

2009

# Utah v. Graham : Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

STATE OF UTAH,

Plaintiff / Appellee,

**vs.**

Case No: 20090478-CA

MATTHEW GRAHAM,

Defendant / Appellant.

**BRIEF OF APPELLANT**

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF  
UTAH, FROM THE JUDGMENT, SENTENCE AND COMMITMENT FROM A  
CONVICTION FOR TERRORISTIC THREAT AND DOMESTIC VIOLENCE IN THE  
PRESENCE OF A CHILD, THIRD DEGREE FELONIES, BEFORE THE  
HONORABLE SAMUEL McVEY

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**FILED**  
**UTAH APPELLATE COURTS**  
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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,

Plaintiff / Appellee,

vs.

Case No: 20090478-CA

MATTHEW GRAHAM,

Defendant / Appellant.

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**BRIEF OF APPELLANT**

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**JURISDICTION OF THE UTAH COURT OF APPEALS**

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

**ISSUES PRESENTED AND STANDARDS OF REVIEW**

1. Whether the trial court erred by finding that the police were a unit of government for the purposes of convicting him of a third degree felony under the terroristic threat statute. The trial court's decision that the police constitute a unit of government for the purposes of Utah Code Annotated § 76-5-107(1)(b)(i) is a question of law and should be reviewed for correctness. *See State v. Galli*, 967 P.2d 930, 933 (Utah 1998). *See also State v. Mitchell*, 824 P.2d 469, 471-72 (Utah App. 1991) ("Questions of legislative intent

and statutory interpretation are matters of law”). “Legal determinations are defined as ‘those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances.’” Judge Norman H. Jackson, *Utah Standards of Appellate Review – Revised*, 12-OCT UTBJ 8 (citing *State v. Pena*, 869 P.2d 932, 935 (Utah 1994)). A review for correctness “means [this Court] decides the matter for itself and does not defer in any degree to the trial judge’s determination of law.” *Pena*, 869 P.2d 932, 936 (Utah 1994) (abrogated on other grounds) (citing *State v. Deli*, 861 P.2d 431, 433 (Utah 1993)).

Graham preserved this issue in a motion for a directed verdict following the close of the State’s case, claiming that the State had failed to admit any evidence that he acted with intent to influence or affect the conduct of a government or a unit of government as required for conviction of the felony. R. 509: 155-56.

2. Whether the evidence was sufficient to convict Graham of domestic violence in the presence of a child as a third degree felony. This Court views the evidence “in a light most favorable to the jury’s verdict.” *State v. Hamilton*, 827 P.2d 232, 233 (Utah 1992). However, if “reasonable minds could not rationally have arrived at a verdict of guilty beyond a reasonable doubt based on the law and the evidence presented[]” then a jury’s verdict must be overturned. *State v. Hancock*, 874 P.2d 132, 134 (Utah App. 1994).

Graham preserved this issue in a motion to arrest judgment. R. 468-

## **CONTROLLING STATUTORY PROVISIONS**

All controlling statutes and constitutional provisions are contained in the Addendum.

## **STATEMENT OF THE CASE**

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

Matthew Graham appeals from the judgment, sentence and commitment of the Honorable Samuel McVey, Fourth District Court, after he was convicted by a jury of a terroristic threat and domestic violence in the presence of a child, third degree felonies.

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

Matthew Graham was charged by criminal information filed in Fourth District Court on February 8, 2008 with the following: Count 1 – Terroristic Threat, a second degree felony, in violation of Utah Code Annotated § 76-5-107; Count 2 – Aggravated Assault (Domestic Violence), a third degree felony, in violation of Utah Code Annotated §§ 76-5-103 and 77-36-1; Count 3 – Commission of Domestic Violence in the Presence of a Child, a third degree felony in violation of Utah Code Annotated § 76-5-109.1(2). R. 2.

On March 5, 2008 the State filed a Petition for Inquiry into Defendant's Competency. R. 24-21. Said inquiry was subsequently ordered by the trial court. R. 32-25. On May 5, 2009 the parties stipulated to Graham's competency to proceed. R. 44.



On May 5, 2008 an Amended Information was filed charging: Count 1 – Aggravated Kidnapping (Domestic Violence), a first degree felony, in violation of Utah Code Annotated §§ 76-5-302 and 77-36-1. The original three counts were charged in the alternative to this new charge. R. 46-45.

On May 12, 2008 a preliminary hearing was held before Judge Samuel McVey. At the end of the hearing the charge was bound over for trial upon a finding of probable cause. R. 49-48. On May 19, 2009 Graham entered pled “not guilty” to the aggravated kidnapping charge. R. 53.

In July of 2008 the Utah County Public Defender Association was appointed as counsel for Graham. R. 134.

A jury trial was held on March 24-April 1, 2009. After deliberation, the jury acquitted Graham of Aggravated Kidnapping and Aggravated Assault, and convicted him of a Terroristic Threat and Commission of Domestic Violence in the Presence of a Child. R. 459-458.

On April 27, 2009 Graham filed a Motion to Arrest Judgment. R. 468-.

On May 11, 2009 Graham was sentenced to 72 months probation and was ordered to serve 730 days in the Utah County Jail, and to pay a fine of \$1,160.00. R. 472-70.

On June 10, 2009 Graham filed a Notice of Appeal in Fourth District Court. R. 487.

On July 27, 2009 Graham filed a Motion to Correct the Record. indicating that he had, in fact, been honorably discharged from the United States Marine Corps R. 500-.

### **STATEMENT OF RELEVANT FACTS**

#### **A. Testimony of Mike Bower**

Mike Bower is a lieutenant with the Utah County Sheriff's Office R. 507: 140. On January 31, 2008 as the on-call investigations sergeant, he received a SWAT team page concerning an incident in Eagle Mountain, where an individual was barricaded in a residence. R. 507: 142, 143. He responded to the location and was there for several hours. R. 507: 143-44.

After the incident was "resolved" he entered the home and met with Matthew Graham briefly. R. 507. 144, 174. He then left the residence to obtain more information and subsequently after consent was obtained from Mindi Graham, he went back into the home and retrieve weapons. R. 507: 144. Photographs from inside the home were also taken. R. 507: 148-172 (State's Exhibits # 1-13, 16-18, 20-22). Ammunition was located in the home and weapons—including rifles and handguns, were found in a locked safe, some of which were loaded with ammunition. R. 507: 150-, 167-, 175. None of the weapons that were recovered were illegal. R. 507: 175. By the time, Bower went into the home, the SWAT team had been through the residence. R. 507: 175.

#### **B. Testimony of Ryan McMurtrey**

Ryan McMurtrey is an LDS bishop in Eagle Mountain. R. 507: 182. On January 31, 2008 at approximately 10 a.m. he received a text message that stated, “Please help me.” R. 507: 183. He didn’t recognize the phone number so he called and Mindi Graham, a ward member, answered. R. 507: 183-84. Mindi whispered that she was in trouble, that she had been ordered to kill herself and the children or her husband, Matthew, would. R. 507: 184. According to his statement to police, she informed him that she was in the basement with the children. R. 507: 186, 187, 189. Upon questioning, she informed him she was in immediate danger. She ended the conversation by saying, “I’ve got to go. He [Matthew] is coming.” R. 507: 186. McMurtrey immediately called 911. He informed the police that Matthew was ex-military and that he had multiple weapons. R. 507: 188.

### **C. Testimony of BJ Eckles**

BJ Eckles was employed by the Utah County Sheriff’s Office as a patrol officer at the time of the incident. R. 508: 5. He testified that he received a 911 call through dispatch of a possible incident of domestic violence and that it may involve a person with military training that suffered from Post Traumatic Stress Disorder (PTSD). R. 508: 5, 27. He and Deputy Nelson initially responded to the scene. R. 508: 5. Because of the safety concerns regarding domestic violence calls, Officers Eckles and Nelson approached the home with “high alert” because there was a possibility weapons were involved. R. 508: 7.

Officer Eckles went to the front door of the home and knocked. R. 508: 7. Matthew Graham answered the door. R. 508: 7. Matthew opened the door only a few inches, revealing his head and part of his shoulder. R. 508: 8. Due to the domestic violence call and the manner in which Matthew answered the door, Officer Eckles testified that “there was a big issue inside that house. [And] wasn’t quite sure what it was.” R. 508: 10. Officer Eckles testified that he perceived Matthew to be “very agitated” and “angry that I was at the door and another deputy was at his residence.” R. 508: 10. When asked if he could enter the home, Matthew adamantly said, “no.” R. 508: 11. This made Officer Eckles feel the need to make contact with somebody in the home. R. 508: 11-12.

Subsequently, Officer Eckles asked Matthew if he had anything in his hand – due to the possibility that a weapon may be involved. Matthew responded, “I do.” Officer Eckles asked if it was a weapon and Matthew responded, “That’s for me to know and for you to find out.” R. 508: 13. At this point Officer Eckles drew his weapon and put it in the “low ready position....” R. 508: 13. Officer Eckles never saw Matthew’s hands during this incident. R. 508: 29.

Officer Eckles then asked Matthew if he could speak with Mindi. R. 508: 14. Matthew called for Mindi and Officer Eckles observed her walk about half way down the stairs. R. 508: 15. She appeared to be pale, scared and to have been crying hysterically. R. 508: 15. As Mindi came to the door, Officer Eckles testified that she seemed to be fixated or starring at the right side of Matthew’s body, creating the concern that he had a

weapon. R. 508: 16-18. Mindi asked Matthew if she could leave the house to speak with the officers; Officer Eckles did not hear or recall Matthew saying anything in response until the third time when Matthew said it was okay for her to leave the home. R. 508: 19.

Mindi left the home with their four children. R. 508: 20. Mindi and her children were crying. R. 508: 20. Officer Eckles testified that Mindi told him that Matthew had a .45 caliber gun in his hand and that he had a .38 caliber handgun, an AR, a .223 and other weapons inside the house. R. 508: 25. Deputy Eckles testified that he never saw Matthew with a gun, observed any physical signs of domestic violence besides Mindi and the children crying, and he never interviewed Mindi and the children regarding the incident. R. 508: 34-36.

#### **D. Testimony of Jared Nelson**

Jared Nelson was employed by the Utah County Sherriff's Office at the time of the incident and accompanied Deputy Eckles at the scene. R. 508: 45-47. Deputy Nelson was approximately seven (7) feet from the porch of the Graham home when Deputy Eckles made contact. R. 508: 48.

Deputy Nelson testified that he could only see part of Matthew's body because he was behind the front door, revealing only his head and shoulder. R. 508: 48, 51. Deputy Nelson further testified that because of the "tension" and for officers' safety, he and Deputy Eckles drew their weapons and held their weapons in the "low ready position". R. 508: 52-53.

Deputy Nelson testified that he observed Mindi leave the Graham home with her children. R. 508: 54. Deputy Nelson described Mindi's face as she left the home as "terrified." R. 508: 55. After Mindi and the children left, Deputy Nelson testified that Matthew come out onto his porch with his hand behind his back and told the officers to get off his property; which made him feel threatened. R. 508: 55-56, 62. But, Deputy Nelson never saw a gun in Matthew's hand. R. 508: 59-60.

