

1981

State of Utah v. Lester Ralph Romero : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF
THE STATE OF UTAH

THE STATE OF UTAH,

Respondent,

ESTER RALPH ROMERO,

Petitioner.

PETITION FOR REHEARINGS
AND BRIEF IN SUPPORT THEREOF

Appeal from a verdict
rendered at a bench trial
by the Honorable James S. Sams, Jr.
Third Judicial District Court
from the denial of a Motion
Arrest of Judgment.

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236 State Capitol
Salt Lake City, Utah 84114

Attorney for Respondent

FILED

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IN THE SUPREME COURT OF
THE STATE OF UTAH

THE STATE OF UTAH,	:	
Respondent,	:	
	:	
v.	:	
	:	
LESTER RALPH ROMERO,	:	Case No. 16638
Petitioner.	:	

PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF

Appeal from a verdict of guilty
rendered at a bench trial before
the Honorable James S. Sawaya of the
Third Judicial District Court and
from the denial of a Motion in
Arrest of Judgment.

JOHN D. O'CONNELL
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Attorney for Petitioner

DAVID WILKINSON
Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorney for Respondent

IN THE SUPREME COURT OF
THE STATE OF UTAH

THE STATE OF UTAH,	:	
Respondent,	:	
	:	
v.	:	
	:	
LESTER RALPH ROMERO,	:	Case No. 16638
Petitioner.	:	

PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF

COMES NOW LESTER RALPH ROMERO, appellant-petitioner, and hereby petitions the Court to rehear the above captioned appeal of a criminal conviction for the following reasons which pertain to erroneous factual assumptions and, therefore, petitioner has incorporated his "Brief in Support" into this Petition:

1. The primary holding, that the evidence derived from the illegal seizure of defendant's papers was admissible because the taint of the illegal search was removed by attenuation, decided an issue which was not addressed or anticipated by the parties on appeal and assumed critical facts contrary to the evidence in the record. The "live witness - attenuation" analysis of

United States v. Ceccolini, 435 U.S. 268 (1978), by this Court is inappropriate and not dispositive because:

a) Indirectly derived "live witness" testimony constituted only a part of the evidence objected to on Fourth Amendment grounds. Physical evidence which was seized directly from defendant's vehicle under circumstances which this Court assumed violated defendant's Fourth Amendment rights was, itself, admitted into evidence at trial, over the Fourth Amendment objection of the defendant. This evidence included the "ABC envelope" (Exhibit S-10, R-192, 207), which was the critical link connecting the defendant to the stolen property. (R-199, R-202-06).

b) The Court's analysis treats the seizure of the defendant's papers from his truck and the subsequent obtaining of the search warrant for ABC Storage as isolated events separated by a two month interval. As appellant attempted to make clear on appeal, appellant objected to the seizure which included the taking of the papers to the County Attorney's Office, photocopying them, filing them, and, in accordance with an expressed plan, using them in the continuing investigation of the appellant (Exhibit D-3, Appendix A). Thus, the violation of appellant's rights was a continuing violation which included the direct and repeated use

of the appellant's papers in obtaining the search warrant for ABC Storage. (Affidavit for Search Warrant, Exhibit D-2, Appendix B). Thus, there was no time interval between the Fourth Amendment violation and the obtaining of the warrant which produced the other evidence used at trial. Removal from the Affidavit of statements expressly connected to the seized envelope or dependant thereon to establish a connection to the storage unit would clearly eliminate probable cause. (Ibid.)

c) The decision finds no connection between the statement of the confidential informant and the seized envelope. The Affidavit itself (Exhibit D-2, Appx. B, p. 2), clearly establishes that the confidential informant observed a copy of the illegally seized envelope. The testimony was that the informant asked to see the items seized from the vehicle because appellant was concerned that the contents of an envelope would lead to stolen property. (R-127-28, R-242-43).

d) In United States v. Ceccolini, 435 U.S. 268 (1978), the Supreme Court was concerned with a completely different situation where the information obtained illegally may have led the police to the witness, but the illegally obtained information was not ever used as evidence, nor could it be shown that it had any effect

on the motivation of the witness to testify or on the testimony itself. The illegally obtained information was not used even in questioning the witness. 435 U.S. at 279.

e) In the instant case the illegally seized envelope and its contents were used directly and expressly in obtaining the warrant for the search of ABC and were introduced into evidence at trial. The envelope and its contents were necessary to connect the statements and testimony of the live witnesses and other exhibits to the defendant both in the Affidavit for the Warrant and at trial.

2. The decision of this Court states that the facts indicate that the defendant may not have had a possessory right to assert a Fourth Amendment claim. The County Attorney's investigator who seized the papers from the truck testified that he knew that the vehicle was registered to Golden Circle Corporation by the appellant, that appellant was in possession of the vehicle, and that appellant was associated with Golden Circle Corporation. (R-142-43). That same officer charged the appellant with having an illegal safety inspection sticker on the vehicle in question at the time of the seizure (R-143), and he was convicted of that offense. (R-112). Not only was defendant's interest in the vehicle clearly shown by the evidence, the State is collaterally estopped from claiming it was not his vehicle after convicting him of the motor vehicle offense.

3. The Court's decision dismisses appellant's challenge to the sufficiency of the reliability information in the Search Warrant Affidavit because Lyle's statements were admissions against interest and therefore carried their own indicia of reliability. That Lyle's statement was against interest is a reasonable inference and one that the magistrate probably made from the sparse information in the Affidavit. However, it is not true since Lyle was given immunity and promised help with the parole board. (R-181, 188). The false inference results from the lack of information in the Affidavit concerning circumstances of reliability which Spinelli v. United States, 393 U.S. 410 (1969), requires. By not explaining the circumstances surrounding the informant's statement, the Affidavit did not just deprive the magistrate of information to make a conclusion on reliability, it led the magistrate and this Court to a false conclusion regarding reliability.

