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**IN THE SEVENTH JUDICIAL DISTRICT COURT**

**IN AND FOR SAN JUAN COUNTY, STATE OF UTAH**

| | |
|---|---|
| STATE OF UTAH,<br><br>Plaintiff,<br><br>-vs-<br><br>ROSALIE JEAN CHILCOAT,<br><br>Defendant. | **MOTION TO ENFORCE AGREEMENT TO DISMISS ALL CHARGES AGAINST MS. CHILCOAT**<br><br>Case Number: 171700041<br>Judge: Lyle R. Anderson |

On April 18, 2018, the State (hereinafter referred to more precisely as "San Juan County") extended to Ms. Chilcoat an offer to drop all charges against her. Thereafter, Ms. Chilcoat accepted that offer in writing. The Court should enforce the agreement by San Juan County to dismiss all charges against Ms. Chilcoat.

[1] This daytime business address is provided for identification and correspondence only and is not intended to imply institutional endorsement by the University of Utah for this private representation.

## FACTUAL BACKGROUND

The relevant facts are easy to state, and show the County's offer of dismissal of charges and an acceptance of that offer. Because the issue in this motion is enforcement of a plea agreement, a review of the events forming the agreement is required.

On April 18, 2018, at 5:13 PM, the San Juan County Attorney sent the following email to counsel for Ms. Chilcoat (Mr. Delicino), for Mr. Franklin (Mr. Williams), and motions counsel for both (Mr. Cassell). In the email, the County Attorney extended separate plea offers to Ms. Chilcoat and Mr. Franklin. The relevant parts of the email are quoted here, with several footnotes added now by defense counsel for clarification of certain statements:

> Gentlemen:
>
> In consideration of our telephone conversation yesterday,[2] I have spent the day talking to other prosecutors as well as reviewing other information.
>
> As I'm sure you know, some of the content of your proposed Reply brief violate the rules of criminal procedure, the rules of professional conduct and the rules of civility. I trust that at the end of the day, each of you know that you are required to be truthful and honest in all of your pleadings and I know, based on our phone call yesterday, that you are aware that some of the content of your Reply brief is not truthful or honest.[3] If you choose to file that document as it is written, you do

[2] During the telephone call, defense counsel asked the County Attorney's Office to recuse from further participation in this case. The County Attorney agreed to do so, stating it was the right thing to do. Thereafter during the call, the parties reached agreement as to how to move forward with the recusal. Later, through the email quoted above, the County Attorney's refused to honor his agreement to recuse. That refusal will be the subject of an additional motion from the defense, to be filed shortly, asking the Court to direct recusal of the San Juan County Attorney's Office from further handling this case.

[3] As a courtesy to the prosecution, defense counsel has provided an advance copy of a reply in support of the defense's motion to quash. It is not clear what the prosecutor is referring to in connection with his assertions about being "truthful and honest" and defense counsel believe that every single word in the advance copy of their draft pleading was entirely truthful and honest. Defense counsel promptly asked the prosecutor to identify any specific inaccuracies in the draft,

> so at your own peril. I will consider all options, including the options available in Rule 11(b).[4] This is not a threat, it is simply notice.
>
> I want to make sure that I put my most recent settlement offer in writing and expect that it will be shared with your clients in a timely manner. This offer reflects a fair and reasonable resolution to the matter and I will give you until 5:00 pm (Utah Time) on Friday to accept the offer or it will be removed from the table. If this case proceeds to trial, I intend to place, on the record, statements from your clients acknowledging that they have been informed of the offer presented here.
>
> The offer is as follows:
>
> Mr. Franklin pleads GUILTY to Count 1 as a Class A misdemeanor and Count 2 as charged (Class A Misdemeanor). I will agree to 18 months of probation, no jail time, a reasonable fine, and he will not be on State of Utah Land for the entire term of his probation.
>
> **The charges against Ms. Chilcoat will be dismissed.**
>
> I remind you that you have a legal obligation to your client to fully and fairly explain to them any and all settlement offers.
>
> . . .
>
> Please get back to me prior to 5:00 pm on Friday April 20, 2018.