#### **E. Testimony of Mindi Graham**

Mindi Graham was the wife of Matthew Graham, and was married to him for close to thirteen (13) years. R. 508: 66. Mindi testified that the morning of the incident Matthew wanted to have sexual intercourse with Mindi, but she did not feel physically able due to cramping related to her menstrual period. . R. 508: 67-68. Mindi testified that when she told Matthew this, he became irritated but neither of them were arguing or yelling. R. 508: 68-69. Mindi stated that she tried to talk with him later that morning, but Matthew became angrier, telling her that he wanted to have an affair and that he had wasted 12 years of his life with her. R. 508: 69-70. Matthew then got into the shower. R. 508: 71. During this time the children were downstairs and were not in a position where they could have heard what she and Matthew were talking about. R. 508: 71.

After Matthew took a shower, Mindi stated that she tried to talk to him and calm him down, but Matthew's physical communication was rigid and tight. R. 508: 71-72. Mindi stated that because she thought Matthew may be upset in front of the children, she called a friend to see if she would take her children to lunch or a movie so they did not

have to be present. R. 508: 73. Matthew, however, told Mindi that the kids were not going anywhere, and that if she wanted to leave, she could. R. 508: 78.

Mindi further testified that Matthew told Mindi to call her friend and tell her not to come for the kids, that it would be “bad for her” and “it’s not going to be good.” R. 508: 80-82. Mindi testified that Matthew was unarmed at that time. R. 508: 82. Mindi then sent a text to her friend that stated, “When I am gone, fight for my kids.” R. 508: 84 (Exhibit 24). Mindi stated that she was in the bedroom when she sent this message. R. 508: 86.

While in the bedroom, Mindi testified that she took out a blue backpack and put in one change of clothes and some medicine. R. 508: 86-87. Mindi also testified that at that time she also wrote a note to her children, which stated that she loved them. R. 508: 87-88. Mindi then sent another text message to her friend Becky that stated “When I am gone, if I have custody of my kids, I want you to have them. Yeah. I want you to have them.” R. 508: 88. Mindi indicated that that day may be the day that Matthew hurts her, because he had made reference in the past to how he would hurt her and dispose of her body. R. 508: 88-89.

Mindi then testified that soon after she meet up with the children again, and Matthew was present. R. 508: 91. This is when she states she first saw Matthew with his .45 caliber handgun which was the concealed weapon he carried by permit. R. 508: 92-93. Mindi and Matthew continued to argue about whether Becky should come to pick

up the children. Mindi stated that Matthew said, "Tell her not to come or I will shoot her." R. 508: 94.

Mindi testified that she then sent a text to Becky telling her not to come. R. 508: 95-96. Then, while with the children in the loft, Mindi sent a text message to her Bishop, which stated, "Please help me." R. 508: 97. The Bishop then called Mindi on her phone. R. 508: 100. She told him that Matthew had his guns, that she was scared, and that she needed his help. R. 508: 100.

When asked why she [Mindi] did not call the police herself, she stated that Matthew would retaliate against her; that Matthew had told her that the police were the enemy, terrorists, and that their intent was to take away your rights. R. 508: 101. Mindi testified that Matthew then found her backpack, threw it and became more "animated." R. 508: 103. Mindi testified that Matthew started saying, in front of the children, that Mindi was going to kill herself, that she was going to "quit on [the children]" and that she was going to leave. R. 508: 104. At that point, three of the four children were crying. R. 508: 105.

Thereafter, the police arrived at the Graham home. R. 508: 109-11. Mindi testified that when the police arrived Matthew stated "Here we go" and that she expected gunfire. R. 508: 110-11. And, that Matthew stated, "This is what you wanted." R. 508: 111. Mindi testified that when one of the officers stated, "Can we talk to your wife?" while speaking with Matthew at the door, she came half way down the stairs and saw Matthew holding his .45 caliber handgun behind his back. R. 508: 113. She later



testified that Matthew was holding the .45 handgun, had Mindi's .38 caliber handgun in his belt, and that one of her children later told an officer that Matthew had his S&W 1911 by the door. R. 508: 117, 120.

#### **F. Testimony of Madilyn Graham**

Madilin Graham is the daughter of both Matthew and Mindi Graham and was approximately 11 years old at the time of the incident. R. 508: 186. Madilin testified that she did recall an argument occurred between her parents, Matthew and Mindi. R. 508: 186. And that she was pretty sure that Matthew was wearing a gun belt. R. 508: 188. But, that she never saw Matthew with a gun in his hand, only that she thought she saw the gun because Matthew was wearing his gun belt. R. 508: 192-93, 196. Madilin also indicated that it was normal to see Matthew with his gun, and that it was "kind of an everyday thing, unless he was relazing." R. 508: 194.

Madilin further testified that Matthew told her that Mindi was "going to go away for a little bit, and she needed to get her head on straight; and then he read us a note [Mindi] had written to us." R. 508: 188. Madilin stated that the note indicated that the note said that Mindi was leaving for about a month or so to get her head together. R. 508: 195.

Madilin testified that she overheard a dispute between Mindi and Matthew. R. 508: 189-90. Madilin said that Matthew kept saying "I'm going to do it" and Mindi begged him not to. R. 508: 189-90. Madilin also stated that Matthew was downstairs at

the time police arrived while she, her siblings and her mother remained upstairs. R. 508: 191. Madilin stated that she overheard Matthew say, while discussing with the police, that “My wife and children are upstairs” and that he also stated that “It’s okay if they come” in response to Mindi’s statement that “I’m not going to leave without my kids.” R. 508: 191. Madilin did describe Matthew’s demeanor as angry with regards to his engagement with the police. R. 508: 191.

#### **G. Testimony of Merrick Graham**

Merrick Graham is the son of Mindi and Matthew Graham and was present at the time of the incident. R. 508: 203-04. Merrick indicated that Matthew was yelling at Mindi in the house and that he was scared. R. 508: 205. Merrick did not recall Matthew reading a note Mindi wrote to the children, only that Matthew told Merrick that Mindi was going to leave. R. 508: 206. Merrick testified that he saw Matthew with two guns – a Smith and Wesson 1911 and another – and that Matthew was wearing those same weapons when Merrick saw Matthew at the door with police. R. 508: 206, 208.

#### **H. Testimony of Neil Castleberry**

Neil Castleberry is a chief deputy with the Utah County Sheriff’s Office. R. 509: 13. At the time of the incident at the Graham residence he was a patrol lieutenant with supervisory duties over Eagle Mountain, and he received a call about a barricaded subject (Matthew Graham) alone inside the home. R. 509: 14, 30. Before he arrived at the scene

he was also informed that the subject had weapons, and that there had been a domestic violence situation. R. 509: 31, 43.

When he arrived at the scene, he spoke with other officers and with Mindi Graham at an adjacent home. R. 509: 15, 28. He was informed that there was a potential that Matthew was suffering from PTSD, and that he was ex-military and had prior sniper training. R. 509: 32-33. Castleberry testified that he based “a lot of [his] decisions in what [he] was thinking, knowing that” Matthew was ex-military and had received sniper training. R. 509: 33.

While he spoke with Mindi, Matthew Graham called from inside the home and he spoke with Matthew. R. 509: 15. Castleberry testified that he told Matthew that the intentions of the police were to keep him and the community safe, and that they wanted him peacefully to come out of the house and speak to them so that the situation could be resolved at the “lowest level possible.” R. 509: 16. Matthew informed him that he “felt he had done nothing wrong, that there was no reason for us to be there and he wished for us not to be anywhere near his home and that he intended to stay in the home and not come out.” R. 509: 16. At times, Matthew sounded excitable and other times his tone of voice was calm. R. 509: 17.

Castleberry informed Matthew that a crime had been committed (domestic violence) and that law enforcement would not leave until he came out to speak to them without any weapons. R. 509: 17, 20. Matthew then indicated that he had no intention to come out and that he felt that police presence there was a threat to him and his property,

“that he was well versed in his constitutional rights and that any—any individual that he felt posed a threat to him would result in what he stated as his responsibility to take action to neutralize that threat; something to that effect. He indicated he had training and the means—to do that, and that if we were ever to enter on to his property or if he ever observed a law enforcement official in a position to do him harm, he would take whatever action was never for him to neutralize that threat.” R. 509: 17-18. Castleberry interpreted “take any action to neutralize that threat” as an indication that Matthew would shoot any law enforcement officers that he observed. R. 509: 18.

Castleberry also testified to his belief that in this first conversation Matthew mentioned having some type of long gun or rifle that would allow him to shoot greater distances than a handgun. R. 509: 19. Matthew terminated the first conversation. R. 509: 19. Castleberry testified that he was “quite upset and told us that he had no intention of coming out, told me that he would—again restated that he would—he would in essence shoot any law enforcement official that he saw.” R. 509: 19.

Castleberry kept Mindi’s cell phone and she was taken to another location. R. 509: 20. Matthew called back. R. 509: 21. This conversation was similar to the first. Matthew again “talked about his training, his military training, that he knew weapons, he had weapons, and that again he—he felt like our presence there was—was an invasion of his rights. He wished for us to leave, and he was willing and able to—to stop or shoot, what I interpreted as meaning shoot the—any law enforcement official that he observed.” R. 509: 21. However, Matthew never used the words “shoot someone.” R. 509: 43.

There was also a third conversation. R. 509: 37-38. All three conversations were initiated by Matthew. R. 509: 40. In these conversations Castleberry felt: “like [Matthew] was indicating... that he was willing to escalate the situation to become violent if we did not completely vacate the area and make our presence completely invisible to him. I felt that he had all—from all the information that I had received from the other deputies, from the responding deputies, the sergeants, all the information that I had received from [Mindi], I had every reason to believe that he had the means, capability, and based on my opinion of his state of mind, that he had the mental capability of carrying out violence against any—any person in the community and/or police officers.” R. 509: 22. *See also* R. 509: 48. He agreed that during the incident/conversations, Matthew communicated to him that he felt threatened; and that in one conversation Matthew mentioned that he could see a deputy pointing a weapon at his house. R. 509: 39, 40.

Castleberry’s written narrative does not contain the wording of Matthew’s threats. R. 509: 37. Castleberry acknowledged that there could have been 40-50 officers present that day. R. 509: 38.

Other officers had conversations with Matthew after Castleberry. R. 509: 41.

## **I. Testimony of Shaun Bufton**

Shaun Bufton is a sergeant in the emergency service division of the Utah County Sheriff’s Office. R. 509: 50-51. On January 31, 2008 he had a conversation with

Sergeant McDow about the incident unfolding at the Graham residence—that there was a possibility of a barricaded person in the Eagle Mountain area. That the suspect had a gun and that the wife and children had left the home. R. 509: 51, 59. At McDow’s request, Bufton deployed the SWAT unit. R. 509: 52.

Upon arrival, Bufton began to set up a command post approximately two blocks away from the residence. R. 509: 52, 53. Team members arrived and put on their gear. R. 509: 52. Bufton briefed them and deployed them in teams of 4-6 to various points to set up a more of a perimeter around the residence. R. 509: 53, 60, 65.

Bufton testified that his knowledge of Matthew’s military experience did not affect his deployment of the officers. R. 509: 56-57. He also was aware that Graham had weapons in the home. As a result, his officers would be more cautious on “where they stage” and how “tight on target” they were positioned. R. 509: 57. Bufton never received any information from his SWAT team that Graham was in possession of a weapon. R. 509: 61-62.

