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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

ALFRED WILLIAM JOHNSON,

Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT [illegible]
RENDERED BY THE THIRD [illegible]
COURT, IN AND FOR [illegible]
STATE OF UTAH, THE [illegible]
SAWAYA, JUDGE, [illegible]

G. FRED METOS

Salt Lake Legal Defender Association
333 South Second East
Salt Lake City, Utah 84111

Attorney for Appellant

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 16668
ALFRED WILLIAM JOHNSON,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT AND CONVICTION RENDERED BY THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAMES S. SAWAYA, JUDGE, PRESIDING

DAVID L. WILKINSON
Attorney General

EARL F. DORIUS
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

G. FRED METOS

Salt Lake Legal Defender Association
333 South Second East
Salt Lake City, Utah 84111

Attorney for Appellant

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 16668
ALFRED WILLIAM JOHNSON,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with and convicted of burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1953, as amended).

DISPOSITION IN THE LOWER COURT

Appellant, Alfred William Johnson, was tried before a jury in the Third Judicial District Court, the Honorable James S. Sawaya, Judge, presiding. The jury returned a verdict of guilty. The court sentenced the appellant to serve the indeterminate term as provided by law of not less than one nor more than fifteen years at the Utah State Prison.

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RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the verdict of guilty rendered by the jury below.

STATEMENT OF THE FACTS

At trial the victim, Richard Ball, testified that on return to his apartment, located at Snowbird Ski Resort, Salt Lake County, he found the appellant inside (T.11). Mr. Ball testified that all doors to his apartment were locked when he left at 10:10 a.m. and that he was the only person with a key (T.17,18). He noted that a screen which was intact when he left two hours earlier now had a "L" shaped cut in it (T.12,17).

The victim noticed that a security box which had a hidden lock had been moved from its normal resting place at the head of the bed to the center of the bed (T.11,18). The hidden lock, which was exposable only by sliding a piece on the bottom of the box was now exposed (T.19). Mr. Ball asked the appellant what he was doing in his room and was told that he was "looking for a way out" (T.12,25). When Mr. Ball continued to question the appellant he was told that the appellant was a guest who was staying upstairs (T.12,13). Mr. Ball called the front desk to verify the appellant's story. Meanwhile the appellant made his way to the door and then left Richard Ball's apartment (T.13,26). Mr. Ball followed the appellant who broke into a jog along

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a narrow foot path and a full fledged run when he reached the parking lot (T.14).

Richard Ball was able to take down the appellant's license plate number which he reported to Snowbird security (T.15).

The appellant was apprehended by Officer Chard at 1250 East on 6800 South (T.37), and later was positively identified by Richard Ball (T.16).

During cross-examination of arresting officer Chard, appellant's counsel attempted to elicit a statement made by the appellant (T.39). The prosecution objected on the ground that the statement would be hearsay and the trial court sustained the objection (T.39). When appellant's counsel contested the ruling of the judge the jury was dismissed and the issue was argued (T.40-45). At that time appellant's counsel directed the court solely to Rule 63(6) of the Utah Rules of Evidence (T.40). The trial court rejected the appellant's construction of Rule 63(6) and ruled that the appellant's statement was self-serving and not admissible as a confession or admission (T.45).

The appellant requested that an instruction on the lesser offense of criminal trespass be given. The trial court refused and the appellant took exception (T.75).

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ARGUMENT

POINT I

THE APPELLANT IS PRECLUDED FROM RAISING ANY EXCEPTION TO THE HEARSAY RULE WHICH WAS NOT TIMELY RAISED IN THE COURT BELOW.

The appellant contends that the trial court erred in excluding his hearsay statement because it falls under at least one of five exceptions to the hearsay rule (Appellant's brief at p.4). This general contention should fail because the only exception which is properly before this Court on appeal is Rule 63(6) of the Utah Rules of Evidence, which was timely raised by the appellant at trial as the sole basis for admitting the hearsay statement of the appellant. The transcript reveals that the appellant's attorney attempted to solicit a hearsay statement from the arresting police officer. The prosecution objected to introduction of the conversation on the grounds that it was hearsay, and the court sustained the objection (T.39).

The appellant contested the court's ruling and the issue was discussed out of the presence of the jury (T.40). The appellant directed the court to Rule 63(6) as the exception which justified admission of the appellant's hearsay statement (T.40).

Appellant is now raising for the first time on

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appeal the applicability of the following additional exceptions: Rule 63(12)(a), statement of Physical or Mental Condition of the Declarant; Rule 63(7) Admission by Parties; Rule 63(10) Declaration Against Interest; and Rule 63(4)(b) Contemporaneous Statements. Normally this Court will not consider an issue for the first time on appeal. In Simpson v. General Motors Corporation, 24 Utah 2d 301, 470 P.2d 399 (1970), this Court said:

> Orderly procedure, whose proper purpose is the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial court; and having done so, he cannot thereafter change to some different theory and thus attempt to keep in motion a merry-go-round of litigation.

470 P.2d at 401. See also: State v. Treadway, 28 Utah 2d 160, 499 P.2d 846 (1972); State v. Starlight Club, 17 Utah 2d 174, 406 P.2d 912 (1965).

