

2009

## Utah v. Clay Lowe : Brief of Appellee

Utah Court of Appeals

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Attorney for Appellant; Sheldon R. Carter.

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Case No. 20090149

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IN THE  
UTAH COURT OF APPEALS

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State of Utah,  
Plaintiff/ Appellee,

vs.

Clay Lowe,  
Defendant/ Appellant.

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Brief of Appellee

---

Appeal from conviction for possession of methamphetamine, in the  
Fourth Judicial District Court of Utah, Utah County, the Honorable  
Claudia Laycock presiding.

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Oral argument requested

FILED  
UTAH APPELLATE COURTS

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Case No. 20090149

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State of Utah,  
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Oral argument requested

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Case No. 20090149

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IN THE  
UTAH COURT OF APPEALS

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State of Utah,  
Plaintiff/ Appellee,

vs.

Clay Lowe,  
Defendant/ Appellant.

---

Brief of Appellee

---

STATEMENT OF JURISDICTION

Defendant appeals from a conviction for possession of methamphetamine, a third degree felony. This Court has jurisdiction under UTAH CODE ANN. § 78A-4-103(2)(e) (West 2008).

STATEMENT OF THE ISSUE

Did the trial court correctly rule that the officer's protective search for weapons was lawful?

*Standard of review.* The appellate court reviews for clear error the factual findings underlying a trial court's decision to grant or deny a motion to suppress. *State v. Krukowski*, 2004 UT 94, ¶ 11, 100 P.3d 1222. The trial court's legal conclusions are reviewed non-deferentially for correctness, including its application of the legal standard to the facts. *State v. Brake*, 2004 UT 95, ¶ 12, 103 P.3d 699.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. CONST. Amend. 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.

## STATEMENT OF THE CASE

Defendant was charged with possession of methamphetamine, a third degree felony, in violation of UTAH CODE ANN. § 58-37-8(2)(a)(i) (West 2004). R1. Defendant moved to suppress the methamphetamine, which was seized pursuant to a warrantless search. R44-37, 82-64. Following oral argument on the motion, the trial court denied the motion in a written ruling. R98-95 (a copy is attached in addendum A). Pursuant to a plea bargain agreement, Defendant pled guilty on the condition that he could appeal the trial court's ruling. R106; *see also* R102. The trial court imposed the statutory prison term of from zero to five years. R131-30. The trial court then stayed imposition of the prison term and placed Defendant on a 36-month term of probation. *Id.* Defendant filed a timely notice of appeal. R168.

## STATEMENT OF THE FACTS

The trial court adopted the facts as set forth in the State's Memorandum in Opposition to Defendant's Motion to Suppress. *See* R97; *see also* R60-58 (copies are attached in the addendum).

1. On February 24, 2008, Utah County Sheriff's Deputy Deke Taylor made contact with Timothy Lamoreaux at the defendant's residence, intending to question [Lamoreaux] as to the whereabouts of a fugitive with whom Lamoreaux was believed to associate.
2. As Deputy Taylor approached the defendant's apartment, Lamoreaux was standing in an outside doorway. When Deputy Taylor identified himself, Lamoreaux placed his left hand in his pocket. Deputy Taylor ordered Lamoreaux to keep his hands where he could see them and to come out of the doorway, but Lamoreaux refused and then reached into his right front pants pocket. Taylor again ordered Lamoreaux to keep his hands visible, but Lamoreaux did not comply. As a result of Lamoreaux's failure to comply with the order to keep his hands out of his pockets, Deputy Taylor pulled Lamoreaux out of the doorway and onto the ground. Deputy Taylor then searched Lamoreaux and found a butterfly knife with a six-inch blade in his right front pants pocket. Lamoreaux's possession of the knife was illegal because he is a category-two restricted person.
3. Just after Deputy Taylor forced Lamoreaux to the ground, Provo Police Officer Troy Morgan arrived, having been dispatched to assist with a warrant service. Officer Morgan heard Deputy Taylor yelling as he approached the area. When he arrived, he saw Deputy Taylor with his gun out, one individual on the ground and at least one other individual (the defendant herein) present and unrestrained. Officer Morgan accordingly made contact with the defendant. As he did so, Deputy Taylor was removing the knife from Lamoreaux's pants pocket. At that moment, the defendant "turned into" Officer Morgan,



immediately causing Officer Morgan to suspect that the defendant also had a weapon and to fear for his safety.<sup>[1]</sup>