4. The Court's decision dismisses appellant's point on the concealment of the identity of the informant, who was defendant's attorney's investigator, on the grounds that disclosure was not required because defendant knew who he was. At the Motion to Suppress, defendant became highly suspicious that the person who told the County Attorney's investigator that appellant was concerned about the envelope which was seized had obtained that information from an attorney-client conversation and put on evidence which left that inference. One could even say that

defendant did know that a breach of the attorney-client relationship had occurred. However, the court did not know. The prosecutor, while refusing to divulge the identity, assured the court that the information did not come from any attorney-client source. (R-152). The identity of the source was therefore the issue --- and under Rule 36 disclosure was required. It does not help if defendant knew, if he was not allowed to prove it. The informant's identity was concealed from the court, not the appellant. Appellant submits he had a right to establish the connection between the privileged conversation and the Affidavit at the Motion to Suppress and was prevented from doing so by improper application of Rule 36.

5. The decision states that the trial court found at the Motion in Arrest of Judgment that the information from the defense attorney's agent "did not come from a confidential and privileged conversation." No such detailed finding was made, although the court made a comment to that effect before the evidence was all in. (R-256).

It is interesting that after the evidence was in the State more or less abandoned its claim that the information came from other sources and argued instead that: the conversation between appellant, his attorney, and his investigator, McLaughlin, was not privileged because it contained information about an ongoing crime; that the County Attorney's Office was not aware that McLaughlin obtained the information from the lawyer's office because they told McLaughlin they did not want information obtained

that way; that there was no state action because McLaughlin was not paid money;¹ and the exclusionary rule should not apply in any event. (R-232).

It should be noted that the only evidence was that McLaughlin was a party to the conversation where appellant asked his lawyer whether the County Attorney's Office could open an envelope. There was no evidence that McLaughlin heard appellant make that statement in another context. The County Attorney's investigator could only testify that he told McLaughlin not to give information obtained from such conferences (R-258), and McLaughlin told him (out of court) that he had obtained it elsewhere. (R-253). This was admissible not for the truth of the matter, but to establish the lack of knowledge of the real source on the part of the prosecution.

This Court's escalation of the trial court's denial of appellant's Motion in Arrest of Judgment, (which was stated in the most general language --- "facts claimed in motion are not supported by credible evidence"), to a specific finding of particular facts, not argued by the prosecution or supported by the evidence, not only deprives the appellant of a fair application of the law in this Court, but severely handicaps him in obtaining relief elsewhere. The Supreme Court of the United States

1. He was, however, given information in exchange for his information. (R-254-55).

has recently held that fact findings of state appellate courts deserve a "presumption of correctness." Sumner v. Mata, 49 Law Week 4133 (Jan. 21, 1981).

It should also be noted that the statement in the decision that the "testimony given by the informant at trial" was neither prompted by nor the product of participation in any privileged communications," (p. 7), clearly assumes an incorrect factual and procedural context of the issue raised. The informant did not ever testify --- he merely told the County Attorney's investigator that appellant was concerned about whether that office could open the seized envelope and that started the use of the seized envelope to obtain the search warrant. That is, the Search Warrant Affidavit was not only based on physical evidence obtained in violation of the Fourth Amendment, but also on information obtained in violation of the Sixth Amendment.

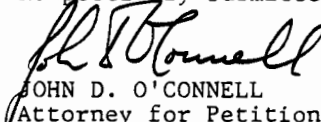
CONCLUSION

The Court's decision appears to be based upon assumed facts which are contrary to those in the record. Furthermore, the decision addresses some critical issues not raised by the parties or applies analyses not anticipated by the parties so that they could marshal the facts necessary for the Court's determination. Counsel would particularly call to the Court's attention that the Constitutional violations complained of here were not the result of a mere "blunder of a constable on the beat," but were made by a law-trained agent of the prosecuting attorney,

after consultation with a deputy county attorney (Supplementary Report, Exhibit D-3, Appx. A), and were ongoing over an extended period of time.

If the exclusionary rule is to be applied in only the most extreme case, this is it.

Respectfully submitted,


JOHN D. O'CONNELL
Attorney for Petitioner

CERTIFICATE OF SERVICE

Served two copies of Petitioner's Petition for Rehearing and Brief in Support Thereof to David Wilkinson, Attorney General and Attorney for Respondent, by leaving same at the office of the Attorney General, 236 State Capitol, Salt Lake City, Utah, this ____ day of February, 1981.



APPENDIX A

DEFENDANT'S EXHIBIT <u>3</u> CP78-1046

Supplementary Report
Salt Lake County Attorneys Office
Criminal Division

DEFENDANT'S EXHIBIT NO.

OFFENSE AS REPORTED	CODE VIOLATION	DATE REPORTED	DATE OCCURRED	CASE NUMBER	CUTSIDE AGENCY & CASE NUMBER
COMPLAINANT	ADDRESS	RESIDENCE PHONE	BUSINESS PHONE		

ADDITIONAL INFORMATION & SYNOPSIS

ARREST OF LESTER RALPH ROMERO

On August 25, 1978, at approximately 0750 hours, I proceeded to the area of the suspect's home. I made a drive past the suspect's home and observed in and around the suspect's home four vehicles. There was a white over green Thunderbird. There was a green Chevette and a green Volkswagon and a light blue over dark blue Ford pickup truck with a camper.

I then proceeded to perk on 6200 South at approximately 1800 West. At approximately 0815 hours, Sgt. Dennis Harwood from the Salt Lake County Sheriff's Office joined me and set up surveillance west of the suspect's home.

At approximately 0830 hours, Sgt. Harwood contacted me by radio and advised that the suspect had just left his home and had gotten into the blue Ford pickup truck with the camper.

I then started the engine in my vehicle, pulled forward, and observed the suspect as he came to the stop sign at 2200 West on 6200 South. Suspect made a right turn and proceeded eastbound on 6200 South. I made a U-turn prior to the suspect getting to my location; and as the suspect passed, I pulled in behind the suspect and awaited Sgt. Harwood's arrival to stop the suspect with his red light. However, prior to Sgt. Harwood's arrival, I observed the suspect pull his pickup truck to the right and off the roadway and turn off the engine.

I exited my vehicle and proceeded to meet the suspect at the left rear corner of his pickup truck. I there displayed my badge and identification card and requested the suspect to produce a driver's license. Suspect pulled out his wallet from his right hip pocket and started looking through it. The suspect appeared to be quite nervous and his hand was visibly shaking. The suspect did not appear to be locating a driver's license.

I asked the suspect if he had a driver's license and he stated that he did. He continued to look but was not able to come up with one. I then asked the suspect if he had any kind of identification. He then gave me a card, typewritten, with his name and address on it. He asked what this was all about. I advised him that I had an outstanding warrant for his arrest.

