

2008

# Utah v. Michael Duke Tanner : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,

Plaintiff / Appellee

vs.

MICHAEL DUKE TANNER,  
Defendant / Appellant

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Case No. 20080043-CA

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**BRIEF OF APPELLANT**

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APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY,  
STATE OF UTAH, FROM A CONVICTION OF SIX FELONY CONTROLLED  
SUBSTANCE VIOLATIONS, BEFORE THE HONORABLE CLAUDIA LAYCOCK

---

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**FILED  
UTAH APPELLATE COURT**

**MAR - 3 2010**

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,

Plaintiff / Appellee,

vs.

Case No: 20080043-CA

MICHAEL DUKE TANNER,

Defendant / Appellant.

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**BRIEF OF APPELLANT**

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**JURISDICTION OF THE UTAH COURT OF APPEALS**

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78A-4-103(2)(j).

**ISSUES PRESENTED AND STANDARD OF REVIEW**

Whether the trial court erred in refusing to grant Tanner's motion to compel discovery? "While a trial court is generally allowed broad discretion in granting or denying discovery, *see State v. Knill*, 656 P.2d 1026, 1027 (Utah 1982), '[t]he proper interpretation of a rule of procedure is a question of law, [and this Court should] review the trial court's decision for correctness.' *Ostler v. Buhler*, 1999 UT 99, ¶ 5, 989 P.2d 1073; *see also State v. Bybee*, 2000 UT 43, ¶ 10, 1 P.3d 1087." *State v. Spry*, 2001 UT App 75, ¶ 8, 21 P.3d 675. This issue was preserved in pre-trial motion and in a hearing (R. 138-37, 153, 155, 159-57, 173-68, 186-85, 297).

## **CONTROLLING STATUTORY PROVISIONS**

All controlling statutory provisions are set forth in full in the Addenda.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

Michael Duke Tanner appeals from the judgment, sentence and commitment of the Honorable Claudia Laycock, Fourth District Court, after he was convicted of multiple felony controlled substance violations.

### **B. Trial Court Proceedings and Disposition**

Michael Tanner was charged by amended information filed in Fourth District Court on March 14, 2007 with: Count 1 – possession or use of a controlled substance, a second degree felony in violation of Utah Code Annotated § 58-37-8(2)(a)(i); Count 2 – possession of drug paraphernalia in a drug free zone, a class A misdemeanor, in violation of Utah Code Annotated § 58-37a-5(a); Counts 4-8 – distribution or arranging to distribute a controlled substance in a drug free zone, first degree felonies, in violation of Utah Code Annotated § 58-37-8(1)(a)(ii) (R. 27-25). Counts 1-2 allegedly were committed on February 7, 2007, while Counts 4-8 were allegedly committed in October, 2006 (Id.).

On March 29, 2007 Tanner filed a request for specific discovery seeking “any and all audio or visual recordings taken of conversations between the Defendant and the confidential informant” and “a copy of the field test results taken from the confidential

informant on all five occasions” (R. 35). Tanner also filed a subpoena duces tecum on the Utah County Major Crimes Task Force on April 9, 2007 seeking a copy of “the Return of Search Warrant Affidavit for the Search Warrant that was issued on January 31, 2006 at 8:25 a.m. on the residence of 375 West 300 North, in Provo, Utah” (R. 39-38).

Tanner was arraigned on May 9, 2007 and entered ‘not guilty’ pleas to each count (R. 50-49, 289).

On June 5, 2007 Tanner filed another request for specific discovery seeking a list of all witnesses the State intends to call at any hearing related to this matter, the identity of the confidential informant, and copies of the supporting affidavit and return of search warrant that was issued on October 25, 2006 at the residence of 375 West 300 North in Provo (R. 56).

On June 13, 2007 Tanner filed a motion to sever counts 1 and 2 from counts 4-8 (R. 66-58). Later the parties stipulated to the severance (R. 291-5, 292-3, 5).

On June 27, 2007 Tanner filed a motion to compel specific discovery and also requested a continuance of the jury trial, alleging that the State had not complied with his request for the names of witnesses, the identity of the confidential informant, and the affidavit supporting the October 25, 2006 search warrant (R. 75-73). At pre-trial hearings on July 11, 2007 and August 1, 2007 Tanner advised the trial court that he still had not received discovery (R. 78-77, 81-80).

On September 4 and 6, 2007 Tanner filed motions in limine, requesting that evidence of his prior bad acts be excluded and seeking notice from the State of any

Evidence (R. 92-87, 142).