Exhibit 1 (email from Kendall Laws to Jeremy Delicino et al.) (emphasis added).

Thereafter, following consultation with her legal counsel, Ms. Chilcoat through counsel accepted the offer to her in advance of the 5:00 p.m. deadline. Her written acceptance made clear that she had unequivocally accepted all terms in the County's proposal. Defense counsel accepted the offer in writing via email as follows:

> Dear Kendall,
>
> Paul Cassell and I write on behalf of our client, Rosalie Jean Chilcoat. She was delighted to learn this afternoon that you have agreed to dismissal of the charges against her. She is understandably quite relieved, both because of the resolution

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and thus far he has not done so. Defense counsel remain perplexed as to how the prosecutor could make such false assertions about them.

[4] This is apparently a reference to Rule 11(b) of the Utah Rules of *Civil* Procedure.

and because she has now begun to make arrangements to travel to Africa without worrying about any charges. **Per your offer below, she hereby accepts your offer that "The charges against Ms. Chilcoat will be dismissed."** See email below.

As you can imagine, Professor Cassell's telephone call with her this evening was lengthy – and obviously addresses your concern that the defense team communicate to the client your plea offer to her, as you indicated below. He discussed whether we should also ask you for other conditions to be attached to your dismissal, but have decided to accept the offer as you have written it.

Accordingly, Professor Cassell and I have stopped exploring possible defenses for her. And we have also stopped working on our reply in support of motion to quash. In light of your offer, which we accept, Professor Cassell, who also represents Mark, has begun reworking the motion so that it will apply just to Mark Franklin – the need for any such motion for Rose having evaporated.

On behalf of Rose, please understand how much she appreciates your agreement to dismiss the charges against her. As you know, from the beginning, she has maintained her absolute innocence of all charges. And in our reply brief, we were going to further establish – beyond any doubt – that she has been unjustly charged. We appreciate you doing the right thing and simply dismissing the charges now. That has brought a huge sense of emotional relief to her.

Please let Professor Cassell and I know when the dismissal will be filed and if there is anything we can do to assist the process. In view of the collateral consequences of the pending charges, we ask you to file the dismissal by 4:00 p.m. tomorrow, Thursday, April 19.

Sincerely,

Jeremy Delicino
Counsel for Rosalie Jean Chilcoat

Exhibit 2 (email from Jeremy Delicino to Kendall Laws) (emphasis added).

Thereafter, on the morning of April 19, 2018, the County Attorney refused to abide by the agreement that it had made and Ms. Chilcoat had accepted:

Jeremy and Paul:

Since this case has been a combined effort from the beginning between Jeremy and Jon, this is a package deal offer. It is accepted in total or not at all

> between the defendants. Perhaps my wording **could have been more clear** but that is the purpose behind the offer, resolve it the case entirely.
>
> Regards,
>
> Kendall

Exhibit 3 (email from Kendall Laws to Jeremy Delicino et al.). Ms. Chilcoat, through counsel, has objected to the County's refusal to abide by its agreement, even though Ms. Chilcoat has detrimentally relied upon its offer. *See* Exhibit 4 (Email from Jeremy Delicino to Kendall Laws) (noting, among other things, defense investigator directed to stop working on the case).

Since then, the County Attorney's Office has refused to fulfill the terms of its agreement with Ms. Chilcoat, apparently taking the position that unless Mr. Franklin also enters a guilty plea, it will not dismiss the charges against Ms. Chilcoat as required by its agreement with her.