#### **J. Testimony of Erik Knutzen**

Erik Knutzen is employed by the Utah County Sheriff’s Office and is a member of the SWAT team. R. 509: 72. At the scene he as a point man with the Alpha and Bravo team, which had combined into a single unit. R. 509: 72-73. They covered the northwest corner of the Graham residence and were stationed about 25-30 yards away. R. 509: 73. They remained stationary in that position, taking turns watching to see if anybody came

outside, with guns in front and pointed to the ground but towards the house/garage. R. 509: 74, 88. From their location they could see the open garage of the residence. R. 509: 94.

The Charlie team was on the west side of the residence. R. 509: 75. Knutzen could see them from his position. R. 509: 75. They, too, were approximately 20-30 yards from the residence. R. 509: 76. In addition, there were three sniper teams. R. 509: 86. Knutzen was there for 4-5 hours. R. 509: 75. No officer with him made contact with Matthew, or attempted to make contact with him. R. 509: 77.

When Graham exited the residence, Knutzen and other members of his team entered the home and did a protective sweep. R. 509: 78. When a protective sweep is done, officers try not to touch anything inside. R. 509: 78. However, in this situation, they did lift some blankets in the master bedroom to make sure nobody else was in the house. R. 509: 79.

After performing the protective sweep, Knutzen changed clothes and returned to the Graham residence as an investigator. R. 509: 79-80. As part of that assignment, he videotaped the inside and exterior of the house. R. 509: 80.

#### **K. Testimony of Walter Perschon**

On January 31, 2008 Walter Perschon was a SWAT commander and a lieutenant in the patrol division with the Utah County Sheriff's Office. R. 509: 100. On that date he was deployed to the Graham residence. R. 509: 100. When he arrived at the scene, he

requested that the road be shutdown and then he set up a temporary command post at the church, before moving closer to the residence and running the command post from his vehicle until the SWAT vehicle arrived. R. 509: 101.

Perschon spoke with Castleberry and perceived that the situation was “escalating very rapidly and that something had to be done right now to de-escalate it; otherwise, things were going—bad things were going to happen as far as the safety of my—the patrolman in the area and the arresting SWAT officers.” R. 509: 103. Perschon also received information that Matthew had a military background, sniper training, and may have PTSD. R. 509: 114-15. This information “definitely [heightened their] awareness of what—what we are dealing with, particularly because it is daytime and we have possibly known long rifles, absolutely, it is a different—you know, it is a heightened awareness.” R. 509: 116.

Perschon took Mindi’s cell phone from Castleberry so that he could call Matthew since negotiators weren’t there yet. Perschon testified that he “stepped out of [his] role a little bit as SWAT commander in desperation to make a phone call, because of my background of being a sniper, former military or current military background, I thought I’d be able to make a little connection with this individual, to say hey, everything’s going to be okay.” R. 509: 104.

Perschon had 5-6 phone calls with Matthew. R. 509: 104. Perschon described the first ten minutes of his initial call with Matthew as “kind of the same as Lieutenant Castleberry’s situation, where things were still in escalation stage and there were—they



were just escalating rapidly and within about ten minutes I think we were able to stop that escalation and start it down to resolution.” R. 509: 105. He testified that initially it was escalating because of the “threats that [Matthew] was making, as far as if we don’t do something right now, that things were going to get ugly. He was going to have to take some action. He deemed any and all officers, regardless of whether they were on his property, a threat, and that they were taking some defensive positions therefore he was going to have—he couldn’t put up with that, so he was going to have to take some action. And he got—he went into his abilities, his—as a marksman.” R. 509: 105.

Matthew told him he was a skilled sniper. R. 509: 105-06. He also told him that he could see two armed individuals and he wanted them “gone right now.” R. 509: 106. Perschon also testified that Matthew made statements like, “If I wanted them I could have taken them out already if I—if I wanted to. But if you don’t do it, if you don’t get them out, gone now, then I’ll have to do something,” insinuating that, you know, he would take—hurt or shoot my officers.” R. 509: 107. Matthew sounded anxious, paranoid, wound up. R. 509: 108. According to Perschon, there was “no doubt” in his mind that “this had the potential that [Matthew] would—in his state of mind, fire on my officers.” R. 509: 111. *See also* R. 509: 119-20.

While they continued to talk, the situation calmed down. R. 509: 112-13. Perschon testified that Matthew asked for a letter that would assure him that he was not going to be charged criminally. R. 509: 108. Matthew also maintained that he had done nothing wrong. R. 509: 117, 121. Perschon felt that Matthew did not want to face

charges because he did not want potentially to lose his right to possess weapons. R. 509: 122. A letter was prepared that was signed by Perschon under a signature of “Judge Andrus” (Defense Exhibit #3). R. 509: 122-24. The letter was not given to Matthew but was read to him over the phone by a negotiator. R. 509: 123. Perschon testified that the letter was a “tool” to stop the escalation and reach a resolution. R. 509: 127.

None of Perschon’s conversations with Matthew were recorded. R. 509: 126.

#### **L. Testimony of Whitnie Tait**

Whitnie Tait is deputy with the Utah County Sheriff’s Office and is a part of the hostage negotiation team. R. 509: 139. She responded to the scene at the request of Lieutenant Brower. R. 509: 139-40. She met with Castleberry and Perschon and they updated her on the situation.

Within 20-30 minutes she spoke with Matthew on the phone for the first time. R. 509: 140. In these communications she identified herself as a police officer. R. 509: 141. Her impression was that Matthew was “pretty much in control of—of his emotions” and that he was “insistent on what he wanted and he just stayed with that.” R. 509: 141. He “wanted everyone to leave. Just kept on repeating that there was no reason why we were there, and he wanted everyone to leave and pretty much insistent on that nobody enter his home.” R. 509: 141.

Tait testified that she tried to be up front with Matthew, and explain to him that the best thing for him would be to put his weapons away and come out of the residence. R.

509: 142. Matthew was not receptive to these suggestions absent a guarantee that no one would enter his home and that he would not be charged criminally. R. 509: 142-43. Her typical response to these demands was to say, “We’ll see what we can do.” R. 509: 145.

It took 2-3 hours before Matthew eventually left the home. R. 509: 143. It took this long because “we didn’t think it was feasible to guarantee him that he would not be criminally charged. And he kept on hanging up continuously throughout the negotiations.” R. 509: 145. In the last 30 minutes of negotiation, Tait was provided with a letter that she read to Matthew over the phone (Defense Exhibit #3). R. 509: 145-46. Tait testified that reading the letter to Matthew was, in her opinion, the only viable means of getting him to leave the home. R. 509: 146. She also testified that the idea for the letter was initiated after she began her negotiations with Matthew. R. 509: 150.

When she finished the letter, Matthew “stated that he would come out and that he just needed a few minutes to put his guns away.” R. 509: 147. She then heard what sounded like a gun being unloaded. R. 509: 148. Afterwards, Matthew indicated he was ready to come out and she told him to come out the front door. R. 509: 149.

The negotiations with Matthew were not recorded because they did not have their equipment at the scene. R. 509: 151. There is also no written record of Matthew’s statements. R. 509: 152.

### **M. Testimony of Doug Eastman**

In January of 2008 Doug Eastman was a Pleasant Grove patrol sergeant and a sniper team leader with the SWAT team. R. 509: 186. His job as team leader is to get the snipers as close to the house as possible in order to do surveillance. R. 509: 186. His position at the scene during the incident in question was inside a home close to the Graham residence. R. 509: 190. He was there for 5-7 hours. R. 509: 194. The only time Eastman saw Matthew was when he came out the front door to surrender. R. 509: 193. He never saw Matthew with a weapon. R. 509: 195.

### **N. Testimony of Rebecca “Becky” Call**

Rebecca Call testified that she has known Matthew since the time he married Mindi and that she has known Mindi her entire life. R. 510: 90-91. She also testified that she had received a text message from Mindi on the day of the incident. R. 510: 92-93. Specifically, that Call received a text from Mindi stating “When I’m gone please fight for custody of my kids. I want you to have them.” R. 510: 92. And that when Rebecca tried to contact Mindi regarding that text there was no answer so she went on with her day. R. 510: 93.

Call also testified about Mindi telling her that Matthew had threatened to shoot Call that day. R. 510: 95. Call stated that “the only thing he said he sounded rational, so I didn’t really know what to think. I have never been threatened so I didn’t believe it” and that she “was never afraid of Matt that day.” R. 510: 95. Call testified that later that

day or the next, Mindi said that Matthew “had threatened her, pointed a gun at her.” R. 510: 97.

Call testified that when Mindi called her to see if she was on her way to the Graham home, that Mindi did not say during that conversation that Matthew was going to hurt her. R. 510: 102. Call also testified that during a subsequent conversation with Mindi, she overheard Matthew say that Mindi could go as long as “you took her to a mental hospital.” R. 510: 103. Call further stated that Mindi had told her that Matthew had a gun in his hand. R. 510: 104.

#### **O. Testimony of John Luke**

Deputy Luke was employed by the Utah County Sheriff’s Office at the time of the incident. R. 510: 115-16. Deputy Luke and Detective Provstgaard conducted a recorded interview with Mindi Graham after Mindi had left the house on the day of the incident. R. 510: 117.

Deputy Luke testified that during his interviews with Mindi Graham that he asked Mindi, in several different ways, whether Matthew had assaulted her. R. 510: 123. Deputy Luke stated that he recalled “specifically asking if he had assaulted her, if he had pointed a gun at her, things of that nature.” R. 510: 123. He did not recall Mindi’s exact response other than “she was very consistent, saying that, ‘He did not assault me. No. He did not point a gun at me’” and that he did not pull the gun on her. R. 510: 123, 126. Deputy Luke also testified that he recalled Mindi stating that she was glad that Matthew

did not pull his gun when he opened the door because the officer had his gun out, but that he was holding the handgun in the small of his back. R. 510: 129, 138.

**P. Testimony of Jory Provstgaard**

Deputy Provstgaard was employed by the Utah County Sheriff's Office as a detective at the time of this incident and was assigned the particular task of interviewing Mindi Graham. R. 510: 142-43. This interview was conducted with Detective Luke. R. 510: 143.

Deputy Provstgaard confirmed Mindi's statement during the interview that "she was glad he [Matthew] didn't pull out his gun right when he opened the door because the officer had his gun out...." R. 510: 166.

**Q. Testimony of Helen Esby**

Helen Esby is Matthew's mother. R. 511: 25. She stayed with Mindi and Matthew the last time between January 22-29, 2008. R. 511: 27. Matthew's demeanor during the week was "fine." R. 511: 30. She's known Mindi for 12.5 years and her opinion of Mindi in regards to her reputation for truthfulness and honesty is "very negative." R. 511: 31. The situation with Mindi has upset her, and she would like to see her grandchildren, whom she hasn't seen since January 29, 2008. R. 511: 32.

## **R. Testimony of Amy Parker**

Amy Parker is Matthew's sister. R. 511: 35. She, too, has known Mindi for 12.5 years. R. 511: 35. She testified that Mindi is untruthful. R. 511: 36.

## **S. Testimony of Erik Hutchings**

Erik Hutchings is a Utah State Legislator and married to Mindi's older sister. R. 511: 39-40. He has known Mindi for 14 years and his opinion is that she is dishonest. R. 511: 40-41.

## **SUMMARY OF ARGUMENT**

One, the trial court incorrectly interpreted the language of the statute by finding as a matter of law and instructing the jury that the police and sheriff constitute a unit of government for the purposes of terroristic threat statute found in Utah Code Annotated § 76-5-107. This interpretation is incorrect because according to the plain language of the statute, if considered as a whole, the police are more likely to be considered an official agency organized to deal with emergencies than a unit of government.

