

2009

# James Christiansen Crabb v. State of Utah : Brief of Appellee

Utah Court of Appeals

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Case No. 20091046-CA

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IN THE  
UTAH COURT OF APPEALS

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State of Utah,  
Plaintiff/ Appellee,

vs.

James Christiansen Crabb,  
Defendant/ Appellant.

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Brief of Appellee

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Appeal from convictions for possession of a controlled substance and possession of drug paraphernalia, in the Sixth Judicial District Court of Utah, Sevier County, the Honorable Paul D. Lyman presiding.

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- Addendum A: Utah Code Ann. § 58-37-2 (West Supp. 2005) (controlled substances – definitions);  
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Utah Code Ann. § 58-37a-5 (West 2004) (drug paraphernalia).
- Addendum B: Defendant’s proposed jury instruction
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Brief of Appellee

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (West Supp. 2005), and possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (West 2004). This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2009).

STATEMENT OF THE ISSUES

1. Should this Court review Defendant's three insufficiency claims where two of the claims are unpreserved and where Defendant has not marshaled the evidence relevant to any of them? If the Court reviews the claims, was the evidence sufficient to support the jury's finding beyond a reasonable doubt that Defendant possessed methamphetamine and drug paraphernalia?

*Standard of Review.* This Court “will reverse a jury verdict for insufficient evidence only when the evidence, viewed in a light most favorable to the verdict, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.” *State v. Buck*, 2009 UT App 2, ¶ 9, 200 P.3d 674 (citations and internal quotation marks omitted).

2. Where the jury instructions required the jury to find all elements of the offenses beyond a reasonable doubt, did the trial court err when it declined to give Defendant’s proposed instruction that the jury could not find him guilty “unless the proved circumstances are not only consistent with the theory that the defendant is guilty, but cannot be reconciled with any other rational conclusion”?

*Standard of Review.* Whether the trial court erred when it denied a jury instruction is a question of law, reviewed for correctness. *See State v. Harper*, 2006 UT App 178, ¶ 9, 136 P.3d 1261.

3. Defendant claims that the trial court plainly erred for instructing the jury that the urine sample had been lost and not tested. He also claims the trial court plainly erred for not dismissing the case based on the State’s failure to provide him a urine sample. Should this Court review these claims where Defendant invited any error? If so, did the trial court plainly err for instructing the jury about a fact stipulated to by both parties? Did the trial court plainly err by not dismissing based

on the State's failure to provide a urine sample, where Defendant has not shown that the sample was exculpatory and where, in fact, Defendant expressly asked the State not to provide the sample unless the State could provide twice as much urine as the sample contained?

*Standard of Review.* To establish plain error, a defendant must show "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error there is a reasonable likelihood of a more favorable outcome for [the defendant]." *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993). But where a defendant has invited error, review for plain error does not lie. *State v. Bullock*, 791 P.2d 155, 159 (Utah 1989).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant constitutional statutes are included in Addendum A:

Utah Code Ann. § 58-37-2 (West Supp. 2005) (controlled substances—definitions);

Utah Code Ann. § 58-37-8 (West Supp. 2005) (controlled substances—prohibited acts);

Utah Code Ann. § 58-37a-5 (West 2004) (drug paraphernalia).

## STATEMENT OF THE CASE

The State charged Defendant by second amended information with possession of methamphetamine, a third degree felony, possession of drug paraphernalia, a class B misdemeanor. R322-23. A jury found Defendant guilty on both counts. R394.

The trial court imposed a five-year maximum indeterminate prison term on the methamphetamine possession conviction and a concurrent six-month jail term on the drug paraphernalia conviction. R416-17. The court suspended the sentences and placed Defendant on six months' probation. *Id.* As a condition of probation, the court ordered that Defendant serve a 90-day jail term. *Id.*

Defendant timely appealed the judgment. R414-15.<sup>1</sup>

### STATEMENT OF THE FACTS

At about 10:30 a.m. on October 20, 2005, five officers from the Central Utah Narcotics Task Force executed a search warrant on a small, "older type" camp trailer in Elsinore, Utah. R434:96-97, 99. The trailer was situated on property owned by Morris Crabb, Defendant's father. R434:97, 275. Defendant's witness described it as "nothing but an office," "a painter's booth." R434:257. Defendant painted cars in a tarp-covered lean-to or makeshift garage attached to the trailer. R434:97, 103, 256. The trailer was "not very big, and [the walls were] not very far apart." R434:107.

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<sup>1</sup> The appeal, filed after the announcement but before the entry of judgment, was timely as to the judgment. *See* R399-401, 416-18; *see also* Utah R. App. P. 4(b)(2). It was not timely, however, as to the denial of a later-filed motion for new trial. *See* Utah R. App. P. 4(b)(2).

Detective Kerry Ekker, standing in the doorway of the trailer, could see Defendant and all the other officers. *Id.*

Inside, on the south side of the trailer, the officers found Defendant in a bed. R434:107-08, 112. He was half-dressed and looked like he was sleeping in the bed. R434:178. The officers took Defendant outside and then searched the trailer. R434:108.

In “a little closet space” about an “arm’s reach” from the bed, the officers found a broken light bulb containing burnt residue. R434:109-10. In a cubby hole at the end of a couch at the northeast corner of the trailer, they found an unbroken light bulb. R434:112-113. The center metal piece had been bored out, forming a tempered-glass pipe. R434:114-15. The unbroken bulb also contained residue. R434:115.

Officer Kerry Ekker later scraped residue from the broken bulb and delivered it to the State Crime Laboratory. R434:116-17. The residue tested positive for methamphetamine. R434:224.

### SUMMARY OF ARGUMENT

1. The evidence sufficed to support Defendant’s conviction. Defendant was found alone in bed in his trailer. Within an “arm’s reach” of the bed, officers found a modified light bulb with burnt residue. The residue later tested positive for methamphetamine. Another light bulb was found next to Defendant’s couch. It too

contained burnt residue. This evidence established a sufficient nexus between Defendant and the methamphetamine and paraphernalia to show that he had the power and intent to exercise control over them and therefore to support a jury's finding beyond a reasonable doubt that he possessed them and that he possessed the paraphernalia for a prohibited purpose. The State was not required to show, in addition, that the evidence precluded every reasonable alternative hypothesis of guilt, as it is within the province of the jury to weigh competing theories of the case and conclude which one they believe.

2. The trial court did not err when it rejected Defendant's proposed jury instruction requiring the jury to eliminate all reasonable alternative hypotheses of guilt. The Utah Supreme Court has repeatedly held that when the jury is correctly instructed on the requirement that it may convict a defendant only upon finding him guilty beyond a reasonable doubt, there is no need to provide the jury with a reasonable alternative hypothesis instruction. And the United States Supreme Court has held that where the jury is properly instructed on the standards for reasonable doubt, an instruction requiring the prosecution to exclude every reasonable hypothesis other than guilt is confusing and incorrect.

3. Defendant claims that the trial court erred when it instructed the jury that the urine sample was lost and when it did not dismiss the case for the State's alleged failure to preserve and produce exculpatory evidence. First, Defendant invited the

very error he now claims on appeal, thus foreclosing review for plain error. Moreover, Defendant has not shown that the trial court erred, let alone obviously and prejudicially erred, when it gave the jurors the stipulated fact that the urine sample had been lost, thus providing a neutral explanation for the lack of testing results in the trial testimony. Moreover, he has not shown that the trial court erred, let alone obviously erred, for not dismissing the case for the State's alleged destruction or concealment of the urine sample. The State did not produce the sample because Defendant requested a sample only if the State could provide 60 cc's of urine. The State responded that it had only 30 cc's. Nothing suggests that Defendant later requested a smaller sample. Moreover, even had the State failed to produce a requested sample, Defendant suffered no violation of his due process rights. Where evidence is only potentially exculpatory, failure to preserve that evidence does not constitute a denial of due process unless the defendant can show bad faith on the part of the police. Defendant has not suggested, much less shown, bad faith. Moreover, nothing in the record suggests that any error should have been obvious, and Defendant has not demonstrated harm. He has not shown that the sample would have been exculpatory or that his testing of it would have made any difference to the jury.

## ARGUMENT

On appeal, Defendant claims that the evidence is insufficient to support his possession convictions for multiple reasons: he claims the evidence is insufficient (1) to show that he possessed methamphetamine and paraphernalia, (2) to show that he possessed paraphernalia with the intent to use it for a prohibited purpose, and (3) to establish a chain of custody demonstrating that the lab-tested residue was the substance taken from Defendant's trailer (the chain of custody claim). He further claims that the trial court erred when it rejected his jury instruction requiring the jury to eliminate all reasonable alternative hypotheses of innocence. Finally, he argues that the trial court plainly erred for instructing the jury that the urine sample had been lost and for not dismissing the case upon learning that a sample survived and had not been produced.

### I.

**THIS COURT SHOULD NOT REVIEW DEFENDANT'S INSUFFICIENCY CLAIMS WHERE TWO OF HIS THREE CLAIMS ARE UNPRESERVED AND WHERE HE HAS NOT MARSHALED THE EVIDENCE SUPPORTING ANY OF THE CHALLENGED FINDINGS; IN ANY CASE, THE EVIDENCE SUFFICED**

**A. This Court should not review Defendant's unpreserved insufficiency claims where he has articulated no justification for review.**

As a preliminary matter, this Court may decline to review Defendant's claims for inadequate briefing. Under the appellate rules, an appellant is required to



“cit[e] to the record showing that the issue was preserved in the trial court.” Utah R. App. P. 24(a)(5)(A). Defendant has not provided such a citation for any of his claims, including his sufficiency claims, but has “dump[ed] the burden” of research on this Court and on opposing counsel; therefore, the Court need not review them. *West Jordan City v. Goodman*, 2006 UT 27, ¶ 29, 135 P.3d 874 (internal quotation marks and citations omitted).