**ARGUMENT**

Utah and federal caselaw makes clear that plea agreements are analogous to contracts and have applied principles derived from contract law to plea agreements. *See, e.g., Santobello v. New York*, 404 U.S. 257, 262 (1971); *State v. West*, 765 P.2d 891, 896 (Utah 1988). Trial courts must "keep in mind that the defendant's underlying 'contract' right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law." *State v. Patience*, 944 P.2d 381, 389 (Utah App. 1997) (*citing Olesen*, 920 F.2d 538, 542 (8th Cir. 1990)). In this case, the State made an offer and Ms. Chilcoat accepted it. The Court should enforce the agreement between the State and Ms. Chilcoat – i.e., dismiss all charges against her.

A plea contract is binding "where there is 'a meeting of the minds of the parties . . . with sufficient definiteness to be enforced.'" *United States v. Mower*, 110 F.Supp.3d 1196, 1198 (D.

Utah 2015) (*citing On the Planet v. Intelliquis Intern., Inc.*, No. 2:99-CV-324, 2000 WL 33363260, at *4 (D. Utah 2000)). Here the County extended to Ms. Chilcoat an offer in writing, demanded that her response be in writing, set a deadline of 5:00 p.m. on August 20, 2018, and declared that it would make a record in the trial court as to whether or not she had accepted its plea offer to her. In compliance with the County's demands, Ms. Chilcoat accepted its offer to her, in writing, in advance of the deadline.

The County's arguments against this obvious conclusion are remarkably weak. The State apparently views its offer as requiring *both* Ms. Chilcoat and Mr. Franklin to accept its terms before the agreement is valid. The County claims that offer was a "package deal," but nothing in the offer so provides. As a result, the County believes that this point is somehow implicitly conveyed in its offer because this criminal case has been a "combined effort between Jeremy and Jon," Ex. 3 – i.e., the two defense attorneys who have been representing Ms. Chilcoat and Mr. Franklin respectively. But the mere fact that they have been two separate attorneys only underscores the fact of separate cases in this matter – i.e. *State v. Chilcoat*, case no. 71700041, and *State v. Franklin*, case no. 71700040. Indeed, the acceptance of the plea offer was only made through separate legal counsel for Ms. Chilcoat – her attorney Mr. Delicino.

The County Attorney concedes in his follow-up email that "[p]erhaps my wording could have been more clear but is the purpose behind the offer, resolve it the case entirely." But in fact, the offer the County extended was clear. Looking through the email extending the written offer emailed by the County – Exhibit 1 – the email begins with unfounded attacks on the professionalism of the three defense counsel on this case – including an unsupported and entirely false allegation that some of the content of a draft reply memorandum that defense counsel had shared with the prosecutors in advance (as a matter of courtesy) contained inaccuracies.

Following a further threat to seek sanctions against defense counsel, the County demanded that defense counsel share the offer with his client. *See* Exhibit 1 ("I want to make sure that I put my most recent settlement offer in writing and expect that it will be shared with your clients in a timely manner. . . . If this case proceeds to trial, I intend to place, on the record, statements from your clients acknowledging that they have been informed of the offer presented here.").

Accordingly, in response to the threats and demands of the prosecution, defense counsel conveyed the County's offer to Ms. Chilcoat. The offer to her was: "The charges against Ms. Chilcoat will be dismissed." Ex. 1. To underscore the importance of the offer, the County Attorney additionally stated: "I remind you that you have a legal obligation to **your client** to fully and fairly explain to them any and all settlement offers. . . ." Ex. 1 (emphasis added). The use of the singular term – "your client" – is significant because it underscores that the plea offer was being extended to a single individual.

It appears to be the position of the State that the offer it was extended was a so-called "wired plea" – in which two defendants both had to accept particular terms before any part of the plea could be effective. The immediate problem with that position is that the offer the County conveyed does not contain any such language.