In addition there is some ambiguity in the statute because the legislature did not expressly define unit of government; and the police can reasonably be thought of to be either a unit of government or more appropriately an official emergency agency. To resolve the ambiguity the Court should look to the legislative intent of the statute though legislative history of the statute and its amendments, the past nature and use of the statute, and the historical context in which the statute was created and amended. According to

these sources the police and sheriff were not intended to be considered a unit of government for the purposes of subsection (1)(b)(i) and the trial court incorrectly allowed the jury to find that Graham was guilty of third degree felony terroristic threat for his conduct related to the sheriff's office.

Two, to have convicted Matthew Graham of having committed Domestic Violence in the Presence of a Child as a third-degree felony, the State must have shown that he used a dangerous weapon in committing the offense. At trial, no evidence was presented which would lead a jury to reasonably conclude that Matthew Graham, although possessing a dangerous weapon at the time, used it against his wife, Mindi Graham or any other cohabitant.

In light of the plain meaning of the word "use" or even applying the broader definition employed by Utah appellate courts, reasonable minds could not have rationally concluded that Matthew Graham used a dangerous weapon in committing domestic violence.

### **ARGUMENT**

#### **I. THE TRIAL COURT INCORRECTLY INTERPRETED THE PLAIN LANGUAGE OF UTAH CODE ANNOTATED § 76-5-107(1)(b), AND BETRAYED THE LEGISLATURE'S INTENT BY FINDING THAT THE POLICE CONSTITUTED A UNIT OF GOVERNMENT FOR THE PURPOSES OF THE TERRORISTIC THREAT STATUTE**

At the close of the State's case, Graham made a motion for a directed verdict on each individual charge. R. 509: 155. On count 3, TERRORISTIC THREAT, counsel



argued that there had not been any evidence that Matthew had intended to influence or affect a ‘unit of government’ because the police force, namely the Sheriff’s Department, is not a unit of government. R. 509: 157. Counsel cited case law to show that a local police force is not a unit of government for the purposes of the statute.<sup>1</sup> Defense counsel then directed the court to subsection (ii) of the terroristic threat statute to argue that the police should more accurately be described as an official agency organized to deal with emergencies and as opposed to a unit of government. R. 509: 158-59. Finally, counsel cited other statutory references to ‘unit of government as defined as “any county, municipality, school district, special district, or any other political subdivision of the

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<sup>1</sup> Counsel cited the following cases: *Interwest Aviation v. County Bd. Of Equalization of Salt Lake*, 743 P.2d 1222, 1225 (Utah 1987) (Concessions operators appealed a tax taken for improvements to the public land where they leased space from the city, plaintiffs claimed the improvements were owned by the city so they should not be taxed for the added value. The Court used ‘governmental unit’ language to describe entities that had the power to tax, i.e. cities and counties.); *Utah Restaurant Assoc. v. Davis Cnty. Bd. Of Health*, 709 P.2d 1159, 1161 (Utah 1985) (County Board of Health appealed a ruling invalidating a permit fee for food establishments. The Court used the term ‘unit of government’ to describe bodies with law making power, both legislative and administrative.); *Hawlingsworth v. City of South Salt Lake*, 624 P.2d 1149, (Utah 1981) (massage parlor challenged a local ordinance prohibiting “massage parlor” ordinance. The Court describes ‘local governmental units’ as being endowed with power to pass ordinances and rules, again having law-making power.); *Redwood Gym v. Salt Lake Cnty. Commission*, 624 P.2d 1138, (Utah 1981) (Challenge to another “massage parlor” ordinance. The Court noted that local units of government do not have inherent police power and derive that power from the State either expressly or impliedly.); *Rich v. Industrial Commission*, 15 P.2d 641, 80 Utah 511 (Utah 1932) (The Court refers to townships as small geographical units of government.); *Smith v. Carbon County*, 63 P.2d 259, 90 Utah 560 (Utah 1936) (Plaintiff sued for a refund of a fee charged to file an inventory during probate of an estate. Plaintiff claimed the fee was excessive and violated the Utah Constitution. The Court defined a ‘local unit of government’ as an entity for which tax revenue is raised.).

state.” R. 509: 159. See UT ST § 63M-5-103(6) (Definitions from Governor’s Programs Resource Development Act).

Counsel for the State responded by arguing “that unit of government has always applied to police action, particularly in the 4th Amendment context.” R. 509: 162. It was the State’s position that the police who responded were designated representatives of Utah County and therefore were representatives of the government of Utah County. R. 509: 162-63. The State also argued in the alternative that there was evidence that a school was shutdown satisfying subsection (i)’s reference to intimidating or coercing a civilian population. R. 509: 163.<sup>2</sup>

In preface to its ruling the trial court noted that criminal statutes must be “construed according to the fair import of their terms to promote justice and to affect the objects of the law” and to “permit and prevent the commission of offenses ” R. 509: 164 (citing Utah Code Ann. §§ 76-6-106, 76-1-104). The court then recited the first element of terroristic threat and found that there was some evidence of a threat to commit any offense involving bodily injury, death, or substantial property damage. The court then moved to the next set of elements, of which one must be shown in addition to the first threat element. The trial court found “while there may not any intent here to intimidate or coerce a civilian population, there is some evidence that there may have been an attempt here to affect the conduct of a unit of government...” R. 905: 165.

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<sup>2</sup> It is possible that the State actually meant to point to subsection (1)(b)(iv) claiming that Matthew prevented the occupation of a school as a building where the public had access but there is no evidence of an intent to prevent use of the school.

The trial court found that the Utah County Sheriff's Office was at the scene with several lieutenants and that a fair, and not unreasonable, reading of the term unit of government would include the sheriff's office. R. 905: 165. The court then went further by stating that the intent of the legislature in this case was unambiguous. Id. Finally, after discussing other analogous situations the court thought would satisfy subsection (1)(b)(i), the court said unequivocally "[t]he fact is the Sheriff's Office is by -- and it's (sic) individuals are [--] by any stretch of the imagination a unit of government." R. 509: 168. The trial court then submitted an instruction to the jury that stated "'Government or a unit of government' includes a police department or agency." R. 447.

Matthew Graham asserts that the trial court incorrectly interpreted the statute when it found that the police are a unit of government for the purposes of the terroristic threat statute, specifically subsection (1)(b)(i). This error is manifest by examining the plain language of the statute as a whole, the history of the statute and its amendments, the historical context of the amendment adding subsection (1)(b)(i), and the legislative history of the statute.

#### **A. The plain language of the statute**

The relevant portions of Utah Code Annotated § 76-5-107 provide:

(1) A person commits a terroristic threat if he threatens to commit any offense involving bodily injury, death, or substantial property damage, and:

(a) he threatens the use of a weapon of mass destruction, as defined in Section 76-10-401, or threatens by the use of a hoax weapon of mass destruction, as defined in Section 76-10-401; or

(b) he acts with intent to:

(i) intimidate or coerce a civilian population or to influence or affect the conduct of a government or a unit of government;

(ii) cause action of any nature by an official or volunteer agency organized to deal with emergencies;

(iii) place a person in fear of imminent serious bodily injury, substantial bodily injury, or death; or

(iv) prevent or interrupt the occupation of a building or a portion of the building, a place to which the public has access, or a facility or vehicle of public transportation operated by a common carrier.

(2) (a) A violation of Subsection (1)(a) or (1)(b)(i) is a second degree felony.

(b) A violation of Subsection (1)(b)(iv) is a third degree felony.

(c) Any other violation of this section is a class B misdemeanor.

“In construing this statute, [this Court] look[s] first and foremost to the statute's plain language... [and] consult other sources only if the plain language of the statute is ambiguous.” *Peterson & Simpson v. IHC Health Services Inc.*, 2009 UT 54, ¶ 9, 217 P.3d 716, 720 (citing *Dale T. Smith & Sons v. Utah Labor Comm'n*, 2009 UT 19, ¶ 7, 208 P.3d 533, and *Otter Creek Reservoir Co. v. New Escalante Irrigation Co.*, 2009 UT 16, ¶ 14, 203 P.3d 1015). Graham asserts that the trial court incorrectly interpreted the plain language of the statute when it found and instructed the jury that the police were a unit of government on that day. This error arises from the trial court's reading of the term ‘unit of government’ in isolation from the other subsections. “[T]he plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and with other statutes under the same and related chapters.” *State v.*

*Schofield*, 2002 UT 132, ¶ 8, 63 P.3d 667, 669 (further citations omitted)); *see also Silver v. Auditing Div.*, 820 P.2d 912, 914 (Utah 1991); *Osuala v. Aetna Life & Cas.*, 608 P.2d 242, 243 (Utah 1980). Graham asserts that had the trial court examined subsection (1)(b)(i) in conjunction with the rest of the statute, subsection (1)(b)(ii) in particular as suggested by Graham at trial, the court would have found that the police do not constitute a government or unit of government for the purposes of this statute.

The legislature has not chosen to define ‘unit of government’ in this or any related statute so the Court is left to consider whether this term is ambiguous as it is used. “Statutory language is ambiguous if it can reasonably be understood to have more than one meaning.” *Evans v. State*, 963 P.2d 177, 184 (Utah 1998) (*citing Miller Welding Supply, Inc. v. State Tax Comm’n*, 860 P.2d 361, 362 (Utah App. 1993), *cert. denied*, 870 P.2d 957 (Utah 1994)). If subsection (1)(b)(i) is considered in isolation it is unclear whether or not the police constitute a unit of government. The trial court found the legislature’s intent unambiguous but failed to give any explanation or justification. Graham asserts that absent any context or legislative direction the question of whether unit of government applies to the police in subsection (1)(b)(i) is ambiguous. However when the statute is considered as a whole the answer becomes a bit more clear.

Subsection (1)(b)(i) prohibits acting with intent to “influence or affect the conduct of a government or a unit of government...” UTAH CODE ANN. § 76-5-107. Subsection (1)(b)(ii) prohibits acting with intent to “cause action of any official or volunteer agency organized to deal with emergencies...” *Id.* Graham asserts that there is no significant

difference between ‘influencing or affecting conduct’ and ‘causing action. The only real difference between these two subsections is the entity whose conduct or actions are influenced or caused and the degree of offense accorded thereto. Graham also asserts that because the only significant difference between these two subsections beyond those to whom it influence is applied, if one entity is both a ‘unit of government’ and an ‘official agency organized to deal with emergencies’ he should have been given the benefit of the lesser degree of offense.

The next question arises that is whether, under the plain language of the statute, the police or sheriff’s office are an ‘official agency organized to deal with emergencies?’ This Court’s “primary goal in construing statutory language is to give effect to ‘the true intent and purpose of the Legislature,’ and the best tool for doing so is generally the plain language of the statute itself.” *Miller v. State*, 2010 UT App 25, ¶ 12, -- P.3d ---, 2010 WL 375578 (citing *State v. Martinez*, 2002 UT 80, ¶ 8, 52 P.3d 1276). “When examining the statutory language we assume the legislature used each term advisedly and in accordance with its ordinary meaning.” *State v. Martinez*, 2002 UT 80, ¶ 8. 52 P.3d 1276. Graham asserts that it is unreasonable, based simply upon the plain language of the statute, that the legislature did not intend for the police and sheriff’s office to be considered an ‘official agency organized to deal with emergencies.’ Because the police and sheriff are by any stretch of the imagination ‘official agenc[ies] organized to deal with emergencies’ it seems clear that subsection (1)(b)(ii) was designed to control threats and actions with intent to cause the police to act.