Moreover, the State, in its review of the record, has found only one sufficiency claim that was preserved below. After the State rested, defense counsel moved “to dismiss, at least the charges as to possession,” alleging that the State had not “established the chain of evidence from the crime lab back to here.” R434:239-40. But Defendant did not claim that the evidence was insufficient to show constructive possession of the items in his trailer or to show that he possessed the paraphernalia with a prohibited intention.

This Court will review unpreserved claims only where an appellant argues some justification for review. *State v. Pinder*, 2005 UT 15, ¶ 45, 114 P.3d 551 (citing *State v. Pledger*, 896 P.2d 1226, 1229 n.5 (Utah 1995)). Defendant argues no exception to the preservation rule. Thus, this Court should decline to review Defendant’s unpreserved claims that the evidence did not suffice to show actual or constructive possession of methamphetamine and drug paraphernalia or to show possession of paraphernalia with a prohibited intent.

**B. This Court should not review any of Defendant's insufficiency claims where he has not marshaled the evidence supporting the fact-dependent legal conclusions he challenges.**

Rule 24 also requires an appellant, when challenging a factual finding or a fact-dependent legal conclusion, to “first marshal all record evidence that supports” the challenged finding or ruling. *See* Utah R. App. P. 24(a)(9); *Chen v. Stewart*, 2004 UT 82, ¶ 20, 100 P.3d 1177 (“Even where the defendants purport to challenge only the legal ruling, as here, if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, the defendants also have a duty to marshal the evidence.”). Proper marshaling requires an appellant to amass “every scrap of evidence and draw all reasonable inferences that support the adverse decision and then show why that evidence, even when viewed in the light most favorable to the decision, is legally insufficient.” *United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶ 24, 140 P.3d 1200; *State v. Chavez-Espinoza*, 2008 UT App 191, ¶¶ 7 & 20, 186 P.3d 1023. The requirement is not met “by simply providing an exhaustive review of all evidence presented at trial.” *United Park City Mines*, 2006 UT 35, ¶ 26 (citation and internal marks omitted). Rather, parties are required to “temporarily remove their own prejudices and fully embrace the adversary's position; they must play the ‘devil's advocate.’ In so doing, appellants must . . . not attempt to construe the evidence in a light favorable to their case . . . [and must not] merely re-argue the factual case presented in the trial court.”

*Id.* (citations and internal marks omitted). When an appellant fails to properly “perform this critical task, [the appellant court] can rely on that failure to affirm the lower court’s findings of facts” and its fact-dependent legal rulings. *Id.* at 27; *see also State v. Clark*, 2005 UT 75, ¶ 17, 124 P.3d 235 (same).

Defendant has not met the marshaling requirement. Defendant challenges the sufficiency of the evidence to show possession of methamphetamine and drug paraphernalia, to show that the paraphernalia was possessed with a prohibited intent, and to show that the residue tested was the residue taken from his trailer. Br. Appellant at 18-35. But he has not amassed the evidence or drawn the inferences supporting the findings the trial court necessarily made, i.e., findings that the evidence did suffice, when it submitted the case to the jury. Nor has he explained why that evidence, viewed in a light most favorable to those findings, was insufficient.<sup>2</sup>

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<sup>2</sup> While Defendant provides a Statement of Facts, Br. Appellant at 9-17, he has not marshaled the record evidence that supported submission of the case to the jury. The Statement does not present all the evidence supporting the trial court’s decision, nor does it present the evidence in a light most favorable to the State. *See id.*

**C. The evidence sufficed to support the jury's finding Defendant guilty beyond a reasonable doubt.**

In any case, the evidence sufficed to show that Defendant possessed the methamphetamine and paraphernalia found in his trailer, that he possessed the paraphernalia with a prohibited intent, and that the residue tested was the residue taken from the light bulb found in his trailer.

This Court “will reverse a jury verdict for insufficient evidence only when the evidence, viewed in a light most favorable to the verdict, “is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.” *Buck*, 2009 UT App 2, ¶ 9 (quoting *State v. Lyman*, 966 P.2d 278, 281 (Utah App. 1998)) (in turn quoting *State v. Hamilton*, 827 P.2d 232, 236 (Utah 1992)).

- 1. The evidence sufficed to support the jury's finding that Defendant possessed methamphetamine and drug paraphernalia and that he possessed the paraphernalia with the intent that it be used to introduce drugs into the human body.**

The evidence sufficed to show that Defendant possessed both drugs and drug paraphernalia. It also sufficed to show that he possessed the paraphernalia for one or more of the prohibited purposes enumerated in the statute.

**Applicable law.** It is unlawful “for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while

acting in the course of the person's professional practice, or as otherwise authorized by this chapter." Utah Code Ann. § 58-37-8(2)(a)(i) (West Supp. 2005). It is also "unlawful for any person to use, or to possess with intent to use, drug paraphernalia to . . . inject, ingest, inhale or otherwise introduce a controlled substance into the human body." Utah Code Ann. § 58-37a-5(1) (West 2004).

Possession of a controlled substance or drug paraphernalia may be proved by showing that the defendant had either "actual possession" or "constructive possession" of the contraband. See *State v. Workman*, 2005 UT 66, ¶ 31, 122 P.3d 639. Actual possession occurs when the contraband is found on the defendant's person or is otherwise under his or her direct control. See *State v. Carter*, 696 N.W.2d 31, 38 (Iowa 2005) (holding that "[a]ctual possession occurs when the controlled substance is found on the defendant's person"); *State v. Matthews*, 484 P.2d 942, 943 (Wash. App. 1971) (holding that "[a]ctual possession is proved when the drugs are found to be in the actual, physical custody of the person charged with possession"). Because the contraband in this case was not found on Defendant's person, the State was required to prove that Defendant had constructive possession of the drugs and paraphernalia found in the trailer. See *id.*

To prove constructive possession, the State must introduce evidence establishing "a sufficient nexus between the accused and the [contraband] to permit an inference that the accused had both the power and the intent to exercise

dominion and control over the [contraband].” *Workman*, 2005 UT 66, ¶ 31 (quoting *State v. Fox*, 709 P.2d 316, 319 (Utah 1985)). In other words, “[t]here must be some action, some word, or some conduct that links the individual to the narcotics and indicates that he had some stake in them, some power over them.” *Rivas v. United States*, 783 A.2d 125, 130 (D.C. 2001). Simply stated, “[t]here must be something to prove that the individual was not merely an incidental bystander.” *Id.*

Whether a defendant had a sufficient nexus to infer constructive possession is “a highly fact-sensitive determination,” *State v. Layman*, 1999 UT 79, ¶ 14, 985 P.2d 911, which “depends upon the facts and circumstances of each case,” *Fox*, 709 P.2d at 319. In making that determination, courts may consider such factors as “ownership and/or occupancy of the . . . [place] where the drugs were found, presence of defendant at the time drugs were found, defendant’s proximity to the drugs, previous drug use, incriminating statements or behavior, [and] presence of drugs in a specific area where the defendant had control.” *Workman*, 2005 UT 66, ¶ 32. However, this list of factors is not to be treated as “a checklist of things that must be present if the law’s requirements are to be met.” *Layman*, 1999 UT 79, ¶ 15. The listed factors are not “universally pertinent” and the list is not “exhaustive.” *Id.* at 14-15; accord *Workman*, 2005 UT 66, ¶ 32.

As explained in *Layman*, “[t]he final legal test is the most generally-worded one,” i.e., whether the facts and circumstances establish “a sufficient nexus between

the defendant and the drugs or paraphernalia to permit a factual inference that the defendant had the power and the intent to exercise control over the drugs or paraphernalia.” *Layman*, 1999 UT 79, ¶ 15.

Moreover, “[p]ossession’ or ‘use’ . . . includes individual, joint, or group possession or use of controlled substances. For a person to be a possessor or user of a controlled substance, it is not required that he be shown to have individually possessed, used, or controlled the substance, but it is sufficient if it is shown that the person jointly participated with one or more persons in the use, possession, or control of any substances with knowledge that the activity was occurring, or the controlled substance is found in a place or under circumstances indicating that the person had the ability and the intent to exercise dominion and control over it.” Utah Code Ann. § 58-37-2 (West Supp. 2005).

**a. The evidence sufficed to support a finding that Defendant possessed both drugs and drug paraphernalia.**

Here, the evidence sufficed to show that Defendant possessed both drugs and drug paraphernalia. Morris Crabb testified that the trailer and the attached makeshift garage belonged to Defendant, his son. *See* R434:275. Looking at an exhibit picturing the trailer and attached garage, Mr. Crabb stated: “This is my son’s work shop, he built it out on our property.” *Id.* He stated that Defendant used the attached makeshift garage for painting cars and doing mechanical work.

R434:276. Mr. Crabb had been out to the trailer, but “didn’t go out there very often.” R434:281.

Moreover, the officers executing the warrant found Defendant alone in the trailer, half-dressed and in bed. R434:107-08, 112, 178. In a little closet space about an “arm’s reach” from the bed, they found the broken light bulb with its burnt residue. R434:109-10. The bulb had been transformed into a pipe and contained burned residue. R434:114-115. The evidence tested positive for methamphetamine. R434:224. Next to the couch in the trailer, the officers found a bored-out light bulb also containing residue. R434:112-14.

