

2002

Utah v. Clark : Brief of Appellant

Utah Supreme Court

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J. Frederic Voros, Jr.; Assistant Attorney General; Mark L. Shurtleff; Attorney General; Attorneys for Plaintiff/Appellee.

Catherine E. Lilly; Salt Lake Legal Defender Assoc.; Attorney for Defendant/Appellant.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 RONALD K. CLARK, : Case No. 20020215-SC
 :
 Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from a judgment of conviction for operation of a clandestine laboratory, a first degree felony, in violation of Utah Code Ann. § 58-37d-4 (Supp. 2001); unlawful possession of a controlled/counterfeit substance with intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (Supp. 2001); and use or possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (1998), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable William W. Barrett, Judge, presiding.

CATHERINE E. LILLY (7746)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorney for Defendant/Appellant

J. FREDERIC VOROS, JR. (3340)
ASSISTANT ATTORNEY GENERAL
MARK L. SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Plaintiff/Appellee

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PAT BARTHOLOMEW
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ASSISTANT ATTORNEY GENERAL
MARK L. SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P. O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Plaintiff/Appellee

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STATE OF UTAH, :
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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for one count of operating a clandestine laboratory, a first degree felony, in violation of Utah Code Ann. § 58-37d-4 (Supp. 2001); possession with intent to distribute a controlled substance, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (Supp. 2001); and use or possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (1998), in the Third Judicial District Court, State of Utah, the Honorable William W. Barrett, Judge, presiding. Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. § 78-2-2(3)(i) (1996). See Addendum A (Judgment and Conviction).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

ISSUE: Whether defense counsel rendered prejudicial ineffective assistance of counsel in failing to challenge inappropriate opinion testimony under rules of evidence 701, 702 and 704?

Standard of Review: A claim of ineffective assistance of counsel, raised for the first time on appeal without an evidentiary hearing, presents a question of law. See State

v. Bryant, 965 P.2d 539, 542 (Utah App. 1998) (citation omitted). “However, 'appellate review of counsel's performance must be highly deferential.’” Id. (quotation and citations omitted). Appellant must show that counsel's performance fell below a reasonable standard of professional care, and that the deficient performance prejudiced the outcome of trial, i.e., that the outcome of the trial would have been different absent counsel's deficient performance. Id. (citations omitted); see also State v. Bluff, 2002 UT 66, ¶29, 52 P.3d 1210; Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Appellant must also show that there was no “‘conceivable tactical basis' for counsel's actions.’” Bryant, 965 P.2d at 542 (quotation and citation omitted).

PRESERVATION OF THE ARGUMENT

Counsel for Appellant Ronald K. Clark (“Clark”) did not challenge the opinion testimony under Rules 701, 702 or 704. R.284-86. Nonetheless, Clark may raise these issues on appeal since he is alleging ineffective assistance of counsel based on his attorney's failure to make the challenges. See State v. Hansen, 2002 UT 114, ¶21 (citing State v. Roth, 2001 UT 103, ¶5, 37 P.3d 1099).

RULES AND CONSTITUTIONAL PROVISIONS

The following rules and constitutional provisions are determinative of the issues on appeal. Their text is provided in Addendum B to this brief.

United States Constitution Amendment VI - Rights of Accused, Effective Assistance of Counsel;

United States Constitution Amendment XIV - Due Process;

Utah Const. art. I, § 7 - Due Process;

Utah Rule of Evidence 701 (2001) - Opinion Testimony by Lay Witnesses;

Utah Rule of Evidence 702 (2002) - Testimony by Experts;

Utah Rule of Evidence 704 (2001) - Opinion on Ultimate Issue.

STATEMENT OF THE CASE

**Nature of the Case, Course of the Proceedings,
and Disposition in the Court Below.**

Clark was charged by amended information with one count of operating a clandestine lab, a first degree felony, in violation of Utah Code Ann. § 58-37d-4(1)(a) and/or -(b) (Supp. 2001); one count of unlawful possession of a controlled substance with intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii); and unlawful possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5 (1998). R.34-36. An arrest warrant issued. R.5. Clark pled not guilty. R.39-40. Clark was appointed a legal defender. R.19-20. He hired private counsel, Randall Lund, to represent him. R.29-30. He was tried by a jury. R.284-86. The jury found Clark guilty as charged. R.165-68. Clark was sentenced to prison on all charges, with the sentences to run concurrently. R.173-74.

Lund neglected to file a notice of appeal. Clark filed a pro se request for a legal defender and notice of appeal. R.191-96. His appeal was filed in the Utah Court of Appeals. R.197. A legal defender was appointed to Clark. R.208. The case was transferred to the Utah Supreme Court because it involved a first degree felony. R.210.

The Supreme Court remanded the case to the trial court for sentencing nunc pro tunc in order to reinstate a timely notice of appeal. R.216,221. Clark was resentenced. R.244-45. A notice of appeal was timely filed by the Legal Defenders Association. R.264.

Clark filed a motion for an evidentiary remand pursuant to Utah Rule of App. Procedure 23B (2002) based on the conflict of interest that arose when Clark's trial counsel was being prosecuted for nine counts of prescription fraud at the same time that he was representing Clark. This Court denied Clark's motion, as well as a petition for rehearing on the same issue. A briefing schedule was subsequently set.

STATEMENT OF THE FACTS

In July, 1999, Marilyn Milburn ("Milburn"), a DCFS investigator, was assigned to investigate allegations of neglect concerning Clark's care of his two-year-old child. R.284[62-63, 84]. The allegations were made by the mother of Clark's child and included, in part, that he was using methamphetamine ("meth"). R.284[63].