It is a ‘well-accepted rule[] of statutory construction that the provisions must be harmonized with the legislative intent and purpose and that the more specific provisions ... take precedence over and control the more general provisions.’” *State v. Webster*, 2001 UT App 238, ¶ 41, 32 P.3d 976, 989 (citing *Forbes v. St. Mark's Hosp.*, 754 P.2d 933, 935 (Utah 1988)). Graham asserts that subsection (1)(b)(ii)’s reference to ‘official agenc[ies] organized to deal with emergencies’ more specifically applies to the police of sheriff than does subsection (1)(b)(i)’s reference to ‘unit[s] of government.’ As a more specific provision subsection (1)(b)(ii) should have taken precedence when the trial court was considering whether or not the police were a ‘unit of government’ for the purposes of § 76-5-107. According to the plain language of the statute, read as a whole, the police and sheriff are not a ‘unit of government’ but are more accurately an ‘agency organized to deal with emergencies.’ The trial court’s statutory interpretation was incorrect when one considers the plain language of the statute and for that reason this Court should reverse.

#### **B. The current statute compared to the earlier versions of the statute**

“One of the cardinal principles of statutory construction is that [we] will look to the reason, spirit, and sense of the legislation, as indicated by the entire context and subject matter of the statute dealing with the subject.” *Miller*, 2010 UT App 25, ¶ 12 (citing *In re Marriage of Gonzalez*, 2000 UT 28, ¶ 23, 1 P.3d 1074). See also *State v. Webster*, 2001 UT App ¶ 19, 32 P.3d 976, 982. Graham suggests that this Court consider

the changes that have occurred to the statute over the past 37 years in order to understand the reason, spirit, and sense of the statute.

Utah Code Annotated § 76-5-107 was originally enacted in 1973. The original statute as enacted prohibited one from threatening “to commit an offense involving violence with intent: (a) To cause action of any sort by an official or volunteer organized to deal with emergencies...” Laws of Utah 1973, c. 196, § 76-5-107. Under the original statute terroristic threat was a class B misdemeanor unless the intent was to interrupt the use of a building or form of conveyance, in which case it was a third degree felony. This statute was amended in 1988 and renamed a threat against life or property however the substance of the statute was not altered in any significant way. See Laws of Utah 1988, c. 38 § 1.

The current statute was amended in early 2002. The name terroristic threat was returned. The structure of the statute was altered by adding several significant additional elements, including a means for victims to recover losses incurred as a result of terroristic threats. The legislature added what is now subsection (1)(a) wherein a terroristic threat can be shown if “he threatens the use of a weapon of mass destruction, as defined in Section 76-10-401, or threatens by the use of a hoax weapon of mass destruction, as defined in Section 76-10-401.” UTAH CODE ANN. § 76-5-107. Most relevantly, the legislature added what is now subsection (1)(b)(i) wherein terroristic threat can be shown if one [acts with intent to] “intimidate or coerce a civilian population or to influence or affect the conduct of a government or a unit of government...” Id. Finally, the legislature



provided that these two new subsections would be punishable as second degree felonies in addition to the existing class B misdemeanor and third degree felony subsections.

Graham asserts that if one compares the statute as it was in 1973 or 1988 with the amendments added in 2002 it is unreasonable to find that the police should be considered a ‘unit of government’ and not an ‘official agency organized to deal with emergencies.’ “[W]here a literal reading of the plain language at issue ‘creates an absurd, unreasonable, or inoperable result, we assume the legislature did not intend that result... [and] endeavor to discover the underlying legislative intent and interpret the statute accordingly.’” *Miller*, ¶ 12 (citing *State v. Jeffries*, 2009 UT 57, ¶ 8, 217 P.3d 265). It is absurd to assume that in 1973 or 1988 if Graham had engaged in making threats with intent to cause the police to take action he would have been guilty of a class B misdemeanor but in 2008 the very same conduct would subject him to guilt on a second degree felony without any change in the existing class B language.

**C. The historical context and the legislative history of the amendment adding subsection (1)(b)(i)**

“For assistance in ascertaining the meaning of statutory language, we look to the background and general purpose of the statute.” *Versluis v. Guaranty Nat. Companies*, 842 P.2d 865, 867 (Utah 1992) (citing *Jamison v. Utah Home Fire Ins. Co.*, 559 P.2d 958, 959 (Utah 1977)). See also *Neil v. Utah Wholesale Grocery Co.*, 210 P. 201, 61 Utah 22 (Utah 1922) (in determining the intent of the Legislature the court should consider the history of the times and the condition of the country at the time of the enactment).

Finally, Graham asserts that the legislative history of this statute, particularly the history associated with the 2002 amendment, suggests that subsection (1)(b)(i) was added with and intent to counter terrorism on a more broad basis rather than to confront threatening actions between a citizen and his local police department arising from a domestic dispute. “[I]f the language is ambiguous, the court may look beyond the statute to legislative history ... to ascertain the statute's intent.” *LPI Services v. McGee*, 2009 UT 41, ¶ 11, 215 P.3d 135, 139 (*citing Martinez*, 2007 UT 42, ¶ 47, 164 P.3d 384). There is no explicit evidence from the legislature that it intended to move acts intended to cause police action from the existing subsection (1)(b)(ii) (formerly subsection (1)(a)) into acts intended to influence or effect a unit of government from the new subsection (1)(b)(i). There is however some evidence from the proponents of the amendment that the purpose of the amendment was to address the threats from terrorist aimed at widespread threats of terrorism and not to change the existing statute. See Addendum ??? lines 8-40 (changes aimed at weapons of mass destruction, bomb threats, anthrax, etc.), and lines 95-100 (changes were not meant to changing the current statute or effecting the elements that existed at the time). Because the legislature did not intend to effect the existing elements of § 76-5-107 when they amended it in 2002, by adding subsection (1)(b)(i) to the existing elements the legislature intended for threats and acts that were intended to cause action of the police as an official agency organized to deal with emergencies to be charged as class B misdemeanors and not as second degree felonies.

Because the legislature did not intend for the police to become units of government for the purposes of the 2002 amendment the trial court incorrectly interpreted the statute. As a result the trial court improperly instructed the jury that the police were a unit of government and therefore the jury improperly convicted Graham of a second degree felony. This error is clearly prejudicial and as such must be reversed.

**II. DUE TO THE INSUFFICIENCY OF THE EVIDENCE PRESENTED AT TRIAL, NO REASONABLE PERSON COULD HAVE CONCLUDED THAT GRAHAM COMMITTED FELONY DOMESTIC VIOLENCE IN THE PRESENCE OF A CHILD**

The United States Supreme Court has explicitly held that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *see also*, *State v. Lopes*, 1999 UT 24, ¶ 13, 980 P.2d 191; Utah Const. art. I, § 7; U.S. Const. amend. V and XIV. As such, it is the State’s constitutional burden to present evidence to the trier-of-fact that sufficiently links the commission of unlawful activity to the defendant under this standard.

Although on appeal this Court will view those facts presented to the jury “in a light most favorable to a jury’s verdict”, *State v. Hamilton*, 827 P.2d 232, 233 (Utah 1992), However, if “reasonable minds could not rationally have arrived at a verdict of guilty beyond a reasonable doubt based on the law and the evidence presented[]” then a jury’s verdict must be overturned. *State v. Hancock*, 874 P.2d 132, 134 (Utah App. 1994). Here, Graham contends that the jury’s verdict convicting Graham of Domestic Violence

in the Presence of a Child, a third-degree felony, is wholly irrational and unsubstantiated based on the evidence presented and must be corrected.<sup>3</sup>

**A. No Evidence was Presented that Would Lead Reasonable Minds to Rationally Conclude that Graham Violated Utah Code Ann. § 76-6-109.1(2)(a) or (b)**

At trial, the State must have shown beyond a reasonable doubt that Graham committed every element of the offense Domestic Violence in the Presence of a Child under Utah Code Ann. §76-6-109.1, which, to be classified a felony, includes either subsection (2)(a) or (2)(b).

In order to establish that Graham did commit domestic violence as a third degree felony, the State must have proved four elements, with the last element having two alternatives that would qualify the offense as a felony. *See*, Utah Code Ann. §76-6-109.1 (2008).

First, the State must have proved that the victim was a qualified “cohabitant,” as defined by Utah Code Ann. §78B-7-102. Utah Code Ann. §76-6-109.1 (2008). Second, the State must have proved that an act of “domestic violence,” as defined by Utah Code Ann. §77-36-1, occurred. Utah Code Ann. §76-6-109.1 (2008). Third, it must have been proved that the offense occurred “in the presence of a child,” meaning a child was physically present or the actor had knowledge that a child was present and may see or

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<sup>3</sup> Graham asserts even viewing the evidence in light of most favorable to the jury’s verdict, proof of Domestic Violence in the Presence of Child rises, at most, to satisfy Utah Code Ann. § 76-6-109.1(2)(c) (2008), which is classified as a class B misdemeanor under Utah Code Ann. § 76-6-109.1(3)(b) (2008).

hear an act of domestic violence. Utah Code Ann. §76-6-109.1 (2008). Last, the State must have proved that either (a) the actor committed or attempted to commit criminal homicide as defined in Utah Code Ann. §76-5-201; or (b) intentionally causes serious bodily injury to a cohabitant or used a dangerous weapon, as defined by Utah Code Ann. §76-1-601, or other means or force likely to produce death or serious bodily injury. Utah Code Ann. §76-6-109.1 (2008).

Here, the State failed to prove *every* element of the offense of domestic violence in the presence of a child, a third-degree felony, to wit: that Graham used a dangerous weapon.<sup>4</sup>

**1. No Proof Existed to Show Beyond a Reasonable Doubt that Graham Used a Dangerous Weapon**

“Dangerous weapon” is defined by Utah Code Ann. § 76-1-601 (2007) for purposes of Domestic Violence in the Presence of a Child, a third-degree felony.<sup>5</sup> To prove that the actor is guilty of a third-degree felony domestic violence in the presence of a child, however, the State must prove “use” of that dangerous weapon. Unfortunately, “use of a dangerous weapon” is undefined by statute and the jury was left to their understanding of the common meaning of “use.”

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<sup>4</sup> Graham does not dispute that reasonable minds could have concluded that Mindi was a “cohabitant” as defined in Utah Code Ann. §78B-7-102 and that the events occurred in the presence of a child per Utah Code Ann. §76-5-109.1(1)(c) (1) or (2).

<sup>5</sup> Graham concedes that the weapons possessed were “dangerous weapons” as defined in Utah Code Ann. §76-1-6-1 (2007).

When attempting to understand the legislative meaning of a statute, which in this case is Utah Code Ann. §76-5-109.1 and the role the phrase “uses a dangerous weapon” plays in that statute, the intent of that statute can be “gleaned from the definition of the individual words comprising the phrase.” *State ex rel. A.C.*, 2004 UT App 255, ¶ 13, 97 P.3d 706, 712. And, in determining the plain meaning of a statute Utah courts have consistently relied on dictionary definitions.

