

1987

## Utah v. Salvador Ayala : Brief of Respondent

Utah Court of Appeals

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David L. Wilkinson; Attorney General; Dan R. Larsen; Assistant Attorney General; attorneys for respondent.

Larry R. Keller; attorney for appellant.

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IN THE UTAH COURT OF APPEALS

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DOCKET NO.

~~870533-CA~~

~~STATE OF UTAH,~~

:

Plaintiff-Respondent, : Case No. 870533-CA

v.

:

SALVADOR AYALA,

:

Category No. 2

Defendant-Appellant.

:

BRIEF OF RESPONDENT

- - - - -

APPEAL FROM A CONVICTION OF UNLAWFUL  
POSSESSION OF A CONTROLLED SUBSTANCE WITH  
INTENT TO DISTRIBUTE FOR VALUE, A SECOND  
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.  
§ 58-37-8(1)(a)(ii) (1953, AS AMENDED) AFTER  
A TRIAL IN THE THIRD JUDICIAL DISTRICT COURT,  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE HOMER F. WILKINSON, JUDGE,  
PRESIDING.

DAVID L. WILKINSON  
Attorney General  
DAN R. LARSEN  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Respondent

LARRY R. KELLER  
257 Towers, Suite 340  
257 East 200 South - 10  
Salt Lake City, Utah 84111

Attorney for Appellant

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff-Respondent, : Case No. 870533-CA  
v. :  
SALVADOR AYALA, : Category No. 2  
Defendant-Appellant. :

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DAVID L. WILKINSON  
Attorney General  
DAN R. LARSEN  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114  
  
Attorneys for Respondent

LARRY R. KELLER  
257 Towers, Suite 340  
257 East 200 South - 10  
Salt Lake City, Utah 84111  
  
Attorney for Appellant

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BRIEF OF RESPONDENT

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of Unlawful Possession of a Controlled Substance With Intent to Distribute For Value, a second degree felony pursuant to Utah Code Ann. § 58-37-8(1)(a)(ii) (1953 as amended). The conviction occurred after a jury trial in the Third District Court, the Honorable Homer F. Wilkinson, presiding. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (1987).

STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issues are presented for review in this Appeal:

1. Is the affidavit in support of the search warrant sufficient to establish probable cause based upon the totality of the circumstances?
2. Should the evidence seized from defendant be admitted on the ground that the search, although presumably for weapons, was expanded, based upon the fact that there was sufficient probable cause to arrest?



3. Did defendant have adequate command of the English language to fully understand the nature of his Miranda rights and to enter a valid waiver thereto?

4. Were statements made to officer Labrum by defendant, after he had invoked his fifth amendment right to silence, properly admissible for impeachment purposes?

5. Were defendant's statements either properly allowed under his waiver of fifth amendment privileges, properly allowed for use as impeachment, or properly suppressed?

#### CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. IV:

##### **AMENDMENT IV**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V:

##### **AMENDMENT V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Utah Const. art. I, § 14:

**Sec. 14. [Unreasonable searches forbidden--  
Issuance of warrant.]**

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Minn. Const. art. I, § 10:

**Sec. 10. Unreasonable searches and seizures prohibited.** The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

Utah Code Ann. § 58-37-8(1)(a)(ii) (1953, as amended):

**58-37-8. Prohibited acts--Penalties.**

(1) Prohibited acts A--Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person knowingly and intentionally:

(ii) to distribute for value or possess with intent to distribute for value a controlled or counterfeit substance;

Utah Code Ann. § 77-35-19(c) (1953, as amended):

(c) No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.

Utah Rules of Civil Procedure, Rule 51:

**Rule 51. Instructions to jury; objections.**

At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in said requests. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally or otherwise waive this requirement. If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving of or failure to give an instruction. Opportunity shall be given to make objections, and they shall be made out of the hearing of the jury.

Arguments for the respective parties shall be made after the court has instructed the jury. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

(Amended, effective Jan. 1, 1987.)

STATEMENT OF THE CASE

Defendant, Salvador Ayala, was charged with Unlawful Possession of a Controlled Substance With Intent to Distribute for Value, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (1953, as amended) (R. 3). Prior to trial, defendant filed a Motion to Suppress Evidence on April 14, 1986

which the Court granted in part and denied in part on July 22, 1986 (R. 35-36, 91-96). Further, on August 19, 1987, defendant filed a Motion to Clarify Court Ruling on Suppression of Evidence which was denied in part and granted in part following a hearing on September 15, 1987 (R. 128, 205-207). After a jury trial on September 28-29, 1987, in the Third District Court, the Honorable Homer F. Wilkinson, presiding, defendant was found guilty as charged (R. 259-61). A Notice of Appeal was filed in the Utah Court of Appeals on December 1, 1987 (R. 270-73).

#### STATEMENT OF FACTS

On January 14, 1986, Deputy John Conforti of the Salt Lake County Sheriff's Office obtained a search warrant for the premises of 8853 Julia Lane in the City of Salt Lake, County of Salt Lake, State of Utah. (Appendix B.) Within seven days previous to the issuance of this warrant, Deputy Conforti arranged for a Confidential Informant (CI) to make a controlled drug buy at the named premises. (Appendix A.) Prior to him entering the premises, the CI was given a body search for controlled substance and U.S. currency. (Appendix A.) He was then given a predetermined amount of money, and subsequently observed entering and exiting the house. (Appendix A.) The CI then turned over a quantity of heroin that he stated had been purchased in the residence. (Appendix A.) Another body search was given, and, again, no controlled substances or U.S. currency was found. (Appendix A.) The information obtained through this controlled buy was supplemented by an express statement from a second Confidential Informant that heroin had been sold out of

that specific residence for some time. (Appendix A.) Based upon this information, Judge Sheila K. McCleve found sufficient probable cause for issuance of a search warrant for the premises. (Appendix B.)

On January 15, 1986, pursuant to the search warrant, deputies of the Salt Lake County Sheriff's Office, assisted by additional police officers, arrived at the residence shortly after 9:00 p.m. (R. 285, p. 20). At the time the officers arrived and began their search of the home, only a young female and her baby were present (R. 285, p.5). During the search, Deputy Upton found a .38 caliber pistol under a bed between the box springs and the mattress in what has been identified as the south bedroom (R. 285, p. 6). In addition, he found .357 caliber ammunition in the closet in that same bedroom (R. 285, p.6). In the north bedroom, Upton found what was described as two balloons or one plastic-like baggie material containing a black tar substance suspected to be heroin and a piece of cellophane which also had the black tar substance on it (R. 285, p. 8). Also found by Upton was a syringe and a silver-colored metal canister commonly used to transport narcotics (R. 285, p. 8).

Approximately one hour after the search began, and after Deputy Upton had turned his findings into the evidence custodian and was checking the residence for what he thought was possible stolen stereo and computer equipment, defendant and two others arrived (R. 285, p. 11). When defendant entered the residence, he exclaimed, "I live here, what's going on?" (R. 285, p. 25.) Deputy Conforti initially conducted a search of

defendant for weapons, and subsequently recovered 96 balloons believed to contain heroin and \$1,320 in currency from defendant's pockets (R. 285, pp. 26-28)

Following this search, defendant was specifically asked if he understood English, to which he responded affirmatively, and Conforti then advised defendant of his Miranda rights (R. 163). After receiving the Miranda warnings, defendant declared that he understood them and opted to remain silent (R. 163)

Deputy Conforti, as well as deputies Julian, Eyre, Labrum, and Rigby, testified that defendant spoke understandable English, albeit with an accent (R. 285, pp. 25, 41, 71, 73, 78; R. 283, p. 89). Although defendant initially chose to remain silent, he returned to Conforti about five minutes after receiving the Miranda warnings and initiated further conversation regarding the charges and criminal penalties facing him (R. 163). In his Minute Entry dated September 23, 1987, Judge Homer F. Wilkinson declared that the substance of this volunteered conversation was admissible at trial (R. 207).