On September 6, 2007 Tanner filed a motion for discovery seeking: the criminal history of the confidential informant, Arthur V Allred; and what charges Allred was “working off” with the county’s Major Crimes Task Force (R. 138-37). On September 14, 2007 Tanner filed another request for discovery seeking a copy of the charges Allred was working off during the period of October 3-26, 2006 when he made controlled buys from Tanner (R. 153). On September 18, 2007 Tanner requested a copy of the return of search warrant affidavit that was issued on October 18, 2006 on 375 West 300 North in Provo (R. 155).

On September 25, 2007 Tanner filed a motion to compel discovery (R. 159-57). Tanner had served subpoenas with the Utah County Major Crimes Task Force and/or the Provo City Attorney’s Office that had not been honored. Copies of the subpoenas were filed with the court (R. 170-68, 173-71). Specifically, Tanner requested a copy of the October 18, 2006 return of search warrant affidavit; copies of any other probable cause affidavits and search warrants for the same residence (375 West 300 North, Provo) between the dates of January 2006-January 2007; a copy of the Utah County Major Crimes Task Force procedures for controlled buys, and for using voluntary or paid confidential informants (R. 159-57). In addition, to responding to the motion to compel, the State filed a motion to quash the subpoenas (R. 176-75). Oral arguments were heard on the motions on October 10, 2007, and the trial court denied Tanner’s motion to compel (R. 186-85, 297).

On October 16, 2007 a jury trial was held on counts 4-8 (R. 200-198, 288).<sup>1</sup> After its deliberation, the jury convicted Tanner on all five counts (R. 199, 207-203, 288: 234-38).

On December 12, 2007 Tanner was sentenced on counts 4-8 to concurrent terms of five years to life at the Utah State Prison (R. 263-61, 298). On January 10, 2008 Tanner pled guilty to count 1, amended to a third degree felony, and count 2 was dismissed (R. 277-75, 299). He was sentenced to concurrent statutory terms in the Utah State Prison with a recommendation that he receive credit for 341 days spent in jail (R. 276, 299).

A notice of appeal was filed in Fourth District Court on January 11, 2008 and the matter was transferred from the Utah Supreme Court to this Court.

### **STATEMENT OF FACTS**

#### **A. Testimony of Officer Mark Troxell**

Mark Troxell is a sergeant with the Provo City Police Department (R. 288: 58-59). In October of 2006 he was assigned to the Utah County Major Crimes Task Force, supervising a team of detectives involved in drug investigations (R. 288: 59). Troxell testified that he had met Tanner prior to October, 2006 (R. 288: 64).

Troxell met Arthur Allred when Allred was referred to the task force by the Utah County Attorney's Office in the late summer of 2006 because Allred had useful information (R. 288: 64, 105). Allred indicated he had information about Mike Tanner

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<sup>1</sup> To avoid confusion to the jury, the counts were renumbered at trial to counts 1-5.

and that he would be able to arrange another buy (R 288 65, 105)

On October 3, 2006 Allred made a phone call to Tanner in Troxell's presence and arranged to purchase drugs (R 288 65-66) Troxell could not hear the conversation but the person Allred was talking to "sounded to be male" (R 288 106) Allred's vehicle, one of two tow trucks, and person were searched for drugs and money before he met Tanner at 375 West 300 North in Provo, and no drugs or money were found on him or his person (R 288 66-69, 107 109) Allred was also given \$200 to purchase the drugs (R 288 68-69) The money was not marked (R 288 106) Allred went into the residence and came out with a small baggie containing a white granular substance (R 288 71) Troxell testified that the substance appeared to be methamphetamine (R 288 72) The location of the house is within a 1000 feet of Timpanogas Elementary School (R 288 73-74)

Troxell testified that late on the evening of October 5, 2006 another buy was conducted between Allred and Tanner at the same residence (R 288 74-75) The same procedures were followed except that Allred had already arranged the buy and the drugs he came out with weighed less (R. 288: 75-79) Again the officers did not observe the actual interaction/exchange between Allred and Tanner (R. 288: 77).

On October 12, 2006 a third buy took place at approximately 6 p.m. (R. 288: 80-81). Allred was again searched and officers found no drugs on his person prior to entering the residence (R. 288: 81, 84). Approximately fifteen minutes later, Allred exited the house (R. 288: 82). The officers followed him to another location and again searched

him and his truck (R. 288: 82). Allred gave them a small plastic bindle containing a crystal substance (R. 288: 82-83). Allred had been given \$120 by the officers prior to going to the residence (R. 288: 83-84).