4. Officer Morgan performed a *Terry* frisk on the defendant's outer clothing, noticing a hard cylindrical object in defendant's left front pocket. Although Officer Morgan did not believe the object was a gun, he was concerned that he was feeling the handle of a knife. Because he could not readily determine whether the object was a weapon, Officer Morgan removed the object from the defendant's pocket. As he removed the object, a baggie containing a crystal substance also fell out of the defendant's pocket. At this point, Officer Morgan saw that the object was a prescription medication bottle, and this initial impression of the baggie was that it contained methamphetamine.

5. The crystal substance field tested positive for methamphetamine and weighed 1.16 grams. The defendant admitted buying the methamphetamine from Lamoreaux just before officers arrived.

R60-58.

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<sup>1</sup> Officer Morgan testified at the preliminary hearing that he received a call from "dispatch to assist . . . with a possible warrants service." R172:5. Dispatch advised "that the officers on the scene wanted us to park short, and to walk into the location, due to the individual that they were going make contact with has a flight risk, and is also a violent person, and will resist officers at the scene." *Id.* at 5-6. As Officer Morgan approached the scene, he heard "an officer yelling, 'Stop resisting. Show me your hands. Get on the ground,' several times " *Id.* at 6. Officer Morgan believed the officer yelling "was in some sort of trouble, that he was being fought with." *Id.* Officer Morgan was immediately concerned for officer safety and ran toward the sound of the melee, where he saw Defendant standing about four or five feet away, with his hands up. *Id.* at 7. Defendant stood between Officer Morgan and Lamoreaux, who was on the ground, and Deputy Taylor. *Id.* Deputy Taylor was holding both Lamoreaux and Defendant at gunpoint. *Id.* at 14; *see also id.* at 17 (affirming Deputy Taylor was attempting to control Lamoreaux with one hand while holding a gun on Defendant with his other hand).

Based on these findings, the trial court ruled that under the totality of the circumstances, Officer Morgan was justified in performing a weapons frisk on Defendant. R97. Specifically, Officer Morgan heard Deputy Taylor yelling as he approached, and upon arriving at the scene, saw Deputy “Taylor with his gun out, Defendant with his hands in the air, and Lamoreaux not complying.” *Id.* Moreover, at the same moment that Deputy Taylor discovered a butterfly knife on Lamoreaux, Defendant made a 180 degree turn toward Officer Morgan. *Id.* The trial court thus concluded that Officer Morgan was justified in fearing that Defendant may also have a knife, or that he may be armed and dangerous. *Id.* Finally, the trial court ruled that the methamphetamine fell from Defendant’s pocket when, after Officer Morgan patted what he reasonably believed “could be a knife handle,” he retrieved the object only to find that it was a pill bottle. *Id.*

### SUMMARY OF THE ARGUMENT

A protective weapons search is justified where the facts and circumstances known to the officer, together with the reasonable inferences drawn by the officer based on his or her experience and training, give rise to a reasonable belief that the suspect may be armed and dangerous. The trial court correctly concluded that Officer Morgan’s protective weapons search of Defendant was supported by reasonable suspicion. Officer Morgan was dispatched to Defendant’s residence to

assist Deputy Taylor, who was attempting to talk to Lamoreaux, who was known to be a violent person. As Officer Morgan approached the residence, he heard Deputy Taylor yelling, and saw the deputy attempting to control Lamoreaux with one hand while holding a gun on Defendant with his other hand. Moreover, at the same time Deputy Taylor discovered a butterfly knife on Lamoreaux's person, Defendant, who was standing between Deputy Taylor and Officer Morgan, turned 180 degrees into Officer Morgan, causing to him to be concerned that Defendant may also have a knife. These facts and the reasonable inferences therefrom combined to create reasonable suspicion that Defendant, like Lamoreaux, was armed and dangerous.