The word “use,” as a verb, is defined as “to put into action or service” or “to carry out a purpose or action by means of.” Merriam-Webster Online Dictionary (2010) <http://www.merriam-webster.com/dictionary/use>. This definition of “use” is consistent with Utah case law concerning whether a defendant “uses a dangerous weapon.” This common meaning of the word “uses” could not have been employed by the jury in reaching their verdict because no evidence was presented that Matthew Graham put his firearms “into use or service” or even carried out an act of domestic violence by means of a dangerous weapon. Even if the jury failed to apply the term “use” in this narrow sense, the broader definition of “use” as interpreted by the Utah appellate courts further demonstrates that Matthew Graham could not have used a dangerous weapon.

In 1979, the Utah Supreme Court concluded that for purposes of aggravated robbery, “it is not necessary that the State prove that the robber actually pointed a gun at the victim nor is it necessary to find the gun and place it in evidence. If merely exhibiting the gun creates fear in the victim, it constitutes ‘use of a firearm’ for that purpose.” *In re R.G.B.*, 597 P.2d 1333, 1334 (Utah 1979). In *R.G.B.*, Terri Lium, who was employed at

Cheryl's Gift Shop, testified at trial that the juvenile defendant entered the shop and "demanded that she place all of the shop's money into a white paper bag which he presented to her while revealing a gun stuck into the front of his jeans[.]" *In re R.G.B.*, 597 P.2d 1333, 1334 (Utah 1979). Although the defendant did not "use" the gun in the sense that the firearm was discharged or that he even pointed the weapon at the victim, the Court affirmed the conviction because he "**exhibited**" the firearm for the purpose of committing a robbery. *In re R.G.B.*, 597 P.2d 1333, 1334 (Utah 1979) (emphasis added).

Furthermore, in *State v. Weisberg*, 2002 UT App 434, 62 P.3d 457, this Court found that the defendant had used a dangerous weapon for purposes of Stalking under Utah Code Ann. §76-5-106.5(8)(a). At trial, the State provided evidence that the defendant had been stalking the victim, Robin Archibald, and that on a particular day Weisberg

stopped his car directly behind Archibald's car... in a fashion that would have prevented Archibald from moving her car[,]... opened his trunk[,]... then opened the passenger door of his car and removed a pistol-grip shotgun from the passenger compartment. He lifted the shotgun from the car with the pistol-grip in his right hand and the barrel in his left hand. With the shotgun in his hands, Weisberg looked toward [the building where Archibald was] and walked both toward the rear of his car and directly toward [the building's] front window. Weisberg then placed the shotgun in the trunk, closed the trunk, and drove away.

*Weisberg*, 2002 UT App 434, ¶¶ 9-10. This Court concluded that a "jury could reasonably infer that Weisberg stalked Archibald and **exhibited** the shotgun for the purpose of creating fear in her." *Weisberg*, 2002 UT App 434, ¶ 20 (emphasis added).

These cases in the context of other criminal statutes suggest that “use” of a dangerous weapon does not necessarily require pointing or even discharging the weapon, but rather the exhibition of a dangerous weapon during the commission of an underlying offense may suffice. However, they also establish that mere possession is not enough. Here, however, the State did not present any evidence that could lead the jury to reasonably conclude that Graham used or exhibited a dangerous weapon with a view to committing domestic violence against a cohabitant, Mindi Graham.

Presently, the evidence only shows only that Graham possessed, not “used,” a dangerous weapon. As presented at trial, Graham had several weapons and possessed a valid concealed weapon permit. R. 508: 92-93. In fact, Madilin Graham, Mindi and Matthew’s daughter, testified that it was normal to see Matthew with his gun. R. 508: 194. Mindi also clearly testified that at some point Matthew was carrying a firearm. R. 508: 92-93. Mere possession, however, without more does not qualify as “use” of a dangerous weapon. It is undisputed that there was at least some evidence to prove that Matthew Graham *possessed* a firearm during the incident; that evidence, however, falls fatally short of proving that he committed felony domestic violence by the *use* of a dangerous weapon. *See*, Utah Code Ann. §76-6-109.1 (2007).

Here, the facts are clearly distinguishable from *Weisberg* and *R.G.B.* in the sense that Matthew Graham used a dangerous weapon. In both *Weisberg* and *R.G.B.*, the defendants used a dangerous weapon by displaying or exhibiting the weapon with the purpose of threatening the victim. In this case, no evidence was presented to show that



Matthew Graham displayed or exhibited his weapon with the intent of threatening Mindi Graham. In fact, no testimony was given, even by Mindi Graham, that Matthew Graham *used* his weapons in the manner illustrated in *Weisberg* and *R G B*.

As illustrated in *Weisberg* and *R G B*, more than mere possession of a dangerous weapon is required to qualify as “use.” In *R G B*, the defendant exhibited the weapon by revealing it during the robbery. *R G B*, 597 P.2d 1333, 1334 (Utah 1979). In *Weisberg*, the defendant appeared to have deliberately displayed his firearm by taking hold of the weapon in both hands, and he did this in front of the building where he knew the victim was at that time. *Weisberg*, 2002 UT App 434, ¶¶ 9-10. See also, *State v. Cly*, 2007 UT App 212 (Knife was a dangerous weapon and Defendant’s throwing it, which left a bruise on son’s ankle, supported felony conviction for domestic violence in the presence of a child).

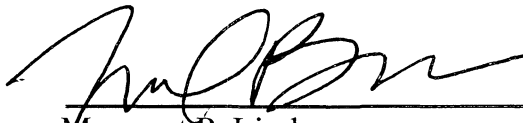
Here, Mindi Graham never testified that Matthew exhibited, pointed, flashed, or otherwise used his guns against her. Only Rebecca Call’s testimony that Mindi had told her that Matthew threatened to shoot her that day, provided any basis for a threat. R. 510: 95. That testimony, however, only indicates a threat, not that the threat was accompanied by the “use” of a dangerous weapon. Furthermore, Deputy John Luke testified that after Mindi Graham left the home the day of the incident, she, in response to Deputy Luke’s question of whether Matthew Graham had assaulted her, responded with “He did not assault me. No. He did not point a gun at me” and that he never pulled a gun on her. R. 510: 123, 126.

Therefore, because of the insufficient evidence presented at trial, it was totally unreasonable for a jury to conclude that Matthew Graham committed domestic violence with the use of a dangerous weapon. As such, Matthew Graham could only have been, at most, convicted of a class B misdemeanor under Utah Code Ann. §76-6-109.1(2)(c) (2002). *See, State v. Carruth*, 974 P.2d 690, 694 (Utah Ct. App. 1997) (Court reversed defendant's felony conviction and entered it as a misdemeanor based on the evidence presented at trial).

### **CONCLUSION AND RELIEF SOUGHT**

For the foregoing reasons, the defendant respectfully requests this court to reverse his third degree felony convictions for a terroristic threat and domestic violence in the presence of a child.

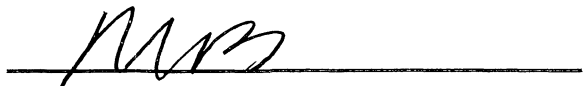
RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of March, 2010.



Margaret P. Lindsay  
Douglas J. Thompson  
Michael Brown  
Counsel for Appellant

### **CERTIFICATE OF MAILING**

I hereby certify that I delivered two true and correct copies of the foregoing Brief of Appellant to Utah Attorney General, Appeals Division, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 22<sup>nd</sup> day of March, 2010.



## **ADDENDA**



West's Utah Code Annotated Currentness

Title 76. Utah Criminal Code

Chapter 5. Offenses Against the Person (Refs & Annos)

Part 1. Assault and Related Offenses

→ § 76-5-107. **Terroristic threat--Penalty**

(1) A person commits a terroristic threat if he threatens to commit any offense involving bodily injury, death, or substantial property damage, and:

(a) he threatens the use of a weapon of mass destruction, as defined in Section 76-10-401, or threatens by the use of a hoax weapon of mass destruction, as defined in Section 76-10-401; or

(b) he acts with intent to:

(i) intimidate or coerce a civilian population or to influence or affect the conduct of a government or a unit of government;

(ii) cause action of any nature by an official or volunteer agency organized to deal with emergencies;

(iii) place a person in fear of imminent serious bodily injury, substantial bodily injury, or death; or

(iv) prevent or interrupt the occupation of a building or a portion of the building, a place to which the public has access, or a facility or vehicle of public transportation operated by a common carrier.

(2)(a) A violation of Subsection (1)(a) or (1)(b)(i) is a second degree felony.

(b) A violation of Subsection (1)(b)(iv) is a third degree felony.

(c) Any other violation of this section is a class B misdemeanor.

(3) It is not a defense under this section that the person did not attempt to or was incapa-

ble of carrying out the threat.

(4) A threat under this section may be express or implied.

(5) A person who commits an offense under this section is subject to punishment for that offense, in addition to any other offense committed, including the carrying out of the threatened act.

(6) In addition to any other penalty authorized by law, a court shall order any person convicted of any violation of this section to reimburse any federal, state, or local unit of government, or any private business, organization, individual, or entity for all expenses and losses incurred in responding to the violation, unless the court states on the record the reasons why the reimbursement would be inappropriate.

#### CREDIT(S)

Laws 1973, c. 196, § 76-5-107; Laws 1988, c. 38, § 1; Laws 2002, c. 166, § 3, eff. May 6, 2002.

#### HISTORICAL AND STATUTORY NOTES

Laws 2002, c. 166, rewrote this section that formerly provided:

“(1) A person commits a threat against life or property if he threatens to commit any offense involving violence with intent to

“(a) cause action of any nature by an official or volunteer agency organized to deal with emergencies;

“(b) place a person in fear of imminent serious bodily injury; or

“(c) prevent or interrupt the occupation of a building or room; place of assembly; place to which the public has access; or aircraft, automobile, or other form of transportation.

“(2) A threat against life or property is a class B misdemeanor, except if the actor's intent is to prevent or interrupt the occupation of a building, a place to which the public has access, or a facility of public transportation operated by a common carrier, the offense is a third degree felony.”

West's Utah Code Annotated Currentness

Title 76. Utah Criminal Code

Chapter 5. Offenses Against the Person (Refs & Annos)

Part 1. Assault and Related Offenses

**§ 76-5-109.1. Commission of domestic violence in the presence of a child**

(1) As used in this section:

(a) "Cohabitant" has the same meaning as defined in Section 78B-7-102.

(b) "Domestic violence" has the same meaning as in Section 77-36-1.

(c) "In the presence of a child" means:

(i) in the physical presence of a child; or

(ii) having knowledge that a child is present and may see or hear an act of domestic violence.

(2) A person commits domestic violence in the presence of a child if the person:

(a) commits or attempts to commit criminal homicide, as defined in Section 76-5-201, against a cohabitant in the presence of a child; or

(b) intentionally causes serious bodily injury to a cohabitant or uses a dangerous weapon, as defined in Section 76-1-601, or other means or force likely to produce death or serious bodily injury against a cohabitant, in the presence of a child; or

(c) under circumstances not amounting to a violation of Subsection (2)(a) or (b), commits an act of domestic violence in the presence of a child.

(3)(a) A person who violates Subsection (2)(a) or (b) is guilty of a third degree felony.

(b) A person who violates Subsection (2)(c) is guilty of a class B misdemeanor.

(4) A charge under this section is separate and distinct from, and is in addition to, a charge of domestic violence where the victim is the cohabitant. Either or both charges may be filed by the prosecutor.

(5) A person who commits a violation of this section when more than one child is present is guilty of one offense of domestic violence in the presence of a child regarding each child present when the violation occurred.