Testimony regarding these matters established a sufficient nexus between Defendant and the drugs and paraphernalia “to permit an inference that [Defendant] had both the power and intent to exercise dominion and control” over them. *See Workman*, 2005 UT 66, ¶ 31 (quoting *State v. Fox*, 709 P.2d 316, 319 (Utah 1985)). This sufficed to show that Defendant possessed both bulbs. While Defendant did not have the light bulb in his hand when the officers entered, the broken bulb was next to his bed and the other bulb was next to his couch. R434:109-10. Thus, the testimony showed that Defendant owned and occupied the trailer where the drugs and paraphernalia were found, he was present when they were found, he was close to the items when they were found, and he had control of the area where they were found. This evidence established a sufficient nexus between



Defendant and the items to show that he had the power and intent to exercise control over them. It thus sufficed to show that Defendant possessed both drugs and drug paraphernalia.

- b. The evidence also sufficed to support a finding that Defendant possessed the paraphernalia with the intent that it be used to "introduce a controlled substance into the human body."**

There is no law against possessing light bulbs or even broken light bulbs. Thus, the evidence must be sufficient to support a finding that the light bulbs were possessed with intent that they be used for a prohibited purpose, such as for introducing drugs into the human body.

Here, the evidence showed that the light bulbs had been altered by boring out their centers. R434:115-16. Thus, the light bulbs could not be used for their normal purposes. The evidence also showed that they contained burned residue. R434:109-15. Thus, they had apparently been used for burning something. Tests were performed on the residue taken from one of the light bulbs. R434:222-24. The tests identified the residue as methamphetamine. R434:224. Additionally, there was testimony that the broken light bulb had been converted into a pipe. R434:114-15. From this evidence, the jury could reasonably have inferred that Defendant possessed the light bulbs with the intent that they be used to introduce drugs into the human body.

Defendant seems to argue that the verdict form had to include all of the elements of the offense. He asserts that because the verdict form allowed the jury to find him “guilty of ‘possession of drug paraphernalia,’” but did not specify that the possession be “‘with intent to use[] drug paraphernalia’ for any of twenty-two specified ‘purpose[s],” the jury failed to find him guilty of one of the elements of the crime.” Br. Appellant at 36.

But verdict forms usually only list the offense, not the elements of the offense. Jury instructions, on the other hand, contain the elements. Here, Instruction No. 31 told the jury that before they could convict Defendant of possession of drug paraphernalia they “must find, from the evidence beyond a reasonable doubt, all of the following elements of the crime” – (1) “That on or about October 20, 2005, at Sevier County, State of Utah, the Defendant possessed with intent to use drug paraphernalia,” and (2) “That the purpose of possessing the drug paraphernalia was to inject, ingest, inhale, or otherwise introduce a controlled substance into the human body.” R388.

Jurors are presumed to follow the instructions given them. *See State v. Harmon*, 956 P.2d 262, 273 (Utah 1998) (holding that the Court will normally presume that the jury will follow the trial court’s instructions unless there is an overwhelming probability that the jury will be unable to do so).

Here, having been instructed that they had to find that Defendant possessed the paraphernalia with the purpose to “inject, ingest, inhale, or otherwise introduce a controlled substance into the human body,” the jurors could not have found Defendant guilty on the drug paraphernalia charge without first having found that he possessed it for one of the four enumerated purposes. Those four purposes are among the prohibited purposes specified by the drug paraphernalia statute. *See* Utah Code Ann. § 58-37a-5. Thus, the jury’s verdict reflects its finding that Defendant possessed the paraphernalia with the intent that it be used for a statutorily-prohibited purpose.

**c. Testimony that other persons may have had access to the trailer did not foreclose the jury’s finding that Defendant possessed the drugs and paraphernalia.**

Defendant argues that the State is required to “preclude every reasonable hypothesis of innocence.” Br. of Appellant at 28. In making this claim, Defendant cites to a plurality opinion in *State v. Hill*, 727 P.2d 221, 222 (Utah 1986), which sets forth this standard in opining that the evidence in that case was insufficient, a view contrary to that of the majority in the case and not controlling precedent. Defendant then speculates that the drugs and paraphernalia could have been left in the trailer twenty years before the search. Br. Appellant at 27. He speculates that they could have been left in the trailer by other persons visiting while Defendant worked in the garage or while Defendant was not at home. *Id.* He speculates that because a

fingerprint expert found prints on one of the light bulbs, but could not identify the prints as being Defendant's, "the broken bulb was not Defendant's." *Id.* at 28 (italics omitted) (citing R434:148).

But the State is not required to preclude every hypothesis or even every reasonable hypothesis of innocence. "The existence of one or more alternative reasonable hypotheses does not necessarily prevent the jury from concluding that [a] defendant is guilty beyond a reasonable doubt." *Buck*, 2009 UT App 2, ¶ 14 (quoting *State v. Lyman*, 966 P.2d 278, 281 (Utah App. 1998)) (additional citation and internal quotation marks omitted). "This is so because it is the exclusive province of the jury to weigh the competing theories of the case, in light of the evidence presented and the reasonable inferences drawn therefrom, and to conclude which one they believe." *Id.* "[I]t is perfectly appropriate for a jury to reject a reasonable alternative hypothesis presented by the defense, and to convict the defendant." *Id.* (citation and internal quotation marks omitted). This is because it is "within the province of the jury to judge the credibility of the testimony, assign weight to the evidence, and reject these alternate reasonable hypotheses." *Id.* (citation and internal quotation marks omitted). "Where the jury has done just that," this Court "will reverse its verdict only if [it] determine[s] that the evidence and inferences did not preclude the reasonable alternative hypothesis presented by the defense." *Id.* "[P]ut another way, [this Court] will reverse a conviction if the evidence is so

insubstantial or inconclusive that reasonable minds must necessarily entertain a reasonable doubt as to a defendant's guilt." *Id.* (citation and internal quotation marks omitted).

Similarly, reviewing the court of appeals' holding on a challenge to the sufficiency of the evidence in *Layman*, 1999 UT 79, ¶ 2, the Utah Supreme Court explained, "[W]e find the court of appeals' discussion of the reasonable alternative hypothesis doctrine problematic and unnecessary." *Cf. Holland v. United States*, 348 U.S. 121, 139-40 (1955) (stating that instructing on reasonable alternative hypothesis is "confusing and incorrect") (discussed more extensively under Point II, below). The Utah Supreme Court went on to find the evidence insufficient to support the jury's guilty verdict, but not because the State had failed to eliminate some reasonable alternative hypothesis of innocence. Rather, the Supreme Court applied the ordinary standard: "An appellate court should overturn a conviction for insufficient evidence when it is apparent that there is not sufficient competent evidence as to each element of the crime charged for the fact-finder to find, beyond a reasonable doubt, that the defendant committed the crime. *Layman*, 1999 UT 79, ¶ 12.

Here, Defendant's father testified that Defendant owned the small trailer, R434:275. Officers testified that he was found sleeping there. R434:107-12, 178, 286. No testimony was given that anyone else occupied or ever slept in the trailer. *See id.*

The officers testified that Defendant was present when the trailer was searched, R434:107, and that contraband was within an “arm’s reach” of his bed, R434:109-10. Given that testimony, the evidence was not so insubstantial or inconclusive that reasonable minds must have doubted that Defendant possessed it, i.e., that he had both the power and the intent to exercise dominion and control over the drugs and the paraphernalia. And this is so whether he individually possessed the drugs and paraphernalia or “jointly participated with one or more persons in the use, possession, or control of” them. Utah Code Ann. § 58-37-2. Thus, even assuming that someone else had had used the drugs and paraphernalia in the trailer, whether in Defendant’s absence or presence, the facts were still sufficient to show that Defendant possessed the drugs and paraphernalia when the officers searched the trailer.

**2. The evidence sufficed to support a finding that the residue that tested positive for methamphetamine was the residue found in Defendant’s trailer.**

Defendant also claims that the trial court erred when it denied his motion to dismiss. See Br. Appellant at 36-37. He claims that the evidence was insufficient to support his conviction for drug possession because the chain of evidence was imperfect. *See id.*; *see also* R434:240. He asserts “there was a broken chain of evidence because no one testified about how the baggie with residue came from the laboratory to the evidence locker and how the evidence came from the evidence

locker to the trial court.” Br. Appellant at 37. While Defendant’s claim is not completely clear, he apparently is arguing that the residue should not have been admitted at trial and should not be considered in assessing the sufficiency of the evidence, because the chain of custody was allegedly broken when no one could testify for certain what officer returned the residue from the crime laboratory to the evidence locker.