## ARGUMENT

### **OFFICER MORGAN'S PROTECTIVE SEARCH FOR WEAPONS WAS LAWFUL**

The sole question on appeal is whether the facts known to Officer Morgan justified a weapons search of Defendant's person. The trial court concluded that they did:

I find that under the totality of the circumstances, with the other officer there, having had a gun raised, holding the two men at bay, for all [Officer Morgan] knew, and eventually taking Mr. Lamoreaux to the ground and finding indeed a weapon that Mr. Lamoreaux seemed to be hiding, and then the movement of [Defendant] at that same time, turning 180 degree at a point where he had his hands in the air – and I think that can possibly cut both ways. He's got his hands in the air because he's got a gun pointed at him at some point, but also it puts

him in a position as he turns on the officer to do something with those hands that are in the air.

R181:17; *see also* R98-97. The trial court's conclusion was correct. Accordingly, this Court should affirm Defendant's conviction.<sup>2</sup>

In *Terry v. Ohio*, 392 U.S. 1, 30, 24 (1968), the United States Supreme Court held that where an officer has reason to believe that a lawfully detained person "may be armed and presently dangerous," the officer may "conduct a carefully limited search of the [person's] outer clothing" to determine "whether the person is in fact carrying a weapon." *Accord State v. Warren*, 2003 UT 36, ¶ 13, 78 P.3d 590. A protective frisk may not be based on an "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 27; *accord Warren*, 2003 UT 36, at ¶ 14. The officer must have "some minimal level of objective justification." *INS v. Delgado*, 466 U.S. 210, 217 (1984). Indeed, the officer "must be able to point to specific facts which, considered with rational inferences from those facts," give rise to a reasonable belief

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<sup>2</sup> Defendant cites to both the state and federal constitutions, but he engages in no state constitutional analysis. *See* Aplt. Br. at 2, 4, 9-10. His reliance on the state constitution is thus nominal. *See Brigham City v. Stuart*, 2005 UT 13, ¶ 14, 122 P.3d 506 (Utah 2005) ("[W]e are resolute in our refusal to take up constitutional issues which have not been properly preserved, framed, and briefed"), *overruled on other grounds*, 547 U.S. 398 (2006); *see also State v. Lafferty*, 749 P.2d 1239, 1248 n.5 (Utah 1988) ("As a general rule, we will not engage in state constitutional analysis unless an argument for different analyses under the state and federal constitutions is briefed.").

that the person may be presently armed or may gain immediate control of a weapon. *Warren*, 2003 UT 36, at ¶ 14 (citing *Terry*, 392 U.S. at 30). In assessing reasonable suspicion, officers may “draw upon their own experience and training to make determinations based on the cumulative facts before them that may elude an untrained person.” *Id.* (citing *United States v. Arvizu*, 534 U.S. 266, 273 (2002)).

In determining whether a particular protective search was justified, the overarching question is “whether ‘the facts available to the officer at the moment of . . . the search, “warrant a [person] of reasonable caution in the belief” that the action taken was appropriate.’” *Warren*, 2003 UT 36, at ¶ 14 (quoting *Terry*, 392 U.S. at 21-22) (internal citation omitted). In other words, the search must be judged against an objective standard, based on the totality of the circumstances. *Id.* at ¶¶ 14, 16. “Courts must . . . avoid the temptation to divide the facts and evaluate them in isolation from each other.” *Warren*, 2003 UT 36, at ¶ 14 (citing *Arvizu*, 534 U.S. at 274). Instead, they “must view the articulable facts in their totality.” *Id.* And although the review court applies an objective standard, it must give “due weight to the specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience.” *Terry*, 392 U.S. at 27; accord *Warren*, 2003 UT 36, at ¶¶ 20-21 (recognizing that “an officer’s own evaluation of the circumstances,” based on his or her training and experience, “factor[s] into the objective analysis”).