Milburn received four hours of training in clandestine lab ("clan lab" or "meth lab") recognition one month prior to her visit to Clark's house. R.284[84]. She was taught the ingredients used in meth production. R.284[91]. She was informed that these products have legal uses as well. R.284[92]. She had received no other specific training regarding clandestine labs. R.284[85]. She had also been in the field with mentors on general calls although none specifically related to houses containing clandestine labs. R.284[85-86]. Her area of expertise was in sexually abused children at the time she

began training in clan lab detection. R.284[87].

Milburn spoke to Clark at his house for a half hour on his front porch. R.284[64]. She testified that he was reluctant to let her inside or speak to her at first. R.284[64]. Clark then became calmer and spoke to her. R.284[64]. Milburn observed sores on Clark's arms. R.284[65]. She felt they were similar to sores that she learned about in her training. R.284[65]. Clark explained they were bug bites and rashes. R.284[65].

Milburn and Clark went into the yard, which was strewn with “tons and tons of items everywhere.” R.284[66]. She testified that there were generators, areas penned off to hold wires and cans, piles of trash and varied items, propane tanks, and “massive clutter. There were just tons of objects.” R.284[67-68]. She also saw that “he had a beer bottle that had a cork in it, with a hose . . . leading into a Tupperware container.” R.284[67]. Milburn asked him if he used the apparatus to make beer. Id. Clark indicated he did, however Milburn felt that Clark was operating a meth lab. Id.

Clark showed Milburn into sheds in his backyard. Id. The smaller shed contained many items that Clark said he used in developing film. Id. The shed was piled high with other items as well, including acetone and “several lawn care cans, chemicals, just kind of everywhere.” R.284[67,94]. She explained that the shed had floor-to-ceiling shelves all around it “piled deep” with stuff. R.284[68].

Milburn asked to go into the larger shed. R.284[68]. Clark indicated it was locked and that the keys were in Kearns. R.284[68]. Shortly thereafter, the shed door

opened and a female emerged. Id. Clark allowed Milburn to go inside. Id. The female later introduced herself as Yvette Bickley (“Bickley”), Clark's friend. R.284[68-69].

The large shed was just as cluttered too. R.284[69]. It had shelves on both sides with a narrow aisle down the center. R.284[70]. “[T]here was a large propane tank on the floor that had a [] welding nozzle connected to it, to burn directly from the propane.” There were a couple of bottles on a counter containing “dirty, yellow-color liquid.” R.284[69]. Clark said the bottles contained cleaning solutions. R.284[71]. There were also scales. R.284[69]. Milburn said souvenir spoons were in the scale. R.284[69]. Milburn noticed a round-bottom flask containing shredded paper hanging from the shed ceiling. R.284[70]. It was in netting. Id. Clark said he found it, and explained that it contained old shredded money he found in a box. Id.

Milburn testified the shed had a smell she associated with meth. Id. Milburn, however, had never actually smelled a known meth lab at the time. R.284[104]. She asked Clark about it. R.284[70]. Clark offered to turn on the air conditioning, which was part of a ventilation system that he made. R.284[71]. She did not detect that same odor inside Clark's house. R.284[104].

Clark showed Milburn his computer and surveillance camera. R.284[71]. He also showed her the baby monitors he used to hear what was being said at the front door of his house and outside his fence. Id. The computer screen showed Clark's front yard, the sidewalk and driveway. Id. The camera was inside a birdhouse, positioned on a

pole. R.284[73]. Clark explained that he used the system to watch his neighbors and whoever came on his property. R.284[112].

Milburn observed a gun underneath the air conditioning vent. R.284[73]. Clark showed it to her, said it was a pellet gun, and put it back. Id. Milburn said it was a small, wooden-handled pistol that did not appear to be a pellet gun. Id. Milburn admitted that she is not familiar with guns. R.284[110-11]. Clark continued to show her “collectible items.” R.284[73]. He pulled out a bottle of mercury that he said he used for his coins. R.284[74]. He also took a book out of a filing cabinet which contained sketches of computer mother boards. Id. Milburn acknowledged that Clark was working on a lot of projects. R.284[93-94]. She described him as a “very creative, ingenious man . . . [with] a lot of ideas.” R.284[93]. She acknowledged that the acetone she observed was consistent with his hobbies. R.284[92-93].

There was an ice chest on the floor. R.284[74]. Bickley stood next to it or with her foot on it. Id. Milburn said Bickley was “protective” of it, so she did not inquire about it. R.284[74,98-99]. Milburn testified that she had learned in her training that such chests are used to transport labs. R.284[74]. She acknowledged that there could be legitimate reasons for the cooler. R.284[98]. Milburn opined that the chest was not used to keep cold drinks since there was a small refrigerator in the shed as well. Id.

Clark took Milburn inside his house. R.284[77]. She noticed one room was closed. Id. Clark told Milburn that she could not go in there. Id. Clark explained that

he and the child slept in the front bedroom. Id. Then he said they slept on the sofa. Id. Milburn clarified that the room that was shut off was Clark's bedroom. R.284[78].

Milburn concluded in her DCFS report that the house did not fall below minimal standards. R.284[78]. Although she did not substantiate an allegation of a meth lab or meth use, Milburn “substantiated” the case under the general categories of physical and environmental neglect and failure to protect. R.284[91,116]. Milburn contacted law enforcement. R.284[78]. She reported her observations, including the beer bottle with the tube, the bottles in the shed containing the yellow liquid, and the surveillance equipment. R.284[79]. She told police that Clark seemed to be running a meth lab. Id.