**Inadequate briefing.** As a preliminary matter, this Court may decline to address this issue because it is inadequately briefed. Defendant cites only one case for his claim, *State v. Madsen*, 498 P.2d 670, 672 (Utah 1972), which affirmed the admissibility of evidence where the evidence was shown, like the evidence in this case, to be “in substantially the same condition as at the time of the crime.” But Defendant ignores law developed in the intervening almost-40 years that expressly holds that where the court finds the evidence to be in substantially the same condition, defects in the chain of custody go to the weight of the evidence, not its admissibility. See *State v. Torres*, 2003 UT App 114, ¶ 8, 69 P.3d 314; *State v. Eagle Book, Inc.*, 583 P.2d 73, 74 (Utah 1978); *State v. Wynia*, 754 P.2d 667, 671 (Utah App. 1988); *State v. Bradshaw*, 680 P.2d 1036, 1040 (Utah 1984) (all discussed below). In so doing, Defendant has inadequately briefed his claim, again leaving the burden of research and analysis to this Court and to the State. See *Goodman*, 2006 UT 27, ¶ 29. For this reason, this Court may decline to review the claim. See *id.*

**Applicable law.** The relevant inquiry for a trial court considering whether to admit an exhibit is not whether the party offering the exhibit has established a sufficient chain of custody. *See Torres*, 2003 UT App 114, ¶ 8. Although testimony about an exhibit's chain of custody may be relevant, the trial court's inquiry regarding foundation focuses on whether the exhibit has been changed or altered, not on whether its chain of custody is unbroken: "[b]efore a physical object or substance connected with the commission of a crime is admissible in evidence there must be a showing that the proposed exhibit is in substantially the same condition as at the time of [the] crime." *Id.* (quoting *Eagle Book*, 583 P.2d at 74) (alteration in original). "If after consideration of [the circumstances surrounding preservation, custody, and the likelihood of tampering with the substance] the trial court is satisfied that the article or substance has not been changed or altered, [the trial court] may permit its introduction into evidence." *Id.* (quoting *Eagle Book*, 583 P.2d at 74-75) (alteration in original). "The party proffering the evidence is not required to eliminate every conceivable possibility that the evidence may have been altered." *Wynia*, 754 P.2d at 671 (citing *Bradshaw*, 680 P.2d at 1040). Sealed packaging containing the appropriate identifying marks "strongly indicat[es] that the evidence [is] still in its original form." *Id.*

The chain of custody for an exhibit is a matter of more concern for the jury than the trial court. *See Torres*, 2003 UT App 114, ¶ 8, 10. After a trial court



determines that the exhibit has not been changed or altered—and is therefore admissible—“it is up to ‘the jury to weigh the evidence based on its assessment of the showing of chain of custody.’” *Id.* at 8 (quoting *Eagle Book*, 583 P.2d at 75).

Consequently, defects in the chain of custody go to an exhibit’s evidentiary weight, not its admissibility: “[a]ny weak link in the chain of custody in the State’s case goes to the weight of the evidence ‘once the trial court has exercised [its] discretion [and] conclude[d] that . . . the proffered evidence has not been changed in any important respect.’” *Id.* (quoting *Bradshaw*, 680 P.2d at 1039); *see also United States v. Cardenas*, 864 F.2d 1528 (10th Cir. 1989) (“The well-established rule in this circuit is that deficiencies in the chain of custody go to the weight of the evidence, not its admissibility; once admitted, the jury evaluates the defects and, based on its evaluation, may accept or disregard the evidence.”).

When considering whether the State has established that an exhibit has not been altered, a trial court must presume that law enforcement officers handle exhibits with regularity: “[o]nce the evidence is in the hands of the state, it is generally presumed that the exhibits were handled with regularity.” *Wynia*, 754 P.2d at 671 (citing *Eagle Book*, 583 P.2d at 75). A defendant can rebut this presumption only by making “an affirmative showing of bad faith or actual tampering.” *Id.* (citing *Eagle Book*, 583 P.2d at 75); *see also Cardenas*, 864 F.2d at 1532-33 (“Absent some showing by the defendant that the [evidence has] been

tampered with, it will not be presumed that the investigators who had custody of [it] would do so.”) (quoting *United States v. Wood*, 695 F.2d 459, 462 (10th Cir. 1982)) (alterations in original).

**Background.** At trial, Detective Kerry Ekker testified that he saw the broken light bulb in its original location in the trailer before it was gathered. R434:109. He testified that he picked it up, placed it in an envelope, sealed it with evidence tape to prevent tampering, and initialed it. R434:109-110. He also testified that he opened the envelope to remove a sample of the residue from the light bulb to send to the lab, replaced the bulb, and then re-taped and re-initialed the envelope. *See* R434:110. He testified that the evidence custodian witnessed his scraping the residue from the broken bulb. *Id.* He testified that he took the scraped residue, placed it in a new ziplock baggie, put the baggie inside a manila envelope, filled out the envelope, numbered it as item 1:A, and delivered it to the lab. R434:118-19. He identified the item at trial and testified that it was “in substantially the same condition” as when he “took the sample.” *Id.* The court admitted the item as Exhibit 5. R434:121. The detective testified that “from the time he collected it to the time he dropped it off,” he was the only person who had possession of the residue sample. R434:123.

Terry Lamoreaux, a forensic scientist for the Department of Public Safety, testified that he recognized the sample based on the laboratory bar code label and his initials that he had placed on the evidence bag. R434:219. He testified that he

analyzed the evidence and returned it to the evidence room. R434:221. He testified that he tested the residue twice and confirmed that it was methamphetamine. R434:222-23. He then resealed it, dated it, initialed it, put it back into the evidence bag, and checked it back into the evidence room. R434:23. He then wrote a report of his findings. R434:223.

Detective Ekker testified that the item was later picked up at the crime lab. R434:122. He did not know whether he or one of the other officers picked it up. *Id.*

**Analysis.** Defendant now claims that the evidence chain was broken because the State did not identify and call the officer who picked up the residue from the crime laboratory. Defendant claims that, absent this testimony, the verdict should be reversed. Br. Appellant at 37.

On the contrary, the testimony established that when the residue was introduced at trial, it was “in substantially the same condition as at the time of [the] crime.” *Torres*, 2003 UT App 114, ¶ 8 (quoting *Eagle Book*, 583 P.2d at 74). While Detective Ekker could not remember whether he had personally picked up the residue from the lab or whether it had been picked up by another officer, his testimony was that it had been in the care of law enforcement. Thus, it “will not be presumed that the investigators who had custody of [it]” would have tampered with it. *See Cardenas*, 864 F.2d at 1532-33. And Detective Ekker’s testimony, together with the testimony of Terry Lamoreaux, the forensic scientist, demonstrated that the

residue had been kept in sealed packaging containing the appropriate identifying marks, thus “strongly indicating that the evidence was still in its original form.” See *Wynia*, 754 P.2d at 671. Thus, the trial court did not err in admitting it.

Nor did the trial court err in admitting the results of the crime lab’s testing. The chain of custody was not in any way broken between the time the light bulb was found and the residue collected and the time when the crime lab scientist identified it as methamphetamine. Thus, the evidence sufficed to support a finding that the tested substance was the residue found on the broken light bulb in Defendant’s trailer and that the residue found was methamphetamine.

Whether Detective Ekker or one of the other officers picked up the residue after the testing was completed is not relevant to the critical issue here – whether the residue tested was the residue that came from the broken light bulb. Indeed, had the lab simply thrown the residue away or had it used up all the residue in the testing process, the relevant chain of custody – the chain between the detective’s finding the residue in the light bulb in the trailer and the forensic scientist’s determining that it was methamphetamine – would still have remained unbroken.

Defendant has not established that the evidence was altered between the time of the crime and his trial. More specifically, he has not established that it was altered between the time Detective Ekker gathered it at the crime scene and the time when scientist Terry Lamoreaux tested it and determined that it was

methamphetamine. While the jury was entitled to consider any weakness in the chain of custody in weighing the evidence, the evidence was admissible.

Moreover, under the circumstances, Defendant cannot show harm. Even assuming there was some break in the chain of custody upon return of the residue to police, that chain between gathering the evidence and testing it was unbroken, showing that the substance taken from Defendant's trailer was methamphetamine. The alleged break in the chain occurred after the residue was tested and found to be methamphetamine. Thus the alleged break did not affect the laboratory scientist's testing and results and therefore could not have harmed Defendant.

## II.

### **THE TRIAL COURT DID NOT ERR WHEN IT REJECTED DEFENDANT'S PROPOSED JURY INSTRUCTION REQUIRING THE JURY TO ELIMINATE ALL REASONABLE ALTERNATIVE HYPOTHESES OF GUILT**

Defendant claims that "[t]he trial court erred in rejecting [his] proposed jury instruction that is consistent with case law regarding the State's need to preclude all reasonable possibilities or alternate hypotheses of innocence in circumstantial evidence cases in order for a defendant to be found guilty beyond a reasonable doubt." Br. Appellant at 39 (boldface and uppercase omitted) (citing *State v. Hill*, 727 P.2d 221, 222 (Utah 1986) (plurality opinion)).

**Background.** Defendant proposed a jury instruction that included the following paragraph:

You are not permitted to find the defendant guilty of the charges against him based totally on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion.

R372; *see also* R434:297-301. The trial court rejected that instruction. *See* R434:301.

The court did, however, give several instructions informing the jurors that they could not find Defendant guilty unless they were “satisfied that each element [of the offense] had been proven beyond a reasonable doubt.” *See* R384 (instruction on possession of a controlled substance); R388 (instruction on possession of drug paraphernalia); R391 (“The law presumes that the defendant is not guilty of the crime(s) charged. This presumption persists unless the prosecution’s evidence convinces you beyond a reasonable doubt that the defendant is guilty.”).

The trial court did not err in denying Defendant’s reasonable alternative hypothesis instruction, as the proposed instruction did not accurately reflect the law and where, alternatively, the instructions actually given sufficed to convey to the jury that they could only find Defendant guilty if the credible evidence was sufficient to show guilt beyond a reasonable doubt.

As explained under Point IA3, above, the State is not required to preclude every reasonable hypothesis of innocence. “The existence of one or more alternative reasonable hypotheses does not necessarily prevent the jury from concluding that [a] defendant is guilty beyond a reasonable doubt.” *State v. Buck*, 2009 UT App 2,

¶ 14, 200 P.3d 674 (quoting *Lyman*, 966 P.2d at 281) (additional citation and internal quotation marks omitted). “This is so because it is the exclusive province of the jury to weigh the competing theories of the case, in light of the evidence presented and the reasonable inferences drawn therefrom, and to conclude which one they believe.” *Id.* Thus, the jury can find a defendant guilty even where evidence has been produced that provides a reasonable explanation consistent with innocence, if the jury does not believe that evidence to be true.