CREDIT(S)

Laws 1997, c. 303, § 5, eff. May 5, 1997;Laws 1998, c. 81, § 2, eff. May 4, 1998;Laws 2002, c. 81, § 1, eff. May 6, 2002;Laws 2008, c. 3, § 234, eff. Feb. 7, 2008;Laws 2009, c. 70, § 1, eff. May 12, 2009.

West's Utah Code Annotated Currentness  
Title 76. Utah Criminal Code  
Chapter 1. General Provisions  
Part 6. Definitions

**§ 76-1-601. Definitions**

Unless otherwise provided, the following terms apply to this title:

- (1) "Act" means a voluntary bodily movement and includes speech.
- (2) "Actor" means a person whose criminal responsibility is in issue in a criminal action.
- (3) "Bodily injury" means physical pain, illness, or any impairment of physical condition.
- (4) "Conduct" means an act or omission.
- (5) "Dangerous weapon" means:
  - (a) any item capable of causing death or serious bodily injury; or
  - (b) a facsimile or representation of the item, if:
    - (i) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury;
    - or
    - (ii) the actor represents to the victim verbally or in any other manner that he is in control of such an item.
- (6) "Grievous sexual offense" means:
  - (a) rape, Section 76-5-402;
  - (b) rape of a child, Section 76-5-402.1;
  - (c) object rape, Section 76-5-402.2;
  - (d) object rape of a child, Section 76-5-402.3;
  - (e) forcible sodomy, Subsection 76-5-403(2);
  - (f) sodomy on a child, Section 76-5-403.1;
  - (g) aggravated sexual abuse of a child, Subsection 76-5-404.1(4);
  - (h) aggravated sexual assault, Section 76-5-405;
  - (i) any felony attempt to commit an offense described in Subsections (6)(a) through (h); or
  - (j) an offense in another state, territory, or district of the United States that, if committed in Utah, would constitute an offense described in Subsections (6)(a) through (i).
- (7) "Offense" means a violation of any penal statute of this state.
- (8) "Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting.
- (9) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association.
- (10) "Possess" means to have physical possession of or to exercise dominion or control over tangible property.



(11) “Serious bodily injury” means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

(12) “Substantial bodily injury” means bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ.

(13) “Writing” or “written” includes any handwriting, typewriting, printing, electronic storage or transmission, or any other method of recording information or fixing information in a form capable of being preserved.

#### CREDIT(S)

Laws 1973, c. 196, § 76-1-601; Laws 1989, c. 170, § 1; Laws 1995, c. 244, § 1, eff. May 1, 1995; Laws 1995, c. 291, § 1, eff. May 1, 1995; Laws 1996, c. 205, § 26, eff. April 29, 1996; Laws 2007, c. 339, § 2, eff. April 30, 2007.

#### HISTORICAL AND STATUTORY NOTES

Laws 2007, c. 339, in subsec. (5)(b) substituted “, if” for “; and”; inserted subsec. (6) and redesignated former subsecs. (6) through (12) as subsecs. (7) through (13).

**§ 77-36-1. Definitions**

As used in this chapter:

- (1) "Cohabitant" has the same meaning as in Section 78B-7-102.
- (2) "Department" means the Department of Public Safety.
- (3) "Divorced" means an individual who has obtained a divorce under Title 30, Chapter 3, Divorce.
- (4) "Domestic violence" means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one cohabitant against another. "Domestic violence" also means commission or attempt to commit, any of the following offenses by one cohabitant against another:
  - (a) aggravated assault, as described in Section 76-5-103;
  - (b) assault, as described in Section 76-5-102;
  - (c) criminal homicide, as described in Section 76-5-201;
  - (d) harassment, as described in Section 76-5-106;
  - (e) electronic communication harassment, as described in Section 76-9-201;
  - (f) kidnapping, child kidnapping, or aggravated kidnapping, as described in Sections 76-5-301, 76-5-301.1, and 76-5-302;
  - (h) sexual offenses, as described in Title 76, Chapter 5, Part 4, Sexual Offenses, and Title 76, Chapter 5a, Sexual Exploitation of Children;
  - (i) stalking, as described in Section 76-5-106.5;
  - (j) unlawful detention, as described in Section 76-5-304;
  - (k) violation of a protective order or ex parte protective order, as described in Section 76-5-108;
  - (l) any offense against property described in Title 76, Chapter 6, Part 1, Property Destruction, 2, Burglary and Criminal Trespass, or 3, Robbery;
  - (m) possession of a deadly weapon with intent to assault, as described in Section 76-10-507;
  - (n) discharge of a firearm from a vehicle, near a highway, or in the direction of any person, building, or vehicle, as described in Section 76-10-508;
  - (o) disorderly conduct, as defined in Section 76-9-102, if a conviction of disorderly conduct is the result of a plea agreement in which the defendant was originally charged with any of the domestic violence offenses otherwise described in this Subsection (2). Conviction of disorderly conduct as a domestic violence offense, in the manner described in this Subsection (2)(o), does not constitute a misdemeanor crime of domestic violence under 18 U.S.C. Section 921, and is exempt from the provisions of the federal Firearms Act, 18 U.S.C. Section 921 et seq.; or
  - (p) child abuse as described in Section 76-5-109.1.

(5) “Marital status” means married and living together, divorced, separated, or not married.

(6) “Married and living together” means a man and a woman whose marriage was solemnized under Section 30-1-4 or 30-1-6 and who are living in the same residence.

(7) “Not married” means any living arrangement other than married and living together, divorced, or separated.

(8) “Separated” means a man and a woman who have had their marriage solemnized under Section 30-1-4 or 30-1-6 and who are not living in the same residence.

(9) “Victim” means a cohabitant who has been subjected to domestic violence.

#### CREDIT(S)

Laws 1983, c. 114, § 1; Laws 1990, c. 256, § 3; Laws 1991, c. 180, § 7; Laws 1993, c. 137, § 13; Laws 1995, c. 300, § 16, eff. July 1, 1995; Laws 1996, c. 79, § 105, eff. April 29, 1996; Laws 1999, c. 229, § 1, eff. May 3, 1999; Laws 2002, c. 81, § 2, eff. May 6, 2002; Laws 2006, c. 46, § 15, eff. May 1, 2006; Laws 2008, c. 3, § 259, eff. Feb. 7, 2008; Laws 2008, c. 375, § 1, eff. May 5, 2008.

#### HISTORICAL AND STATUTORY NOTES

Composite section by the Office of Legislative Research and General Counsel of Laws 2008, c. 3, § 259 and Laws 2008, c. 375, § 1.

provided the individual in its employ:

the option to receive, instead of provid-  
death benefit, any part of the payment  
h benefit is insured, any part of the pre-  
ntributions to premiums paid by his  
nit; and

t the right, under the provisions of the  
m or policy of insurance providing for  
enefit, to assign that benefit, or to re-  
consideration instead of that benefit  
is withdrawal from the plan or system  
that benefit or upon termination of the  
m or policy of insurance or of his serv-  
employing unit.

ayment by an employing unit, without  
om the remuneration of the individual  
, of the tax imposed upon an individual  
under Section 3101 of the Federal In-  
ue Code with respect to services per-  
December 31, 1940; or

sal payments after December 31, 1940,  
mploying unit is not legally required to

" means the period or periods of seven  
alendar days as the commission may  
rule.

## CHAPTER 38

### H. B. No. 150

Passed February 10, 1988

Approved March 9, 1988

Effective April 25, 1988

## UAL THREAT AMENDMENTS

By Kelly C. Atkinson

RELATING TO CRIMINAL LAW;  
VG AN OFFENSE REGARDING  
; TO LIFE OR PROPERTY; AND  
TECHNICAL AMENDMENTS.

FFECTS SECTIONS OF UTAH CODE  
ED 1953 AS FOLLOWS:

AS ENACTED BY CHAPTER 196,  
UTAH 1973

, AS REPEALED AND REENACTED  
ER 238, LAWS OF UTAH 1987

*by the Legislature of the state of Utah:*

### Section Amended.

–5–107, Utah Code Annotated 1953, as  
Chapter 196, Laws of Utah 1973, is  
read:

**Threat against life or property —**

(1) A person commits [~~terroristic~~] a threat  
against life or property if he threatens to commit  
any offense involving violence with intent to:

(a) [~~To~~] cause action of any [~~sort~~] nature by an offi-  
cial or volunteer agency organized to deal with  
emergencies; [~~or~~]

(b) [~~To~~] place a person in fear of imminent serious  
bodily injury; or

(c) [~~To~~] prevent or interrupt the occupation of a  
building[;] or room; place of assembly; place to  
which the public has access; or aircraft, automobile,  
or other form of [~~conveyance~~] transportation.

(2) [~~Terroristic~~] A threat against life or property  
is a class B misdemeanor [~~unless~~], except if the ac-  
tor's intent is to prevent or interrupt the occupation  
of a building, a place to which the public has access,  
or a facility of public transportation operated by a  
common carrier, [~~in which event terroristic threat~~]  
the offense is a third degree felony.

### Section 2. Section Amended.

Section 76–10–1602, as repealed and reenacted  
by Chapter 238, Laws of Utah 1987, is amended to  
read:

### 76–10–1602. Definitions.

As used in this part:

[(2)] (1) "Enterprise" means any individual, sole  
proprietorship, partnership, corporation, business  
trust, association, or other legal entity, and any un-  
ion or group of individuals associated in fact al-  
though not a legal entity, and includes illicit as well  
as licit entities.

[(3)] (2) "Pattern of unlawful activity" means en-  
gaging in conduct which constitutes the commission  
of at least three episodes of unlawful activity, which  
episodes are not isolated, but have the same or simi-  
lar purposes, results, participants, victims, or  
methods of commission, or otherwise are interre-  
lated by distinguishing characteristics. Taken to-  
gether, the episodes shall demonstrate continuing  
unlawful conduct and be related either to each other  
or to the enterprise. At least one of the episodes  
comprising a pattern of unlawful activity shall have  
occurred after July 31, 1981. The most recent act  
constituting part of a pattern of unlawful activity as  
defined by this part shall have occurred within five  
years of the commission of the next preceding act al-  
leged as part of the pattern.

[(4)] (3) "Person" includes any individual or entity  
capable of holding a legal or beneficial interest in  
property, including state, county, and local govern-  
mental entities.

[(1)] (4) "Unlawful activity" means to directly en-  
gage in conduct or to solicit, request, command, en-  
courage, or intentionally aid another person to en-  
gage in conduct which would constitute any offense  
described by the following crimes or categories of  
crimes, or to attempt or conspire to engage in an act  
which would constitute any of those offenses, re-  
gardless of whether the act is in fact charged or in-  
dicted by any authority or is classified as a misde-  
meanor or a felony:

(2) Assault is a class B misdemeanor except where:

(a) It is committed in a fight or scuffle entered by mutual consent and no serious bodily injury results, in which case it is a class C misdemeanor; or

(b) It is committed by a prisoner who intentionally or knowingly causes bodily injury to another, in which case it is a felony of the third degree.

**Section 76-5-103.** (1) A person commits aggravated assault if he commits assault as defined in section 76-5-101 and:

(a) He causes serious bodily injury to another; or

(b) He uses a deadly weapon.

(2) Aggravated assault is a felony of the third degree except

(a) Where it is committed by a prisoner, in which case it is a felony of the second degree; or

(b) Where it is committed by a prisoner serving a sentence for a felony of the first degree and no serious bodily injury is inflicted, in which case it is a felony of the first degree; if the prisoner intentionally causes serious bodily injury, the offense is a capital offense.