Here, the totality of the circumstances support that Officer Morgan was justified in performing the protective search of Defendant's person. As found by the trial court, Deputy Taylor wanted to talk to Lamoreaux, who was standing in an outside doorway, about a fugitive with whom Lamoreaux was believed to associate. R59. However, when Deputy Taylor identified himself and attempted to initiate the voluntary encounter, Lamoreaux placed his left hand in his pocket. R59; *see also State v. Adams*, 2007 UT App 117, ¶ 10, 158 P.3d 1134 ("A level one encounter is a voluntary encounter during which a citizen may choose to answer a police officer's questions but is free to leave at any time during the questioning"). The deputy "ordered Lamoreaux to keep his hands where he could see them and to come out of the doorway, but Lamoreaux refused and then reached into his right front pants pocket." *Id.* "[Deputy] Taylor again ordered Lamoreaux to keep his hands visible, but Lamoreaux did not comply." *Id.* Given Lamoreaux's threatening behavior, and fearing for his safety, Deputy Taylor pulled Lamoreaux from the doorway and to the ground. *Id.*; *see also* R97. Because a person of reasonable caution would be concerned for his safety in this circumstance, a weapons frisk of Lamoreaux's person was justified. *See Terry*, 392 U.S. at 21-22 (officer action reasonable where facts "warrant a man of reasonable caution in the belief that the action taken was

appropriate”). That frisk revealed a butterfly knife with a six-inch blade in Lamoreaux’s right front pants pocket. R59.

Almost simultaneously with the discovery of the butterfly knife on Lamoreaux’s person, Officer Morgan came on the scene. Officer Morgan knew that Lamoreaux was a dangerous person, and that Deputy Taylor was attempting to talk to him at Defendant’s residence. *See* R172:5-6; *see also* R59. As Officer Morgan approached, he heard Deputy Taylor yelling repeatedly to Lamoreaux, ““Stop resisting. Show me your hands. Get on the ground.”” R172:6. As he got closer, Officer Morgan saw Deputy Taylor attempting to control Lamoreaux, who was on the ground, with one hand while holding a gun on Defendant with his other hand. *Id.* at 6-7. Moreover, as found by the trial court, at the same time Deputy Taylor discovered the butterfly knife on Lamoreaux’s person, Defendant, who was standing between the officers, turned 180 degrees into Officer Morgan, causing to him to be concerned that Defendant may also have a knife. R97; *see also* R59. Finally, even though Defendant and Lamoreaux were discovered outside Defendant’s house, rather than inside a “relatively small automobile,” an objectively reasonable person could have concluded that they were “engaged in a common enterprise . . . and ha[d] the same interest in concealing the fruits or the evidence of [any] wrongdoing.”” *Maryland v. Pringle*, 540 U.S. 366, 373 (2003) (*quoting Wyoming*

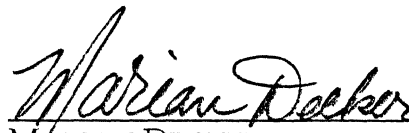
*v. Houghton*, 526 U.S. 295, 304-05 (1999)). Given these facts, and the reasonable inferences therefrom, the trial court properly ruled that Officer Morgan had reasonable suspicion that Defendant, like Lamoreaux, was armed and dangerous.

### CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted 29 October 2009.

MARK L. SHURTLEFF  
Utah Attorney General

  
\_\_\_\_\_  
MARIAN DECKER  
Assistant Attorney General  
Counsel for Appellee

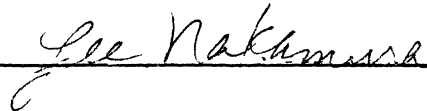


## CERTIFICATE OF SERVICE

I certify that on November 16, 2009, two corrected copies of the foregoing  
brief were ☒ mailed ☐ hand-delivered to:

Shelden R. Carter  
3325 North University Ave., Suite 200  
Provo, Utah 84604

A digital copy of the brief was also included: ☐ Yes ☒ No

  
\_\_\_\_\_

# Addendum

FILED

NOV 18 2008

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STATE OF UTAH

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

STATE OF UTAH,  Plaintiff,  vs.  CLAY LOWE,  Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (Regarding Defendant's Motion to Suppress)  Case No. 081400641  Judge: Claudia Laycock
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Oral Argument on the Defendant's motion to suppress evidence in this matter was held on August 20, 2008. The Court made its ruling at that time in open court. Plaintiff appeared through and was represented by Deputy Utah County Attorney Julia Thomas. Defendant appeared in person and was represented by Sheldon Carter. The court reviewed the memoranda of law filed by Defendant and Plaintiff, heard oral arguments from both parties, and sought clarification directly from counsel. Now, being fully advised in the premises and legal issues, the Court enters the following factual findings, conclusions of law, and order regarding the Defendant's motion:

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## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court enters the following regarding Defendant's motion:

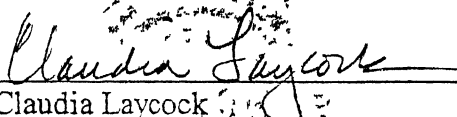
1. The parties agreed that the facts set forth in the State's Opposition to the Defendant's Motion to Suppress were accurate. The Court therefore adopts those facts for purposes of this motion.
2. The Court is required to look objectively at the totality of the circumstances. Those circumstances and their legal relevance include:
3. That Deputy Taylor's fear for officers' safety, based on Lamoreaux's failure to comply with repeated orders to keep his hands visible, <sup>was</sup> ~~were~~ well-founded. The initial detention of Lowe, who was with Lamoreaux, was therefore lawful.
4. That Officer Morgan, upon his arrival, saw Taylor with his gun out, Lowe with his hands up, and Lamoreaux not complying. When Lowe turned 180 degrees to face Morgan as a butterfly knife was discovered on Lamoreaux, Morgan was justified in feeling that Lowe could also have a weapon. A *Terry* frisk was appropriate.
5. That Morgan, patting Lowe's clothing, felt a hard object in Lowe's pocket that he thought could be a knife handle. Because he could not rule out the object being a knife, he pulled it out of Lowe's pocket. Morgan did not know the object was a bottle until he pulled it out. The baggie containing a controlled substance came out with the bottle.
4. Under the totality of these circumstances and especially given the volatility of the situation, the detention and subsequent *Terry* frisk were lawfully conducted.

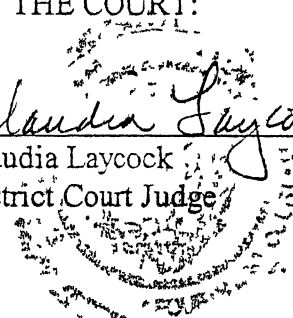
**ORDER**

Having entered the foregoing Findings of Fact and Conclusions of Law, the Court DENIES the Defendant's motion to suppress the evidence.

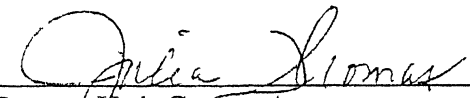
On this 18th day of November, 2008.

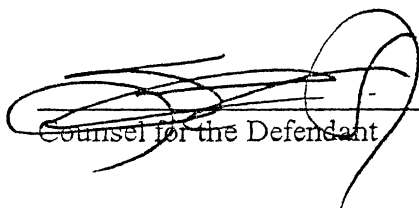
BY THE COURT:

  
\_\_\_\_\_  
Claudia Laycock  
District Court Judge



Approved as to form:

  
\_\_\_\_\_  
Deputy Utah County Attorney

  
\_\_\_\_\_  
Counsel for the Defendant

0300

**CERTIFICATE OF SERVICE**

I hereby certify that on the 9th day of September, 2008, a true and correct copy of the foregoing **PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was:

(x) sent via first class mail, postage prepaid, and facsimile to the following:

( ) sent via inter-office mail, to the following:

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

<b>STATE OF UTAH,</b>  Plaintiff,  <b>vs.</b>  <b>CLAY LOWE,</b>  Defendant.	<b>STATE'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS</b>  Case No. 081400641  Judge: Claudia Laycock
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Comes now the State, by and through counsel, Julia Thomas, and respectfully requests this Court DENY Defendant's motion to suppress.