Later that evening, Deputy Jay Labrum initiated further conversation with defendant (R. 283, pp. 98-100). The substance of this conversation was ruled inadmissible by Judge Wilkinson because it was an illegal violation of defendant's Miranda rights (R. 207). However, at trial, following defendant's specific denial of selling drugs and being the owner of the money found, Labrum's testimony of the conversation that he initiated with defendant was admitted for the limited purpose of impeachment (R. 283, pp. 72-83).

In addition to the evidence found in the residence before defendant's arrival, and the evidence found on defendant's person during Deputy Conforti's search of him, \$9,550 in currency was found in the kitchen drawer and a small package of balloons and a bottle of lactose, commonly used as a cutting agent, were found in the attic (R. 285, pp. 26, 75). Items found on other individuals who arrived at the house after the search began, but before defendant arrived, included \$7,242 in cash, a hype kit and rolling papers, and 23 additional packets of heroin (R. 285, pp. 51, 62-63).

Following a jury trial, defendant was convicted of the offense of Possession of a Controlled Substance with Intent to Distribute for Value and was sentenced by the Court to an indeterminate term of not less than one (1) nor more than fifteen (15) years in the Utah State Prison (R. 267).

#### SUMMARY OF ARGUMENT

The affidavit in support of the search warrant was sufficient to establish probable cause for a search of the residence based upon the totality of the circumstances test advocated by federal cases and applied in similar factual situations in other state courts. Although both informants were confidential, the controlled buy was completely surveilled by the police and the recovery of heroin was supported by a statement that heroin was commonly sold at that residence.

The evidence seized from the defendant was properly admissible because at the time of the search, officers had already discovered in the residence a weapon, ammunition, two

balloons suspected of containing heroin, a syringe, and a canister commonly used to transport narcotics. Thus, there was probable cause to arrest defendant who had announced that he was the resident when he arrived at the home.

Based on the testimony of several officers, and defendant's own actions of never revealing any trouble in understanding either the Miranda warnings or any other conversation, the record shows that defendant had sufficient command of the English language to enter a valid waiver to his fifth amendment right to silence.

Statements made after defendant had invoked his right to silence were not admissible for the State's case in chief; but were clearly admissible for the limited purpose of impeachment. Defendant's statements at trial were directly contradicted by previous statements made to the police following an illegal post-Miranda interrogation.

All of defendant's statements admitted at trial were allowable either because they were made following a proper waiver of his Miranda rights, or were used solely for impeachment purposes. Any other statements that defendant had previously made were properly suppressed.



## ARGUMENT

### POINT I

BASED UPON THE TOTALITY OF THE CIRCUMSTANCES, THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS SUFFICIENT TO ESTABLISH PROBABLE CAUSE AND FULLY SATISFIES THE REQUIREMENTS OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE CONSTITUTION OF THE STATE OF UTAH.

Under the federal interpretation of the Fourth Amendment to the United States Constitution, the test for determining the sufficiency of an affidavit for search warrant purposes arises from the decision of Illinois v. Gates, 462 U.S. 213 (1983). Prior to this decision, many states strictly adhered to the rigid "two-pronged test" of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), which provided that:

the Fourth Amendment requires that affidavits based on informants' tips must set out "underlying circumstances" sufficient (1) to reveal the basis of informant's knowledge and (2) to establish the veracity of the informant or alternatively, the reliability of his report in a particular case. . . .

State v. Bailey, 675 P.2d 1203, 1205 (Utah 1984).

However, in 1983, with the decision of Illinois v. Gates, the United States Supreme Court held that the Aguilar-Spinelli test was abandoned, and in its place, the "totality of the circumstances" approach would be substituted. Illinois v. Gates at 214. In this approach

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there

is a fair probability that contraband or evidence of a crime will be found in a particular place. . . .

Id. at 238.

That this new "totality of the circumstances" has completely replaced the Aguilar-Spinelli analysis under the federal interpretation of the Fourth Amendment was reiterated in Massachusetts v. Upton, 466 U.S. 727 (1984). In that case, the United States Supreme Court stated, "[w]e did not merely refine or qualify the 'two-pronged test.' We rejected it as hypertechnical and divorced from the 'factual and practical consideration of everyday life on which reasonable and prudent men, not legal technicians, act.'" Massachusetts v. Upton at 732, quoting Brinegar v. United States, 338 U.S. 160, 175 (1949).

However, even though it is clear that the "totality of the circumstances" approach is controlling under a federal interpretation of the Fourth Amendment, Justice Stevens points out in his concurring opinion in Massachusetts v. Upton, that it may be a fundamental error for a state to base its decision solely upon the federal interpretation of the Fourth Amendment without any determination of the law based on its own state constitution. Id. at 735. A similar warning was given by Justice Durham of the Supreme Court of Utah in the case of State v. Earl, 716 P.2d 803 (Utah 1986) when she stated "that despite our willingness to independently interpret Utah's constitution in other areas of the law, the analysis of state constitutional issues in criminal appeals continues to be ignored. . . . It is imperative that Utah lawyers brief this Court on relevant state constitutional questions." State v. Earl at 806.

There is some evidence that the State of Utah has provided a stricter interpretation of Article I, Section 14 of the Utah Constitution than the "totality of the circumstances" approach rising from the federal interpretation of the Fourth Amendment. In State v. Bailey, 675 P.2d 1203 (Utah 1984) the Supreme Court of Utah states that even in light of Illinois v. Gates,

compliance with the Aguilar-Spinelli guidelines may be necessary to make a sufficient basis for probable cause. Depending on the circumstances, a showing of the basis of knowledge and veracity or reliability of the person providing the information for a warrant may well be necessary to establish with a "fair probability" that the evidence sought actually exists and can be found where the informant states.

State v. Bailey at 1205 (emphasis added). See also, State v. Anderson, 701 P.2d 1099 (Utah 1985). However, other Utah Supreme Court cases have entertained fourth amendment analysis solely based on the Illinois v. Gates, "totality of the circumstances" test. See State v. Hansen, 732 P.2d 127 (Utah 1987); State v. Espinoza, 723 P.2d 420 (Utah 1986).

In his brief, defendant uses the Bailey and Anderson cases as the foundation for his argument that the affidavit in support of the search warrant is insufficient because it fails to comply with the Aguilar-Spinelli requirements. The state submits that the case at hand is easily distinguishable from Bailey and Anderson and is the type of case described by the court in Bailey when it stated:

In other cases, however, a less strong showing of the basis of the affiant's

knowledge, veracity and reliability may be required, if the circumstances as a whole indicate that the informant's report is truthful. . . .

State v. Bailey, at 1205-1206.