Officer Brad Marshall (“Marshall”), conducted 24-48 hours of surveillance on Clark's house. R.284[134]. Marshall had taken a course in detecting clan labs in 1997. R.284[118]. He learned about identification of labs, procedures for entering and securing them, and their dangers. R.284[119]. He was a member of the SWAT team. Id.

Sargent Cody Acocks (“Acocks”) of the West Valley City Police Department supervised the investigation. R.284[138]. He said there were no signs of heavy traffic at Clark's house, which is normally present at clan labs. R.284[145]. Acock's obtained a no-knock warrant. R.284[138]. Given reports of mercury and wires, and the concern for possible explosive devices, Acock's decided to serve the warrant on Clark when he was away. R.284[138-39]. Accordingly, Clark was watched until he drove away from his house. R.284[139]. Marshall conducted the stop of Clark in his truck. R.284[121].

Clark was driving and Bickley sat in the passenger seat. R.284[123]. Acocks and other narcotics agents arrived at the scene. R.284[123,140]. Clark was “calm.” R.284[141].

Clark and Bickley were removed from the truck. R.284[124]. Marshall observed acetone in two one-gallon cans. R.284[125,126,148]. The officers searched the bed. R.284[125]. Marshall found a duffel bag containing an unknown substance. Id. Acocks saw a garbage bag with a tube attached with duct tape. R.284[140]. He noted discoloration on the tube. R.284[140-41]. Acocks saw iodine, “both in crystal form and liquid form.” R.284[147]. Marshall observed chains and some rocks. R.284[136]. Acocks noticed a compressor, which he acknowledged was a tool used in auto body work. R.284[149]. Based on Marshall’s training, Marshall testified that acetone is used in meth labs. R.284[148]. He admitted it had legitimate uses too. R.284[149]. Acocks opined that the tube connected to the bag was a “vent tube” used in labs. R.284[141].

The truck and its contents were towed to Clark's house. R.284[127]. Clark was also taken to the house. R.284[142]. Acocks observed an orange stain on Clark's pants. Id. He believed it was a chemical stain. Id. The agents “decontaminated” Clark by removing his clothes and giving him a soap bath. R.284[201-02]. A sample from the pants were later tested. R.284[316]. The stain tested negative for meth precursors. Id. The house, sheds and yard were secured by the SWAT team for potential suspects or dangers. R.284[127]. Marshall was concerned about possible explosives given the reported presence of mercury and a surveillance system. R.284[120,127]. Marshall

testified that no booby traps or explosives were found at Clark's house. R.284[137].

Officer Doran Troy Denney (“Denney”) of the Department of Public Safety, Criminal Investigations Bureau, searched Clark's house as well. R.285[197]. He was a member of the DEA Metro Narcotics Task Force. R.285[196]. He had taken two 80 hour training courses in clan lab detection. R.285[195]. He was certified as a drug recognition expert in Utah. R.285[196]. He had investigated 200 labs and had approximately 400 hours of “drug-related, narcotic-related, search-warrant-related” experience. Id. Denney processed and mapped the 69 items of evidence. R.284[197-98].

Denney cataloged a gas mask located inside Clark's house. R.285[205]. He opined the mask was used during cooking, although he admitted it could be worn to protect one from any sort of fumes. R.285[205,286-87]. A receipt for iodine was found in a truck other than Clark's that was parked at the house. R.285[220]. The truck belonged to Michael Dineen, Bickley's fiancé. R.285[220,277].

The remainder of the items that Denney cataloged came from the shed or Clark's truck. R.285[204-05]. Denney catalogued 5.5 pounds of iodine in Clark's truck. R.285[206]. Hydrochloric acid and two cans of acetone were in the truck too. R.285[207-08]. He also catalogued a tube that was connected to a bag with tape. R.285[285]. The apparatus was not connected to any vessel, however. R.285[289]. He said a vent bag is often used in meth labs. R.285[285].

Denny catalogued muriatic acid and acetones in the shed, opining that they are

used in meth labs as well as legal activities. R.285[207-08,224-25]. He also catalogued unknown liquids located in the shed, varying from milky to sludgy in nature.

R.285[207]. There were bases, sodium hydroxide, an iodine tincture, and ephedrine. Id. A bent-neck flask was located, as well as a few gas cans with duct tape on them.

R.285[286, 289]. The contents of the gas cans were not tested. R.285[289]. Although it generally takes red phosphorous, blue iodine, and white ephedrine to make methamphetamine, Denney did not catalog anything that was identified as phosphorous.

R.285[223]. Denney opined that there was enough material to construct and operate a lab, although he conceded that most people have the basic elements at their houses to do so. R.285[234-35].

In addition, Denney noted there was an engine hoist and assorted auto parts in the yard. R.285[226]. He testified that the “shed was filthy. . . . It was cluttered. The yard was strewn with debris.” R.285[230]. He testified to “thousands” of items stashed in hundreds of drawers within the shed. Id. A compressor and auto painting equipment were in the shed. R.285[288].