Allowing the appellant to raise new issues on appeal which were not raised in the court below is not appropriate in this case. Here the appellant contends that the trial court erred in not allowing the hearsay statement of the appellant to come into evidence because it falls under one of five exceptions to the hearsay rule. In light of the fact that appellant directed the court to that specific

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exception which he felt allowed the hearsay statement to come into evidence the appellant should not, after failing below on one theory be allowed to change his theory on appeal, and thus "keep the merry-go-round of litigation in motion." Simpson, supra.

Hearsay statements are generally inadmissible unless they fall within one of the defined exceptions to the hearsay rule. By directing the court to Rule 63(6), the appellant was in fact attempting to define the limited scope of the use of the proffered statement in accordance with Rule 6 of the Utah Rules of Evidence which provides:

> When relevant evidence is admissible as to one party or for one purpose and is inadmissible as to other parties or for another purpose, the judge upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

The appellant's attempt to define an admissible use of an otherwise inadmissible hearsay statement failed and the appellant should be precluded from raising new theories of admissibility on appeal.

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POINT II

THE TRIAL COURT DID NOT ERR IN EXCLUDING APPELLANT'S HEARSAY STATEMENT.

The trial court was correct in excluding the appellant's hearsay statement because it did not fall within any of the exceptions to the hearsay rule. "Hearsay statements have been generally discredited because they (1) lack trustworthiness and (2) the person purporting to know the facts is not stating them under oath." State In Re K.D.S., 578 P.2d 9, 12 (Utah 1978). Exceptions to the hearsay rule are enumerated in Rule 63 of the Utah Rules of Evidence. In this case the appellant attempted to introduce his exculpatory statement without taking the stand to avoid cross-examination by the prosecution about his prior convictions for burglary. The judge was correct in excluding the hearsay statement because it lacked trustworthiness and was to be introduced to keep the appellant from being cross-examined under oath, thus this case falls within the scope of statements which should be excluded under the authority of State In Re K.D.S., supra.

A.

THE APPELLANT'S HEARSAY STATEMENT WAS NOT ADMISSIBLE UNDER RULE 63(12)(a) AS A STATEMENT OF THE MENTAL CONDITION OF THE DECLARANT.

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As stated earlier, this issue is not properly before this Court on appeal since it was not raised in the trial court. However, if this Court decides to examine this issue, the record below indicates that the appellant's hearsay statement does not fall within the statement of mental condition exception to the hearsay rule which states:

> Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, including statments of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is an issue or is relevant to prove or explain acts or conduct of the declarant.

Rule 63(12)(a), Utah Rules of Evidence.

Since this issue was not raised below the trial court was not given an opportunity to make a specific finding on whether the statement was in bad faith. On appeal this Court should affirm the trial court if the record discloses that the proper legal ground existed even if it was not stated by the trial court. Edwards v. Iron County, 531 P.2d 476 (Utah 1975); Foss Lewis & Sons Const. Co. v. General Insurance Co. of America, 30 Utah 2d 290, 517 P.2d 539 (1973).

In examining the discussion that occurred out

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of the presence of the jury, the record indicates that the judge implicitly ruled that the appellant's statement was in bad faith. The court characterized the attempt of the appellant by stating:

> What you are trying to do and I can tell you right now is, you are trying to get his excuse before this jury without putting him on the stand to say it and I'm not going to let you do it.

(T.42).

The reasoning of the trial court is mirrored by the Washington Court of Appeals in dealing with a case similar to this one. In State v. Smith, 15 Wash.App. 103, 547 P.2d 299 (1976), the defendant appealed from a conviction of two charges of taking a motor vehicle without the permission of the owner. The defendant contested the exclusion of hearsay testimony as to defendant's intoxicated state at the time of making a confession. The appellate court sustained the exclusion as proper and not within the state of physical and mental condition exception to the hearsay rule because:

> The statements were self serving and their admission would have avoided cross-examination at trial and circumvented the purpose of Cr.R. 3.5.

547 P.2d at 302.

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Here as there, the "self-serving characterization" is sufficient to establish that the statement does not come within the state of mind exception to the hearsay rule.

The only significant obstacle to the admission of state of mind declarations is that of willful misrepresentations which can be overcome if the court finds that the declaration was given under circumstances showing no apparent motive for the speaker to falsify. 1977 Utah Law Review 85, 88. The judge's ruling indicates doubt of the lack of motive to falsify. The appellant's "admission" consisted of confirming the fact that he had been at Snowbird, a fact which could not be denied because appellant knew that an eyewitness could identify him, and an exculpatory statement which was given to the arresting police officer and thus lacked the verity that accompanies statements to independent third parties.

The cases cited by the appellant are not determinative in this case. In State v. Simmons, 573 P.2d 341 (Utah 1977), the statement which the defendant had attempted to introduce was not similar in character to the one in this case because there the defendant made the statement to an independent third person. Here the defendant had just fled from the scene of the burglary and knew that an

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eye-witness could identify him. Even if the statement was admissible under Rule 63(12)(a), failure to admit the statement would not be prejudicial error according to Simmons, supra.