In Bailey, the informant was a concerned citizen who felt that he was doing his duty in reporting a burglary and theft. He asked that his identity remain confidential "[b]ecause he feared retaliation and knew that the defendant and his friend owned guns," State v. Bailey, at 1204. In Anderson, the affidavit was based upon a sheriff's statement that "he had received information from a previously reliable informant that a wooden fence, . . . would be built on Anderson's property . . . for the purpose of concealing marijuana plants being cultivated." State v. Anderson, at 1100. In the case at hand, there is not merely a statement from an informant upon which the affidavit is based, but rather a controlled buy, supported by a general statement of a second confidential informant. (See Appendix A). Bailey and Anderson, while undoubtedly helpful in determining the State's approach to the affidavit requirements in a situation where there is a simple statement from an informant, should not be unquestionably generalized to include a situation where there has been a controlled buy in addition to an informant's statement.

In arguing this point, the State will use the "sibling state approach" outlined in State v. Jewett, 500 A.2d 233 (Vt. 1985) and recommended by the Supreme Court of Utah in State v. Earl, 716 P.2d 803 (Utah 1986), and will refer to the decisions of the Court of Appeals and the Supreme Court of Minnesota in several cases with fact situations parallel to the case at hand.

In the first of three important Minnesota cases, State v. Hawkins, 278 N.W.2d 750 (Minn. 1979), the affidavit indicated that there had been two controlled purchases, the latest consisting of the police providing an informant with a sum of money which was then passed on to an unwitting informant who made the purchase of the controlled substance and then turned it over to the original informant, who then gave it to the officers. State v. Hawkins, 751. In that case, the definition of a controlled purchase is given that:

A "controlled purchase" involves providing money to a buyer, who is searched before and after making contact with the seller. It also involves police surveillance of as much of the transaction between the buyer and seller as possible. . . .

Id.

In Hawkins, the court determined that it was not necessary to refer to the Aguilar test because of the direct police observations of the controlled purchases. Id. Further reference was made to Moylan, Hearsay and Probable Cause, 25 Mercer L. Rev. 741, 778:

When [independent police] observations are sufficient in themselves to demonstrate probable cause, the final problem is thereby solved and all information both from and about the informant becomes a redundancy; probable cause is established without necessary resort to the hearsay." Accord, LaFave, Probable Cause from Informants, 1977 U. Ill. L.F. 1, 63.

Id.

The court in Hawkins further stated that because the police were unable to search the unwitting informant before he entered the residence in question, they could not establish

beyond a reasonable doubt that the heroin retrieved came from within the residence; but based on the police observations, the conclusion that the heroin came from within the residence was, at least, probable, and the affidavit was deemed sufficient to obtain the search warrant. Id. at 751-52

In State v. Aguilar, 352 N.W.2d 395 (Minn. 1984) the fact situation was much like that in State v. Hawkins. The confidential informant was given a sum of money which was passed on to an unwitting informant. The unwitting informant entered the residence, returned to the confidential informant, and gave that informant a substance found to be heroin following a field test. Based upon this controlled purchase, and information from a DEA agent, the affidavit was submitted and a search warrant was granted. State v. Aguilar, at 396. The Supreme Court of Minnesota, referring to State v. Hawkins and the analysis of independent police observation held that the affidavit in Aguilar "contained sufficient information to establish probable cause." Id.

In the most recent of these three Minnesota cases, State v. Valento, 405 N.W.2d 914 (Minn. App. 1987), a confidential informant (CI) stated that he could purchase cocaine from an unknown source through an unwitting informant (UI). The police officer involved met with the confidential informant, searched the informant for money and controlled substances, and when none were found, he provided the confidential informant with money for the purchase. Surveillance was maintained as the CI met with the UI, the UI travelled to a residence--unknown until

this time--and then the UI returned to the CI. The CI then met with the police, gave them what he had received from the UI (which was determined to be cocaine), and was again searched for money and controlled substances. State v. Valento, at 916.

In analyzing Valento, the Court of Appeals of Minnesota referred to both Hawkins and Aguilar. However, Valento is distinguished from Hawkins because there was only one controlled buy, and distinguished from both cases because prior to the purchase, the police did not even suspect the residence that was searched. However, due to police observations and the efficiency of the controlled purchase, it was determined that the reasonable inference was that the cocaine had come from the residence in question and there was probable cause for a search warrant. Id. at 918. Also in this case, the Court relies upon the "totality of circumstances" approach as derived from Illinois v. Gates. Although there is no discussion as to the reason for the use of the federal interpretation of the Fourth Amendment rather than a direct analysis of the search and seizure provision in the Minnesota Constitution, Article I, Section 10, an argument may be made that the Court's analysis of this particular issue remained the same under Valento and the federal requirements of Illinois v. Gates as it did in Hawkins under the Aguilar v. Texas approach. This suggests that the Courts of Minnesota did not bend their analysis with changing federal interpretation, but distinguished their analysis in Hawkins from the prongs of Aguilar, and supported their analysis in Valento with the applicable totality of circumstances approach of Illinois v.

Gates. Thus, Minnesota may serve as an example of a state that has developed its own laws--presumably under the Minnesota Constitution--and has determined that in a case such as that at hand which includes a confidential informant and a controlled purchase, the proper analysis fits perfectly under the totality of the circumstances approach and is most likely one of the "other cases" spoken of by the Supreme Court of Utah in State v. Bailey, 675 P.2d 1203, 1205 (Utah 1984).

In the instant case, a detective with the Salt Lake County Sheriff's Narcotics Unit made arrangements with a confidential informant to make a controlled drug purchase at the residence in question. (Appendix A.) A full body search for controlled substances and currency was made on the confidential informant and he was then given a specific sum of money with which to make the purchase. Id. The confidential informant was under continual observation, except when he was inside the home. Id. After he exited the home, the confidential informant gave the police what was later identified as heroin. Id. He was again searched for controlled substances and money, and again nothing was found. Id. This controlled purchase was supplemented by a general statement from a second confidential informant that heroin was sold from the residence in question. Id.

Obviously, the facts in this case are even more reliable than those found acceptable in State v. Valento. Here, there was no middleman; the confidential informant purchased the drugs himself and was subject to a complete search before and



after he was in the residence. Also, in this case, the police had a specific residence in suspicion before initiating the controlled purchase.

The State submits that under the totality of the circumstances approach of Illinois v. Gates, as relied upon in State v. Valento, the affidavit contained sufficient information to establish probable cause for the search warrant for the house. The State further submits that even if the Court wishes to go beyond the federal approach and offer a more stringent reading of search and seizure requirements based upon the Utah Constitution, Article I, Section 14, it should consider the analysis used in Minnesota--under an almost identical constitutional section.

Certainly, direct police control and observation inherent in a controlled buy investigation adds significantly to the credibility and basis of knowledge prongs required under the Aguilar-Spinelli test. To require more than the care taken in this prime example of a controlled purchase situation, may be to move away from warrants based on probabilities toward warrants requiring substantial proof. An informant's tip or statement may necessitate further substantiation to "secure the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." Utah Constitution, Article I, Section 14. However, additional requirements than those provided in the instant situation do nothing more in protecting citizens' rights. In fact, more requirements may discourage the police from so carefully observing and controlling a drug buy as they did here in order to satisfy the probable

cause standard. Instead, the police may be encouraged to simply use an affiant who can describe well, and who has worked for the police an arbitrary number of time in order to establish reliability, rather than stage an ideal controlled drug buy with a confidential informant, as was done here, simply so that the necessary "prongs" are satisfied. Such a sacrifice of precision police work for statistical achievement should not be recommended.