Moreover, the Utah Supreme Court has repeatedly stated that when the jury is correctly instructed on the requirement that it may convict a defendant only upon finding him guilty beyond a reasonable doubt, there is no need to provide the jury with a reasonable alternative hypothesis instruction. See *State v. Hansen*, 710 P.2d 182, 183 (Utah 1985) (addressing “reasonable alternative hypothesis instruction” and stating that “we have clearly ruled that no such instruction need be given where the jury is instructed that the State must prove a defendant’s guilt beyond a reasonable doubt”); *State v. Eagle*, 611 P.2d 1211, 1213 (Utah 1980) (the prosecution’s burden of proof “is that of beyond a reasonable doubt”; court must instruct the jury as to that burden; court need not give reasonable alternative hypothesis instruction); *cf. State v. Hamilton*, 827 P.2d 232, 236 n.1 (Utah 1992) (“With regard to the ‘no reasonable alternative hypothesis’ theory upon which defendant proceeds, we note that this court has previously indicated that this is only one way of stating the prosecution’s

burden of proof, which requires proof beyond a reasonable doubt.”); *State v. Shaffer*, 725 P.2d 1301, 1312 (Utah 1986) (affirming its “rule that [a reasonable alternative hypothesis] instruction is unnecessary where the jury is instructed that the State must prove a defendant’s guilt beyond a reasonable doubt”) (citation and internal quotation marks omitted); *State v. Schad*, 470 P.2d 246, 247 (Utah 1970) (If “from all of the facts and circumstances shown,” the jurors “are convinced beyond a reasonable doubt of the defendant’s guilt, it necessarily follows that they regarded the evidence as excluding every other reasonable hypothesis.”).

Both the United States Supreme Court and the Utah Supreme Court have explained that the reasonable alternative hypothesis doctrine, which is usually invoked in cases based on circumstantial evidence, is confusing and problematic. In *Holland*, the petitioners “assail[ed] the refusal of the trial judge to instruct that where the Government’s evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt.” 348 U.S. at 139. Noting that there was “some support for this type of instruction in the lower court decisions,” the United States Supreme Court rejected the need for and use of such an instruction. *Id.* (citations omitted). The court stated: “[T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an instruction on circumstantial evidence is confusing and incorrect.” *Id.* at 139-40 (citations omitted).



The court explained that it is the jury's responsibility to weigh the evidence and the probabilities:

Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

*Id.* at 40.

Similarly, the Utah Supreme Court has explained that use of the reasonable alternative hypothesis doctrine causes confusion. In *Layman*, that Court held that the court of appeals' application of the reasonable alternative hypothesis doctrine was "problematic and unnecessary" and clarified that the case "should have been decided by applying an ordinary sufficiency of the evidence test." See 1999 UT 79, ¶¶ 2, 10.

Defendant was entitled to instructions requiring the jury to find the elements of the offenses beyond a reasonable doubt. See *id.* The instructions did that. See R384, 388, 391. The trial court did not err in denying Defendant's problematic and unnecessary reasonable alternative hypothesis instruction.

### III.

#### BECAUSE DEFENDANT INVITED ANY ERROR BELOW, THIS COURT SHOULD NOT REVIEW HIS CLAIMS THAT THE TRIAL COURT PLAINLY ERRED FOR INSTRUCTING THE JURY THAT THE URINE SAMPLE WAS LOST OR FOR NOT DISMISSING THE CASE

Defendant claims that the trial court plainly erred for telling “the jury that [the urine sample] was lost and never sent to [the crime lab in] Fillmore.” Br. Appellant at 38. He also claims that the trial court plainly erred for not dismissing this case because the State failed to produce a urine sample at or before trial. *Id.* at 37-38. He asserts that the State’s not producing a urine sample at trial was “tantamount to the destruction of evidence in violation of Defendant’s due process rights.” *Id.* at 38. In support for his claim, Defendant cites a single federal case, *California v. Trombetta*, 467 U.S. 479 (1984).<sup>3</sup>

**Background.** Following his arrest, Defendant produced a urine sample. R434:151. The State took the sample into custody. R434:151-53. Defense counsel, Marcus Taylor, requested that the State split the sample and provide the defense a

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<sup>3</sup> Because Defendant has made no separate claim under the Utah Constitution, the State does not address any state constitutional claim. *See State v. Harris*, 2004 UT 103, ¶ 23, 104 P.3d 1250 (quoting *State v. Lafferty*, 749 P.2d 1239, 1248 n.5 (Utah 1988)) (“As a general rule, [this Court] will not engage in [a] state constitutional analysis unless an argument for different analyses under the state and federal constitution is briefed.”).

split portion, *but only if* the split portion would constitute 60 or more cubic centimeters (cc's). R78-79.<sup>4</sup> Counsel stated that he intended to do both drug and DNA testing and that the DNA testing required 60 cc's. *Id.* He stated that "[i]f the quantity of the urine sample is insufficient to meet this request, then the defendant does not want the sample unthawed and split until he can make inquiries with other laboratories." *Id.* The State later notified counsel that the urine sample was only 30 cc's. R126.

At trial, defense counsel, James Slavens, cross-examining Detective Kerry Ekker, asked whether the sample had been lost. R434:151-52. The detective said that it had not been lost, but remained frozen in the freezer in Fillmore. R434:152.

Mr. Slavens later stated that both he and his predecessor had made requests for the urine sample and had been told that the sample was lost. R434:165, 241-42. The prosecutor, then Mr. Jewkes, did not know whether the sample had been lost, R434:246, but thought it had been lost and was unconcerned because the State had not based any charges on Defendant's consumption of methamphetamine, R434:241-42.

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<sup>4</sup> At least four different attorneys served as defense counsel below: Richard J. Culbertson, R9, Marcus Taylor, R70, James K. Slavens, R194, and Douglas L. Neeley, R403.

Defense counsel stated that the lost sample was relevant because it showed the State's "careless nature of taking care of evidence" and was thus relevant to whether the residue in the broken light bulb "got sent to the crime laboratory in a pristine manner." R434:242. He did not claim that the case should be dismissed because the State had failed to produce exculpatory evidence. *See id.*

During a discussion after the State rested at trial, the trial court, concerned because the prosecutor did not know whether the sample had been lost, discussed the matter with both counsel. R434:249-53. The prosecutor said that he would be willing to stipulate that a urine sample had been taken and was lost, but asked that "there be no comment on whether it was positive or negative." R434:249-50. The court asked defense counsel if that would be "all right." R434:250. Defense counsel stated, "Absolutely. . . . [T]he alternative would be for me to file a motion to dismiss because they did not provide. . . ." *Id.* The court then stated that the jury would be given the stipulated fact that a urine sample was taken on the day of the arrest and had been lost. *Id.*

Based on the parties' stipulation, the trial court gave the jury the stipulated fact: "I mentioned earlier that there might be things that are stipulated. There is one in this case. The stipulated fact is that a urine sample was taken on the date of the arrest from the defendant. That urine sample has been lost." R434:253.

After the defense rested, the trial court discussed with the parties questions submitted by the jurors. One question read: "The Urine sample 'stipulated as lost,' was it analyzed before it was lost? If so what were the results? i.e., Positive or Negative for Meth?" R370; R434:305.

The trial court asked whether "we'll simply state it was lost." R434:293. The prosecutor agreed to that, but suggested the court could also add that "it was never sent to the crime lab." *Id.* Defense counsel stated that he had no objection to doing that. R434:294.

**A. This Court should not review Defendant's plain error claims, because Defendant invited any error.**

To establish plain error, a defendant must show "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error there is a reasonable likelihood of a more favorable outcome for [the defendant]." *Dunn*, 850 P.2d at 1208-09 (Utah 1993). "But under the doctrine of invited error, [the appellate courts] have declined to engage in even plain error review when 'counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the [proceedings].'" *State v. Winfield*, 2006 UT 4, ¶ 14, 128 P.3d 1171 (quoting *State v. Hamilton*, 2003 UT 22, ¶ 54, 70 P.3d 111).

Here, defense counsel affirmatively represented to the trial court that he would welcome the court's providing a jury with a stipulation that the urine sample

had been taken, but was lost. After the prosecutor said that he would be willing to stipulate to that fact, R434:249-50, the court asked defense counsel if that would be “all right.” R434:250. Defense counsel stated, “Absolutely. . . . [T]he alternative would be for me to file a motion to dismiss because they did not provide . . . .” *Id.* Moreover, when a juror later asked whether the sample had been tested and what the results were, defense counsel affirmatively represented that he had no objection to instructing the jurors that the sample was lost and never sent to the crime lab. R434:294.

Counsel’s responses constituted affirmative representations that the stipulated explanations would be appropriate and that they would be an adequate alternative to his filing a motion to dismiss. *See* R434:250. Defendant now claims that the trial court plainly erred for telling the jury that the sample was lost and not sent to Fillmore, Br. Appellant at 38, and for not dismissing this case because the State failed to produce a urine sample at or before trial, *id.* at 37-38. Because Defendant invited any error below, this Court should not review his claims for plain error. *See Winfield*, 2006 UT 4, ¶ 14.