On October 19, 2006 another transaction between Allred and Tanner was arranged (R. 288: 84). Allred was again searched before going to the residence and officers found no drugs (R. 288: 84). He was given \$100 (R. 288: 84). Officers followed him to the same residence after dark (R. 288: 84-85). Allred only remained in the residence for “about a minute” (R. 288: 85). He was followed to another location and was found to have a substance which appeared to be methamphetamine with him (R. 288: 85-86).

Finally, on October 24, 2006 Allred made a phone call and then officers followed him to the same residence around 9:30 p.m. (R. 288: 86-87). Again Allred was searched and given \$200 (R. 288: 87). He was observed to go into the residence (R. 288: 87). Afterwards officers met with him at a separate location (R. 288: 88). At this location a small plastic baggy was observed by officers in Allred’s truck (R. 288: 88). It was open and had spilled on the truck’s floormats, and Allred “was quite excited and trying to sweep this up off the floor” (R. 288: 88, 92-93). Allred was told to step back and he was searched (R. 288: 88). No suspected drugs were found outside of what was in the baggy in the truck (R. 288: 88).

Troxell testified that on one of the first two transactions he observed Tanner in the front yard with another male (R. 288: 81-82, 115-16). Allred met them at the gate and followed Tanner and the other male into the home (R. 288: 82, 113). However, this

information is not contained in Troxell's police reports for either October 3<sup>rd</sup> or October 6<sup>th</sup> (R 288 118)

All five transactions occurred outside the view of the officers at the Tanner residence (R 288 89) Before and after Allred entered the residence he was in the line of sight of Troxell (R 288 89, 110-11) The longest time Allred remained in the residence was approximately thirty minutes (R 288 112) There were usually one or two vehicles in the driveway at the residence and sometimes an additional vehicle was parked out front (R 288 117) Troxell ran the license plates number and a dark green Corvette which was broken down was registered to Tanner (R 288 117) Although Troxell had the ability to body wire a confidential informant, Allred was never wired (R 288 117-18)

The parties stipulated that the substance contained in each of exhibits 2, 4, 6, 8 and 10 was methamphetamine (R 288 98) As a result, the reports from the crime lab (exhibits 1, 3, 5, 7 and 9) were admitted into evidence (R 288 101-02)

#### B Testimony of Arthur Allred

Arthur Allred testified he has known Michael Tanner for approximately 18-24 months (R. 288. 125) After he was arrested for prescription and credit card fraud, he became a confidential informant for the police and received a plea in abeyance on the charges for helping them out with three cases and testifying in court and for violating no laws for six months and paying a \$300 fine (R. 288: 125-26, 128). Since the entry of his plea in abeyance approximately six months prior to trial, he has testified in one other case (R. 288: 126-27).

Allred testified that in October of 2006 he purchased drugs five times from Michael Tanner as part of his work with the Utah County Major Crimes Task Force (R. 288: 129). On the first buy he contacted Tanner by cell phone while in the presence of Troxell and his partner, Bill Young (R. 288: 129-30). He got Tanner's number from a friend (R. 288: 130). He told Tanner he needed to buy a teener or an eightball and was given a time for the buy (R. 288: 130). He was given money by the officers, and was searched thoroughly (R. 288: 130-31). He drove to Tanner's house and Tanner was out front (R. 288: 131). They talked for a minute and then went into the house to Tanner's bedroom (R. 288: 132). A woman named Stacy was in the room (R. 288: 132). Tanner had the drugs "ready" for him and they conversed for 5-7 minutes (R. 288: 133). He took the drugs and examined them and then gave Tanner the \$200 cash (R. 288: 133). As he left, Stacy warned him "about what happens to people that tell on people for buying drugs" (R. 288: 134).

On October 5-6, 2006 he met with the officers underneath the overpass in Provo (R. 288: 135). He called Tanner on his cell phone and arranged the buy (R. 288: 135). He was searched by officers and went to Tanner's house (R. 288: 135). He called Tanner again and was told to walk in the house (R. 288: 135-36). Allred walked into Tanner's bedroom and found Tanner with "a large amount of methamphetamine (5-10 ounces) that he was going through" (R. 288: 136). There were also scales and baggies (R. 288: 136). Tanner was separating the "clean shard" or "good stuff" from the "cut crap" (R. 288: 136). Allred was getting the "good stuff" (R. 288: 136). He stayed approximately ten minutes (R. 288: 137). Tanner gave him the drugs and then he gave Tanner the money

(R. 288: 145). After he left, he drove to the meeting place set up by the task force (R. 288: 137). He and his truck was searched (R. 288: 137).