Defendant further contends that the State's failure to disclose the names of the confidential informants relied upon for a determination of probable cause also violates his Constitutional rights. The State refused to supply the identity of the informants because, first, the informants were still being used in undercover narcotics investigations and disclosure might prejudice those investigations, and, second, the disclosure is not essential to assure a fair determination of the issues. The confidential informants were used only in establishing probable cause necessary for obtaining a search warrant. In the case of State v. Bankhead, 514 P.2d 800 (Utah 1973), the Supreme Court of Utah specifically held that "the courts will not compel disclosure of the identity of an informant, who has supplied probable cause for the issuance of a warrant, where disclosure is sought merely to aid in attacking probable cause." Bankhead, at 802. See also State v. Sessions, 583 P.2d 44 (Utah 1978). The State avers that defendant has not carried his burden of showing that the informant was a material witness and urges the Court to find that the trial court properly denied defendant's disclosure request.

## POINT II

THE EVIDENCE SEIZED FROM DEFENDANT'S PERSON SHOULD BE ADMITTED BECAUSE THE SEARCH OF DEFENDANT OCCURRED AFTER THERE WAS PROBABLE CAUSE TO ARREST DEFENDANT.

The State recognizes that defendant has divided his argument concerning the search and seizure into two parts in which he argues that 1) his constitutional rights were violated because the search was unreasonable, and 2) the seizure was not legitimate as part of a pat-down search. The State addresses both arguments in one point because if there was probable cause to arrest defendant at the time of the search, both the search and the subsequent seizure of the questioned items were proper.

The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Utah Constitution provide protection against unreasonable searches and seizures. Defendant submits that this protection leads to "a well established rule that a warrant authorizing the search of a premises does not extend to authorize the search of a person found on the premises." Defendant's Brief at 15. However, in State v. Banks, 720 P.2d 1380, 1383 (Utah 1986) the Supreme Court of Utah noted an important exception when they stated:

[A] person's mere presence in the company of others whom the police have probable cause to search does not provide probable cause to search that person. United States v. Di Re, 332 U.S. 581, 587, 68 S.Ct. 222, 225, 92 L.Ed. 210 (1948). Nor are police officers authorized to search an individual merely because that person is present on premises for which a search has been authorized, id., unless there is some independent probable cause to justify a search of the individual. Cf. Ybarra v. Illinois, 444 U.S. 85, 92-93 and n. 4, 100 S.Ct. 338, 342-43 and n. 4, 62

L.Ed.2d 238 (1979); United States v. Peep,  
490 F.2d 903, 905 (8th Cir. 1974).

In the case at hand, a no-knock search warrant had been issued for the residence at 8853 West Julia Lane (R. 285, p. 5). Approximately fifty minutes following the beginning of the search, defendant and two others arrived at the residence (R. 285, p. 24). Before the arrival of defendant, Deputy James Upton had found a .38 caliber pistol, some ammunition, two balloons described as "one plastic-like baggy material containing a black tar substance, one piece of cellophane which had a black tar substance on it. . . a syringe and a silver colored metal canister commonly used to transport narcotics in." (R. 285, pp. 6, 8, 11.)

Upon specific questioning, Deputy John Conforti, who subsequently searched defendant, testified that he had been made aware of the finding of the firearm before the arrival of defendant (R. 285, pp. 23-24). When asked why defendant and his two companions were searched upon entering the residence, Deputy Conforti explained that "initially the search was conducted for our own safety because we had information that there were weapons in the house and we'd already located one firearm in the house prior to their arrival." (R. 285, pp. 25-26).

According to Terry v. Ohio, 392 U.S. 1, 27 (1968), the officers were justified in performing a pat-down search for weapons in order to insure their safety. See also Adams v. Williams, 407 U.S. 143 (1972), State v. Banks, 720 P.2d 1380

(Utah 1986). Additionally, it has been written that:

the courts were willing to permit frisk of persons found in or coming to places being searched pursuant to warrant even in the absence of evidence specifically tending to connect those persons with the criminal activity under investigation. Rather, it was deemed sufficient that the criminal activity to which the search warrant relates is fairly serious and that the person frisked reasonably appears to be an acquaintance of the person in possession of the premises. As stated by one court, because "it is generally known by the police and others that those who traffic in large quantities of narcotics are often armed," the "mere presence of a person or persons in such an environment, presents that reasonable suspicion and belief, which gives rise to sufficient and legal justification to frisk all present for weapons."

LaFave, Search and Seizure, Section 4.9(d) (1982).

However, defendant does not direct his argument at the Terry weapons search; rather, he submits that the \$1,320 in currency and the 96 balloons of heroin found by the deputy during the initial search should be suppressed because the "soft object" (R. 285, p. 44) was obviously not a weapon, and any search beyond the stop and frisk was beyond that specified in the warrant to search the residence. However, in this case, the facts were such that probable cause to arrest the defendant had already arisen, and the thorough search of the defendant was thereby justified as a search incident to an arrest.

According to the issued search warrant, the purpose of the no-knock search was to find "heroin, cutting agents, weighing and packaging materials, transactions, ledgers and other related controlled substances and/or devices." (Appendix A). This warrant was granted because a controlled purchase of heroin at

that residence had established probable cause that evidence of the crime of Possession of a Controlled Substance with Intent to Distribute for Value might be found at the residence. (Appendix A). Before defendant arrived, the police had discovered a weapon, two balloons containing a black tar substance suspected to be heroin, and drug paraphernalia (R. 285, p. 6, 8, 11). Upon arriving at the home, defendant stated, "I live here, what's going on?" (R. 285, p. 25).

In a similar case, Michigan v. Summers, 452 U.S. 692 (1981), the United States Supreme Court said the search warrant of a residence implicitly carried with it the limited authority to detain the occupants of the premises in which a search was conducted. Michigan v. Summers, at 701. In that case, the police had obtained a search warrant for the premises. The police detained the owner of the residence from leaving when they began the search, and while he was still being properly detained, narcotics were discovered in the home. Id. at 693. The police then arrested the owner and in a subsequent search found an envelope of heroin on his person. Id. Justice Stevens said that "because it was lawful to require respondent to re-enter and to remain in the house until evidence establishing probable cause to arrest him was found, his arrest and the search incident thereto were constitutionally permissible." Id. at 692.

In this case, defendant was not detained at the premises before the search began. However, by the time that he arrived and identified himself as a resident of the home, sufficient evidence to establish probable cause for an arrest had been found, and defendant was properly searched.

Another inconsistency between the instant case and Michigan v. Summers is that in Summers the resident was arrested and then searched. In this case, the formal arrest was not made until after defendant had been searched and the currency and 96 balloons had also been found (T. 38). However, this concern was specifically addressed in the case of State v. Banks, 720 P.2d 1380, 1383-84 (Utah 1986). The Supreme Court of Utah stated:

A search is not invalid, despite the fact that it precedes a formal arrest, so long as the arrest and the search are substantially contemporaneous and probable cause to effect the arrest exists independent of the evidence seized in the search. E.g., Buick v. United States, 396 F.2d 912, 915 (9th Cir. 1968), cert. denied, 393 U.S. 1068, 89 S.Ct. 724, 21 L.Ed.2d 711 (1969); United States v. Thomas, 432 F.2d 120, 122 (9th Cir. 1970), cert. denied, 400 U.S. 1022, 91 S.Ct. 587, 27 L.Ed.2d 634 (1971). Prior to searching Banks and discovering the drug vial in his pocket, the officers had discovered other drugs and a loaded firearm in the immediate vicinity. Thus, the search revealing the drug vial was preceded by probable cause and was therefore a valid search incident to arrest.