**B. Defendant has not adequately briefed his claims.**

Moreover, Defendant has not adequately briefed these claims. “It is well established that a reviewing court will not address arguments that are not adequately briefed.” *State v. Thomas*, 961 P.2d 299, 304 (Utah 1998). Under rule

24(a)(9), Utah Rules of Appellate Procedure, the appellant's argument "shall contain the contentions and reasons of the appellant with respect to the issues presented." "Implicitly, rule 24(a)(9) requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." *Thomas*, 961 P.2d at 305.

Here, Defendant has not adequately explained what error occurred. Defendant has cited to one case, *Trombetta*, 467 U.S. at 479, but has not explained what standards it sets forth or how the trial court violated those standards in this case. Moreover, Defendant has not attempted to show why the error should have been obvious to the trial court or why, absent the error, there would have been a reasonable likelihood of a more favorable outcome. Thus, Defendant has not adequately briefed his claim, and this Court should not address it.

**C. In any event, the trial court did not plainly err for instructing the jury that the urine sample was lost and had not been tested.**

As explained, to establish plain error, Defendant must show that an error exists, that it should have been obvious to the trial court, and that the error was harmful, i.e., that absent the error there is a reasonable probability of an outcome more favorable to Defendant. *Dunn*, 850 P.2d at 1208-09.

The trial court did not err in instructing the jury that the urine sample was lost and had not been tested. In so doing, the trial court provided the jury with a

neutral explanation about why no testing had been done. Defendant has not explained why the trial court erred in giving such an explanation to the jury, particularly where both parties stipulated to that fact.

Moreover, he has not demonstrated that the trial court obviously erred. Defendant has cited no settled appellate authority for his claim that the trial court cannot provide a brief explanation, agreed to by both parties, to fill in an apparent evidentiary gap. *See State v. Ross*, 951 P.2d 236, 239 (Utah App. 1997) (error not obvious when “there is no settled appellate law to guide the trial court”). Moreover, any error could not likely have been obvious, where both parties agreed to the procedure.

Finally, Defendant has not demonstrated that the procedure harmed him. The explanation was neutral. The record strongly suggests that the sample had not been tested. See R434:151-53, 242-43. Therefore, nothing suggests that there were any results showing whether Defendant was or was not using drugs at the time of the search. And, in any case, the facts and circumstances showing that Defendant possessed methamphetamine and contraband did not depend on his also using them at the time he was found in possession. In other words, absent the stipulated fact, there is no reasonable probability of an outcome more favorable to Defendant. *See Dunn*, 850 P.2d at 1208-09.



**D. Further, the trial court did not plainly err for not sua sponte dismissing the case, where the State adequately responded to Defendant's conditional request for the urine sample and where the sample was only potentially exculpatory.**

Defendant apparently claims that "the State's failure to produce [the urine sample] at trial was a spoliation of evidence," that the failure to produce violated his due process rights, and that the trial court should therefore have "dismiss[ed] the case due to the State destroying [or withholding] potentially exculpatory evidence." Br. Appellant at 37-38 (boldface omitted).

**Background.** Defense counsel, Mr. Slavens, claimed at trial that both he and his predecessor had made requests for the urine sample and had been told that the sample was lost. R434:164, 241-42. He asserted that both requests "should be in the file." R434:242. On appeal, Defendant claims that trial counsel had made "multiple requests" for the sample but had been told the sample was lost. *See* Br. Appellant at 38. While he cites to defense counsel's assertions at trial that this was what had happened, Defendant does not cite to any motion or response in the pleadings. *See id.*

In its review of the record, the State found that prior counsel, Marcus Taylor, had requested a urine sample, asked that the sample taken by the State be split and a portion provided to him, but only on condition that the sample was large enough to provide him with 60 cc's or more after the split. *See* R78-79. He explicitly stated that if he could not be given 60 cc's, he did "not want the sample unfrozen and

split until he [could] make inquiries with other laboratories.” R79. The prosecutor in the case, then Dale Eyre, responded, informing Mr. Taylor that the sample was only 30 cc’s. R126-27.

The State was unable to locate any further request from Mr. Taylor or his successors in the record. At the time of trial, Casey Jewkes had apparently taken over prosecution of the case from Mr. Eyre. When asked about the urine sample at trial, he explained that he did not personally know what had happened to the sample. R434:246. Detective Ekkers, however, testified that the sample had not been lost, but had been frozen and transferred to Fillmore and was still there. R434:151-52.

The record indicates that the State fully complied with Defendant’s requests regarding the urine sample. While defense counsel at trial, Mr. Slavens, suggested that he had asked for the sample, the State has found nothing in the record showing that he made such a request. The record indicates only that Mr. Slavens made a general discovery request, R195-97, and that Mr. Eyre responded, R200-01. Neither the request nor the response directly addressed the urine sample. *See* R195-97, 200-01. The request asked for “[a]ny and all exculpatory information of any type or any evidence which tends to negate guilt” in the possession of the prosecutor, his staff, any police officer, or any other person who participated in the investigation of this case.” R197. The prosecutor’s response stated: “None, other than possible

inferences from circumstances surrounding the investigation as indicated in the police report.” R201. As nothing suggests that the urine sample was exculpatory or tended to negate Defendant’s guilt, Defendant has not shown that Mr. Slavens’ general request should have alerted the prosecutor that counsel now had changed his mind and wanted a urine sample even though it would necessarily be less than 60 cc’s.

Defendant claims that “the State’s actions toward [the urine sample] were tantamount to the destruction of the evidence in violation of Defendant’s Due Process rights.” Br. Appellant at 38. The State’s actions were not tantamount to destruction of evidence. The State destroyed nothing and concealed nothing. Moreover, even had the State destroyed the urine sample, it would not have violated Defendant’s rights. The urine sample apparently was not tested. See R434:151. And the State had no duty to test the urine sample. See *Arizona v. Youngblood*, 488 U.S. 51, 59 (1988) (police have no constitutional duty to perform any particular test). At most, the sample contained evidence *potentially* useful to Defendant. But failing to produce potentially useful evidence does not, by itself, violate the Due Process Clause. “[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process.” *Youngblood*, 488 U.S. at 58. Defendant has not suggested, much less shown, that police intentionally concealed or destroyed any

evidence. Thus, Defendant has not shown that not providing the sample constituted a denial of due process.

Moreover, Defendant has not shown that the State failed to respond to his request for the urine sample. Defendant made a conditional request—a request he explicitly asked be fulfilled only if the State could provide him at least 60 cc's of urine. *See* R78-79. But the State had gathered only 30 cc's. R126-27. Defendant explicitly told the State that he did not want the State to thaw and split the sample until he could “make inquiries with other labs.” R79. Nothing in the record suggests that Defendant later informed the prosecutor that he wanted a sample, even if it had to be smaller than the sample he originally requested.

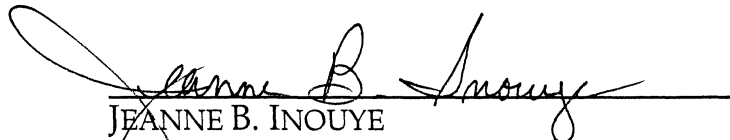
Under these circumstances, the trial court did not err, let alone plainly err, for not dismissing the case based on the State's not producing the sample. Moreover, nothing suggests that any error should have been obvious on the basis of this record. Finally, Defendant has not demonstrated harm. He has not demonstrated that the sample would have been exculpatory or would have made any difference at all to the jury.

## CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted May 25, 2011.

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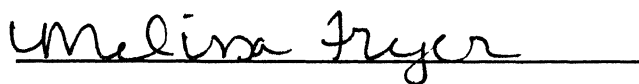
### CERTIFICATE OF SERVICE

I certify that on May 25, 2011, two copies of the foregoing brief were

☒ mailed ☐ hand-delivered to:

Taylor C. Hartley  
The Advocate Attorney, LLC  
10939 N. Alpine Highway, #505  
Highland, UT 84003

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



## Addenda

## Addendum A

U.C.A. 1953 § 58-37-2

West's Utah Code Annotated Currentness

Title 58. Occupations and Professions

Chapter 37. Utah Controlled Substances Act (Refs & Annos)

**§ 58-37-2. Definitions.**

(1) As used in this chapter:

(a) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

(i) a practitioner or, in his presence, by his authorized agent; or

(ii) the patient or research subject at the direction and in the presence of the practitioner.

(b) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or practitioner but does not include a motor carrier, public warehouseman, or employee of any of them.

(c) "Consumption" means ingesting or having any measurable amount of a controlled substance in a person's body, but this Subsection (1)(c) does not include the metabolite of a controlled substance.

(d) "Continuing criminal enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or groups of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities created or maintained for the purpose of engaging in conduct which constitutes the commission of episodes of activity made unlawful by Title 58, Chapters 37, 37a, 37b, 37c, or 37d, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise.

(e) "Control" means to add, remove, or change the placement of a drug, substance, or immediate precursor under Section 58-37-3.

(f)(i) "Controlled substance" means a drug or substance included in Schedules I, II, III, IV, or V of Section 58-37-4, and also includes a drug or substance included in Schedules I, II, III, IV, or V of the federal Controlled Substances Act, Title II, P.L. 91-513 [FN1], or any controlled substance analog.

(ii) "Controlled substance" does not include:

(A) distilled spirits, wine, or malt beverages, as those terms are defined or used in Title 32A, regarding tobacco or food;

(B) any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription; or

(C) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(g)(i) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4, or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513 [FN1]:

(A) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances in the schedules set forth in Subsection (1)(f); or

(B) which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances in the schedules set forth in this Subsection (1).