Denney took fingerprints off six of the items. R.285[211,213-14]. Darren Jewkes, a fingerprint examiner, had print cards from Bickley and Clark. R.285[305]. Two of the prints matched Clark's with over 10 points of comparison. R.285[299,302]. Of the nine latent prints lifted, only the two that were matched were complete enough to make an identification. R.285[301]. Jewkes could not determine whether Bickley's

prints were on any of the items. R.285[305]. He acknowledged that there is no way to determine how old the prints were. R.285[303-04]. he tried to get a print off the receipt. R.285[309]. He could only obtain a partial print that was insufficient for comparison. R.285[310].

Officer Julia Jorgensen searched Clark's shed. R.285[236-37]. She testified that the walls and the ceiling were stained black. R.285[237]. She noted the “shed was [] filled with shelves and different drawers and desks and a large quantity of items,” including buttons, cd's, keys, nuts and bolts. R.285[237,241]. She testified that Clark had a collection of books on auto repair, computer equipment, and many other items. R.285[242]. Jorgensen described a “chemical odor” in the shed. R.285[237]. At the time, she did not recognize the smell. R.285[238]. Subsequent to the search of Clark's shed, she searched other meth labs and sensed the same odor. R.285[238]. Someone at the scene also told her that the odor was from a clandestine lab. R.285[243]. Although she observed a number of containers containing chemicals, she did not attempt to discern whether the odor emanated from any of them. R.285[240-41,243].

Detective Alva Davis (“Davis”) testified that a 9 mm gun, two .22 caliber guns, and a .30 caliber gun were located in a desk drawer in the shed. R.285[252]. He said none of the guns were pellet guns, but rather were firearms that shoot bullets. R.285[253]. The guns were not loaded and no ammunition was found. R.285[264].

Davis located items in the shed that he considered paraphernalia, including a

butane torch, a large stash of baggies, a triple beam scale, a makeshift bong or pipe, coffee filters and straining filters, and a bent-neck flask. R.285[254,285-86]. Davis also testified about a cd with keys attached to it that was stored in a baggy. R.285[272]. Davis acknowledged that there were many similar items around the shed. R.285[273].

Davis opined the torch was used for heating up meth so that it can be “vaporized and ingested,” but acknowledged that it could be used for soldering. R.285[255]. He asserted the bong could be used to heat up the meth. Id. He noted that bongs are consistent with use and are not used in manufacturing meth often. R.285[258]. He conceded that Clark used the baggies to bag up several of his collections in the shed. R.285[261]. He did not locate any narcotics bagged up in the baggies. R.285[261]. He did not test the scales to ensure their accuracy. R.285[265]. According to Davis, the filters are be used to “strain out the cook after it is finished.” R.285[285]. However, Davis did not attempt to locate a coffee pot in the shed. R.285[287]. He noted that the coffee filters were found in a cooler, while the straining filters were located in different areas of the shed. R.285[288]. Davis did not locate the round-bottom flask that Milburn reported seeing during her visit to the house. R.285[269]. He wanted to find it because he thought the shredded paper in it was being used to clean it out. Id.

Robert William Brinkman (“Brinkman”), a chemist for the Utah State Crime Lab, ran screening tests for chemicals on several of the items seized. R.285[313-14]. The tests he administered provided preliminary indications for precursors. R.285[316-17].

Brinkman testified that the stain on the pants tested negative. R.285[316]. However, he noted that traces of chemicals could have been washed off in the laundry. Id. Two bottles of tan liquid tested negative. R.285[318]. The two bottles connected with a tube tested negative. R.285[319]. A bottle of brown crystal substance tested negative. Id. The bottle containing a white solid tested negative. R.285[321]. A bag containing pink crystals tested negative. R.285[324-25]. A bottle of brown liquid tested negative. R.285[317].

A second bottle of brown liquid preliminarily tested positive for amphetamine, but Brinkman did not verify the identity of the substance amphetamine. R.285[318]. A mountain dew bottle containing a substance preliminarily tested positive for amphetamine. R.285[319]. Gray crystals tested positive for iodine. R.285[320]. Another bottle of liquid preliminarily tested positive for amphetamine. R.285[321]. However, Brinkman did not conduct further tests to determine whether it was actually methamphetamine or a derivative. Id. A bottle of brown sludge tested positive for amines, but no further tests were performed to establish the presence of amphetamine or meth. R.285[321]. Another bottle of a white substance preliminarily tested positive for ephedrine. R.285[322]. It was verified as pseudoephedrine. Id. A plastic bag containing a white solid (1.1 g) preliminarily tested positive for amine, but the sample was too weak to verify it. R.285[322-23]. Another plastic bag with .21 grams of crystals and a plastic container with pink crystals tested positive for meth. R.285[324]. A

container with sludge tested positive for meth. Id. An unmarked sample preliminarily tested positive for amine. R.285[325]. A follow-up test on the sample confirmed the presence of meth and pseudoephedrine. R.285[339]. The follow-up test could not confirm the amount of meth in the sample. R.285[341].

Jeff Payne is a member of the Salt Lake City Police Department / DEA Clandestine Lab Response Team. R.285[345]. He testified that the bottle with a cloudy liquid above a white layer resembled pseudoephedrine as it was being extracted from medicine tablets. R.285[353]. He noted that the toluene, paint thinner, and acetone could be used to clean the product before gassing out the meth. R.285[354-55]. Sodium hydroxide and muriatic acid could be used to adjust pH levels. Id. The coffee filters could be used to remove red phosphorous off of matches. R.285[361-62].