In the instant case, a controlled purchase which led to the issuance of the search warrant suggested that a resident at this home had been selling heroin. When defendant arrived, he stated that he lived in the residence and demanded to know what was going on. Prior to his arrival, the officers had discovered the two balloons containing the black tar substance suspected to be heroin, drug paraphernalia, and a weapon. The combination of these facts gave Deputy Conforti, who had prepared the affidavit and led the subsequent search, reason not only to frisk defendant for weapons, but to search defendant as an expansion of the search of the residence to a search of the resident incident to probable cause for his arrest.

In the case of Boyd v. State, 621 S.W.2d 616 (Tex. Cr. App. 1981), three police officers were informed that narcotics were being sold out of a cafe. The officer surveyed the premises and observed an exchange of several small tin foil bindles for cash. Following such an exchange, the officers observed defendant in that case leave the establishment and return to his car. The defendant was stopped by the officers and two bindles were removed from the defendant's pocket. Defendant's contention was that the officers lacked probable cause to arrest him and that the evidence found, two bindles containing heroin, should have been suppressed. At trial, the police officer testified that he was familiar with the packaging of heroin and specifically stated that he was aware that heroin was commonly packaged in balloons or bindles. The court found that "[t]he observed exchanges of money for tinfoil bindles coupled with the officer's knowledge that heroin is normally packaged in tinfoil bindles was sufficient to provide probable cause to believe that an offense had been committed." Boyd v. State at 617. Therefore, the warrantless arrest was determined to be proper and defendant's motion to dismiss was denied.

In this case, Conforti's knowledge of the general situation and his specific narcotics training also support a finding of probable cause. Conforti procured the search warrant for the house and was involved in the controlled drug buy that led to the warrant (R. 285, p. 20; Appendix A). The officer had also worked in the narcotics division for seven months and during the previous two and one-half years while he had been working



vice, he was also involved in narcotics work and had participated in several drug buys--four or five involving heroin (R. 285, pp. 29-30). He further testified that the heroin had been packaged in balloons on each of these occasions (R. 285, p. 31). This knowledge is very important because it gave greater weight to the evidence that had been found prior to defendant's arrival. Conforti knew that there had been a controlled drug by at this residence, and he knew the purpose of the search of the residence--to find evidence of the possession and distribution of narcotics. Obviously, when Deputy Upton found the balloons containing the black tar substance, he suspected it of being narcotics. Otherwise, he would have had no purpose in taking it into evidentiary custody. Conforti's additional knowledge of the entire situation and his specific expertise in narcotics trafficking offered further significance to the finding. He had seen similar packaging of heroin and he was aware that heroin had been purchased from the house less than seven days earlier (R. 285, pp. 29-30; Appendix A). Therefore, when defendant arrived and announced his residence, according to the analysis of Boyd v. State, the warrantless arrest and search of defendant was appropriate based on Deputy Conforti's knowledge of the entire situation, his previous narcotics experience, and the evidence found in the residence prior to defendant's arrival.

In his Memorandum of Law in Support of defendant's Petition for Certificate of Probable Cause, defendant contends that the recent case of State v. Northrup, 83 Utah Adv. Rep. 28 (Ct. App. filed May 26, 1988) "compels the conclusion that the

the evidence seized from defendant's person was illegally seized and should have been suppressed by the trial court as demanded." (Memorandum at 2-3). In that case, following the arrest of an unwitting narcotics informant/buyer, the police received word that someone was leaving the residence in question. They quickly stopped the vehicle, but found nothing in their search of the driver. The officer, believing that the evidence (marked bills) might be destroyed, forcibly entered the residence, conducted a protective sweep of the house, patted-down the occupants, and found the money that they were looking for on one of the residents--all before obtaining a search warrant.

The Court analyzed the issue of whether or not the evidence seized in the pat-down of Northrup was properly admitted by use of the independent source analysis and the inevitable discovery doctrine. Under the independent source analysis, the Court determined that the officers had no evidence independent of their illegal entry which would have given them sufficient probable cause to assist and search Northrup. Northrup was merely a person within the home that the police illegally entered, and, without further ties, was not sufficiently connected to the evidence to establish cause for his arrest.

In the Northrup discussion of the inevitable discovery doctrine, the Court determined that without the police error, the evidence seized in the illegal pat-down search would not have been discovered. The police, in Northrup, had no specific connection to the defendant, so the search warrant, had it been obtained, would have been solely for the purpose of searching the

residence for evidence relating to the sale of the controlled substance retrieved from the unwitting buyer/informant, or, specifically, the marked bills. Since the money was on the defendant, the officers would not have found it because the search was limited to the house. Also, since the defendant could not have been specifically connected to the sale of narcotics, or the residence in question, a search of his person would have been improper. Therefore, the money would not have been inevitably discovered, and the pat-down search which followed an illegal entry was clearly "fruit of the poisonous tree."

The State submits that the factual dissimilarities between the two cases clearly distinguishes the applicability of the Northrup analysis from the issues presented here. In this case, officers were legally in the home under a valid search warrant before defendant arrived. Also before he arrived, they had found a weapon, ammunition, two balloons suspected of containing heroin, a syringe, and a canister commonly used for transporting narcotics (R. 285, p. 8). The State submits that when defendant arrived and identified himself as the resident of the house in which the evidence had been seized, the police had probable cause based on the evidence already obtained to search defendant incident to an arrest. Thus, the search was properly given, the evidence was properly obtained, and it should not now be suppressed. An analysis of the independent source theory and the inevitable discovery doctrine is unnecessary here because the entry was legal and defendant was sufficiently connected to the residence to allow for his arrest. Admittedly, it would have

been more appropriate for the officers to simply have arrested defendant prior to the search, instead of seemingly "expanding" the weapons search based on his declaration of residency; but, in the light of the presence of probable cause for arrest, and based upon the foregoing argument, this procedural variance is, at most, harmless error.

### POINT III

DEFENDANT HAD ADEQUATE COMMAND OF THE ENGLISH LANGUAGE TO FULLY UNDERSTAND THE NATURE OF HIS MIRANDA RIGHTS AND TO ENTER A VALID WAIVER THERETO.

In the landmark case of Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court held that the prosecutor may not use statements of a defendant obtained during custodial interrogation unless that defendant has been properly informed of his rights and has "voluntarily, knowingly and intelligently" waived those rights. Miranda v. Arizona, at 444. In this case, defendant had been informed of his Miranda rights to remain silent, to have an attorney retained or appointed, and was further informed that anything he said could be used against him (R. 285, p. 35). Defendant does not suggest that the Miranda warnings were not given; rather, defendant contends that he "could not speak English well enough to understand the nature of his Miranda rights, nor to enter valid waiver thereto." (Defendant's Brief at 30). Defendant further points to a statement of the United States Court of Appeals for the Ninth

Circuit in the case of United States v. Martinez, 588 F.2d 1227, 1235 (9th Cir. 1978) which reads:

We assume without so holding that if Miranda warnings are given in a language which the person being so instructed does not understand, a waiver of those rights would not be valid. . . .