On October 12, 2006 he again met with the officers under the viaduct and arranged to buy from Tanner on his cell phone (R. 288: 137). He was searched and given money before driving to Tanner's residence (R. 288: 137). He called Tanner and was again told to walk into the house (R. 288: 137). He walked straight back into the bedroom and found two females in the room with Tanner, one of whom was engaged in sexual activity with Tanner (R. 288: 138). Allred remained in the room for 15-20 minutes before exchanging the money for drugs with Tanner (R. 288: 138-39). He left and called the officers from his truck to tell them what he had seen in the house (R. 288: 139). After he left his subsequent meeting with the officers where he and his truck were again searched, he discovered some spilt methamphetamine on his truck floor (R. 288: 153, 155-56). He called the officers and pulled over (R. 288: 153). They came to him at the East Bay off-ramp and again searched his truck (R. 288: 153-54).

On October 19, 2006 Allred again met the task force officers at the overpass and was searched thoroughly (R. 288: 139). After calling Tanner and obtaining the money from police, he drove to the house and Tanner was outside washing his black Corvette (R. 288: 139, 156). Tanner set the drugs on one side of the windshield and he put the money down on the other side (R. 288: 140). He then picked up the drugs and Tanner picked up the money (R. 288: 140). *See also*, R. 288: 162-64. They talked for a couple of minutes before Allred left (R. 288: 140). He drove to the meeting place and was again thoroughly searched by police (R. 288: 140).

On October 24, 2006 Allred and task force officers met at the overpass again (R. 288: 140). He said that when he spoke with Tanner by telephone, Tanner was reluctant to sell to him because he'd recently been arrested (R. 288: 140). He drove to Tanner's house and Tanner threw the drugs on the grass while Allred put the money down on the porch after lighting a cigarette (R. 288: 140, 161). Allred did not go into the house but picked up the drugs from the lawn and spoke with Tanner, who was standing on the porch, for a couple of minutes before leaving (R. 288: 140, 157). He met officers back at the overpass and was again searched (R. 288: 141).

Allred testified he was searched prior to each transaction and that he never brought drugs to the scene nor did he take drugs home with him (R. 288: 142). On the three buys he made inside the residence, he put the drugs Tanner gave him in a cigarette pack to carry them from the house (R. 288: 144, 150). On the other two buys he put the drugs in his pocket (R. 288: 150). Allred denied using any drugs since the entry of his plea in abeyance (R. 288: 144). Allred also testified that he did not have to testify against Tanner as part of his plea in abeyance deal (R. 288: 145-47). Allred admitted to having a prior misdemeanor conviction for giving false information to a police officer (R. 288: 146).

Allred did not take any notes about the transactions and testified that his recollection of events would not be as accurate as a police report (R. 288: 181).

## **SUMMARY OF ARGUMENT**

Tanner asserts that the material he requested from both the State and from the Major Crimes Task Force through subpoena was potentially exculpatory or mitigation, and that it was also material and necessary for proper preparation of a defense. The trial court erred in denying his motion to compel and in quashing those subpoenas. Tanner satisfied the requirements of Rule 16(a)(4) and or (5) and should have been provided with that discovery, either directly from the State or through enforcement of his Subpoenas. Accordingly, he requests that this Court reverse his conviction and remand the matter back for a new trial with directions that his discovery requests and/or subpoenas are to be honored.

## **ARGUMENT**

### **A. The Trial Court Erred in Denying Tanner's Motion to Compel Discovery and in Quashing his Subpoenas under Rule 16(a) of the Utah Rules of Criminal Procedure.**

Prior to trial Tanner made several motions for specific discovery. In addition, he served subpoenas on the Utah County Major Crimes Task Force and the Provo City Attorney's Office. Copies of the subpoenas were filed with the court (R. 170-68, 173-71). Specifically, Tanner requested a copy of the October 18, 2006 return of search warrant affidavit; copies of any other probable cause affidavits and search warrants for the same residence (375 West 300 North, Provo) between the dates of January 2006-January 2007; a copy of the Utah County Major Crimes Task Force procedures for

controlled buys, and for using voluntary or paid confidential informants (R. 159-57).

When these subpoenas were not honored, he filed a motion to compel with the trial court (R. 159-57). In response, the State filed to have the subpoenas quashed (R. 176-75). A hearing was held before the trial court on October 10, 2007, and the trial court denied Tanner's motion to compel (R. 186-85, 297). Tanner asserts that the trial court erred in denying his motion to compel discovery and in essentially quashing his subpoenas.