State v. Wauneka, 560 P.2d 1377 (Utah 1977) is totally inapplicable because there the statements which the prosecution attempted to introduce were statements of the victim in a homicide case which were not relevant because the victim's state of mind is not in question in a homicide case.

The record is sufficient to establish that the statement was hearsay which was not made in good faith and thus the trial court did not commit error in excluding it since it did not come within Rule 63(12)(a) as an exception to the hearsay rule.

B

THE APPELLANT'S HEARSAY STATEMENT WAS NOT ADMISSIBLE UNDER RULE 63(6) AS A CONFESSION OR ADMISSION.

The record indicates that the judge made a ruling which specifically determined that the hearsay statement which the appellant wished to introduce was not a confession or admission. The appellant contends that the statement established that the appellant was at Snowbird, but that he

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did not possess the intent to commit burglary. Such in and of itself does not, as appellant claims, establish that appellant could be convicted of criminal trespass. The appellant's statement not only denies intent to commit theft, but also fails to suggest that appellant possessed the intent to commit criminal trespass (See Point III, *infra*). Since the statement would not be a basis upon which the appellant could be convicted of criminal trespass it is not an admission as claimed by the appellant.

Rule 63(6) provides:

> In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the statement was made knowingly and voluntarily by the accused and the circumstances under which the statement was made were not violative of the constitutional rights of the accused.

The appellant conceded that the statement is not a confession (T.41) thus on appeal this Court need only decide whether the trial court was correct in refusing to sustain appellant's claim that his statement was less than a full confession and thus equal to an admission.

The trial court characterized the statement as "not a proper admission or confession but an excuse for why he was there" (T.41).

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> What you are trying to elicit is a statement, I'm sure, that says: "I admit I was there but I wasn't there with the intent of committing any crime."
>
> Now, that's not an admission and that's not against his interest. That's a self-serving statement and it loses the character of truthfulness that the admission -- that the exception contemplates and has been permitted for all these hundreds of years.
>
> The reason for this exception is because the law says a man is not going to say something against his own interest unless it's true.

(T.44).

The court found that the appellant's construction of Rule 63(6) would "contemplate allowing anything that the accused says to come in regardless of whether it's an admission or not . . ." (T.45) and ruled that that was not the proper construction of Rule 63(6) and thus the appellant's statement was not admissible because it was not an admission against the appellant's interest but was simply a self-serving exculpatory statement.

C

THE APPELLANT'S HEARSAY STATEMENT WAS NOT ADMISSIBLE UNDER RULE 63(7) AS AN ADMISSION BY A PARTY.

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Respondent submits that this issue is not properly before this Court on appeal since it was not raised in the trial court. However, if this Court decides to examine this issue the record demonstrates that the appellant's hearsay statement does not fall within Rule 63(7) which provides:

> As against himself a statement by a person who is a party to the action in his individual or a representative capacity and, if the latter, who was acting in such representative capacity in making the statement;

J. Maughan, concurring in State In Re K.D.S, supra at 13 noted that this exception only applies in civil cases. This matter is not a civil case and this exception is inapplicable.

Even if this exception applied in criminal cases it is clearly not applicable to this case because it states that "as against himself" a statement is admissible. The appellant's statement is not against himself, it is simply an exculpatory statement which does not create any basis upon which the appellant could be admitting to the lesser crime of criminal trespass.

The cases cited by appellant, State In Re K.D.S, supra; and Watters v. Querry, 588 P.2d 702 (Utah 1978) support the interpretation of Rule 63(7) as applying only to civil cases, thus the trial court did not err in excluding the hearsay statement.

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D

THE APPELLANT'S HEARSAY STATEMENT WAS NOT ADMISSIBLE UNDER RULE 63(10) AS A DECLARATION AGAINST INTEREST.

Again, this issue is not properly before this Court on appeal since it was not raised in the trial court. However if this Court decides to examine this issue the record clearly indicates that the appellant's hearsay statement does not fall within the declaration against interest exception to the hearsay rule, Rule 63(10) which provides:

> Subject to the limitations of exception (6), a statement which the judge finds was made by a declarant who is unavailable as a witness and which was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval that the declarant under the circumstances existing would not have made the statement unless he believed it to be true;

In order to establish that the appellant's hearsay statement was admissible as a declaration against interest the appellant must show that (1) the declarant was unavailable, (2) the statement was against his pecuniary or proprietary interest or so far subjected him to civil or criminal liability, and (3) the declarant would not have made the statement

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unless it were true. The appellant cannot show that any of these requirements are present in this case.

In the present case the appellant claims that by exercising his priviledge against self incrimination he was unavailable as a witness. In State v. Smith, supra, the defendant made a similar claim. The trial court rejected that claim and the appellate court affirmed stating:

> Here the defendant chose not to testify at trial. This does not constitute a sufficient showing of unavailability to allow introduction of a defendant's former testimony. Unavailability, for purposes of the hearsay exception, must be "without the connivance of the party seeking to introduce the testimony" of the absent witness. State v. Ortego, supra, 22 Wash.2d at 564, 157 P.2d at 326. A defendant responsible for his own absence or unavailability cannot be considered unavailable for purposes of introducing his prior testimony. State v. Small, 20 N.C.App. 423, 201 S.E. 2d 584 (1974).