However, the State submits that in the instant case defendant gave ample evidence that he not only understood the warnings, but he knowingly and intelligently made decisions based on those warnings to initially remain silent and then to personally initiate further conversation with the deputy who had given him the warning.

In the case of State v. Bueno, 499 So.2d 362 (La. Ct. App. 1986), the defendant claimed that he did not knowingly and intelligently waive his Miranda rights because "the rights were given to him in English which was his second language." State v. Bueno, at 363. However, the Court of Appeal of Louisiana in the Fourth Circuit found that evidence that the defendant could speak, write, and understand English overcame the claim that defendant did not knowingly and intelligently waive his Miranda rights because they were given to him in English, which was his second language. Id. at 362. Specifically, the Louisiana court pointed to the testimony of the defendant's sister, who said that he could speak English and had written her letters in that language; the fact that even when the rights were later read to him in Spanish, he continued to affirm his understanding in spoken English; and the fact that during the entire interrogation the defendant never indicated that he did not understand English

and the officers had no difficulty in understanding him. Id. at 364.

In the present case, there is no hard evidence of the fact as to whether defendant can read or write in English; however, there is an abundance of testimony that defendant easily conversed in English during the interrogation which took place on January 15, 1986 at the time of the search of the residence. First, Officer John Conforti testified that at the time defendant entered the home, defendant's initial exclamation, "I live here. What's going on?", was in English, and that all further conversation remained in that language (R. 285, p. 25). Upon being further questioned as to whether defendant spoke in "broken English," Officer Conforti asserted, "No, he spoke very well but with a Spanish accent." (R. 285, p. 41). The officer also testified that he conversed with defendant for a total of about one hour, all responses were in English, and defendant never gave any indication that he had trouble understanding (R. 285, p. 48-49).

A second officer, Deputy Mike Julian, also testified that he heard defendant speaking English for "quite sometime. Off and on when I was going throughout the home" (R. 285, p. 71). When asked on recross examination if what he heard was "broken English," Deputy Julian stated, "it was fairly plain to me. It was understandable." (R. 285, p. 73). Another officer also testified that defendant had been heard speaking unbroken understandable English (R. 285, p. 55-56).

Concerning the events directly surrounding the time when defendant was given his Miranda warnings, Officer Conforti testified as follows:

Q: And where was that that you gave him Miranda?

A: It was in the upstairs rear bedroom.

Q: Did you inquire as to whether or not he understood English?

A: Yes I did.

Q: And what was his response as far as that?

A: He stated that he spoke English and we had briefly conversed earlier.

Q: The rights that you gave him under Miranda what did he say in reference to those?

A: He stated that he understood them, but that he did not wish to answer questions at that time.

Q: After he made that statement to you did you pursue any further questioning with him?

A: Not at that time no.

Q: Did there come a point in time where he returns to talk to you?

A: Uh yes he asked to speak to me yes.

Q: When was that after you had given him Miranda?

A: It was about five minutes later.

(R. 163).

Although this testimony strongly suggests that defendant both understood his Miranda rights and could easily converse in the English language, in his testimony in connection with defendant's motions to clarify Court's ruling on suppression

of evidence, defendant asserted that on the night in question he was afraid for his life and he tried to use what little English he knew because he recognized the police as being Americans and assumed that no one spoke Spanish (R. 284, p. 12). The substance of defendant's testimony then is that although defendant could speak only very simple English (R. 284, p. 10), his initial exclamation and all conversations thereafter took place in English. He also directly answered Officer Conforti that he understood English and continued to speak in such a manner that all of the officers who testified denied that he was speaking "broken English." Furthermore, defendant was able to do this even though he admittedly feared for his life. In contrast, the officers found that defendant's companion, Mr. Villalobas did not speak English, and Mr. Contreras was also only Spanish-speaking (R. 285, p. 55, 67). The testimony is conflicting as to whether Mr. Medina or both he and defendant were used as translators (R. 285, p. 55, 67).

In his brief, defendant points to the case of United States v. Beltran, 761 F.2d 1 (1st Cir. 1985) (Defendant improperly cites this case as United States v. Elles-Martinez) as support of his contention that defendant should have been offered his Miranda warnings in Spanish. Defendant states that "even though some members of the crew knew some words of English, the government agents dealing with the defendants realized that in order to obtain a valid waiver, the defendants must be informed of their rights in Spanish." (Defendant's Brief at 31). However, the instant case is clearly distinguishable. In



Beltran, Spanish was the only language spoken by the crew aboard the Panamanian-registered vessel. In this case it has been clearly established that defendant was not limited to one language and the argument simply concerns the proficiency of his understanding of English.

Defendant seems to confuse the facts of Beltran with another case, United States v. Martinez, 588 F.2d 1227 (9th Cir. 1978), in which the Ninth Circuit Court of Appeals ruled that the reading of the Miranda warnings with a Mexican accent to defendants who had a Cuban accent did not render the warnings inadequate. United States v. Martinez, at 1227. In that case, the Court pointed out that although the defendant claims to not have understood the officer who read the warnings, he continued to converse with him. Id. at 1235. A similar situation occurred in the case at hand. Although defendant claims not to have understood the warnings, and had an allegedly limited English vocabulary, he still returned to the officer to question him concerning the charges and possible penalties that were facing him (R. 283, p. 43, R. 163).

The State submits that the evidence clearly points to the conclusion that defendant could, in fact, understand English with a proficiency that allowed him to comprehend and act upon the Miranda warnings given him. He conversed in English, he told the officer that he understood English, and at no time did he offer any signs that he needed the information given to him in Spanish. Surely the simple fact that a person speaks with an accent, although the English is understandable, is not enough to

require that a translator must be employed. Further, the fact that defendant chose silence following the reading of the Miranda warnings, and then personally initiated a further dialogue with Officer Conforti suggests that he understood the rights and then reconsidered his options, although he was informed of the opportunity for counsel.

Miranda simply requires that a waiver be voluntarily, knowingly, and intelligently given. There is no evidence of coercion on the part of the police; defendant admittedly approached Officer Conforti and directed an inquiry to him (R. 283, p. 43, R. 163). As for whether defendant's waiver was intelligent, in State v. McKnight, 243 A.2d 240 (N.J. 1968), where the defendant had previously been given his Miranda warnings, the Supreme Court of New Jersey stated that "[i]t is irrelevant that the prisoner, so advised, chooses to speak without counsel because he misconceives his need for aid or the utility of a lawyer." State v. McKnight, at at 247. In this case, although no interpreter was obtained, defendant was apprised of his rights, and he voluntarily waived those rights when he chose to approach the officer and inquire further into the matter without the assistance or advice of counsel.

#### POINT IV

STATEMENTS MADE BY DEFENDANT AFTER HE INVOKED  
HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT  
WERE PROPERLY ADMITTED FOR IMPEACHMENT  
PURPOSES.

In a minute entry dated September 23, 1987, the Honorable Homer F. Wilkinson ruled on defendant's motion to clarify court's ruling on suppression of evidence and stated that

"the testimony Ayala volunteered is admissible but the testimony obtained as he was interrogated in the police car is not admissible." (R. 207). The State concedes that in accordance with this ruling, defendant's statements in response to further police questioning after invocation of his right to silence were inadmissible as part of the State's case in chief. Although, as defendant points out in his brief, Officer Conforti's questioning of defendant following defendant's invocation of his right to silence appears in the record of the preliminary hearing, which was attached to defendant's motion to clarify, no such statements were elicited from Officer Conforti during the trial, and error was thereby avoided. Argument on this point is therefore unnecessary.