At this time, Sgt. Dennis Harwood had parked his vehicle to the rear of mine and had come forward. Mr. Romero was advised as to the charges against him and taken to Sgt. Harwood's car and given a field search by Sgt. Harwood.

Sgt. Harwood, at my request, then removed the suspect's wallet and I looked through the wallet and asked the suspect if there was any cash money in the wallet for security reasons. He wanted to know why I was interested in cash money, and I advised him that it was for security purposes so that upon his arrival at the jail if there was any money with him at the time of arrest, that there would be an agreement as to how much that was. Suspect stated that there was no money in his wallet.

Supplementary Report
Salt Lake County Attorneys Office
Criminal Division

OFFENSE AS REPORTED	CODE VIOLATION	DATE REPORTED	DATE OCCURRED	CASE NUMBER	OUTSIDE AGENCY'S CASE NO.
COMPLAINANT		ADDRESS		RESIDENCE PHONE	BUSINESS PHONE

ADDITIONAL INFORMATION & SYNOPSIS

I then continued to look through the wallet and located a temporary driver's license, #C224958, a Class C license signed by Lester Ralph Romero. It indicated it was a duplicate license from D528-36-8859. The suspect's wallet was then returned to him and he was placed in the front seat of Sgt. Harwood's vehicle.

A check was then run through the Sheriff's frequency dispatcher to determine the status of Mr. Romero's driver's license. The Sheriff's Dispatcher Frequency Two advised that Mr. Romero's driver's license was suspended. The license in his possession indicated an examination date of 6-27-78 and an expiration date of 9-27-78.

I then took a copy of the warrant #78-CRS-368 and gave a copy of the warrant to Mr. Romero. I then removed Mr. Romero from Sgt. Harwood's vehicle and advised him of his Constitutional rights from the standard P.O.S.T. Rights Card. This was at approximately 0845 hours. Mr. Romero stated that he understood his rights.

Mr. Romero's vehicle was stopped at 0833 hours and he was arrested at 0835 hours.

After reading Mr. Romero his rights, I asked him who owned the vehicle. He asked me why I wanted to know. I advised Mr. Romero that it made a difference as to what action was taken in regards to the vehicle. I advised him that if the vehicle was his property that we would probably do with it as he directed and that if he wanted it parked and locked we would probably do that. I advised him, however, that if the vehicle did not belong to him that we would contact the party to whom it did belong and advise them where they would be able to locate the vehicle.

Mr. Romero then stated that the vehicle belonged to Golden Circle Investment Corporation. I asked Mr. Romero who I should contact at Golden Circle and he stated that I should contact Bill Hamilton. I asked him if he could advise me how to get a hold of Mr. Hamilton and he stated that he could not understand why I wanted to know since I had been at Mr. Hamilton's home just the day before. I advised Mr. Romero that that was correct; however, I was not going to travel to Mr. Hamilton's home at this time. If he had a telephone number for Mr. Hamilton, I would contact him. He stated that he had none.

I then asked him what his connection with Golden Circle Investment was. He stated that he was the maintenance man for Golden Circle and then declined to make any further statement.

I then contacted via County Attorney radio frequency Greg Bown and advised him of the situation. Prior to doing this, however, Sgt. Harwood had asked Mr. Romero for permission to search the vehicle, and he had declined giving such permission.

After advising Greg Bown of the situation, I requested information as to what action to take concerning securing or releasing the vehicle. Mr. Bown advised that the vehicle should be seized as evidence. Upon receiving this information, Sgt. Harwood requested from the Sheriff's

DISPOSITION	INVESTIGATOR'S SIGNATURE	DATE	APPROVED BY:
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Supplementary Report
Salt Lake County Attorneys Office
Criminal Division

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ADDITIONAL INFORMATION & SYNOPSIS

frequency a wrecker for evidence impound. The Sheriff then dispatched Harmon's '66 Service Wrecker. Mr. Harmon, from the wrecker company, came to the scene and subsequently impounded the vehicle Mr. Romero was in at 2860 West 3500 South, Salt Lake City, Utah 84119, telephone number 969-4749. No further action was taken toward the truck until the arrival of Mr. Harmon.

Upon Mr. Harmon's arrival, myself and Sgt. Harwood did an inventory of the contents of the vehicle. We found in the cab of the vehicle several items which appear to be items of possible evidence. These items were seized pending further investigation. These items consisted of the following:

1. A 1978 vehicle registration for the vehicle which was impounded, a 1970 Ford pickup, license #WS 4921. This registration indicated the owner of the vehicle as Golden Circle Investment, Box 13998 (2255 West North Temple, Salt Lake City). The vehicle, however, was signed owner's name - Golden Circle by Lester Romero.
2. A letter addressed to Ervin Romero, Box 15998, Salt Lake City, Utah 84115. This letter being from the Douvall Press Finance Publications.
3. A letter addressed to Gary Nyer, 8701 West 3500 South, Magna. It had the return address of Royal Acceptance Corporation in Salt Lake City and through that was scratched the address of 338 East 100 South and the address 6266 South Morgray Drive printed over the top (this is the suspect Romero's home address).
4. A card from John E. Runyand, Attorney at Law, Salt Lake City.
5. A check made out to RotoStripper for \$12.95. The check was on the First Security Bank of Utah, #51-14015-23. It was signed Lester Romero and had been cashed. The address on the check for Romero was 616 Colorado Street, Salt Lake City, 84084. However, that had been written through and the address of 6266 South Morgray Drive had been written in. The check was paid by the bank on February 21, 1978.
6. Also in the front seat was found a copy of a Quit-Claim Deed from Lester Romero and Maxine Romero to Golden Circle Incorporated. This was notarized by Margo Bartholomew. There was a statement on the other side to the effect that it was a true copy of an original document. On this was also written "Defendant's Exhibit 17-D."
7. Also in the truck was found in the cabin an Abstract of Title prepared by Alex E. Carr Company on the same property as related in the Quit-Claim Deed.
8. Also in the vehicle was a copy of a registration for a trailer, A 60797, indicating the owner's name as Don Hurst, dba S & T. This was signed by Don Hurst; however, the signature appeared to be that of Lester Romero's.