Rule 16 of the Utah Rules of Criminal Procedure governs discovery. Subsection (a) reads in relevant part:

Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

.... (4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

The Utah Supreme Court has held that: "a criminal proceeding is more than an adversarial contest between two competing sides. It is a search for truth upon which a just judgment may be predicated. Procedural rules are designed to promote that objective, not frustrate it." *State v. Carter*, 707 P.2d 656, 662 (Utah 1985).

Tanner asserts that in denying his motion to compel discovery, and in essentially quashing his subpoenas, the trial court has frustrated the search for truth upon which a

the Return of the Search Warrant that was signed on or about October 18<sup>th</sup> and executed on October 25<sup>th</sup>, and as to copies of any other search warrants, probable cause affidavits and return of search warrants executed on Tanner's residence between January 2006-2007. Tanner argued that such material was exculpatory under Rule 16(a)(4), but also that it satisfied the good cause standard under Rule 16(a)(5) (R. 183-78).

The trial court seemed to focus its good cause analysis in regards to the subpoenas and Tanner's motion to compel on relevance and rules 401-403 of the Utah Rules of Evidence (R. 297: 17, 18). The trial court indicated she wasn't persuaded the information was relevant, but was instead "a waste of the jury's time, and it's not likely to bring us to evidence which is helpful or admissible" (Id.). Tanner asserts that this analysis, while, of course, appropriate and necessary for an ultimate determination of admissibility during trial, is not the focus or framework for determining whether good cause exists under Rule 16(a)(5).

In *State v. Mickelson*, 848 P.2d 677 (Utah App. 1992), and *State v. Spry*, 2001 UT App 75, 21 P.3d 675, this Court examined the "good cause" required under Rule 16(a)(5). In both cases this Court drew from the Utah Supreme Court's opinion in *Cannon v. Keller*, 692 P.2d 740 (Utah 1984) and concluded:

In defining 'good cause,' we reasoned that *Cannon* 'implicitly held that (1) "good cause" requires only a showing that disclosure of requested evidence is necessary to the proper preparation of the defense and (2) such a showing is made whenever

the trial court is apprised of the fact that the evidence is material to an issue to be raised at trial ' [*Mickelson*] at 690

*Spry*, 2001 UT App 75 at ¶ 21 In both cases this court reasoned that this standard [O]ptimally balances the rights and obligations of parties in criminal litigation and allows a defendant ample access to evidence in the State's possession, by requiring, as the only prerequisite to discovery, that the court be apprised of the information's materiality to the case Nonetheless, by requiring defendants to make this preliminary showing of materiality *Cannon* also effectively protects the State and the court from irrelevant and vexing discovery requests Thus the trial can be conducted with a minimum of unnecessary delay, while still allowing both parties a maximum of necessary preparation

*Mickelson*, 848 P.2d at 690 See also, *Spry*, 2001 UT App 75 at ¶ 21

In *Mickelson*, applying the standard set forth above, this Court held that the defendant satisfied the good cause requirement by arguing before the trial court that the information requested—conviction records—would be admissible for impeachment purposes of the witness. Because this showing “clearly set forth the legitimate potential value of the requested evidence to the defense,” it therefore, “establishe[d] the materiality of the evidence to the issues to be raised at trial.” 848 P.2d at 690. See also, *Spry*, 2001 UT App 75 at ¶ 22.

In this case, Tanner asserts he, too, made such a showing before the trial court as to the materiality of the information sought and the necessity for it in order to have proper preparation of a defense at trial. The allegations in this case were that Tanner sold drugs

October 5, October 12, October 19, and October 24. The only two witnesses at trial were Allred and Officer Mark Troxell, a Provo City officer assigned to the Utah County Major Crimes Task Force.

In the hearing on Tanner's motion to compel discovery, it was understood by the parties that a search warrant was issued on Tanner's residence on October 18, 2006—in between the third and fourth controlled buys—and it was executed on October 25, 2006, which was the day after the fifth buy. Apparently Allred, the CI, provided information that the Task Force (and it can be assumed Troxell) used to secure the warrant. Equally apparent was the fact that no charges were filed as a result of that search warrant. Tanner wanted the Return of the Search Warrant in order to compare the information provided by the CI with what was actually found by the Officers and to use it for impeachment purposes against the CI at trial.

