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## INTRODUCTION

The Appellant makes this reply in order to clear up some of the misconceptions brought in the brief of the Appellee. As such, the Appellant will only touch on selected issues raised by the Appellee here, and will rest on his prior argument as to all other points.

## ARGUMENT

### **I. THE PROPER APPLICATION OF THE FOUR-FACTOR TEST FOR THE WITHDRAWAL OF A GUILTY PLEA SHOULD HAVE WARRANTED WITHDRAWAL OF THE APPELLANT'S PLEA.**

The four-factor test for the withdrawal of a guilty plea is correctly stated by the Appellee. Those factors are:

1. The length of time between entering the plea and seeking to withdraw it;
2. The potential prejudice to the State;
3. The Defendant's assertions of innocence; and
4. Any deficiency in the Rule 11 proceedings.

*State v. Lambert*, 775 A.2d 1140 (Me. 2001); *State v. Hillman*, 749 A.2d 758 (Me. 2000).

Although the four-factor test is correctly stated by the Appellee, their application of the test to the facts of this case is improper.

**A. The Five-Month Delay in Seeking to Withdraw the Second Guilty Plea is Excusable in That it Took Significant Time for the Appellant to Choose Other Counsel and to Formulate a Strategy for Going Forward.**

The Appellee suggests that a five-month delay is a *per se* exclusion for withdrawing a guilty plea. It is not. The Appellee cites cases (primarily federal cases) where less than a five month time frame has weighed against withdrawal. These cases are not a *per se* bar to filing a motion to withdraw. Rather, in cases like *State v. Lambert, supra* (a case cited by the Appellee), the Law Court found that a three-month delay in moving for withdrawal, along with the fact that the three other factors favored the State, merited the denial of a Motion to Withdraw. *Lambert, supra* at 1143. In other words, the time period in which withdrawal is sought is a *factor* in evaluating whether withdrawal is merited. A five-month delay, therefore, is not a *per se* bar.

Further, the Defendant in *Lambert* and the other cases cited in the Appellee's brief, did not have to change counsel as the Appellant here did. Although the Appellee's brief makes light of the change in counsel as a reason for delay, the reason is legitimate. The Appellee had to decide to find counsel, to interview lawyers (in fact, he interviewed several attorneys), to meet with the lawyers, to choose and retain one law firm, to explain a very complicated securities case to the lawyer, to produce hundreds of documents for the lawyers to review, to allow time for the lawyer to do legal research on the case, and then to

develop a strategy. Although the Appellee is flip about how long it took the Appellant to prepare the Motion to Withdraw, there is a lot of time and effort by the Appellant and the undersigned before such a motion is even drafted.

The point is simple. The Appellant does not argue that the five-month delay works in his favor. Rather, it is the Appellant's position that given his change of counsel, the five-month delay is excusable. As such, Justice Mills should not have weighed the delay against the Appellant in analyzing his Motion to Withdraw.

**B. The Appellant was Never Sentenced.**

The Appellee incorrectly relies on the fact that sentencing had commenced and was then continued as a factor in disallowing withdrawal. This analysis is incorrect. No sentence was imposed on the Appellant until March 13, 2002. Under Maine Rule of Criminal Procedure 32(d), a defendant can move to withdraw a guilty plea prior to **imposition** of sentence. The Appellant filed his Second Motion to Withdraw on July 3, 2001. Therefore, sentence had not yet been imposed, and the Motion to Withdraw was timely under M.R. Crim. P. 32(d).

**C. The Potential Prejudice to the State is Insignificant When Compared to the Appellant's Liberty Interest.**

The Appellee overstates the prejudice they would face if the Appellant's plea was withdrawn. Although there is no doubt it would be inconvenient for the Appellee, such inconvenience does not compare to the liberty interest at stake here. There are many procedures in the criminal justice system that must be

accomplished simply because Defendant's rights have to be protected. Relatively minor expense and inconvenience to the State is insignificant to those rights.

Further, the standard for prejudice to the State is whether allowing withdrawal of the plea would have "seriously compromised the State's case by affecting the ability of the State to present its evidence." *Hillman, supra* at 761. Counsel for the Appellee, Amy Homans, admitted when asked in open court that "the State could put on a case," if the Appellant was allowed to withdraw his plea. November 5, 2001 Transcript, pp. 100-102. As such, the State's case has not been "seriously compromised," or prejudiced, because they can still present their case. *Hillman* at 761. The inconveniences cited by the State in their brief do not amount to prejudice under the law.