DISPOSITION	INVESTIGATOR'S SIGNATURE	DATE	APPROVED BY:
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Supplementary Report
Salt Lake County Attorneys Office
Criminal Division

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COMPLAINANT	ADDRESS	RESIDENCE PHONE		BUSINESS PHONE	
ADDITIONAL INFORMATION & SYNOPSIS					
<p>9. There was also a customer's copy of a Walker Bank BankAmericard made out to Geraldine P. Barker and signed by Ronald Barker for a total of \$9.51. The invoice was to Quinn's Auto Parts.</p> <p>10. There was another one to Genuine Auto Parts on the same credit card signed by Ronald Barker. However, the signature on these two invoices appeared to be different.</p> <p>Invoice in #9 for \$9.51 was #5083663 and the invoice in #10 for \$27.39 was #5144421.</p> <p>11. The next item found was a note indicating payment of \$1,007.00 for Industrial Power of some type.</p> <p>12. Next item was a letter from the Murray City Corporation to Murray Trailer Court, Box 15998, Salt Lake City, Utah apparently regarding the disconnection of service of electricity, water, and sewage.</p> <p>13. There were also two bank statements for Golden Circle from the Western Bank & Trust, 4129 South 1750 West in Salt Lake City. The bank statements were in effect deposit receipts, one for \$2,888.52 and another for \$858.28.</p> <p>14. There was also a check made payable to Industrial Power for \$1,070 on the Golden Circle Investment account. The check was dated 7-13-78 and was check #155 and was signed by Dale Smith.</p> <p>15. There was also a yellow piece of paper which stated "Received from Las Romero August 15th \$15.00 for a refrigerator." It was signed "Beverly E. Etherington."</p> <p>16. There were also three keys to some Chrysler-type vehicle.</p> <p>17. The next item was a bulk mailing circular to Ervin Romero at Box 15998 Salt Lake City. On the other side, in what appeared to be Lester Romero's handwriting, was a membership request form filled out for a three-year membership in apparently some type of a club.</p> <p>18. Next item was a sealed envelope with two one-cent stamps on it and addressed to A B C, 2250 South 800 West, Woods Cross, Utah 84087. The return address was to Brother Dis Co. at 3955 South State, Salt Lake City, Utah. Through the envelope could be seen what appeared to be checks. I then opened the envelope and found two money orders one for \$30.00; #04-704,887,078 made out to A B C. This was on State Savings & Loan Association. I also found one made payable for \$35.00 #04-710,300,860 also made payable to A B C. There was a piece of paper in the envelope which said "Art Well #85 I think." Also in the envelope was what appeared to be a piece of chipped rhinestone or possibly a diamond.</p> <p>19. Next item found was a checkbook with checks to Robert Dolan, 735 West North Temple, 261-9267 on the Valley Bank & Trust at 1225 South Redwood Road, account #09-11-653-2. There was one check made payable to cash in the checkbook, check #134 for \$2,000 for Robert and signed simply "Robert." This check was dated 7-13-78. There was no check register in the checkbook itself.</p>					
DISPOSITION	INVESTIGATOR'S SIGNATURE	DATE	APPROVED BY:		

Supplementary Report
Salt Lake County Attorneys Office
Criminal Division

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20. Next item was a receipt from Western Alternator & Generator Starter Company made out as "Sold to Ron Barker, 2780 South State" and the sum of \$13.00 received as authorized signature Lester Romoer. Total bill was \$16.27.
21. There was also a promissory note for \$5,000 dated 8-21-78 from the Broadway Office of Zion's First National Bank. It was apparently a 30-day note to be repaid 9-20-78. Person signing it was "Al Johnson". Al Johnson signing it both places, giving as his address as 736 North West Temple, Salt Lake City, Utah.
22. There was also a checkbook for Beaver Investments on the Zion's First National Bank, 102 South Main Street, Salt Lake City, account #01-13343-8, check made out 8-24-78 and #611 signed Al Johnson. The check was blank being payable to no one for no specific amount.
23. Also there was a piece of paper indicating license plate for dump truck #A 60797. This number matches the registration found in the truck signed by Don Hurst.
24. There was also a Warranty Deed wherein N. W. McLachlan, grantor conveying property to Sirren Bybee of Salt Lake City. This document, however, was not notarized, but it was signed purporting to be the signature of N. W. McLachlan.
25. Also in the vehicle was a partial Utah plate, sticker number Utah '79 and it had the month 2 on it and was sticker #91486. This was found in the rear behind the actual seat itself.
26. In the rear of the truck was found a box. On the box was an envelope from "The Greenhouse" from Great Neck, New York. The letter was apparently mailed July 11, 1978 and was mailed to Dale Smith, Box 15998, Salt Lake City, Utah.

These items were all secured for further investigation and as possible evidence.

Also in the truck items which were left in the truck and were not secured. The following items were found in the cab of the truck:

1. One AC fuel pump
2. Two sets of miscellaneous keys
3. One old fuel pump
4. There were miscellaneous tools and small items of that nature.
5. There were other papers and other minor items such as a cup, tooth brush and things of that nature.

In the rear of the vehicle items which were left are as follows:

1. One spare tire with the rim with the tire in tack.
2. A toolbox made of wood with miscellaneous-type tools inside.

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3. There were two high-lift jacks and other miscellaneous tools scattered across the bed of the truck.
4. There were a number of other types of miscellaneous fishing gear and mechanical equipment.

Prior to leaving the scene, the vehicle was impounded. See Sheriff's Department Report #78-60205.

Mr. Romero was then taken to the Salt Lake County Jail where he was booked.

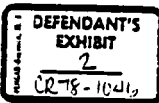
Also included in the items taken was a Motorola Metro-Page Boy, #09945.

Mr. Romero was booked into jail at approximately 0935 hours.

Propr to the truck being impounded, I also noticed that the green Safety Inspection sticker did not appear to be stuck to the window. A closer examination revealed that the sticker was taped on with scotch tape and had no writing on the back. This sticker was very easily removed and secured as evidence. Also taken into evidence was driver's license C224958 and secured as evidence as well.

DISPOSITION	INVESTIGATOR'S SIGNATURE	DATE	APPROVED BY
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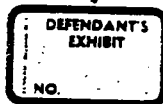
APPENDIX B



IN THE _____ CIRCUIT COURT BOUNTIFUL CITY
COUNTY OF DAVIS STATE OF UTAH

SALT LAKE COUNTY.)