Tanner also sought discovery of other warrants executed at Tanner's residence during the year in order to see if the same CI provided information that was used by police to secure those warrants. Troxell had stated in his supporting affidavit for the October 18, 2006 warrant that "This residence was recognized as one where a Michael Duke Tanner lives and your affiant has been present during the service of other search warrants" (R. 178-79). Yet according to Tanner's criminal history, no charges were filed against him after the service of these other warrants. Accordingly, Tanner argued that there was a strong likelihood that the information provided for the probable cause necessary to obtain those warrants was not reliable; and if that information was provided

by the same CI, that information would be at least mitigating, perhaps even exculpatory, and certainly it was necessary to preparation of a proper defense.

The trial court denied the motion to compel and quashed Tanner's subpoenas in part because there could be many reasons why charges weren't filed against Tanner from other warrants. However, interestingly enough, Officer Troxel testified at sentencing and this subject came up (R. 298: 6-9). At sentencing, Troxell appeared to argue against the recommendation for probation from AP&P. He testified that he had been involved in multiple search warrants involving Tanner (Id. at 6). However, when pressed by the trial court about Tanner's lack of much criminal history, Troxell admitted that, "During those searches that I have been involved in previously, quantities of drugs were not found, so the charges could be brought" (Id. at 8).

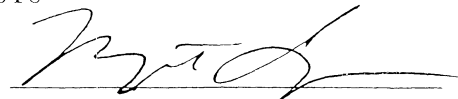
Tanner asserts that the material he requested from both the State and from the Major Crimes Task Force through subpoena was potentially exculpatory or mitigation, and that it was also material and necessary for proper preparation of a defense. The trial court erred in denying his motion to compel and in quashing those subpoenas. Tanner satisfied the requirements of Rule 16(a)(4) and or (5) and should have been provided with that discovery, either directly from the State or through enforcement of his Subpoenas—a process anticipated and approved by the Utah Supreme Court in *State v. Pliego*, 1999 UT 8, ¶ 20, 974 P.2d 279 ("Rather than attempting to obtain the ARTEC, DFS, and CPS records through rule 16(a), Pliego should have attempted to get these records himself" through subpoena under rule 14(b)). Accordingly, he requests that this Court reverse his

requests and/or subpoenas are to be honored.

**CONCLUSION AND PRECISE RELIEF SOUGHT**

Tanner requests this Court to reverse his conviction and sentence and the trial court's denial of his objection to Instruction No. 9A and remand for a new trial.

Respectfully submitted this 3<sup>rd</sup> day of March, 2010



Margaret P. Lindsay  
Counsel for Appellant

**CERTIFICATE OF MAILING**

I hereby certify that I mailed a true and correct copy of the foregoing postage prepaid to the Utah State Attorney General, Appeals Division, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114 on the 3<sup>rd</sup> day of March, 2010.



## **RULE 16. DISCOVERY**

(a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge

- (1) relevant written or recorded statements of the defendant or codefendants,
- (2) the criminal record of the defendant,
- (3) physical evidence seized from the defendant or codefendant,
- (4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment, and
- (5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure

(c) Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute relating to alibi or insanity and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare his case

(d) Unless otherwise provided, the defense attorney shall make all disclosures at least ten days before trial or as soon as practicable. He has a continuing duty to make disclosure

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places. The prosecutor or defense may impose reasonable limitations on the further dissemination of sensitive information otherwise subject to discovery to prevent improper use of the information or to protect victims and witnesses from harassment, abuse, or undue invasion of privacy, including limitations on the further dissemination of videotaped interviews, photographs, or psychological or medical reports

(f) Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, that limitations on the further dissemination of discovery be modified or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances

(h) Subject to constitutional limitations, the accused may be required to: (1) appear in a lineup; (2) speak for identification; (3) submit to fingerprinting or the making of other bodily impressions; (4) pose for photographs not involving reenactment of the crime; (5) try on articles of clothing or other items of disguise; (6) permit the taking of samples of blood, hair, fingernail scrapings, and other bodily materials which can be obtained without unreasonable intrusion; (7) provide specimens of handwriting; (8) submit to reasonable physical or medical inspection of his body; and (9) cut hair or allow hair to grow to approximate appearance at the time of the alleged offense.

Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given to the accused and his counsel. Failure of the accused to appear or to comply with the requirements of this rule, unless relieved by order of the court, without reasonable excuse shall be grounds for revocation of pre-trial release, may be offered as evidence in the prosecutor's case in chief for consideration along with other evidence concerning the guilt of the accused and shall be subject to such further sanctions as the court should deem appropriate.