**D. The Appellant Has Steadfastly Maintained His Innocence Despite the Rule 11 Proceedings.**

The Appellee suggests that because the Appellant plead guilty that he cannot claim to have asserted his innocence throughout the course of the proceedings. We disagree.

Although Rule 11 proceedings may be evidence for the State that the Appellant did not assert his innocence, it does not end the argument. In reality, Defendants are sometimes pressured and/or coerced by their lawyers into pleading guilty. They are boxed into a corner where they want a trial, but do not trust that their lawyer is prepared or capable of trying their case. What choice does a

Defendant in that situation have? He does what his lawyer tells him to do, he says the words the judge wants to hear, and he pleads guilty.

In this case, the point is simply that despite the Rule 11 proceedings, the Appellant consistently asserted that he did not know that what he was selling was a security. As Attorney Van Dyke stated, “[h]e clearly did not know he was selling to his trusted customers a scam.” November 5, 2001 Transcript, p. 17. The Appellant himself stated that, “[t]hroughout this entire process, I have stated that I am innocent.” The Rule 11 proceedings do not change that fact.

**E. The Rule 11 Proceedings Were Deficient in That They Were Brought About By Pressure From Attorney Van Dyke for the Appellant to Plead Guilty.**

The Appellee has significantly muddled the argument related to voluntariness in Rule 11 proceedings. As you will recall, Doyle asserted in his brief that the Rule 11 proceedings were deficient in that Attorney Van Dyke was unprepared to go forward with trial, and left Doyle no choice but to plead guilty. The Appellee relies on the fact that Attorney Van Dyke believed that he was fully prepared for trial. For whatever reason, the Appellee believes that Attorney Van Dyke’s state of mind is what is at issue.

Although Attorney Van Dyke’s state of mind and preparedness is partially relevant, the more direct question is how pressured the Appellant was to plead guilty because of Attorney Van Dyke’s lack of preparation. That question cuts two ways. First, it relates to Attorney Van Dyke’s own actions in pressuring

Doyle because he himself was not prepared to go forward. Attorney Van Dyke has clearly admitted that:

I strongly argued with the appellant for plea as opposed to trial; indeed I had seldom in my career says strenuously argued against the client stated preference for trial. In retrospect, it is clear to me that Mr. Doyle truly wanted to go to trial.

App 33.

The second inquiry regards the Appellant's own subjective belief as to whether he had counsel who was ready to go forward with trial. Any reasonable person standing in a defendant's shoes would want to know whether or not he is going to trial with a lawyer prepared to defend him. Attorney Van Dyke can claim that he was fully prepared for trial, but objectively he was not. We will not go through the laundry list of items Attorney Van Dyke had not prepared as we did in our brief, but suffice it to say that Attorney Van Dyke had not done the most basic things he needed to do to prepare for trial. Doyle could see Van Dyke's Doyle to plead guilty. As a result, Doyle's pleas were not voluntary, and the Rule 11 unpreparedness. In essence that unpreparedness and the pressure brought about by Attorney Van Dyke forced proceedings were deficient.

Although motions to withdraw that are made prior to sentencing are not automatic, they should be "granted liberally" *Hillman supra* at 760. Here, there was sufficient evidence that Doyle should have been allowed to withdraw his

guilty plea and be given a trial. Justice Mills abused her discretion when she refused to do so.

## II. THE LAW OF THE CASE DOCTRINE WAS BINDING.

The law of the case of “no negotiated pleas” ordered by Justice Pierson was binding on Justice Mills.

The Appellee argues that Justice Pierson’s Order has no force. It is true that the Law Court has held that it will not reverse a correct decision of the trial court simply because it is contrary to a prior ruling. *See F.O. Bailey Co., Inc. v. Ledgewood, Inc.*, 603 A.2d 466; *Grant v. Saco*, 436 A.2d 403, 405 (Me. 1981). Common sense dictates, however, that justices need to have some power in making their decisions. If the decisions of justices could simply be overruled by another justice who disagrees with them, the law of the case concept would have no effect. Strangely, that is the position urged by the Appellee here.

When you look at the case law a little closer, and specifically the case law cited by the Appellee, it is clear that the law of the case does have a binding effect.