547 P.2d 299, 301.

Although Rule 62(7)(a) of the Utah Rules of Evidence includes exception of a witness on the grounds of priviledge as a situation constituting unavailability this Court should follow State v. Smith, and not allow a defendant to manipulat[e] the hearsay exceptions and connive unavailability in order

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to avoid cross-examination about prior convictions.

Even if the appellant is allowed to claim unavailability based on his priviledge against self incrimination he failed to establish that his statement was against pecuniary or proprietary interest or such as to subject him to civil or criminal liability. Appellant contends that the statement would subject him to criminal liability, in that it was an admission of criminal trespass. As noted below (See point III, infra) there was never any foundation whereby the appellant could be convicted of criminal trespass thus the statement was not one which would subject him to criminal liability. In fact, the statement, as characterized by the court below (T.41) was merely an "excuse" for his presence, which could not be denied because there was an eye witness.

Finally, even if appellant had established that the statement was such as to subject him to criminal liability the circumstances under which the statement was made are not condusive to showing that the appellant would not have made the statement unless it were true. The appellant had been caught "red handed" in the victim's room and he knew that he could be identified. This knowledge may have prompted the appellant to state to the

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arresting officer that he was at Snowbird, since denial would be useless. Apparently the appellant also stated that he did not intend to take anything from the apartment in which he was found. Such a statement lacks the credibility present in statements to third parties, or those which tend to implicate an individual in a crime. The circumstances of the appellant's statement distinguish it from those which were intended by this exception to the hearsay rule.

The appellant failed to demonstrate any basis upon which Rule 63(10) could apply to his statement and the trial court did not err in excluding the hearsay statement.

E

THE APPELLANT'S HEARSAY STATEMENT WAS NOT ADMISSIBLE UNDER RULE 63(4)(b) AS A CONTEMPORANEOUS STATEMENT.

This issue is not properly before this Court on appeal since it was not raised in the trial court. However, even if this Court decides to examine this issue it is clear that the appellant's proffered statement does not fall within Rule 63(4)(b) contemporaneous statement exception to the hearsay rule which states:

> A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or

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(b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception.

The facts of this case indicate that the statement in question was not made contemporaneous to the event in question. In this case the statement was made after the appellant had left the apartment, and the canyon. He was traveling in the valley when he was apprehended by the police officer.

State v. McMillan, 588 P.2d 162 (Utah 1978) cited by the appellant establishes that this statement was not within the contemporaneous statement exception, quoting Johnston v. Ohls, 76 Wash.2d 398, 457 P.2d 194 (1969), this Court described the nature of this exception to the hearsay rule:

> The crucial question in all cases is whether the statement was made while the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.

State v. McMillan, supra, at 163.

In McMillan the Court found that the statement by a child, made minutes after the event had occurred would not be subject to fabrication. In this case the appellant,

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who was not a child, was able to reflect upon the situation from the time he ran from Richard Ball's room at Snowbird until he reached the Salt Lake Valley where he was arrested.

This case clearly falls within State v. Sanders, 27 Utah 2d 354, 496 P.2d 270 (1972) where the Court found that the nervous excitement necessary to establish this exception to the hearsay rule was not present where the co-defendant made a statement implicating himself and three others after the commission of the robbery. There as here the act of which the appellant was charged had been completed.

If the appellant was under any nervous stress it was that which accompanied his arrest and not that which could be associated to the "burglary." Therefore the appellant's statement did not fall within the contemporaneous statement exception and the trial court did not err in excluding it.

F

THE TRIAL COURT DID NOT ERR IN EXCLUDING APPELLANT'S HEARSAY STATEMENT, AND EVEN IF ERROR OCCURRED IT WAS HARMLESS.

Respondent submits that only Rule 63(6) is properly before this Court on appeal because the appellant failed to timely raise other exceptions to the hearsay rule in the

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court below. However, as shown in A through E above, the appellant's statement was not admissible under any of the hearsay exceptions and the trial court was correct in excluding the evidence.

Assuming arguendo, that the evidence was admissible under any one of the hearsay exceptions noted by the appellant failure to admit that evidence was not prejudicial. In order to reverse a verdict based on the erroneous exclusion of evidence two things must be shown, as described in Rule 5 of the Utah Rules of Evidence:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

In _State v. Simmons_, _supra_, upon finding that the excluded hearsay statement was admissible this Court stated that:

> We must review alleged error in conformity with 77-42-1, U.C.A.1953, and may not interfere with a jury verdict, unless upon review of the entire record,

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> there emerges error of sufficient gravity to indicate defendant's rights were prejudiced, in a substantial manner. There must be a reasonable probability there would have been a result more favorable to defendant, in the absence of error.

The alleged error in this case is not of sufficient gravity to indicate that defendant's rights were prejudiced. In view of the fact that the statement would have been admitted had the appellant wished to take the stand the trial court did not substantially impair appellants rights by excluding the statement. In addition there must be a reasonable probability that there would have been a result more favorable to the defendant, as discussed below (See Point III, <u>infra</u>) the appellant could not establish intent to merely commit criminal trespass, based on the evidence he was either guilty of burglary or not guilty at all. Thus, there is not a reasonable probability that the verdict would have been different and this Court should not reverse appellant's conviction.