STATE OF UTAH)



**AFFIDAVIT FOR
SEARCH WARRANT**

BEFORE S. Mark Johnson 745 South Main, Bountiful, Utah
JUDGE ADDRESS

The undersigned being first duly sworn deposes and says:

That he ~~XXXXXX~~
(has reason to believe)

That ~~XXXXXXXXXXXX~~
(on the premises known as
~~XXXXXX~~)

2250 South 300 West Woods Cross, Ut
A B C Storage, consisting of 4 separate concrete block
buildings containing 128 rental unit storage garages in
building #3 units 76 and 95 being connected storage units
which are 12 x 12 x 60 feet storage garages rented from
A B C in the name of Art Wall

In the City of Woods Cross County of Davis

State of Utah, there is now certain property, namely,

A 1975 Conventional Kenworth Tractor Truck
Model W 900

Vin #1437585 or VIN #1333833

or parts of that truck including a 425 Caterpillar diesel engine
Minnesota license plate PR 20326

Ownership or registration papers for said vehicle in the name of Max
DeFlorin, 964 West Country Road, St. Paul Minnesota, or Fabreze Inc.

Rayette Division, St. Paul, Minnesota or any personal property identifi-
and that said property constitutes:

(☒) Stolen or embezzled property

(☐) Property used as a means of committing a felony

(☐) Property or things in the possession of a person with the intent to use it as a means of committing
a public offense or in the possession of another to whom he may have delivered it for the purpose
of concealing it or preventing its being discovered

(☐) Controlled substances and any device, instrument, or paraphernalia used for consuming, inhaling,
or to facilitate the distribution or production of controlled substances

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

Your affiant is and at all times mentioned herein as been an Investigator
employed by the Salt Lake County Attorney's Officer, and a Peace Officer Special
Deputy Sheriff for the Salt Lake County Sheriff's Office.

On 8-25-78 your affiant arrested Lester Ralph Romero at 1800 West 6200 South in
Salt Lake County.

At the time of his arrest and pursuant to his arrest, the truck which he was
driving, a 1970 Ford pickup truck was seized. An inventory search was done of
that vehicle. On the front seat of the vehicle was an envelope with a return
address of BRODISCO 3955 South State Street, Salt Lake City, Utah 84115. The
envelope had two one-cent stamps on it and was addressed to A B C 2250 South
800 West, Woods Cross, Utah 84087.

Inside that envelope were two money orders from State Savings & Loan Company.
One was #04710-300-860 in the amount of \$35.00. The payee on it was A B C and
it was not dated. The second one was #04-704,887,370 for \$30.00. The payee
being A B C with no date on it.

These two money orders were inside a piece of paper that had the name Art Wall.
#85 I think (this was handwritten "I think" was also written on the paper)
On the back were a number of figures and the word "rent" written with an "X"
through the figures.

A check with the July 1978 Salt Lake City Telephone Directory and adjacent
town directory indicated that A B C was a storage company and that it was at
the address indicated on the envelope.

Your affiant on 10-23-78 spoke with a confidential informant, who observed a copy of the front of this envelope to A B C. He stated that he had been told by Lester Ralph Romero in the presence of other people that inside of the storage units at A B C there was a stolen semi-tractor. He stated that he had had this information as of approximately ten days prior to the date of this interview which was 10-23-78.

This informant stated that he did not want his name used in any legal proceedings because he feared retaliation against him in the form of physical injury to himself or to his family.

On 10-24-78 your affiant talked with Ron Lyle, who is presently an inmate of the Utah State Prison. Lyle advised that approximately a year and a half ago during the summer of 1977, he was approached by Lester Ralph Romero, who asked Lyle to go to Provo, Utah and steal a Kenworth tractor that Lyle could find at a particular location. Lyle stated that his best recollection was that it was a Kenworth Conventional tractor which was blue in color and he believed a 1972 to 1973 model tractor. He stated that it had a Caterpillar engine in it, a 13-speed Fuller transmission, it had a sleeper, no C.B. radio, it had men and women's clothing in it, all black interior, and polished aluminum wheels. He stated it had what appeared to be new General tires also on the vehicle.

He stated that at the request of Lester Ralph Romero he traveled to Provo, Utah with another individual and there entered this truck and stole it. Lyle stated that when he stole it, the truck was in a large empty lot across from the Ramada Inn directly opposite the golf course in Provo, Utah. Lyle stated that at the time he went down that it had started to rain and that during the time he drove the truck from Provo to Salt Lake it was raining.

Lyle stated that he drove the truck from Provo, Utah to approximately 60th South and West Temple in Salt Lake County where he met Lester Ralph Romero and turned the truck over to Romero. He stated that he received \$1,000 from Romero for stealing the truck.

Lyle stated that sometime later the truck was painted black and silver. He stated that shortly after that he had had a conversation with Lester Ralph Romero in which Romero stated that the Sheriff's Department had stopped him at 2100 South and had arrested him. He stated that they had taken at that time a brief case which contained a rental receipt to the garage at 60th South and West Temple. He stated as a result the truck needed to be moved.

Lyle advised your affiant that he and a relative of his then went to Woods Cross to a mini-storage yard there and rented a storage unit under he believed the name of Don Malone. He stated that he rented three units at that time and that those units were turned over to the control of Lester Ralph Romero, who placed padlocks on the units and who maintained and retained the keys to those units.

He further stated that after being advised by Lester Ralph Romero of the necessity to move the vehicle that it was transported by a friend of his from 60th South and placed inside the mini-storage unit. He stated that he had been told by Lester Ralph Romero that he had done work on that tractor at the mini-storage unit, but he did not actually see the work. He stated, however, that he did go to the mini-storage unit on several occasions and did see the work as described by Lester Ralph Romero had been done on the tractor. He stated further that he last saw the tractor in the mini-storage unit in December of 1977 with the tires and wheels removed.

Your affiant talked to the aforesaid confidential informant on 10-23-78 and he was advised of the color of the tractor in the mini-storage unit on Woods Cross was black and silver.

On 10-24-78 your affiant talked to Lt. Bud G. Gillman of Provo City Police Department. He stated that a Stolen Motor Vehicle Report was filed with Provo City Police Department which indicated the following.