(ii) "Controlled substance analog" does not include:

(A) a controlled substance currently scheduled in Schedules I through V of Section 58-37-4;

(B) a substance for which there is an approved new drug application;

(C) a substance with respect to which an exemption is in effect for investigational use by a particular person under Section 505 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 366, to the extent the conduct with respect to the substance is permitted by the exemption;

(D) any substance to the extent not intended for human consumption before an exemption takes effect with respect to the



substance;

(E) any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription; or

(F) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(h) "Conviction" means a determination of guilt by verdict, whether jury or bench, or plea, whether guilty or no contest, for any offense proscribed by Title 58, Chapters 37, 37a, 37b, 37c, or 37d, or for any offense under the laws of the United States and any other state which, if committed in this state, would be an offense under Title 58, Chapters 37, 37a, 37b, 37c, or 37d.

(i) "Counterfeit substance" means:

(i) any substance or container or labeling of any substance that without authorization bears the trademark, trade name, or other identifying mark, imprint, number, device, or any likeness of them, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed the substance which falsely purports to be a controlled substance distributed by, any other manufacturer, distributor, or dispenser; or

(ii) any substance that is represented to be a controlled substance.

(j) "Deliver" or "delivery" means the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not an agency relationship exists.

(k) "Department" means the Department of Commerce.

(l) "Depressant or stimulant substance" means:

(i) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid;

(ii) a drug which contains any quantity of:

(A) amphetamine or any of its optical isomers;

(B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or

(C) any substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found and by regulation designated habit-forming because of its stimulant effect on the central nervous system;

(iii) lysergic acid diethylamide; or

(iv) any drug which contains any quantity of a substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

(m) "Dispense" means the delivery of a controlled substance by a pharmacist to an ultimate user pursuant to the lawful order or prescription of a practitioner, and includes distributing to, leaving with, giving away, or disposing of that substance as well as the packaging, labeling, or compounding necessary to prepare the substance for delivery.

(n) "Dispenser" means a pharmacist who dispenses a controlled substance.

(o) "Distribute" means to deliver other than by administering or dispensing a controlled substance or a listed chemical.

(p) "Distributor" means a person who distributes controlled substances.

(q) "Division" means the Division of Occupational and Professional Licensing created in Section 58-1-103.

(r) "Drug" means:

(i) articles recognized in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, or Official National Formulary, or any supplement to any of them;

(ii) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;

(iii) articles, other than food, intended to affect the structure or function of man or other animals; and

(iv) articles intended for use as a component of any articles specified in Subsection (1)(r)(i), (ii), or (iii); but does not include devices or their components, parts, or accessories.

(s) "Drug dependent person" means any individual who unlawfully and habitually uses any controlled substance to endanger the public morals, health, safety, or welfare, or who is so dependent upon the use of controlled substances as to have lost the power of self-control with reference to his dependency.

(t) "Food" means:

(i) any nutrient or substance of plant, mineral, or animal origin other than a drug as specified in this chapter, and normally ingested by human beings; and

(ii) foods for special dietary uses as exist by reason of a physical, physiological, pathological, or other condition including but not limited to the conditions of disease, convalescence, pregnancy, lactation, allergy, hypersensitivity to food, underweight, and overweight; uses for supplying a particular dietary need which exist by reason of age including but not limited to the ages of infancy and childbirth, and also uses for supplementing and for fortifying the ordinary or unusual diet with any vitamin, mineral, or other dietary property for use of a food. Any particular use of a food is a special dietary use regardless of the nutritional purposes.

(u) “Immediate precursor” means a substance which the Attorney General of the United States has found to be, and by regulation designated as being, the principal compound used or produced primarily for use in the manufacture of a controlled substance, or which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit the manufacture of the controlled substance.

(v) “Manufacture” means the production, preparation, propagation, compounding, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis.

(w) “Manufacturer” includes any person who packages, repackages, or labels any container of any controlled substance, except pharmacists who dispense or compound prescription orders for delivery to the ultimate consumer.

(x) “Marijuana” means all species of the genus *cannabis* and all parts of the genus, whether growing or not; the seeds of it; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from them, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. Any synthetic equivalents of the substances contained in the plant *cannabis sativa* or any other species of the genus *cannabis* which are chemically indistinguishable and pharmacologically active are also included.

(y) “Money” means officially issued coin and currency of the United States or any foreign country.

(z) “Narcotic drug” means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(i) opium, coca leaves, and opiates;

(ii) a compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates;

(iii) opium poppy and poppy straw; or

(iv) a substance, and any compound, manufacture, salt, derivative, or preparation of the substance, which is chemically identical with any of the substances referred to in Subsection (1)(z)(i), (ii), or (iii), except narcotic drug does not include decocainized coca leaves or extracts of coca leaves which do not contain cocaine or ecgonine.

(aa) “Negotiable instrument” means documents, containing an unconditional promise to pay a sum of money, which are legally transferable to another party by endorsement or delivery.

(bb) “Opiate” means any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability.

(cc) “Opium poppy” means the plant of the species *papaver somniferum* L., except the seeds of the plant.

(dd) “Person” means any corporation, association, partnership, trust, other institution or entity or one or more individuals.

(ee) “Poppy straw” means all parts, except the seeds, of the opium poppy, after mowing.

(ff) “Possession” or “use” means the **joint** or individual ownership, control, occupancy, holding, retaining, belonging, maintaining, or the application, inhalation, swallowing, injection, or consumption, as distinguished from distribution, of controlled substances and includes individual, **joint**, or group possession or use of controlled substances. For a person to be a possessor or user of a controlled substance, it is not required that he be shown to have individually possessed, used, or controlled the substance, but it is sufficient if it is shown that the person jointly participated with one or more persons in the use, possession, or control of any substances with knowledge that the activity was occurring, or the controlled substance is found in a place or under circumstances indicating that the person had the ability and the intent to exercise dominion and control over it.

(gg) “Practitioner” means a physician, dentist, veterinarian, pharmacist, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in this state.

(hh) “Prescribe” means to issue a prescription orally or in writing.

(ii) “Prescription” means an order issued by a licensed practitioner, in the course of that practitioner’s professional practice, for a controlled substance, other drug, or device which it dispenses or administers for use by a patient or an animal. The order may be issued by word of mouth, written document, telephone, facsimile transmission, computer, or other electronic means of communication as defined by rule.

(jj) “Production” means the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(kk) “Securities” means any stocks, bonds, notes, or other evidences of debt or of property.

(ll) “State” means the state of Utah.

(mm) “Ultimate user” means any person who lawfully possesses a controlled substance for his own use, for the use of a member of his household, or for administration to an animal owned by him or a member of his household.

(2) If a term used in this chapter is not defined, the definition and terms of Title 76, Utah Criminal Code, shall apply.

Laws 1971, c. 145, § 2; Laws 1977, c. 29, § 3; Laws 1979, c. 12, § 1; Laws 1981, c. 75, § 1; Laws 1982, c. 12, § 1; Laws 1987, c. 190, § 1; Laws 1989, c. 50, § 1; Laws 1989, c. 186, § 1; Laws 1989, c. 225, § 60; Laws 1991, c. 198, § 1; Laws 1992, c. 121, § 1; Laws 1994, c. 132, § 2; Laws 1996, c. 170, § 53, eff. July 1, 1996; Laws 1996, c. 294, § 1, eff. April 29, 1996; Laws 1997, c. 64, § 2, eff. May 5, 1997; Laws 2003, c. 131, § 40, eff. May 5, 2003; Laws 2004, c. 241, § 1, eff. May 3, 2004; Laws 2005, c. 283, § 2, eff. May 2, 2005.

[FN1] 21 U.S.C.A. § 812.

## CROSS REFERENCES

Dangerous weapons, possession by certain persons, see § 76-10-503.

Driving with controlled substance in the body, penalties and arrest without warrant, see § 41-6a-517.

Illegal Drug Stamp Tax Act, see § 59-19-101 et seq.

Implied consent to chemical tests for alcohol or drugs, see § 41-6a-520.

Optometrists, see § 58-16a-601.

Pharmacists, see § 58-17a-102.

Podiatrists, see § 58-5a-102.

Unlawful or unprofessional conduct, generally, see § 58-1-501.

## NOTES OF DECISIONS

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### 1. Law governing

Where specific conduct is controlled by the Imitation Controlled Substances Act, its provisions should control. U.C.A.1953, **58-37-2** et seq., 58-37-19. *State v. Hill*, 1984, 688 P.2d 450. Controlled Substances  43

### 2. Crime prevention

Police officer's participation in drug transaction outside city jurisdiction was not as private citizen, but was in his official capacity as undercover police officer assigned to investigate narcotics offenses, so that police officer acted outside scope of his statutory authority when he conducted investigations outside city jurisdiction. U.C.A.1953, 77-9-3; U.C.A.1953, 77-1-3(5)(a)(i) (Repealed). *State v. Fixel*, 1987, 744 P.2d 1366. Criminal Law  1222.1

### 3. Arrest

Arrest of defendant for unlawful possession of controlled substance was supported by probable cause, where defendant emerged from bedroom in which plate was found with eight chips of heroin, along with paraphernalia to cut and inject heroin, fresh hypodermic tracks were seen on defendant's arms, and other indicia of heroin intoxication were observed such as defendant's nodding off during police raid. U.S.C.A. Const.Amend. 4; U.C.A.1953, **58-37-2**(27), 77-23-10(2). *State v. Lee*, 1993, 863 P.2d 49. Arrest  63.4(15)

### 4. Manufacture

Conviction of possession with intent to produce or manufacture controlled substance could rest upon defendants' use of cooker to remove nonhallucinogenic elements from raw marijuana plant thereby producing more concentrated and potent

U.C.A. 1953 § 58-37-8

West's Utah Code Annotated Currentness

Title 58. Occupations and Professions

Chapter 37. Utah Controlled Substances Act (Refs & Annos)

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

(1) Prohibited acts A—Penalties:

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

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II, a **controlled substance analog**, or gammahydroxybutyric acid as listed in Schedule III is guilty of a second degree felony and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B—Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a **controlled substance analog** or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this chapter;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a **controlled substance analog**, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Upon a person's conviction of a violation of this Subsection (2) subsequent to a conviction under Subsection (1)(a), that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(d) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(e) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as listed in:

(i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (2)(a)(iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(g) A person is subject to the penalties under Subsection (4)(c) who, in an offense not amounting to a violation of Section 76-5-207:

(i) violates Subsection (2)(a)(i) by knowingly and intentionally having in his body any measurable amount of a controlled substance; and

(ii) operates a motor vehicle as defined in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section 76-1-601 or the death of another.