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POINT III

CRIMINAL TRESPASS IS NOT A NECESSARILY LESSER INCLUDED OFFENSE OF BURGLARY AND THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT ON CRIMINAL TRESPASS.

Appellant contends that criminal trespass, Utah Code Ann. § 76-6-206 (1953, as amended), is a necessarily included offense of burglary, Utah Code Ann. § 76-6-201 (1953, as amended), and because he requested an instruction on the lesser crime the trial court's refusal to so instruct constitutes reversible error.

Both the premise and conclusion of appellant's contention are erroneous and do not compel reversal of the jury verdict. Under the facts of this case and the law regarding the giving of requested instructions the trial court ruled properly and no reversible error occurred.

A

THE DEFENDANT IN A CRIMINAL CASE HAS A RIGHT TO SUBMIT HIS THEORY OF THE CASE TO THE JURY IN THE INSTRUCTIONS ONLY UNDER PROPER CIRCUMSTANCES.

Respondent does not dispute the basic premise that a defendant in a criminal case should be allowed to present his theory of the case to the jury. However, in State v. Hendricks, 596 P.2d 633 (Utah 1979), this Court

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recognized that "the right is not absolute, and a defense theory must be supported by a certain quantum of evidence before an instruction as to an included offense need be given." Because the right is not unlimited the trial court is not necessarily bound to give all instructions relating to defense theories just because they are requested or because they are characterized by the defendant as reflecting his theory of the case.

Therefore, if a defendant's theory of the case is all theory and no evidence or so unreasonable based on the evidence presented that it does not satisfy the requirements of a defense, no instruction thereon is required. See Utah Code Ann. § 76-2-201, et seq. (1953), as amended.

In support of his claim that a defendant's theory of the case must be instructed upon, appellant cites State v. Gillian, 23 Utah 2d 374, 463 P.2d 811 (1970), for the proposition that "when the accused as his theory of the case requests instructions on lesser included offenses . . . the trial court as a general rule is duty bound to submit these alternatives to the trier of the fact" (appellant's brief, p.22).

The appellant admits that this general rule is limited to situations where the defendant's argument is

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that he is not guilty of the crime as charged and he is guilty of some lesser charge. A situation which does not factually exist in the present case (See IIIC below). Gillian was a first degree murder trial where substantial evidence of criminal homicide other than first degree murder was presented and this Court found that the trial court's failure to so instruct was reversible error. Gillian does not mean that any defense theory is a basis for a requested instruction on lesser offenses. The theory must be based on reasonable (even substantial) evidence before an instruction on a lesser included offense is mandated.

The lesson of Gillian is that on review this Court must look at the facts of the case to determine the validity of the trial court's rejection of proposed instructions. Because a defendant characterizes certain evidence as a defense theory and requests instructions thereon, does not mean that the trial court, or a reviewing court, must adopt that characterization when the evidence presents a theory different than that which the defendant propounds. In this case the evidence presented does not support the defendant's theory of criminal trespass and the trial court was correct in refusing to instruct thereon.

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B

CRIMINAL TRESPASS IS NOT NECESSARILY
A LESSER INCLUDED OFFENSE OF BURGLARY.

In State v. Hendricks, 596 P.2d 633 (Utah 1979), this Court examined the question of whether criminal trespass is a lesser included offense of burglary and found that it is not. In that case the defendant charged with burglary raised the defense of voluntary intoxication and requested an instruction on criminal trespass which was denied. On appeal this Court sustained the trial court's refusal to give the instruction on criminal trespass because "the evidence (including that presented by the defendant), established all of the elements of burglary but did not establish all of the elements of criminal trespass." Id. at 634. Contrary to the appellant's assertion, this holding indicates that this Court found that criminal trespass is not necessarily a lesser included offense of burglary. The meaning is clear when footnote 6 which follows this Statement is analyzed. In that footnote the Court states that, "Such in and of itself precludes the giving of the requested instructions. As to what constitutes an included offense see: State v. Woolman, 84 Utah 23, 33 P.2d 640 (1934), and State v. Brennan, 13 Utah 2d 195, 371 P.2d 27 (1962)."

The standards under which the Court determined that the instruction on criminal trespass was precluded provide:

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> The statute allows conviction for any lesser offense necessarily included in the offense charged in the indictment or information, but does not allow conviction of any lesser offense stated in the indictment unless it is necessarily included in the greater offense. The lesser offense must be a necessary element of the greater offense and must of necessity be embraced within the legal definition of the greter offense and be a part thereof.

33 P.2d at 645 (emphasis by Court, added).

> The rule as to when one offense is included in another is that the greater offense includes a lesser one when establishment of the greater would necessarily include proof of all the elements necessary to prove the lesser. Conversely, it is only when the proof of the lesser offense requires some element not involved in the greater offense that the lesser would not be an included offense.

371 P.2d at 29 (emphasis added).

Since the evidence established all the elements of burglary but did not establish all the elements of criminal trespass it is clear that "the lesser offense requires some element not involved in the greater offense" and thus criminal trespass is not a lesser included offense of burglary.