Payne testified that a tincture of iodine located at Clark's house is a solution of iodine and liquid. R.285[360]. The tincture must be reduced to pure iodine for manufacturing. R.285[361]. Hydrogen peroxide is used to reduce the iodine tincture. R.285[354-55]. Acocks testified that iodine is used to treat hoof rot in animals. R.284[150]. Payne noted, however, that only a small amount of iodine is required for that. R.285[363]. The 5.5 pounds of iodine located in the truck could yield approximately four pounds of meth. Id.

Payne also testified about the possible uses of some of the physical items that were found. The dark brown bottle connected by a hose to an orange juice container

resembled a hydrochloric gas generator. R.285[357]. The turkey baster could be used to extract by-products that occur after the meth has been washed in toluene. R.285[358]. The vent bag would be used to capture the gases. R.285[360]. Vent bags are generally not tested due to their toxicity. R.285[360]. The flask could be used as a reaction vessel. R.285[364]. Considering the presence of the baggies, Payne opined that the meth found in Clark's shed was intended for distribution. R.285[369].

Payne conceded that critical ingredients or portions of the lab were missing. There was no red phosphorous. R.285[370]. There were no matches with the phosphorus removed. R.285[385]. There was no rock salt or table salt present, which would have been necessary to operate the HCL generator. R.285[381]. There were no pH strips to test the pH balance of the meth. R.285[382]. There was no bag attached to the vent tube. R.285[375]. Likewise, although a cook would need only one kind of solvent, there were several kinds located in the shed. R.285[381]. Payne acknowledged that he had never seen shredded money used to clean out a reaction vessel. R.285[386].

Milburn was also at Clark's house with the police during the search. R.284[80]. Milburn spoke to Clark. Id. He told her that the items she associated with a lab belonged to a friend. Id. He was moving them, and they were not there when his child was there. Id. He told Milburn that he never cooked meth when his child was there. Id.

Bickley testified for the State. She and Clark were close friends. R.284[157]. She testified that she stopped by one night a few months before Clark's arrest and found

“construction set up where you walked in the door [of the shed]” and a “tube and tape, this one thing.” R.284[159]. She explained that there was “junk all hooked together with fire underneath.” R.284[160]. She also said there was a “glass ball, and it had this tube, and it had tape wrapped around it.” Id. Clark said he was “cooking.” R.284[161]. Bickley used meth for eight years. R.284[162,179]. She said she bought meth from Clark a few times. R.284[162]. She claimed that she had never seen anyone but Clark cook meth. R.284[179]. She also claimed that she never cooked meth herself. Id.

Bickley testified that Clark asked her to hide a box containing his “lab” so that DCFS would not find it. R.284[164-65]. Bickley agreed. R.284[165]. Clark put the box in her basement a few days before his arrest. R.284[175]. The day that Bickley went to jail, she called her fiancé Mike Dineen and asked him to get rid of it. R.284[166]. Dineen complied, but Bickley did not know what he did with it. Id.

Clark testified on his own behalf. He denied that he ran a clandestine lab. R.286[429]. He explained that he has lived in the same house with his mother for thirty eight years. R.286[406]. He has always collected things, including scrap from friends, neighbors, and construction sites. R.286[409,411]. Friends or neighbors often left things at his house without telling him because they knew he collected it or sold it at the salvage yard. R.286[419-20]. He stored things in baggies, such as small screws. R.286[416]. Clark found the round-bottomed flask in a dumpster while scavenging for scrap wire. R.286[411]. He brought it home, twisted wire around it so it could hang,

and put some old money in it that he had laying around. R.286[411-412]. He said the flask had been hanging in his shed for six years and was a sort of conversation piece. Id.

Clark explained that the items in his yard and shed were used in his hobbies and inventions. R.286[410]. One of his projects included a cd with keys hanging from it. Id. Clark also made jewelry and worked with stones. R.286[411]. He package the jewelry in the small bags to sell at the swap meet. Id. Clark also made a tricycle for his son out of brass that he soldered together. R.286[412-413]. The seat was made of metal, and the tassels on the handlebars were made from wire insulation. R.286[413]. Clark said he used acid to etch the metal so the solder would adhere to it. Id. Clark collected coins for his son and kept them in baggies or jars. R.286[413-15].

Clark used chemicals in his various hobbies. He used acetone to remove grease and muriatic acid to remove rust while restoring cars. R.286[417]. He kept mercury in a sodium hydroxide bottle and used it for leaching gold off of computer circuit boards. R.286[418-19]. He used nitric acid to break down the brass to which the gold adhered. R.286[424]. He used hydrochloric acid to prep metal plating. R.286[420]. He said the odor in the shed was caused by the chemicals. R.286[447].

Clark explained the physical items found in his shed. The basting bulb was used to reclaim gold removed from the circuit boards. R.286[424]. The gas mask was part of a halloween costume. R.286[425]. He used other gas masks when painting or using chemicals. Id. He said the stains on his jeans were caused by the rust that he came in

contact with while working on cars. R.286[427]. He used the filters to strain paint. He also testified that he used the surveillance system to keep an eye on his motorcycle parked in front of the house. R.286[408-09]. Since Clark was alone much of the time, the monitor also helped him see if anyone was at the front door. R.286[428].

Clark testified that Bickley was at the shed often. R.286[429]. He denied that she saw him cooking meth, or that he ever gave or sold meth to her. R.286[429,453]. Clark admitted that he used methamphetamine six or seven months prior to the search, for approximately two years. R.286[423]. He was clean at the time of the search and intended to remain clean as required by DCFS so that he could get custody of his son. R.286[422]. Clark testified that he Bickley used meth together in the past. R.286[452].