### (3) Prohibited acts C—Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

### (4) Prohibited acts D—Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under this Subsection (4) if the trier of fact finds the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools:

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or

institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in or on the grounds of a house of worship as defined in Section 76-10-501;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i) through (viii);

(x) in the immediate presence of a person younger than 18 years of age, regardless of where the act occurs; or

(xi) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of any correctional facility as defined in Section 76-8-311.3.

(b) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under Subsection (2)(g) or this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense.

(d)(i) If the violation is of Subsection (4)(a)(xi):

(A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to any person who, acting with the mental state required for the commission of an offense, directly or indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(xi).

(e) It is not a defense to a prosecution under this Subsection (4) that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6)(a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(7) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(8) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(9) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(10) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

Laws 1971, c. 145, § 8; Laws 1972, c. 22, § 1; Laws 1977, c. 29, § 6; Laws 1979, c. 12, § 5; Laws 1985, c. 146, § 1; Laws 1986, c. 196, § 1; Laws 1987, c. 92, § 100; Laws 1987, c. 190, § 3; Laws 1988, c. 95, § 1; Laws 1989, c. 50, § 2; Laws 1989, c. 56, § 1; Laws 1989, c. 178, § 1; Laws 1989, c. 187, § 2; Laws 1989, c. 201, § 1; Laws 1990, c. 161, § 1; Laws 1990, c. 163, §§ 2, 3; Laws 1991, c. 80, § 1; Laws 1991, c. 198, § 4; Laws 1991, c. 268, § 7; Laws 1995, c. 284, § 1, eff. May 1, 1995; Laws 1996, c. 1, § 8, eff. Jan. 31, 1996; Laws 1997, c. 64, § 6, eff. May 5, 1997; Laws 1998, c. 139, § 1, eff. May 4, 1998; Laws 1999, c. 12, § 1, eff. May 3, 1999; Laws 1999, c. 303, § 1, eff. May 3, 1999; Laws 2003, c. 10, § 1, eff. May 5, 2003; Laws 2003, c. 33, § 6, eff. May 5, 2003; Laws 2004, c. 36, § 1, eff. March 15, 2004; Laws 2005, c. 30, § 1, eff. May 2, 2005.

## CROSS REFERENCES

Arrest of school employee, notice required, see § 53-10-211.  
Attempt, elements and classification, see §§ 76-4-101 and 76-4-102.  
Conspiracy and solicitation, elements and penalties, see § 76-4-201 et seq.  
DUI, conviction defined, see § 41-6a-502.  
Fines upon conviction of misdemeanor or felony, see § 76-3-301.  
Inchoate offenses, limitations on sentencing, see §§ 76-4-301 and 76-4-302.  
Minors, suspension of driver's license for certain offenses, see § 78-3a-506.  
Penalties for felonies, see § 76-3-203.  
Penalties for misdemeanors, see § 76-3-204.  
Right to trial by jury, see Const. Art. 1, § 10.

## LIBRARY REFERENCES

Controlled Substances ~~§~~ 20 to 51.  
Westlaw Key Number Searches: 96Hk20 to 96Hk51.

## RESEARCH REFERENCES

### ALR Library

118 A.L.R.Fed. 567, Permissibility Under Fourth Amendment of Detention of Motorist by Police. Following Lawful Stop for Traffic Offense, to Investigate Matters Not Related to Offense.

27 A.L.R.5th 593, Validity, Construction, and Application of State Statutes Prohibiting Sale or Possession of Controlled Substances Within Specified Distance of Schools.

34 A.L.R.5th 125, Criminality of Act of Directing To, or Recommending, Source from Which Illicit Drugs May be Purchased.

4 A.L.R.5th 1, Minimum Quantity of Drug Required to Support Claim that Defendant is Guilty of Criminal "Possession" of Drug Under State Law.

57 A.L.R. 3rd 1319, Conviction of Possession of Illicit Drugs Found in Automobile of Which Defendant was Not Sole Occupant.

### Treatises and Practice Aids

U.C.A. 1953 § 58-37a-5

West's Utah Code Annotated Currentness

Title 58. Occupations and Professions

Chapter 37A. Utah Drug Paraphernalia Act (Refs & Annos)

**§ 58-37a-5. Unlawful acts**

(1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to **plant, propagate**, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.

(2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, any drug paraphernalia, knowing that the drug paraphernalia will be used to **plant, propagate**, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body in violation of this act. [FN1] Any person who violates this subsection is guilty of a class A misdemeanor.

(3) Any person 18 years of age or over who delivers drug paraphernalia to a person under 18 years of age who is three years or more younger than the person making the delivery is guilty of a third degree felony.

(4) It is unlawful for any person to place in this state in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement is to promote the sale of drug paraphernalia. Any person who violates this subsection is guilty of a class B misdemeanor.

Laws 1981, c. 76, § 5.

[FN1] Laws 1981, c. 76, that enacted this chapter.

[Note: next amended May 5, 2008]

CROSS REFERENCES

Attempt, elements and classification, see §§ 76-4-101 and 76-4-102.

Conspiracy and solicitation, elements and penalties, see § 76-4-201 et seq.

Fines upon conviction of misdemeanor or felony, see § 76-3-301.

Inchoate offenses, limitations on sentencing, see §§ 76-4-301 and 76-4-302.

Mandatory revocation, denial, suspension, or disqualification of license, see § 53-3-220.

Minors, suspension of driver's license for certain offenses, see § 78-3a-506.


Penalties for felonies, see § 76-3-203.

Penalties for misdemeanors, see § 76-3-204.

Prohibited act and penalties, Controlled Substances Act, see § 58-37-8.

Right to trial by jury, see Const. Art. 1, § 10.

LIBRARY REFERENCES

Controlled Substances  42.



## Addendum B

# Unused Instruction #2

JURY INSTRUCTION NO. \_\_\_\_\_

## DIRECT AND CIRCUMSTANTIAL EVIDENCE

Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, juries lawfully may base their findings whether favorable to the State or to the Defendant, provided, however, that to support a verdict of guilty the evidence, whether of one kind or the other or a combination of both, must carry the convincing quality required by law.

One type of evidence is known as direct and the other as circumstantial. The law makes no distinction between the two classes as to the degree of proof required for conviction or as to their effectiveness in defendant's favor, but respects each for such convincing force as it may carry and accepts each as reasonable method of proof.

Direct evidence of a person's conduct at any time in question consists of the testimony of every witness who, with any of his own physical senses perceived such conduct or any part thereof, and which testimony describes or relates what thus was perceived. All other evidence admitted in the trial is circumstantial in relation to such conduct and, insofar, as it shows any act, statement or other conduct, or any circumstance of fact, tending to prove by reasonable inference the innocence or guilt of the defendant, it may be considered by you in arriving at a verdict.

You are not permitted to find the defendant guilty of the charges against him based totally on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion. Each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt

## Addendum C

INSTRUCTION NO. 31

Before you can convict the Defendant of POSSESSION OF DRUG PARAPHERNALIA, a Class B Misdemeanor, as charged in the Information, you must find, from the evidence beyond a reasonable doubt, all of the following elements of that crime:

1. That on or about October 20, 2005, at Sevier County, State of Utah, the Defendant possessed with intent to use drug paraphernalia.
2. That the purpose of possessing the drug paraphernalia was to inject, ingest, inhale, or otherwise introduce a controlled substance into the human body.

If, after weighing all the available evidence, you are satisfied that all of the above elements have been proven beyond a reasonable doubt, then you should find the Defendant guilty. If, however, you are not satisfied that each element has been proven beyond a reasonable doubt, you must find the Defendant not guilty.

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## Addendum D

Clerk: *J*

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

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STATE OF UTAH,	:	
	:	
Plaintiff,	:	
	:	V E R D I C T
vs.	:	
	:	
JAMES CHRISTIANSEN CRABB,	:	
DOB: 04/04/67	:	Case No. 051600320FS
Defendant.	:	Judge Paul D. Lyman

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WE, THE JURY, FIND THE DEFENDANT, JAMES CHRISTIANSEN CRABB:

WITH REGARD TO COUNT 1:

☒ GUILTY of POSSESSION OF A CONTROLLED SUBSTANCE,  
A Third Degree Felony; or  
           NOT GUILTY.

WITH REGARD TO COUNT 2:

☒ GUILTY of POSSESSION OF DRUG PARAPHERNALIA, A  
Class B Misdemeanor; or  
           NOT GUILTY.

DATED this 2 Nov day of ~~September~~, 2009.

*Paul D. Lyman*  
JURY FOREPERSON  
*Paul D. Lyman*

/erdict



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