This conclusion was not reversed in the recent case of State v. Brooks, ___ P.2d ___, Sup. Ct. No. 16729, May 28, 1981 (Utah), where this Court affirmed the trial court's refusal to grant defendant's motion to reduce the charge from burglary to criminal trespass. In that case this Court's discussion of the issue centered on the proof of the defendant's intent to commit a theft because as a matter of

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of law the trial court would not have been correct if the evidence was insufficient to support a conviction for burglary. This Court ultimately decided that there was enough evidence to submit the question to the jury. In Brooks, this Court did not state that criminal trespass is a lesser included offense of burglary and thus followed the holding of Hendricks, supra, which remains the law.

A comparison of Utah Code Ann. §§ 76-6-202, burglary, and 76-6-206, criminal trespass, confirms that criminal trespass requires proof of elements not involved in burglary. Therefore under the test of Woolman and Brennan, supra, criminal trespass is not a necessarily lesser included offense of burglary. Section 76-6-202 provi:

> (1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.
> (2) Burlgary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

Section 76-6-206 provides:

> (1) For purposes of htis section 'enter' means intrusion of the entire body.
> (2) A person is guilty of criminal trespass if, under circumstances not amounting to burglary as defined in sections 76-6-202, 76-6-203, or 76-6-204:
> (a) He enters or remains unlawfully on property and:
> (i) Intends to cause annoyance or injury to any person thereon or damage to any property thereon; or

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(ii) Intends to commit any crime, other than theft or a felony;

(iii) Is reckless as to whether his presence will cause fear for the safety of another.

(b) Knowing his entry or presence is unlawful, he enters or remains on property as to which notice against entering is given by:

(i) Personal communication to the actor by the owner or someone with apparent authority to act for the owner; or

(ii) Fencing or other enclosure obviously designed to exclude intruders; or

(iii) Posting of signs reasonably likely to come to the attention of the intruders.

(3) A violation of subsection (2)(a) is a class C misdemeanor unless it was committed in a dwelling, in which event it is a class B misdemeanor. A violation of subsection (2)(b) is an infraction.

(4) It is a defense to prosecution under this section:

(a) That the property was open to the public when the actor entered or remained; and

(b) The actor's conduct did not substantially interfere with the owner's use of the property.

To prove criminal trespass, a class C misdemeanor, the state must show that the actor entered or remained on property and had specific intent to do certain things or be reckless about the effect of his presence.

To prove criminal trespass, an infraction, the state must show that the actor knowing his entry or presence was unlawful, entered or remained on property despite certain kinds of notice being given.

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Burglary requires unlawful entry in a building with the intent to commit a felony, theft or assault.

To prove criminal trespass, a class C misdemeanor, requires showing specific intent different than the intent to commit theft, assault or other felony, Brennan, Id. The elements of specific intent required for criminal trespass, a class C misdemeanor, are not necessary elements of burglary, Woolman, supra. Proof of the elements of burlgary does not "necessarily include proof of all the elements necessary to prove the lesser" crime of criminal trespass, Brennan, supra, and therefore no instruction thereon was mandated.

Criminal trespass, an infraction, is likewise not necessarily established by proof of burglary. It requires certain kinds of notice against entry before its sanctions apply.

In conclusion, the cases cited by appellant to support his theory that criminal trespass in Utah is a lesser included offense of burglary, Day v. State, Tex. Cr., 532 S.W.2d 302 (1976); People v. Henderson, 41 N.Y.2d 233, 359 N.E.2d 1357 (1976); and Commonwealth v. Carter, 344 A.2d 899 (Pa. 1975), are distinguishable.

In Day v. State, supra, the criminal trespass statute is significantly different than our statute. The

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Texas statute does not contain any of the specific intent provisions of Section 76-6-206(2)(a). The better view of subsection (2)(b), is that notice against entry must be more than a building itself and the Texas Court of Criminal Appeals incorrectly construed that element of criminal trespass. Moreover, the test for giving lesser included instructions is less rigorous in Texas than in Utah and an instruction thereon in Texas may have been obligatory.

The criminal trespass statute in People v. Henderson, supra, is also dissimilar to Utah's statute. McKinney's Consolidated Laws of New York Ann., Book 39, §§ 140.05, 140.10, reveal that no specific intent element exists in the New York statute. New York has eliminated the word "obviously" from its approximate analog of Section 76-6-206(2)(b) and does not include an explicit notice requirement as exists in Utah's statute.

Commonwealth v. Carter, supra, indicates that Pennsylvania's criminal trespass statute proscribes only unlicensed or unprivileged entry into a building or occupied structure. 344 A.2d 901. Thus, the elements of intent present in Section 76-6-206(2)(a) and the element of notice present in Section 76-6-206(2)(b) are absent from the Pennsylvania statute. Furthermore, the Pennsylvania statute is limited to buildings and structures, a more narrow term

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than the broad "property" language of Section 76-6-206.

For the reasons cited above it is clear that crim[illegible] trespass is not a lesser included offense of burglary and t[illegible] trial court was correct in refusing to grant the appellant's requested instruction on criminal trespass.

C

THE LOWER COURT CORRECTLY REFUSED TO INSTRUCT THE JURY ON CRIMINAL TRESPASS.