Clark claimed ownership of most of the items found in the shed and his truck, including a bottle and two baggies containing meth, and the bong that he used to smoke it. R.286[431, 438, 441-42]. He put tape on the gas cans to prevent them from leaking. R.286[432]. He denied owning the bottles connected with hoses, the jar with the brown liquid, the black bag with the vent tube, the jar of iodine, the baby food jars containing liquid, or the baggie with the pink powder. R.286[433,436,438,442].

Clark explained that some of the items appeared in his yard since people often dropped things off, including the bottles attached with a hose and the black canvas bag. R.286[433,436]. He denied telling the DCFS worker that he used the apparatus to brew beer. R.286[433]. He could not recall when the bag with the vent tube appeared in his

truck. R.286[446]. He said the baby food jars containing liquid were in a box that someone gave to him two weeks before the search. R.286[439]. He did not check into the contents of the jars or clean them out. R.286[441]. The baggie with the pink powder arrived in a plastic drawer organizer that was left off. R.286[442].

David Duckworth also testified for the defense. He is a member of the Salt Lake Valley Health Department as an environmental compliance specialist and inspector. R.286[454]. He inspected Clark's house after the search. R.286[456]. Although he generally closes houses that are significantly contaminated, he did not feel it necessary to close down Clark's house. R.286[456,458]. Duckworth completed a report that indicated contamination on the shed ceiling. R.286[460]. He admitted that chemical stains can result any time that a person works with chemicals, and nothing about the stains in Clark's shed specifically linked them to meth. R.286[466-67].

Donald David Jackson ("Jackson") also testified on behalf of Clark. He owns an auto body shop. R.286[468]. Jackson knew Clark for three years. R.474. He described Clark as a pack rat. R.286[474]. He met Clark when he bought a C.B. radio microphone from Clark. R.286[469]. According to Jackson, Clark was a CB enthusiast, and other enthusiasts went to Clark's house. R.286[474-75]. Often, people would drop off their radios for repair. R.286[475]. Jackson asked Clark to do specialty automotive work. R.286[469]. He testified that Clark could manufacture obsolete parts for old cars and alter body frames. R.286[470]. Jackson also testified that he saw Clark painting cars.

R.286[470]. He said that Clark owned his own equipment. Id. He explained that filters are used to strain paint and to protect from overspray. R.286[471]. He also stated that acetone is used as a paint thinner, while muriatic acid and hydrochloric acid are used to remove rust from metal. R.286[473]. Jackson noted that toluene is a paint solvent that he used for clean-up in his own shop. R.286[475]. Jackson testified that he used these chemicals with Clark in the past. R.286[473]. Jackson also testified to Clark's coin collection. R.286[474]. He said he observed Clark place the coins in baggies. Id.

Terry Ann Smith (“Smith”) testified in Clark's defense. She knew Clark for 16 years. R.286[476]. She attested to the fact that Clark was a pack rat. R.286[477]. He repaired cars and often accepted other people's junk and fixed it or made other things out of it. R.286[477,479]. She testified that people often left items at his house or in the back of his truck for repair. R.286[478]. Smith's own husband deposited a CB radio in the back of Clark's truck, as well as carburetor which Clark rebuilt. Id. Smith testified that she was in Clark's shed regularly and never saw a meth lab there. R.286[480]. She was aware that Clark used meth on occasions. Id. She testified that the shed had a gasoline smell due to the chemicals he used for cleaning parts. R.286[481].

SUMMARY OF THE ARGUMENT

Lund rendered prejudicial ineffective assistance of counsel in failing to challenge the testimony of Milburn, a DCFS worker, when she opined that items and an odor located in Clark's shed were related to methamphetamine production. See U.S. Const.

amend. VI (right to effective assistance of counsel); State v. Bluff, 2002 UT 66, ¶29, 52 P.3d; Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Milburn did not have the personal knowledge, training, and/or experience to qualify her as a proper lay witness or expert witness on the subject. See Utah Rules of Evidence 701 & 702 (2001).

Similarly, Lund rendered ineffective assistance of counsel when he failed to object to the testimony of Detective Davis, who offered inappropriate legal conclusions as to Clark's culpable use of items located at his house in the guise of opinion testimony in violation of Utah Rule of Evidence 704 (2001).

ARGUMENT

ISSUE: LUND RENDERED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO CHALLENGE INAPPROPRIATE OPINION TESTIMONY UNDER RULES OF EVIDENCE 701 AND 702, AND IN FAILING TO OBJECT TO IMPROPER AND PREJUDICIAL STATEMENTS MADE BY THE PROSECUTOR.

Lund rendered ineffective assistance of counsel in failing to challenge the testimony of Milburn, a DCFS worker, when she opined that items and an odor located in Clark's shed were related to methamphetamine production. Milburn did not have the personal knowledge, training, and/or experience to qualify her as a proper lay witness or expert witness on the subject. See Utah R.Evid. 701 & 702 (2001). Similarly, Lund rendered ineffective assistance of counsel when he failed to object to Davis' testimony, which impermissibly directed the jury to find that Clark was operating a meth lab under the guise of expert opinion testimony. See Utah R. Evid. 704 (2001).

The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. "To establish an ineffective assistance of counsel claim, 'a defendant first must demonstrate that counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgement. Second, the defendant must show that counsel's deficient performance was prejudicial - i.e., that it affected the outcome of the case.'" State v. Bluff, 2002 UT 66, ¶29, 52 P.3d 1210 (quoting State v. Litherland, 2000 UT 76, P19, 12 P.3d 92 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984))). Clark's claims of ineffectiveness as to the evidentiary issues will be discussed in turn.

