testify in the MacNeill case. I told Ms. Ford I was willing to do that. I also informed Ms. Ford that I could make no promises to her for Inmate #1, aside from writing a letter because our case was not a federal one. She told me she understood. Ms. Ford did not ask me again to write a letter for Inmate #1.
3. I never spoke or had contact with Ms. Ford's investigator, Steve Speelman.
4. I explained to Inmate #1 that our office had no power or authority to offer him leniency on his federal case due to his cooperation, but that I would write a letter on his behalf for his willingness to come forward with evidence in this case and for his cooperation. He appeared to understand these conditions and was still willing to cooperate.
5. Six days after the verdict was rendered, I wrote a letter on Inmate #1's behalf on November 15, 2013, and sent it to his attorney, Ms. Ford. I also sent a letter to the federal prosecutor who originally handled his case. For some reason the appropriate U.S. Attorney currently handling Inmate #1's case did not get my letter; Ms. Ford referred the letter she received to him.
6. In my letter I expressed appreciation for Inmate #1 coming forward and my belief his testimony was truthful. I also related that this case was televised nationally and Inmate #1's name had been stated in open court by the defense. I wrote that it was my belief defense's use of Inmate #1's name created concerns for his safety.
7. I wrote a letter on behalf of every inmate witness expressing gratitude for their willingness to testify even though their testimony placed their safety at risk. I feel these inmate witnesses had valuable evidence to offer in this case.
8. In addition, I wrote a letter to every non-inmate witness of the State who testified with the exception of Gypsy Willis. I thanked them for their testimonies and for being valiant witnesses in this case. I did this because I believe every witness in this case had valuable evidence to offer.

9. I am completely unaware of any deal for leniency in Inmate #1's federal case based upon his cooperation and testimony in the MacNeill trial. The same is true for each inmate who testified in the trial.
10. In my conversations with Inmate #1 we talked about his potential to be released prior to the MacNeill trial. This had nothing to do with being released as a result of his testimony in the MacNeill case in that our office has no ability or authority to make any such agreements or deals. This "release" was based on the potential for him to be released and out-of-custody at the time of the trial held in this matter. This potential for a release was based on what Inmate #1 termed an "18 to 1" motion, and had nothing to do with his testimony in our case or any such consideration for testifying in the MacNeill case. As stated above, there was no deal for leniency in Inmate #1's federal case based upon his cooperation and testimony in the MacNeill trial.
11. In the days leading up to MacNeill's trial, and at the prosecutors' request, the Bureau of Investigations was informing the State's witnesses to avoid media coverage of the trial. It was my understanding that Inmate #1 was not watching media on the case. However, the Court's extension of the Exclusionary Rule order to fact witnesses and media coverage of the trial issued on Friday, October 18, 2013, was not communicated to Inmate #1 until his arrival at the Utah County Jail. The federal inmate witnesses arrived at the Utah County Jail on October 23 or 24, 2013. I was also told that Utah County Jail personnel were not allowing the federal inmate witnesses to watch the MacNeill case coverage.

DATED this 29 day of January, 2014.


Jeff Robinson
Utah County Attorney's Office

SUBSCRIBED and sworn to before me this 29th day of January, 2014.




Keri Cheney
NOTARY

Exhibit 7

Federal Rule of Criminal Procedure Rule 35
Letter of Substantial Government Assistance
and Requesting Leniency



OFFICE OF THE
Utah County Attorney

Bureau of Investigations

Timothy L. Taylor
Chad E. Grunander
E. Kent Sundberg
Jeff Robinson

County Attorney
Chief Deputy
Civil Division Chief
Investigation Chief

Patty Johnston
Scott R. Finch
Mark Dell'Ergo, CFCE, ACE
Richard C. Hales
Greg Knapp
Chelsea Crawford
Marjorie Hepworth, CP

Sergeant
Sergeant
Sergeant
Sergeant
Investigator
Paralegal
Legal Assistant

100 E Center Street, Suite 3300
Provo, Utah 84606
Phone (801) 851-8021
Fax (801) 851-8070

November 15, 2013

W. Brownlow March, Esq.
U.S. Attorney Office
800 Market Street, Suite 211
Knoxville, TN 37902

Re: Michael Carnell Buchanan Jr., Inmate Registration #31734-074, Case #3:07-CR-00013-
RLJ-HBG

Dear Brownlow March,

This letter is to inform you that Michael Buchanan Jr. recently testified in State of Utah v. Martin Joseph MacNeill, Case #121402323, Provo 4th District Court. This was a very complicated homicide case where the defendant was a medical doctor and an attorney. Because Mr. MacNeill staged the death scene and used his expertise as a doctor, proving the case was difficult. Initially the Utah State Medical Examiner determined the victim died as a result of natural causes due to myocarditis and hypertension. After six years of investigation and as a result of the medical examiner changing his opinion of the death from natural causes to undetermined, this allowed our office to file charges. At the conclusion of the trial the jury made the correct decision and found Mr. MacNeill guilty of murder and obstruction of justice.

Our office is very appreciative of Mr. Buchanan coming forward willingly to risk his safety to testify to what Mr. MacNeill told him while they served time together in FCI Texarkana. The judge ordered that Mr. Buchanan's picture and name not be used in the trial in order to try and protect him from retaliation. However, on two occasions the defense attorney inadvertently stated his name in open court which was being televised nationally by CNN. This created concern for the safety of the inmate. When I spoke to him after he testified, he told me that regardless of his name being mentioned he felt he did the right thing in testifying in spite of his safety concerns.

From my interviews with Mr. Buchanan, I believe he was telling the truth because certain information he told me was not public yet. He could have only known the information from Mr. MacNeill since he did not know the other inmates testifying. **Mr. Buchanan was a very important witness in this case.**

While I understand this is a state case and may have little impact in the federal system, I highly recommend and encourage leniency be shown to Mr. Buchanan for his truthful and courageous testimony in our case. Information from other witnesses indicates that Mr. MacNeill may have been a serial killer.

I appreciate any consideration you can show Mr. Buchanan as a result of him assisting in our case. If you have any questions please feel free to contact me at the number listed above.

Kind Regards,

Jeff Robinson

Exhibit 8

12/4/13 Federal Court Order Commuting
Buchanan's Sentence to Time Served Under
FRCr.P Rule 35 (Vacating Remaining 25 ½
Months of His Original Sentence)

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA)
v.) No. 3:07-CR-013
MICHAEL C. BUCHANAN, JR.)

ORDER

Now before the court is the United States' motion for sentence reduction under Rule 35 of the Federal Rules of Criminal Procedure [doc. 31]. The government recommends reduction to a term of 84 months. The defendant has responded to the motion [doc. 29], agreeing with the government's proposed disposition. The court has carefully considered the United States' motion and the defendant's response. The motion is well-taken, and the recommended sentence will be adopted by the court.

It is hereby **ORDERED** that the pending motion [doc. 31] is **GRANTED**.
The defendant's sentence is reduced to **84 months**. If this sentence is less than the amount
of time the defendant has already served, the sentence is reduced to a "time served" sentence.
This order shall take effect ten days from its entry in order to give the Bureau of Prisons time
to process the defendant's release. Except as provided above, all provisions of the judgment
dated November 29, 2007, shall remain in effect.

ENTER ·

s/ Leon Jordan
United States District Judge