A Max DeFlorin of 964 West Country Road, St. Paul, Minnesota had been in Provo with a 1975 Conventional Kenworth tractor, Model W 900 VIN #143758S on July 1, 1977. He stated that DeFlorin reported that his tractor had been stolen sometime during the night of 7-1-77 and 7-2-77. He stated the report was made at approximately 7:00 A.M. on 7-2-77.

He stated that the report indicated that Max DeFlorin had told the officer taking the report that he had his wife had been traveling cross country together on this trip. They had stopped at the Holiday Restaurant in Provo for dinner and returned to their motel at the Ramada Inn at approximately 10:00 P.M.

He stated that the report said that at that time the tractor-trailer was still there. He stated that he estimated the time of the theft was between 11:00 and 12:00 o'clock on 7-1-77 as it apparently occurred about the time it started raining on that night.

He stated that there had been an insurance claim filed and apparently it had been paid.

He stated that only the tractor was taken. The trailer was left. When your affiant talked to Ron Lyle, Lyle said that there was a trailer attached to the tractor at the time of the theft but the trailer was left and only the tractor was taken.

Lt. Gillman advised your affiant of the following information which was on the stolen report.

He stated that it was a stolen 1975 Kenworth Conventional tractor. It had new paint on the cab which was white over yellow. He stated that there was a black emblem on the door which indicated that the truck belonged to Faberge Inc. Rayette Division, St. Paul, Minnesota.

He stated that they had first received the VIN #1333833 but it had been corrected by the driver to VIN #143758S and that that number was currently entered on the stolen report out of N.C.I.C.

The engine in the truck was a 425 Caterpillar engine. He stated that the report indicated that it had all new General tires and all aluminum wheels. The report stated that there was no C.B. in the truck and that it had license plate PR 20326 in Minnesota.

On 10-26-78 your affiant spoke with James Quam who is also an investigator for the Salt Lake County Attorney's Office. He stated that he had just interviewed one of the owners of A B C by the name of Riley Goodfellow. Mr. Goodfellow stated that he received a money order in the mail 10-25-78 for \$65 for the continued rental of Units 76 and #85 in Building 3 of the A B C complex. He stated that the envelope was the same as the BRODISCO one shown to him which was a copy of the one taken from Lester Ralph Romero on 8-25-78. He stated that he applied this money to Unit #76 and #85 rental in the name of Art Wall. He had no knowledge of what was in the unit and did not know Art Wall. The size of the two connected units which are actually one unit is 14' x 24' x 10' high. The units are controlled by the person controlling the Utah State Library. The units are controlled by the person controlling the Utah State Library.

Your client consents to the information derived from the confidential informant release because any information is obtained from an unnamed informant.

XXXXXX and XXXXX. He has obtained to be covered and because of the following
XXXXXX

WHEREFORE, the affiant prays that a Search Warrant is issued for the seizure of said items (in the daytime) _____, and that the same be brought before this magistrate.

XX
XX

XX
XX

XX
XX

Charles P. Bellin
Affiant

Subscribed and sworn to before me this

_____ day of _____

JUDGE

In the _____

Court of _____

_____ County, State of Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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The State of Utah,
Plaintiff and Respondent,

No. 16638

v.

F I L E D
January 29, 1981

Lester Romero,
Defendant and Appellant.

Geoffrey J. Butler, Clerk

STEWART, Justice:

Defendant seeks reversal of a second-degree felony conviction of theft by receiving. The issues raised involve the legality of a motor vehicle search and the admissibility of subsequently derived evidence, the adequacy of the affidavit for a search warrant, the correctness of the court's refusal to compel disclosure of an informant's identity, and the constitutionality of relying on information allegedly obtained from a privileged attorney-client communication.

On August 25, 1979, defendant was stopped while driving a pickup truck and arrested on a matter not in issue here by Investigator Charles Collins of the Salt Lake County Attorney's Office. Defendant informed the investigator that the vehicle belonged to Golden Circle Investment Corporation. He claimed neither a proprietary nor possessory interest in the truck or its contents. Although it was registered to Golden Circle Investment by Lester Romero, defendant, the defendant explained the use of his name was merely a result of his status as maintenance man for the company. Collins was unable to contact Bill Hamilton, whom defendant said was the spokesman for Golden Circle Investment Corporation, and so he had the truck impounded and its contents inventoried. The inventory list included a description in general terms of "miscellaneous tools, fishing gear, mechanical equipment," etc., which were not removed from the truck. Papers, envelopes, and cards were removed and secured during the inventory and described fully in the report. The report stated: "These items were all secured for further investigation and as possible evidence." At least one envelope was opened and the contents viewed.

Two months after the search, a confidential informant presented himself, on his own initiative, to Collins. A photocopy of an envelope addressed to ABC, Woods Cross, Utah, was shown the informant at his request. Thereafter,

the informant told Collins that he had been told by defendant that there was a stolen truck stored at ABC.

Collins then obtained information from Ron Lyle, who was serving a sentence at the Utah State Prison for an apparently unrelated offense. Lyle informed Collins of his involvement in the actual theft of the truck and gave a detailed description of the truck. He claimed personal knowledge of the presence of the truck at the Woods Cross storage yard as of December 1977. His description of the truck corroborated the confidential informant's information.

A Provo City Police Department investigator informed Collins of a report of a stolen Kenworth truck. This information corroborated many of the details obtained from Lyle, except for connecting the stolen truck with the ABC storage units. Collins obtained information from another investigator for the Salt Lake County Attorney's Office who had interviewed one of the owners of ABC. Upon being shown the "ABC" envelope found in the impounded truck, the owner described it as identical to the one in which he received a money order in the mail on October 25, 1978, for the continued rental of two units in Building "3" of the ABC complex, but he had no knowledge of what was being stored in the units.

Collins set forth the above information in his affidavit to establish probable cause to search the storage units. Defendant filed a motion to suppress the fruits of the search on the ground that the information in the affidavit was inextricably connected with the illegally seized envelope. The motion was overruled. Defendant was also unsuccessful in his objection made at trial to the use of that evidence.

Following his conviction defendant made a motion in arrest of judgment based upon newly discovered evidence to the effect that the confidential informant had obtained information from a privileged attorney-client conversation. The court found that the information was obtained by the informant from a source other than an attorney-client conversation and denied the motion.

The first issue raised by defendant is whether the warrantless search and seizure of the envelope precluded the use of the subsequently derived information, which related to the same subject matter, in an affidavit to support the issuance of a search warrant.