The Law Court in *Grant v. Saco* stated:

The doctrine of the “law of the case” rests on the sound policy that in the interest of finality and intra-court comity a Superior Court Justice should not, in subsequent proceedings involving the same case, overrule or reconsider the decision of another Justice. Such a rule of practice promotes the orderly conduct of an action and discourages judge shopping. While based on important policy considerations, the law of the case is not as rigidly applied as the doctrine of *res judicata*. The rule does not serve as a complete bar to reconsideration of an issue **when the prior ruling is**

**provisional or lacks clarity, or the error is of such character that it should be corrected at trial.**

*Grant, supra* at 405.

Here, Justice Pierson's Order that there be no negotiated pleas was clear and unequivocal. The Order itself states:

After hearing and review, the Court grants the Defendant's Motion to Withdraw the Plea. The matter is placed back on the trial list – a not guilty plea is entered. The Court also indicated on the record that No negotiated pleas would be accepted by the Court. Any change of plea must be open. The Court is to give this case priority in scheduling, but not to set before December 6, 2000.

App. 38 (emphasis included).

On the record, and in equally strong language, Justice Pierson stated the following:

THE COURT: And I want to make it very clear that if the Court grants the withdrawal, there will be no negotiated pleas in this matter. Any pleas that are entered will be just open pleas. You are free to argue for whatever you feel is appropriate. State's free to argue whatever they think is appropriate because there will be no negotiated deals.

Does your client understand that? If you want to take a few minutes and talk to him, you can, but that's a matter of record and that's the **law of the case**.

November 9, 2000 Transcript, pp. 4-5.

Although the Appellee is correct that the law of the case, at times, can be avoided, it should only be avoided if the prior ruling is provisional, lacks clarity, or is in error. *Grant, supra* at 405. Justice Pierson's Order was certainly not

lacking in clarity; if anything, it was abundantly clear. Further, it was not an error for him to strike further negotiated pleas, in that he was clearly forcing the Defendant into making a decision as to whether or not he wanted to withdraw and go forward at his own peril. As a result, Justice Pierson's Order is the law of the case, and should have been followed by Justice Mills.

The Appellee argues that "Justice Pierson's 'no negotiated pleas' ruling is not a ruling on a question of law, but rather a docket management ruling that does not implicate the law of the case doctrine." Appellee's Brief at p. 27. This is, of course, in opposition to the very order issued by Justice Pierson, who stated on the record that no negotiated pleas would be "the law of the case." November 5, 2000 Transcript, pp. 4-5. Clearly, Justice Pierson intended his ruling to be the law of the case.

Further, the Appellee attempts to argue that applying the law of the case here would lead to "absurd results." Appellee's Brief, p. 27. The Appellee goes on to argue that if the law of the case was applied and Mr. Doyle was offered a fully suspended sentence with a negotiated plea, that he would have to go to trial or enter an open plea. We would agree. The simple fact here is that Doyle was given an Order by Justice Pierson that could have potentially hurt his case. He decided to go forward and accept the consequences of that Order. We agree that the Order could cut both ways; that is, both for and against Doyle. The potential negative consequence of the Order does not change the fact that the Order was the

law of the case, and that when Justice Mills accepted a negotiate plea, she violated the law of the case doctrine.

Although the Appellee argues that the law of the case doctrine is absurd, we know clearly that it serves a significant purpose. Superior Court justices should be able to make decisions about issues in their own cases. Justice Pierson clearly made a decision here, and he turned that decision into a binding Order on all other justices in this case. When Justice Mills accepted Doyle's negotiated plea, she violated the prior Order of Justice Pierson. As a result, the law of the case was violated, and the plea entered before Justice Mills should be struck.

### **CONCLUSION**

The Appellant continues to assert that he should have been allowed to withdraw his second guilty plea. The withdrawal was not liberally granted by Justice Mills, and as a result, should be overturned on appeal. Further, the law of the case Order issued by Justice Pierson that no negotiated pleas be entered was violated when Doyle entered his second guilty plea in front of Justice Mills. Because the law of the case was violated, the guilty plea should be struck.

Dated this 30<sup>th</sup> day of July, 2002, at Portland, Maine.

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**CERTIFICATE OF SERVICE**

I, Timothy E. Zerillo, Esq., hereby certify that I have caused two copies of the Reply Brief of Appellant Michael Doyle to be served upon the following party by depositing said copy in the United States mail, postage prepaid, addressed as follows:

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Dated this 30<sup>th</sup> day of July, 2002, at Portland, Maine.

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