I. LUND'S LEGAL PERFORMANCE FELL BELOW A REASONABLE STANDARD OF PROFESSIONAL CARE WHEN HE FAILED TO ARGUE THAT MILBURN'S OPINION TESTIMONY WAS INADMISSIBLE UNDER UTAH RULES OF EVIDENCE 701 & 702.

A. Milburn's Testimony Is Not Properly Admissible as Lay Opinion Pursuant to Rule 701.

Utah Rule of Evidence 701 permits a lay witness to offer her opinion under certain circumstances. The rule states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Rule 701 (2001).

Milburn offered the following testimony: She saw sores on Clark's arms and legs

that “looked like the sores that we had been shown in meth training.” R.284[65]. There was a “beer bottle that had a cork in it , with a hose coming out and leading into a Tupperware container.” R.284[67]. Milburn testified that it “look[ed] just like the stuff they showed us in the meth lab training.” R.284[67]. Milburn also testified that there were a “couple of bottles that had kind of dirty, yellow-color liquid inside of them,” scales, a “round-bottom flask with shredded paper inside it”. R.284[69-70]. She said that there was a smell inside the shed that she “associated with meth. It [was a] kind of choking smell, a nasty smell, kind of unique.” R.284[70]. She testified that she saw a surveillance system. R.284[[72-73]. Clark had a gun in the shed. R.284[73]. He told Milburn that it was a “pellet gun.” R.284[73]. Clark had a small bottle of mercury. R.284[74]. There was an ice chest in the shed as well. R.284[74]. Milburn said it was the sort that she “had been shown that they transport meth labs in.” R.284[74]. Milburn reported her observations to the police. R.284[79]. She testified that she “explained to them about the beer bottle that I had seen with the tubing coming out of it. I explained to them the bottles that I had seen on the counter top, that had yellow liquid in them, that to me looked like could be the process of making meth. . . . I let them know about the surveillance equipment, I let them know what I had seen.” R.284[79].

Lund rendered ineffective assistance of counsel because it fell below a reasonable standard of professional care to fail to object to Milburn's testimony as inadmissible under Rule 701. See Bluff, 2002 UT 66 at ¶29; Strickland, 466 U.S. at 687-88. First,

her testimony lacks the appropriate foundation establishing her training or expertise in detecting and correctly identifying meth lab odors or paraphernalia. Milburn was a DCFS employee whose area of expertise lay in detecting signs of sexual abuse in children. R.284[87]. At the time she observed Clark's house, she only had four hours of training in clan lab recognition, which she received one month prior to her visit. R.284[84]. She had been in the field with mentors, but never to a house containing a known meth lab. R.384[85-86]. She had never received training as to the smell of a meth lab, and had never smelled one before going to Clark's house. R.184[104]. Consequently, Milburn did not have the knowledge necessary to offer an educated opinion about the items she observed. Since Milburn had never smelled a meth lab before, she likewise lacked any knowledge to opine whether the smell she detected was meth as opposed to fumes from the numerous chemicals she observed in the shed.

Milburn's virtually non-existent knowledge about meth labs contrasts sharply with case law discussing appropriate lay testimony from witnesses with a great deal more personal experience substantiating their opinions. See Michael H. Graham, Handbook of Federal Evidence § 701.1, n.2, p.395 (5th ed.) (noting that “personal knowledge is a prerequisite for admitting lay testimony”) (“Handbook of Federal Evidence”). For example, in Lush v. Georgia, 310 S.E.2d 287 (Ga. App. 1983), witnesses were permitted to testify that the “assemblage of chemicals and paraphernalia [] represent[ed] a clandestine or illegal drug laboratory; and identif[y] the strong offensive odor.” Id. at

290. The testimony was admissible because “[e]ach witness sufficiently established his expertise and knowledge of the criminal law, chemical odors, or identity of a clandestine drug laboratory. Such experience and knowledge sufficiently forms the predicate for the opinions rendered.” Id. (citation omitted).

Similarly, in U.S. v. Tinsley, 800 F.2d 448 (4th Cir. 1986), the Fourth Circuit held that lay testimony from witnesses establishing the identity and character of meth was adequate where the witnesses “were experienced not only in buying and selling methamphetamine, but in personally using it. They were familiar with its appearance and the economics of supplying, buying and selling it.” Id. at 450; see also U.S. v. Sweeney, 688 F.2d 1131, 1145 (7th Cir. 1982) (witness qualified to testify as to identity of drug based upon prior use and knowledge of drug and sampling of the substance which he identified, coupled with statement that drug about which he is testifying affected him in same manner as drug he previously ingested”).

As noted above, Milburn had only a cursory four hours of training, some unrelated field training, and no experience of the smell of a meth lab to substantiate her lay testimony in the same way that the lay testimony was substantiated by the personal knowledge of the witnesses in Lush, Tinsley and Sweeney. To this end, Milburn's testimony is not “rationally based on [her] perception.” Utah R. Evid. 701; see also Handbook of Federal Evidence, at § 701.1, p. 397 (noting that foundation directly relates to whether lay testimony is “rationally based on the witness' perception”). At most,

Milburn's testimony about the elements of a meth lab are based on "conjecture and speculation[,] which are no substitute for proof" under Rule 701. Farkas v. Saary, 594 N.Y.S.2d 195, 199 (App. 1993).