The law is well established that warrantless searches of impounded vehicles for the benign purpose of protecting the police and the public from danger, avoiding police liability for lost or stolen property, and protecting

the owner's property, are permitted by the Fourth Amendment. State v. Crabtree, Utah, 618 P.2d 484 (1980); South Dakota v. Opperman, 428 U.S. 364 (1976); Cady v. Dombrowski, 413 U.S. 433 (1973). The State contends that the facts in this case support the conclusion that the police were simply and genuinely engaged in a care-taking search of an impounded vehicle for the purpose of taking an inventory and not in a warrantless search with the purpose of uncovering criminal evidence. See South Dakota v. Opperman, *supra*.

Defendant argues, however, that the "selective" seizure which occurred in this case and the reference made to an investigatory purpose in the officer's inventory list establish a clear and strong investigatory purpose. Defendant further claims that even if the initial action was only a routine inventory, intrusion into the sealed envelope exceeded the proper scope and extent of an inventory search, and, although the seizure of the contents of a car for safekeeping after a lawful inventory search is justified by the need to ensure the safekeeping of those contents, there is no justification shown in this case for the opening of an envelope when no security purpose was accomplished thereby. Defendant concludes that there were no extenuating circumstances justifying the further intrusion, and therefore it did not fall within the routine inventory exception to the Fourth Amendment warrant requirements.¹

Although the facts of this case indicate that defendant may not have had the possessory or proprietary right needed to assert a Fourth Amendment claim, that issue is not properly before us. We therefore assume, without deciding, that the officer's conduct violated defendant's Fourth Amendment protection against an unreasonable search and seizure.

Defendant argues that the illegality of the search rendered the information and evidence secured thereby "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

Although an unlawful seizure and subsequent testimony dealing with the subject of the seizure may have some facial connection, it does not necessarily follow that preclusion of the testimony is required. The testimony of a live witness may be so attenuated from the taint of evidence obtained by the illegal search that the evidence is not the

1. See Bradford v. State, Ind.App., 401 N.E.2d 77 (1980), where intrusion into a purse was unwarranted since initialing, sealing, and placing it in a locked storage room would have been sufficient. But see State v. Crabtree, Utah, 618 P.2d 484 (1980), where circumstances surrounding the routine inventory warranted the opening of a suitcase.

"fruit of the poisonous tree." United States v. Ceccolini, 435 U.S. 268 (1978). But for such evidence to be admissible, despite its connection with the illegally obtained evidence, it must spring basically from an independent motivation by the witness to make the disclosure.

In Ceccolini the Court considered the time period which elapsed since the illegal search and the time, place, and manner of the initial questioning in determining whether the statements were the product of detached reflection and a desire to be cooperative. In that case the Court found evidence admissible even though it was obtained from an informant who had been approached and questioned by officers as a result of information obtained during an illegal search. The willingness of the informant and her eagerness to cooperate persuaded the Court to find that the information attenuated any initial taint.

The facts of the instant case indicate that the statements of the confidential informant were sufficiently attenuated from the taint of the contents of the envelope so as to break the chain of causality. The arresting police officer did not intend or anticipate that the informant would come forward and provide information as a result of the seizure of the "ABC envelope." Rather, the confidential informant, on his own initiative, presented himself to the investigator two months after the initial seizure of the envelope, asked to see an addressed envelope which he described in general terms, and volunteered information which was later incorporated into an affidavit to help establish probable cause for a search warrant. Indeed, the connection between the seizure of the envelope and the information obtained from the confidential informant was less than in Ceccolini where the illegally seized information led the officer to initiate questioning of the informant. The information obtained from the second informant, Ron Lyle, also falls within the exception carved out by Ceccolini. The information was obtained two months later, was not part of a preconceived plan, and was freely submitted by the informant even though against his own interest. Furthermore, it does not appear that the seized letter directed the officer to Lyle.

The third individual to whom the envelope was shown was an owner of ABC Storage. This encounter occurred two months after the initial seizure of the envelope and resulted in information being voluntarily given to the investigator by the owner. At this point in the investigation, there was sufficient evidence obtained from Lyle and the confidential informant connecting defendant with the ABC Storage units to support an interview with the ABC owner, and the investigation was clearly not a link in the chain of events resulting from an illegal seizure. But even

if the connection between the owner's testimony and the envelope were too close to attenuate a prior illegality, the error would be harmless in light of the adequacy of the remaining information to support the issuance of a search warrant.

We therefore reject defendant's claim that the information relied on to support the search warrant was illegally obtained and turn to the second claim of error--the inadequacy of the affidavit to establish probable cause to issue a search warrant.

In addressing this issue, we note that a more relaxed standard governs the type of evidence that may be used to establish a finding of probable cause in an affidavit than governs the admissibility of evidence at trial, McCray v. Illinois, 386 U.S. 300 (1967), and magistrates are not confined by strict evidentiary rules or restrictions on the use of common sense in finding probable cause within an affidavit. United States v. Ventresca, 380 U.S. 102 (1965).

The sufficiency of an affidavit supporting a search warrant depends on indicia of reliability sufficient to assure a neutral magistrate of probable cause. Aguilar v. Texas, 378 U.S. 108 (1964), held that it was necessary that an affidavit inform the magistrate of some of "the underlying circumstances" relied upon by an informant in drawing his conclusions and those circumstances from which the investigative officer concluded that the informant was "credible" or his information "reliable." Spinelli v. United States, 393 U.S. 410 (1969), established that providing sufficient detail of alleged criminal activity serves to validate the reliability and authenticity of the information and allows the magistrate to rely "on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 393 U.S. at 416. Spinelli further held that corroborating allegations contained in a hearsay report can be considered in evaluating the sufficiency of an affidavit. United States v. Harris, 403 U.S. 573 (1971), held that sufficient credibility may be established if the information given was against the informant's penal interest.

The affidavit in the instant case sets forth sufficient information to meet the guidelines established in the above-cited cases. The affidavit details the manner in which Lyle gathered the information and establishes the fact that Lyle spoke from personal knowledge. Detailed information was given by Lyle concerning the criminal activity, the physical appearance of the vehicle, as well as its place of storage. Furthermore, Lyle's information, containing admissions of criminal activity, carried its own indicia of credibility, United States v. Harris, supra.