However, at trial, Deputy Labrum was questioned extensively concerning statements made to him by defendant during an illegal post-Miranda interrogation (R. 283, pp. 87-104). These statements were not produced for the State's case in chief; rather, they were submitted for impeachment purposes in conjunction with specific statements made by defendant during his testimony. On direct examination, defendant testified as follows:

Q: Mr. Ayala, have you ever sold heroin to anybody?

A: No.

. . .

Q: No. Did you ever help anyone else who lived at this house sell heroin?

A: No.

. . .

Q: Was any of the money found inside the house by the police your money, inside the house?

A: No. It was in the kitchen.

Q: I believe that's what the policeman testified.

A: I would have never left it in the kitchen.

(R. 283, pp. 51-52).

The State questioned officer Labrum as to statements made to him by defendant, although illegally post-Miranda, that were in direct opposition to defendant's proffered statements. Officer Labrum testified that defendant stated that he had been selling dope and had acquired approximately \$15,000 (R. 283, p. 90).

Assuming that defendant's statements were inadmissible in the State's case in chief under the Fifth Amendment, this Court may still find that it was not error to admit them in this case. Confessions obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966) have long been held admissible for impeachment purposes. Harris v. New York, 401 U.S. 222 (1971); Oregon v. Haas, 420 U.S. 714 (1975); United States v. Bowers, 593 F.2d 376, 379-80 (10th Cir. 1979). This principle was recently reaffirmed in Oregon v. Elstad, 470 U.S. 298, 307 (1984). The policy underlying these decisions is that a defendant should not be allowed to use the illegal method by which evidence was obtained as "a shield against contradictions of his untruths." Walder v. United States, 347 U.S. 62, 65 (1954). While a

defendant is privileged to testify in his own defense, the privilege does not include a right to commit perjury. Harris, 401 U.S. at 225. For these reasons, the testimony of Officer Labrum which directly contradicted statements and denials made by defendant in direct examination were properly admitted, although those statements were improperly obtained through post-Miranda interrogation. Statements beyond this scope, although mentioned in defendant's brief, were not elicited at trial. (See Defendant's Brief at 38; R. 283, p. 102).

In addition, defendant argues that the jury was not properly instructed that his unmirandized statements could not be used for purposes of determining guilt and were only admissible for the purpose of impeachment. However, at the conclusion of the trial, the court stated:

I ask you to get together with the reporter and put your exceptions on the record. You may do it prior to the jury returning. Otherwise you will have waived all rights to any exceptions.

(R. 283, p. 116.) In response, defendant took exception to two instructions concerning possession of narcotics, but made no reference to the need of a jury instruction concerning the non-Mirandized statements (R. 283, p. 116). In addition, no such instruction was offered in defendant's request for jury instructions (R. 215-217). Rule 19 of the Utah Rules of Criminal Procedure states:

(c) No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure

to object, error may be assigned to instructions in order to avoid a manifest injustice.

Utah Code Ann. § 77-35-19(c) (1953 as amended). In State v. Valdez, 19 Utah 2d 426, 432 P.2d 53 (1967) the defendant therein appealed his conviction of assault with a deadly weapon on the ground that the trial court erred in failing to instruct the jury on the lesser and included offense of simple assault. This Court, in upholding the defendant's conviction, stated:

As a general rule the trial court should submit to the jury included offenses where the evidence would justify such a verdict. But like all general rules, there are exceptions and it may depend on the circumstances. In this case there was no request, either written or oral, for an instruction on the lesser offense of assault. We say this advisedly after having examined the statements of counsel which defendant now argues should be deemed sufficient to constitute a request. If the defendant had desired that procedure, it was his duty to submit a proper request in writing, or at least to clearly indicate to the court orally that such was his desire.

432 P.2d at 54 (emphasis added). In State v. Kazda, 545 P.2d 190 (Utah 1976), a defendant convicted of the theft of copper wire claimed error on the ground that the trial court failed to instruct the jury that an honest mistake of fact constituted a defense to the charge of theft. This Court, while agreeing that an honest mistake of fact was indeed a defense to a charge of theft, held that the failure of the defendant to submit a written request for such an instruction or to take oral exception to the instructions given precluded the defendant from asserting as

error the failure of the trial court to so instruct the jury. In so holding, the Court noted:

There is an important purpose to be served by the rule requiring that objections be made to the instructions. It gives an opportunity for the court to correct, or to fill in any inadequacy in the instructions, so that the jury may consider the case on a proper basis. In order to accomplish that purpose, the rule should be adhered to. Accordingly, the standard rule is that when a party fails to make a proper objection to an erroneous instruction, or to present to the court a proper request to supply any claimed deficiency in the instructions, he is thereafter precluded from contending error. . . .

545 P.2d at 193 (footnotes omitted).

As noted above, Utah Code Ann. § 77-35-19(c) (1953 as amended) provides that "error may be assigned to instructions in order to avoid a manifest injustice." The Utah Supreme Court has held in civil cases that the burden of showing special circumstances which could warrant a departure from Rule 51 of the Utah Rules of Civil Procedure<sup>1</sup> precluding consideration of

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<sup>1</sup> Rule 51, Instructions to Jury; Objections:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in said requests. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions; unless the parties stipulate that such instructions may be given orally, or otherwise waive this requirement. If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider

alleged errors concerning instructions, in the absence of objection thereto, rests on the party seeking to vary it. McCall v. Kendrick, 2 Utah 2d 364, 274 P.2d 962 (1954):

Normally the rules themselves must govern procedure and are to be followed unless some persuasive reason to the contrary invokes the discretion of the Court to extricate a person from a situation where some gross injustice or inequity would otherwise result. The burden of showing special circumstances which would warrant a departure from the rule rests upon the party seeking to vary it. . . .

274 P.2d at 963 (footnote omitted). While McCall is a civil case, its analysis of the application of Rule 51 can properly be considered in a criminal appeal. Defendant has pointed to no special circumstances in his case which would warrant this Court's departure from Rule 19, and indeed the record in this case is void of any such "special circumstances."

Defendant's failure to make his request for an instruction concerning Utah Code Ann. § 77-35-19(c) in writing, his apparent waiver of his oral request for such an instruction, defendant's failure to take exception to the trial court's failure to so instruct, and his failure to point to "special

1 Cont.

its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court in its discretion and in the interests of justice, may review the giving or failure to give an instruction. Opportunity shall be given to make objections, and they shall be made, out of the hearing of the jury. . . ."



circumstances" which would warrant a departure from the requirements of Rule 19, preclude defendant from asserting error on appeal.

#### POINT V

DEFENDANT'S STATEMENTS WERE ALLOWABLE BECAUSE THEY WERE VOLUNTEERED UNDER A PROPER WAIVER OF FIFTH AMENDMENT PRIVILEGES, WERE ADMITTED FOR LIMITED IMPEACHMENT PURPOSES, OR, WERE SUPPRESSED ACCORDING TO THE RULING ON DEFENDANT'S MOTION TO CLARIFY COURT'S RULING ON SUPPRESSION OF EVIDENCE.