**Section 76-5-104.** In any prosecution for criminal homicide under section (2) of this chapter or assault, it shall be no defense to the prosecution that the defendant was a party to any duel, mutual combat, consensual altercation, if during the course of the duel, combat, or altercation any deadly weapon was used.

**Section 76-5-105.** Every person who unlawfully and intentionally deprives a human being of a member of his body, or disables or renders it useless, or who cuts out or disables the tongue, puts out an eye, slits the nose, ear, or lip, is guilty of mayhem.

(2) Mayhem is a felony of the second degree.

**Section 76-5-106.** (1) A person is guilty of harassment if, with intent to frighten or harass another, he communicates in writing or otherwise to commit any violent felony.

(2) Harassment is a class C misdemeanor.

**Section 76-5-107.** (1) A person commits terroristic threat if he threatens to commit any offense involving violence with intent:

(a) To cause action of any sort by an official or volunteer of a law enforcement agency or a person organized to deal with emergencies; or

(b) To place a person in fear of imminent serious bodily injury;

(c) To prevent or interrupt the occupation of a building, room, or place of assembly; place to which the public has access; or aircraft, automobile, or other form of conveyance.

(2) Terroristic threat is a class B misdemeanor unless the intent is to prevent or interrupt the occupation of a building, a room, or place to which the public has access, or a facility of public transportation by a common carrier, in which event terroristic threat is a third degree felony.

1 Utah State Legislature  
2 House Floor Debates (Audio Recordings)  
3 2002 General Legislative Session  
4 Day 44 (3/5/2002) HB0283S01  
5 [http://www.le.state.ut.us/asp/audio/index.asp?Sess=2002GS&Day=0&Bill=HB028](http://www.le.state.ut.us/asp/audio/index.asp?Sess=2002GS&Day=0&Bill=HB0283S01&House=H)  
6 [3S01&House=H](http://www.le.state.ut.us/asp/audio/index.asp?Sess=2002GS&Day=0&Bill=HB0283S01&House=H)  
7

8 Rep. Ray: Yes, all we're doing on this, ah, the way the bill is written right now, we're  
9 requiring expenses to be reimbursed to law enforcement, private businesses,  
10 organizations, anybody who's involved in a terroristic threat for loss or for  
11 expenses. And we just added the words 'and losses incurred' so that we can take  
12 care of these businesses that they've actually had to close the doors and do without  
13 business for a day or two that they can recoup those losses also in court. So that's  
14 what this amendment does.

15  
16 Speaker Pro Tem: Thank you. Any discussion to amendment number three under  
17 Representative Ray's name? I see none. Would you like to summarize  
18 Representative Ray?

19  
20 Rep. Ray: I waive.

21  
22 Speaker Pro Tem: The motion before us is that we accept amendment number 3  
23 under Representative Ray's name, all in favor indicate by saying Aye. (Aye) Any  
24 opposed? The bill as amended is proposed. Representative Ray.

25  
26 Rep. Ray: Thank you Mister Speaker Pro Tem. What this bill does is we are basically  
27 modifying our criminal code, ah, on terrorism. We're modernizing it, we're adding  
28 in chemical, biological, different types of threats that haven't been there in the past.  
29 We're exempting security plans, codes, combinations, passwords, keys, those types  
30 of things from the grandma act so that we can protect those. And then we've taken  
31 different terms such as threat against life or property and just made that a  
32 terroristic threat based on weapons of mass destruction. We've defined what a  
33 weapon of mass destruction is. Made some exemptions on personal firearms so that  
34 those can't be described as that. And, uh, we've added bridges and highways, as far  
35 as threats against those that are also in this bill. Things that we have basically, both  
36 since and before 911, have had to worry about. This would take care of anthrax  
37 hoaxes, bomb threats, those types of situations that are covered. We've increased  
38 the penalty, for instance a bomb threat goes from a misdemeanor to a second-  
39 degree felony. And just tried to put some teeth into the terrorism laws that we have.  
40 So with that I am open for questions.

41  
42 Speaker Pro Tem: Thank you. Questions or comments for Substitute House Bill 283?  
43 I see none. Back to you Representative Ray for summation.

44  
45 Rep. Ray: This is just what we need for the state of Utah. We've written a bill  
46 specifically for Utah.

47 Speaker Pro Tem: Excuse me, Representative Daniels?

48

49 Rep. Daniels: I wish to propose an amendment to the bill. The amendment would be  
50 to strike from the bill lines 95 and 96. I would like to speak to the proposed  
51 amendment.

52

53 Speaker Pro Tem: Please.

54

55 Rep. Daniels: Thank you. Now this doesn't change very much. I support the general  
56 idea behind the bill. The problem I have with these particular lines is that it appears  
57 to make a simple assault into a new crime of terroristic threat. The person who  
58 commits the simple assault would still be guilty of simple assault but would also be  
59 guilty of this crime, a terroristic threat. Let me read through how that would read.  
60 If you start on line 85 "a person commits a terroristic threat if he threatens to  
61 commit any offense involving bodily injury, death, or substantial property damage."  
62 So a simple assault would be an offense involving bodily injury. You hit someone in  
63 the mouth, for example. And then you have to have another element though, if you  
64 turn on the next, from line 88 down to line 100, those are a number of different  
65 categories, any one of which you need. You don't need all of them, you just need one  
66 of them. They are all or's, they are in the disjunctive. And so you get to line 95 and  
67 it places "a person in fear of imminent serious bodily injury, substantial bodily  
68 injury, or death." So if you have a simple assault where some one person is placed in  
69 fear of imminent serious bodily injury that's a terroristic threat. It's not punished  
70 any greater than simple assault. It's still a class B misdemeanor, it doesn't increase  
71 the penalty. The only problem is with a simple assault you say 'I'm going to hit you  
72 in the mouth' and you hit them in the mouth and your convicted of that (microphone  
73 goes off).

74

75 Speaker Pro Tem: Your time is up. Representative Daniels would you like an  
76 extension? (inaudible) Alright, the amendment before us is to delete lines 95 and 96.  
77 I need to clear up something. Representative Daniels had turned on his light and I  
78 did not see it when I asked Representative Ray to begin summation. It was my error  
79 not his. The motion before us is that amendment, to delete lines 95 and 96.

80 Discussion to that motion. Representative Hutchins.

81 Rep. Hutchins: I'd like to make a substitute motion.

82

83 Speaker Pro Tem: Substitute motion is in order.

84

85 Rep. Hutchins: On line 95 after 'a' insert 'group of' and then delete 'person' and  
86 insert 'persons' so that it would read 'group of persons' or I guess more  
87 appropriately to 'a group of people' perhaps. I don't know what the right verbiage  
88 would be. I'm going to stay with 'persons'. 'In fear of serious bodily injury,  
89 substantial bodily injury, or death'. Just to change it from an individual person to a  
90 group of persons.

91 Speaker Pro Tem: The motion before us is the substitute motion before us is to on  
92 line 95 delete the 'person' and insert after the word 'a' 'group of people' and the rest  
93 of it will stay. Back to you Representative Ray as the maker of the original motion.  
94

95 Rep. Ray: I would actually oppose both of those motions. Realize where they're  
96 changing is already current statute. My question... I talked to the Attorney General  
97 about these changes and this is really a separate bill within itself, to argue the merits  
98 of changing this because we fear that if we do it we pull the carpet out from  
99 underneath the victim's rights because we're getting into the current code. And I  
100 don't know that we want to do that right now. I would encourage the  
101 representatives to bring a bill back next year and try to correct that situation. At  
102 this point I think we really need to stick with where the bill is going. It's still a class  
103 B misdemeanor regardless of what you do, if it's terroristic or if it's still a simple  
104 assault. It's still a class B misdemeanor so you're not changing that one bit. So I  
105 would oppose those. Thank you.  
106

107 Speaker Pro Tem: Thank you. Representative Daniels do you have a comment as  
108 maker of the original amendment?  
109

110 Rep. Daniels: Thank you. It is in the original language but it used to be called a  
111 threat against life or property which isn't the same thing in modern parlance, since  
112 the last few months, as a terroristic threat. Representative Ray is correct, it doesn't  
113 change the penalty. Either way, a person who does this is guilty of the same degree  
114 of the offense. The only question is, on the person's record does it say he committed  
115 an assault or does it say he committed a terroristic threat. I would leave it up to the  
116 body with that. Thank you.  
117

118 Speaker Pro Tem: Further discussion to the substituted motion. See none. Back to  
119 you, Representative Hutchins for summation.  
120

121 Rep. Hutchins: I have just been told by counsel that I need to adjust my amendment.  
122 Is it appropriate to do that Mister Speaker Pro Tem?  
123

124 Speaker Pro Tem: Let's hear what you would like to do.  
125

126 Rep. Hutchins: On line 94 I would need to insert after 'emergencies' 'or', the word  
127 'or'. After the semi colon he says. And then the rest of the motion would be the  
128 same.  
129

130 Speaker Pro Tem: So you're just inserting the word or at the end of the line? I think  
131 that just grammatically... actually it doesn't. If substantively changes it. Any  
132 discussion to the substitute motion to amend? See none. Representative Hutchins  
133 would you like to speak?  
134

135 Rep. Hutchins: Thank you. It's my understanding speaking with the sponsor of this,  
136 and I hope he understands I'm doing this in all best faith hoping it goes through, that



137 we are dealing with weapons of mass destruction. And I don't know how you could  
138 limit the weapon, using a nuclear devise against an individual person and so that is  
139 why I thought it would be more appropriate to keep it to, if we are talking about  
140 mass destruction, keep it to groups of people. That's the intent.

141  
142 Speaker Pro Tem: Thank you. The motion before us, substitute motion, the end of  
143 line 94 insert the word 'or', on line 95 after 'a' insert 'group of people' and delete the  
144 word 'person'. All in favor of the amendment indicate by saying Aye. (Aye).  
145 Opposed? (No). Rule the motion fails on a very weak... Let's try it again. Have  
146 everyone vote. All in favor of the substitute motion indicate by saying Aye. (Aye).  
147 Opposed? (No). Thank you the motion fails. We're back to Representative Daniels,  
148 the maker of the original motion to amend.

149  
150 Rep. Daniels: Thank you. I would hope you would vote for this amendment. It  
151 doesn't hurt the bill and it really just makes it a little better bill. Thank you.

152  
153 Speaker Pro Tem: Motion before us now it to delete lines 95 and 96. All in favor of  
154 the motion indicate by saying Aye. (Aye). Opposed? (No). Motion fails. Back to the  
155 original bill, Representative... any further discussion to first Substitute House Bill  
156 283? See none, back to you Representative Ray for summation.

157  
158 Rep. Ray: Again this bill is specifically written for Utah. We didn't jump on the  
159 bandwagon with the Feds and the way they took away rights of private citizens and  
160 some of the things they did. So this is a really strong bill and I urge your support on  
161 it.

162  
163 Speaker Pro Tem: Thank you. Voting is now open on first Substitute House Bill 283  
164 as amended. Seeing all present. Representative Morgan, Representative Peterson?  
165 Representative Peterson? Seeing all present having voted voting will be closed.  
166 First substitute House Bill 283 having received 69 yes votes and 1 no vote passes  
167 this House and will be forwarded to the Senate for further action.