The confidential informant's information as set out in the affidavit corroborated and validated the presence of the vehicle at the same location and included the underlying circumstances from which the confidential informant drew his conclusions.

Further corroboration was provided by the information given by Riley Goodfellow, one of the owners of the ABC Storage Company, who identified the seized envelope as one identical to that in which he received money to rent two of his storage units. The information included in the affidavit given by Lt. Gillman of the Provo City Police Department corroborated many of the specific details in Lyle's hearsay account. Together, this information provided the neutral and detached magistrate a substantial basis to support a finding of probable cause for the issuance of a search warrant.

We next address defendant's contention that the lower court erred in failing to require the disclosure of the confidential informant's identity. Rule 36 of the Utah Rules of Evidence provides:

IDENTITY OF INFORMER. A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this state or of the United States to a representative of the state or the United States or governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.

The record in the instant case reveals that defendant was aware of the identity of the confidential informant. State v. Forshee, Utah, 611 P.2d 1222 (1980), is thus dispositive. In that case, as here, defendant's knowledge of the informant's identity invoked the first exception to the privilege of nondisclosure in Rule 36. It is that "very knowledge of the informer's identity that further served to vitiate any prejudice which may have otherwise resulted from the lower court's failure to require disclosure." State v. Forshee, supra at 1225. Defendant was in as good a position to produce the informant as was the plaintiff, yet failed to do so. See State v. Forshee, supra. Accordingly, there was

no prejudicial error as a result of the nondisclosure of the confidential informant's identity.

Finally, defendant contends that some of the information used to obtain the search warrant and admitted at trial came from a privileged attorney-client communication. A factual issue exists in this case as to whether any information the confidential informant may have heard during a privileged attorney-client communication directly or indirectly produced any of the evidence at trial. The mere fact that the informant may have met with defendant and his counsel does not rise to the level of a constitutional violation if the testimony given by the informant at trial was neither prompted by nor the product of participation in any privileged communications. Weatherford v. Bursey, 429 U.S. 545 (1977). The trial court found that the information obtained from the confidential informant did not come from a confidential and privileged attorney-client conversation. The trier of fact made this factual determination in light of a record which supports the conclusion.

The judgment of the trial court is affirmed.

I CONCUR:

Gordon R. Hall, Justice

Crockett, Retired Justice, concurred in result in this case before his retirement.

WILKINS, Justice: (Dissenting)*

I respectfully dissent. I disagree with the disposition by the majority of several of the issues raised by this appeal.

The majority opinion proceeds on the basis that it is assumed, without deciding, that the search of the truck in question was illegal in that the search exceeded the proper limits of an inventory search. In my view, there is no doubt that the search was not a bona fide inventory procedure. This is most strongly evidenced by the fact that the investigating officer opened a sealed envelope found in the truck and thereafter made extensive use of the contents of the envelope as well as the envelope itself in his continuing investigation.

Neither can I agree with the majority's assertion, made without so deciding, "that defendant may not have had the possessory or proprietary right needed to assert a Fourth Amendment claim." (Emphasis added). Defendant's name appeared on the title to the vehicle and he was clearly in possession of the truck. I believe that under Rakas v. Illinois, 439 U.S. 128 (1978), defendant here had a sufficient possessory interest in the truck to assert Fourth Amendment claims relating to the search of the truck and seizure of items found therein. Furthermore, this defendant had an expectation of privacy in connection with the truck and its contents which would clearly result in his having standing to assert his claims. Katz v. United States, 389 U.S. 347 (1967).

Moving now to the substance of the majority opinion, I am unable to agree that, in this case, the testimony of the live witnesses was "so attenuated from the taint of evidence obtained by the illegal search that [it] is not the 'fruit of the poisonous tree.'" United States v. Ceccolini, 435 U.S. 268 (1978)." Applying Ceccolini to the facts before us, I believe that there was no such attenuation here.

The majority in Ceccolini was impressed by the fact that there was an independent motivation by the witness there to disclose the information she had. Here, with respect to the confidential informant, the disclosure by that informant was inextricably connected to the envelope and other papers that had been illegally seized. Likewise, with respect to the information disclosed by Ron Lyle, there is nothing in the record to suggest that his disclosures were independently motivated or somehow insulated from the same illegally seized documents. Finally, there is no independent motivation for the disclosure made by the owner of ABC Storage because that disclosure was made at the request of the investigator after showing the illegally seized papers to the owner.

It appears that the majority requires a showing of a preconceived plan on the part of investigators to bootstrap illegally seized evidence into independent disclosure by live witnesses before those disclosures will be considered tainted by an illegal search or seizure. I submit that the situation is no less egregious when, as here, the entire framework of the investigation, including disclosures by live witnesses, finds its foundation in and is intimately connected with an illegal search and seizure.

I now discuss the sufficiency of the affidavit in support of the search warrant which was issued. I believe that the basic test as to the sufficiency of an affidavit as laid down by Aguilar v. Texas, 378 U.S. 108 (1964), and

Spinelli v. United States, 393 U.S. 410 (1969), and re-affirmed by United States v. Harris, 403 U.S. 573 (1971), shows the affidavit here to be defective. Those cases require that an affidavit show (1) underlying circumstances to demonstrate the validity of an informant's conclusion of illegal activity and, (2) a basis for relying on the credibility and reliability of the informant.

With respect to the confidential informant here, neither prong of the test is met. As to the information supplied by Ron Lyle, there is no showing of credibility or reliability, but a great many underlying circumstances are set forth. However, the problem with Lyle's information is that it was over one year old. I believe that the lapse of time was too great to permit any conclusion that the information was, at the time the warrant was applied for, reliable.

Finally, I am unconvinced by the majority's treatment of the issues of the refusal of the District Court to require the disclosure of the identity of the confidential informant and whether that informant provided information which came from a privileged attorney-client communication. These two issues are actually interconnected in that disclosure of the identity of the confidential informant was crucial to a determination of whether privileged information was provided to the investigators. I believe that it was "essential to assure a fair determination of [these] issues" that the identity of the confidential informant be disclosed. Rule 36, Utah Rules of Evidence.

I would reverse and remand for a new trial.

Maughan, Chief Justice, concurs with the dissenting opinion of Justice Wilkins.

*Wilkins, Justice, wrote his dissenting opinion prior to his resignation.