The State submits that based on the foregoing arguments in Points II, III, and IV, any statements made by defendant that were admitted during the trial phase of this proceeding were properly entered because they represent volunteered statements, knowingly and intelligently given following Miranda warnings; or the statements were admitted for the limited use of impeachment. Any other statements were effectively suppressed in accordance with the Court's minute entry of September 23, 1987 (R. 207). The State further submits that defendant's "fruit of the poisonous tree" argument is answered by State's Argument, Point I, in that the search was proper as a search incident to probable cause to arrest.

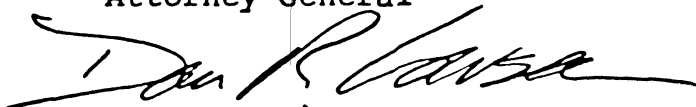
#### CONCLUSION

Based upon the foregoing arguments, the State respectfully requests that the Court affirm defendant's

conviction of Unlawful Possession of a Controlled Substance with Intent to Distribute for Value, a second degree felony.

RESPECTFULLY submitted this 11<sup>th</sup> day of July, 1988.

DAVID L. WILKINSON  
Attorney General



DAN R. LARSEN  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Larry R. Keller, attorney for defendant, 257 Towers, Suite 340, 257 East 200 South - 10, Salt Lake City, Utah 84111, this 11<sup>th</sup> day of July, 1988.



## APPENDICES

## APPENDIX A

T.L. "TED" CANNON  
County Attorney  
By: MICHAEL J. CHRISTENSEN  
Deputy County Attorney  
Courtside Office Building  
231 East 400 South, 3rd Floor  
Salt Lake City, Utah 84111  
Phone: (801) 363-7900

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IN THE FIFTH CIRCUIT COURT, SALT LAKE DEPARTMENT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH                    )  
                                      ): ss  
County of Salt Lake        )

AFFIDAVIT FOR SEARCH WARRANT

BEFORE: ~~THOMAS C. McCleave~~                   450 South 2nd East  
          Eleanor Van Siver                   ADDRESS  
JUDGE

The undersigned affiant being first duly sworn, deposes and says:

That he has reason to believe

That     (X) on the premises known as 8853 Julia Lane (3255 South),  
          yellow brick, yellow wood on front. White siding on  
          sides and a split entry.

In the City of Salt Lake, County of Salt Lake, State of Utah, there  
is now certain property or evidence described as:

Heroin, cutting agents, weighing and packaging materials, transaction  
ledgers and other related controlled substances and/or devices.

and that said property or evidence:

- (X) was unlawfully acquired or is unlawfully possessed;
- (X) has been used to commit or conceal a public offense;
- (X) is being possessed with the purpose to use it as a means  
of committing or concealing a public offense;
- (X) consists of an item or constitutes evidence of illegal  
conduct, possessed by a party to the illegal conduct;
- (X) consists of an item or constitutes evidence of illegal  
conduct, possessed by a person or entity not a party to  
the illegal conduct. [Note requirements of Utah Code  
Annotated, 77-23-3(2)]

Affiant believes the property and evidence described above is  
evidence of the crime(s) of POSSESSION OF CONTROLLED SUBSTANCE WITH  
INTENT TO DISTRIBUTE FOR VALUE.

PAGE TWO  
AFFIDAVIT FOR SEARCH WARRANT

The facts to establish the grounds for issuance of a Search Warrant are:

Your affiant, a detective with the Salt Lake County Sheriff's Narcotics Unit states:

Your affiant made arrangements for a Confidential Informant to make a controlled drug buy at the residence of 8853 Julia Lane, Salt Lake County. The C.I. was given a body search by detectives of the Narcotics Unit, under the direction of your affiant. No controlled substances or U.S. currency were found. Your affiant then gave the C.I. a predetermined amount of money.

Within the last seven (7) days the C.I. was transported to the area of 8853 Julia Lane. The C.I. was observed entering the residence and exit it a short time later; times being recorded by your affiant. The C.I. was never out of the visual contact (except for when inside the residence of 8853 Julia Lane) of the affiant and other detectives. The C.I. turned over to your affiant a quantity of heroin that the C.I. stated had been purchased inside the residence. The heroin was field tested and flashed positive by use of the Dectin-Dickinson Field Test Kit. The C.I. was again given a complete body search and no controlled substances or U.S. currency were found.

Your affiant considers the information received from the confidential informant reliable because (if any information is obtained from an unnamed source)

#2

Another C.I. has stated that drugs, specifically heroin, is and has been sold out of the residence of 8853 Julia Lane for some time.

WHEREFORE, the affiant prays that a Search Warrant be issued for the seizure of said items:

- (X) at any time day or night because there is reason to believe it is necessary to seize the property prior to its being concealed, destroyed, damaged, or altered, or for other good reasons, to-wit:

It is further requested that (if appropriate) the officer executing the requested warrant not be required to give notice of the officer's authority or purpose because:

- (X) physical harm may result to any person if notice were given; or
- (X) the property sought may be quickly destroyed, disposed of, or secreted.

PAGE THREE  
AFFIDAVIT FOR SEARCH WARRANT

This danger is believed to exist because:

Another C.I. (4. #2) has seen on different occasions weapons inside the residence and knows that a handgun is inside the residence.

[Signature]  
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME this 12<sup>th</sup> day of January, 1986.

[Signature]  
JUDGE IN THE FIFTH CIRCUIT COURT,  
IN AND FOR SALT LAKE COUNTY, STATE  
OF UTAH

## APPENDIX B



T.L: "TED" CANNON  
County Attorney  
By: MICHAEL J. CHRISTENSEN  
Deputy County Attorney  
Courtside Office Building  
231 East 400 South, 3rd Floor  
Salt Lake City, Utah 84111  
Phone: (801) 363-7900

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IN THE FIFTH CIRCUIT COURT, SALT LAKE DEPARTMENT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

SEARCH WARRANT

No. \_\_\_\_\_

COUNTY OF SALT LAKE, STATE OF UTAH

To any peace officer in the State of Utah.

Proof by Affidavit under oath having been made this day before me by John Conforti - Salt Lake County Sheriff's Narcotics Division, I am satisfied that there is probable cause to believe

That (X) on the premises known as 8853 Julia Lane (3255 South), yellow brick, yellow wood on front. White siding on sides and a split entry.

In the City of Salt Lake, County of Salt Lake, State of Utah, there is now certain property or evidence described as:

Heroin, cutting agents, weighing and packaging materials, transaction ledgers and other related controlled substances and/or devices.

and that said property or evidence:

- (X) was unlawfully acquired or is unlawfully possessed;
- (X) has been used to commit or conceal a public offense;
- (X) is being possessed with the purpose to use it as a means of committing or concealing a public offense;
- (X) consists of an item or constitutes evidence of illegal conduct, possessed by a party to the illegal conduct;
- (X) consists of an item or constitutes evidence of illegal conduct, possessed by a person or entity not a party to the illegal conduct. [Note requirements of Utah Code Annotated, 77-23-3(2)]

Affiant believes the property and evidence described above is evidence of the crime(s) of POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE FOR VALUE.

PAGE TWO  
SEARCH WARRANT

to make a search of the above-named or described person(s), vehicle(s), and premises for the herein-above described property or evidence and if you find the same or any part thereof, to bring it forthwith before me at the Fifth Circuit Court, County of Salt Lake, State of Utah, or retain such property in your custody, subject to the order of this court.

GIVEN UNDER MY HAND and dated this 14<sup>th</sup> day of January, 1986.

  
JUDGE OF THE FIFTH CIRCUIT COURT