**STATEMENT OF RELEVANT FACTS**

All facts below are derived from the police reports in this and the accompanying case (copies attached hereto), as well as testimony from the preliminary hearing held July 16, 2008.

1. On February 24, 2008, Utah County Sheriff's Deputy Deke Taylor made contact with Timothy Lamoreaux at the defendant's residence, intending to question him as to the whereabouts

of a fugitive with whom Lamoreaux was believed to associate.

2. As Deputy Taylor approached the defendant's apartment, Lamoreaux was standing in an outside doorway. When Deputy Taylor identified himself, Lamoreaux placed his left hand in his pocket. Deputy Taylor ordered Lamoreaux to keep his hands where he could see them and to come out of the doorway, but Lamoreaux refused and then reached into his right front pants pocket. Taylor again ordered Lamoreaux to keep his hands visible, but Lamoreaux did not comply. As a result of Lamoreaux's failure to comply with the order to keep his hands out of his pockets, Deputy Taylor pulled Lamoreaux out of the doorway and onto the ground. Deputy Taylor then searched Lamoreaux and found a butterfly knife with a six-inch blade in his right front pants pocket. Lamoreaux's possession of the knife was illegal because he is a category-two restricted person.

3. Just after Deputy Taylor forced Lamoreaux to the ground, Provo Police Officer Troy Morgan arrived, having been dispatched to assist with a warrant service. Officer Morgan heard Deputy Taylor yelling as he approached the area. When he arrived, he saw Deputy Taylor with his gun out, one individual on the ground and at least one other individual (the defendant herein) present and unrestrained. Officer Morgan accordingly made contact with the defendant. As he did so, Deputy Taylor was removing the knife from Lamoreaux's pants pocket. At that moment, the defendant "turned into" Officer Morgan, immediately causing Officer Morgan to suspect that the defendant also had a weapon and to fear for his safety.

4. Officer Morgan performed a *Terry* frisk on the defendant's outer clothing, noticing



a hard cylindrical object in defendant's left front pocket. Although Officer Morgan did not believe the object was a gun, he was concerned that he was feeling the handle of a knife. Because he could not readily determine whether the object was a weapon, Officer Morgan removed the object from the defendant's pocket. As he removed the object, a baggie containing a crystal substance also fell out of the defendant's pocket. At this point, Officer Morgan saw that the object was a prescription medication bottle, and his initial impression of the baggie was that it contained methamphetamine.

5. The crystal substance field tested positive for methamphetamine and weighed 1.16 grams. The defendant admitted buying the methamphetamine from Lamoreaux just before officers arrived. His written statement is attached hereto.

6. Defendant filed a motion to suppress the methamphetamine on July 25, 2008.

### **ARGUMENT**

Defendant's motion to suppress should be denied because the discovery of the methamphetamine did not violate the Fourth Amendment of the U.S. Constitution.<sup>1</sup> Deputy Taylor initially detained the defendant in order to ensure his own safety and maintain control over the scene because he was involved in a dangerous altercation with Lamoreaux. The defendant's behavior when the butterfly knife was removed from Lamoreaux's person gave Officer Morgan reasonable suspicion to conduct a *Terry* frisk for weapons. Finally, Officer Morgan discovered the

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<sup>1</sup>The defendant also cites the Utah State Constitution (Defendant's Motion at page 1), but provides no separate analysis under the State constitution and cites cases applying the federal analysis. The State therefore addresses only the federal constitutional claim.