Respondent submits that State v. Hendricks, 596 P.2d 633 (Utah 1979), has determined that criminal trespass is not a lesser included offense of burglary and therefore the trial judge was correct in refusing to give an instructi[illegible] on criminal trespass. However, if this Court now determines that criminal trespass is a lesser included offense of burglary, an instruction thereon was not required by the law in Utah, concerning instructions on lesser offenses, on the facts of this case.

Utah Code Ann. § 76-33-6 (1953), as amended, which appellant cites as imposing on the court an obligation to give an instruction on the lesser included offense, reads:

> The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense.

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According to State v. Bender, 581 P.2d 1019, 1020 (Utah 1978). This section is governed by Utah Code Ann. § 76-1-402(4) (1953), as amended, under which:

> The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. (Emphasis added.)

This statute codifies common law principles dating back to territorial days, People v. Robinson, 6 Utah 101, 21 P.2d 403 (1889).

In State v. Dougherty, 550 P.2d 175 (Utah 1976), the defendant was convicted of the crime of unlawful distribution for value of a controlled substance. He appealed, alleging that the trial court erred in refusing to give an instruction on the lesser included offense of possession of a controlled substance. In affirming the conviction, this Honorable Court held that where defense testimony could prove only complete innocence, the defendant was not entitled to an instruction on the lesser included offense. This Court, citing Lisby v. State, 83 Nev. 183, 414 P.2d 592 (1966), also enunciated the three situations in which the question of whether to instruct on lesser included offenses are frequently encountered:

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. . . First, where there is evidence which would absolve the defendant from guilt of a greater offense, or degree, but would support a finding of guilt of a lesser offense, or degree; the instruction is mandatory.

Second, where the evidence would not support a finding of guilt in the commission of the lesser offense or degree. For example, the defendant denies any complicity in the crime charged, and thus lays no foundation for any intermediate verdict, or where the elements of the offense differ, and some element essential to the lesser offense is either not proved or shown not to exist. This second situation renders an instruction on a lesser included offense erroneous, because it is not pertinent.

Third, is an intermediate situation. One where the elements of the greater offense include all the elements of the lesser offense; because, by its very nature, the greater offense could not have been committed without defendant having the intent in doing the acts, which constitute the lesser offense. In such a situation instructions on the lesser included offense may be given because all elements of the lesser offense have been proved. However, such an instruction may properly be refused if the prosecution has met its burden of proof of the greater offense, and there is no evidence tending to reduce the greater offense.

550 P.2d at 176, 177 (emphasis added). This was affirmed in State v. Pierre, 572 P.2d 1338, 1355 (Utah 1977), and State v. Bell, 563 P.2d 186, 188 (Utah 1977).

In the present case, the evidence presented by the appellant falls under the second situation cited above, in which an instruction on a lesser included offense is not appropriate at all. The defendant failed to establish that

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any basis for a conviction of criminal trespass existed. Appellant's characterization of his theory as justifying an instruction on criminal trespass misrepresents his own evidence. His statements as to "looking for a way out" and "being a guest upstairs" if believed would have eliminated all criminal intent and there would have been no basis for a conviction on criminal trespass. As noted above, criminal trespass, a class C misdemeanor, requires specific intent to do certain things or be reckless about the effect of his presence. The appellant failed to show that his actions could be the basis of a class C misdemeanor conviction. Similarly, the appellant's theory also eliminates intent to commit criminal trespass, an infraction, which requires some showing that the actor knowing his entry or presence was unlawful, entered or remained on property despite certain kinds of notice being given. If as the appellant characterizes the evidence the screen was cut open by someone besides the appellant the type of notice which is required to be given under criminal trespass an infraction would not have existed. Thus, "some element essential to the lesser offenses is either not proved or shown not to exist." Dougherty, supra, at 176, and the trial court was correct in refusing to give the requested instruction on criminal trespass.

The facts suggest that appellant was either guilty of burglary or not guilty of any crime. Even if the appellant's version of the story was in fact the case and the jury was so inclined to believe his version, then no conviction could

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stand either for the greater offense of burglary or for the "alleged" lesser included offense of criminal trespass. Thus, the case falls directly under the guidelines of State v. Dougherty, supra, where the Court declared, "The defense testimony could only prove complete innocence." There, as here, the appellant tried to proceed on a lesser included offense theory which was rejected by this Court:

> . . . Such a theory is not available to him where the record shows he could only be found guilty or not guilty of the crime charged.

550 P.2d at 177.

It can be said, therefore, that under Utah Code Ann. § 76-1-402(4) (1953), as amended, the trial court in the case at bar was not obliged to instruct as to an included offense, because even though the jury may have chosen to believe the appellant, thereby acquitting him, no evidentiary basis existed upon which a conviction of criminal trespass could stand. Since Utah Code Ann. § 76-1-402(4) is stated in the conjunctive, both statutory requisites must be present before the trial court would be required to instruct on the included offense.

The appellant also claims that this case is similar to other cases in which the charge of burglary

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has been reduced to criminal trespass. The cases cited by appellant to support this proposition, Crawford v. State, 241 N.E.2d 795 (Ind. 1968); State v. Rood, 11 Ariz.App. 102, 462 P.2d 399 (1969), and State v. Kahinu, 53 Haw. 646, 500 P.2d 747 (1972), are factually distinguishable and support the proposition that felonious intent in a burglary case may be established by circumstantial evidence.