Moreover, the Court should not lightly infer that a plea offer is a "wired" offer without specific language to the effect. Wired pleas must be carefully constructed to avoid unconstitutional coercion. The United States Supreme Court, while not ruling squarely on the constitutionality of such agreements, has pointed out that "a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused ... might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider." *Bordenkircher v. Hayes,* 434 U.S. 357, 364 n. 8 (1978). Where the

state threatens prosecution of one with whom the defendant has familial ties or other close bonds, the threat of coercion is much greater. *United States v. Carr,* 80 F.3d 413, 416-417 (10th Cir.1996). Of special concern with regard to such agreements is that one defendant, who hopes to obtain the more lenient sentence, might coerce another defendant to accept the package deal. *See, e.g., United States v. Castello,* 724 F.2d 813 (9th Cir.1984). It has been held that a plea agreement entailing leniency to a third party imposes a special responsibility on the trial court to ascertain the voluntariness of the plea because of its coercive potential. *See, e.g., United States v. Whalen,* 976 F.2d 1346 (10th Cir.1992).

Even more important, in "wired plea" cases involving leniency toward a third party, or a promise not to prosecute a third party, the government must act in good faith. To act in good faith, the government must have probable cause to charge the third party at the time the defendant is offered leniency for the third party, or at the time the defendant is threatened that the third party will be charged. *United States v. Wright,* 43 F.3d 491, 499 (10th Cir. 1994); *Martin v. Kemp,* 760 F.2d 1244, 1247-48 (11th Cir.1985); *United States v. Diaz,* 733 F.2d 371, 375 (5th Cir.1984); *Harman v. Mohn,* 683 F.2d 834 (4th Cir.1982); *United States v. Canino,* No. 96-271, 1997 WL 141864 (E.D. Penn March 25, 1997). In this case, Ms. Chilcoat's pending motion to quash demonstrates that the charges against Rose are not well-founded.

Given all these facts and this sensitivity with which wired pleas are handled by the courts – particularly in a delicate husband and wife setting – it makes no sense to deviate from the plain language of the offer that the County extended and read into it constitutionally problematic conditions. In its email discussing the subject, the County Attorney states that "[p]erhaps my wording could have been more clear . . . ." But if the offer was somehow ambiguous – and it was not – courts must construe any ambiguity in an offer against the

Government. *State v. Patience*, 944 P.2d at 387 ("[I]n interpreting plea agreements or determining their validity, courts may in certain circumstances hold the government to a higher standard than the defendant.").

Finally, Ms. Chilcoat has detrimentally relied on the County's agreement. *See* Ex. 4. For example, defense counsel spent time late at night (after midnight) redrafting pleadings in light of the dismissal of charges against Ms. Chilcoat. *Id.*

The Utah Supreme Court has held that "the remedy for a defendant where the State fails to fulfill its side of the bargain is frequently specific performance." *State v. W.*, 765 P.2d 891, 896 (Utah 1988). This remedy is important in a plea bargaining context because "[a] contrary result would not encourage a defendant to come to grips with the moral and strategic considerations necessary to accepting a negotiated plea and pleading guilty if he knows the very agreement he must consider is subject to unilateral speculation by the state." *Ex Parte Yarber*, 437 So.2d 1330, 1335 (Ala. 1983) ("A plea bargain is a matter of honor between opposing counsel"). Having threatened defense counsel and demanded a response in writing, the County got what it asked for – timely, specific, and written agreement by Ms. Chilcoat to its plea offer to her. That agreement must now be enforced.

## CONCLUSION

For all these reasons, the Ms. Chilcoat is entitled to have the Court enforce her agreement with the County. The County promised that, as part of the agreement, "The charges against Ms. Chilcoat will be dismissed." Ex. 1. The Court should accordingly dismiss all charges against Ms. Chilcoat.

DATED this 20th day of April, 2018.

*/s/ Paul G. Cassell*
Paul G. Cassell

Jeremy Delicino

*Counsel for Defendant Rose Chilcoat*

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was electronically served on this 20th day of April, 2018, to:

San Juan County Attorney
Via Green File

*/s/ Jeremy Delicino*