In Crawford v. State, supra, there was no evidence that any property within the garage, where the defendant was found hiding, had been removed in any way. In addition there were several broken windows through which the appellant could have entered without using force. Under these facts, the Court determined that the evidence was insufficient to support a conviction of burglary beyond a reasonable doubt. Thus, it was insufficiency of the evidence and not the use of circumstantial evidence which precluded the conviction. In fact, the Court stated that, "We agree with the appellee [state] . . . that intent may be established by inference from the circumstances surrounding an act." Id. at 797.

In State v. Rood, supra, the facts of the case again indicated that there was an unforceable entry into an unlocked building. Although this was insufficient to establish felonious intent the court stated that, "The Arizona Supreme Court has held that proof of intent can be shown by circumstantial

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evidence," Id. at 400, and "Criminal intent is usually proven by circumstantial evidence." Id. at 401.

Similarly in State v. Kanihu, supra, there was evidence which tended to show that the room which the appellant entered was unlocked. Further evidence showed that the room was previously occupied by the appellant's girlfriend. Finally, the appellant's flight from the room was justified by evidence which showed that the appellant was suffering from paranoia as a result of L.S.D. All of these factors led the court to find that the appellant did [illegible] possess the requisite intent to commit burglary. However, the court recognized that:

> Intent in a burglary case can be established by inference from the surrounding circumstances and accompanying and attendant acts of the person accused.

Id. at 749.

The present case is clearly distinguishable from Crawford, Rood, and Kanihu because the evidence upon which the jury convicted the defendant, albeit circumstantial, wa[illegible] sufficient to establish his intent. Here, the appellant wa[illegible] found in Richard Ball's apartment without authorization to [illegible] there (T.11, 19). Entry was forcible through an "L" shaped hole in the screen which was intact when the victim had lef[illegible] his apartment two hours earlier (T.12,17). All doors to Ri[illegible] Ball's apartment were locked when he left at 10:10 a.m. and

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is the only one who possessed a key (T.17,18). A "security box" which had a hidden lock had been moved from its normal resting place to the center of the victims bed with the lock exposed (T.18,19). The appellant jogged up a narrow trail and then broke into a run as he reached the parking lot, this was after Mr. Ball had attempted to verify the appellant's story (T.12,13,14). This evidence was sufficient to establish that the appellant possessed the intent to commit a theft when he entered the apartment of Mr. Richard Ball, and also to distinguish this case from State v. Brooks, supra. As noted above circumstantial evidence may be used to establish intent. In State v. Burch, 17 Utah 2d 418, 413 P.2d 805 (1966), this Court affirmed a second degree burglary conviction stating that circumstantial evidence showing that the defendant was caught "red handed" was sufficient to establish the defendant's intent. Similarly, the circumstantial evidence which tended to show that Richard Ball's security box had been tampered with while the defendant was unlawfully located in Mr. Ball's apartment was sufficient to establish felonious intent. State v. Dusch, 17 Ariz.App. 286, 497 P.2d 402 (1972), states that felonious intent can be inferred from unauthorized entry into a building through a window.

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Appellant's attempt to create a defense theory showing the necessary elements of criminal trespass does not compel reversal.

In compliance with the facts here and State v. Cornish, Utah, 568 P.2d 360 (1977), the trial court properly allowed the trier of fact to consider appellant's intent. The jury could have believed the defendant and found no intent to commit any crime and acquitted appellant, or they could have believed the evidence presented by the state and found the existence of the requisite conduct and intent and convicted appellant of burglary.

Appellant's conviction was valid and the trial court correctly refused to give instructions on criminal trespass.

CONCLUSION

It is a well established principle of law that an appellate court will not review those issues which were not timely raised in the trial court. In this case appellant has attempted to raise hearsay exceptions on appeal which were not timely raised below. Appellant should be precluded from raising any exception to the hearsay rule which was not timely raised in the trial court.

Assuming, arguendo, that the hearsay exceptions which the appellant submits are reviewable on appeal they

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do not apply to facts of this case and the trial court was correct in excluding the self-serving hearsay statement of the appellant.

Finally, the appellant's proffered instruction on criminal trespass was properly rejected by the trial court because in State v. Hendricks, supra, this Court determined that criminal trespass is not a lesser included offense of burglary. Assuming arguendo, that criminal trespass was a lesser included offense the facts of this case do not require that the instruction be given since there is not a basis upon which the appellant could be acquitted of the greater crime and convicted of the lesser crime. Under appellant's theory of the case he was either guilty of burglary or not guilty of any crime.

Appellant's conviction should be affirmed.

Respectfully submitted,

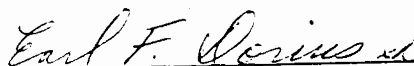
DAVID L. WILKINSON
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent

CERTIFICATE OF MAILING

Mailed a copy of the foregoing Brief of Respondent to Mr. G. Fred Metos, Attorney for Appellant, Salt Lake Legal Defender Association, 333 South Second East, Salt Lake City, Utah 84111, this 9th day of July, 1981.



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