In addition, Milburn's testimony about the meth lab and its smell does not fall within the realm of common knowledge contemplated by Rule 701. See Kaysville City v. Mulcahy, 943 P.2d 231, 237 (Utah App. 1997); U.S. v. Skeet, 665 F.2d 983, 985 (9th Cir. 1982 (matters of "day to day observation" or "common occurrence and observation" are proper subjects of lay testimony). Generally speaking, a lay witness may testify about whether someone is under the influence of drugs or alcohol. See California v. Leahy, 882 P.2d 321, 342 (Cal. 1994) ("we allow lay opinion testimony regarding both drug and alcohol intoxication because laypersons are sufficiently familiar with the symptoms that they are able to identify them"); Mulcahy, 943 P.2d at 237 (lay witness appropriately testified that driver seemed to be driving under influence because such observation is common knowledge among general public). Lay witnesses may also testify to commonly recognizable odors, such as the smell of alcohol on a person's breath, because such smells are familiar to most people in the ordinary course of life. See California v. Williams, 5 Cal. Rptr. 130, 134 (Cal. App. 1992) (allowing lay opinion of another's state of intoxication when based on the witness's personal observations of commonly recognizable signs such as odor of alcohol).

However, smells of less-common substances cannot be the subject of lay opinion

testimony unless the witness has specialized training or experience in the detection of the particular substance by odor or has used the substance previously and is thereby familiar with its scent. See Handbook of Federal Evidence at § 701.1 p.397 ("witness may not testify that something smelled like dynamite unless it is sufficiently established that the witness from prior experience knows what dynamite smells like"); New York v. Kenny, 320 N.Y.S.2d 972, 974 (App. 1971) (lay witness could properly testify to smell of marijuana where he established that he smoked marijuana three times and recognized its peculiar, sweet smell); Oregon v. Lerch, 677 P.2d 678, 685 (Or. 1984) (lay witness could testify that he smelled odor of decomposing flesh in garbage can since he had previously experienced and recognized its smell).

Milburn herself did not have any prior experience in smelling methamphetamine at the time she was in Clark's house and shed. R.284[104]. In addition, meth in particular is not a generally known substance with a commonly recognizable smell. Even the labs used to produce methamphetamine are secreted away to avoid law enforcement detection. Consequently, the general public, including Milburn, does not have occasion to familiarize itself with the elements of a lab or the smell generated by the cooking process. It is for this reason that prosecutions involving clandestine labs require the State to present a host of expert witnesses and chemists to explain their discreet and uncommon aspects. Where such knowledge was not already known by Milburn and is not part of the day-to-day experience of the average person, Milburn required more than a four hour

training course, some unrelated field training, and no training in meth odor detection to provide a foundation for her testimony and to establish that it was "rationally based" on her "perception." Utah R. Evid. 701; see Handbook of Federal Evidence at § 701.1, p.393 (noting distinction between lay testimony and expert opinion that "'results from a process of reasoning which can be mastered only by specialists in the field'").

In addition, Milburn's testimony does not meet the helpfulness requirement of Rule 701. "Lay opinions are not helpful when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion." Handbook of Federal Evidence at § 701.1, n.7, p.400 (citation omitted). The State offered eight witnesses, including police officers and experts trained in meth lab investigation and operation, for the purpose of establishing the items located at Clark's house were parts of a meth lab. Officer Brad Marshall had training in meth lab investigation and identification. R.284[118-19,134]. He testified as a State witness to establish the evidence found in the back of Clark's truck as items associated with a meth lab. R.284[148]. Officer Denny was similarly trained as a drug recognition expert. R.285[194-96]. He was present at Clark's house as it was being searched, and offered testimony that the evidence found there was also linked to meth production. R.285[207-08,224-25,234-35,285]. Jewkes was a fingerprint examiner, testifying for the State, who identified Clark's prints on some of the items associated with a lab. R.285[299-305]. Brinkman, a chemist with the Utah State Crime Lab, preliminarily identified some of the liquids and solid substances as

chemical components of methamphetamine. R.285[313-14]. Payne, a member of the DEA Clandestine Laboratory Response Team, testified for the State about the process of making meth and opined that the evidence located at Clark's house was consistent with a lab. R.285[345]. Two other State witnesses, Officers Jorgensen and Acocks, similarly offered testimony that associated the evidence found at Clark's house to clandestine lab materials. R.284[138-41],285[236-37].

In State v. Mellen, 583 P.2d 46 (Utah 1978), the Utah Supreme Court held that the trial court correctly suppressed lay testimony proffered by the defendant where the defense position was already covered by the “superior testimony” of an expert witness. Id. at 48-49. The Court reasoned that the lay testimony, “in addition to being of highly questionable probative value, would in any event be cumulative.” Id. at 49; see also Utah R. Evid. 403 (2001) (relevant evidence inadmissible where it is cumulative).

As in Mellen, the superior testimony of the State's other witnesses, who were qualified to testify about the possible existence of a meth lab, renders Milburn's testimony unhelpful and cumulative. Id. at 48-49; see also Utah R. Evid. 403 (2001) (relevant evidence inadmissible if cumulative). Indeed, the jury was in an equal or better vantage point to objectively assess the evidence and determine whether he was operating a meth lab or not. See Morrison v. Perry, 140 P.2d 772, 776 (Utah 1943) (lay testimony inadmissible when jurors have “data as fully and exactly as the witness had them at the time [s]he formed h[er] opinion”). Moreover, it could do so without interjecting the

particular bias that Milburn inevitably held as a DCFS worker, whose mission is to protect children and, in this case, to investigate an alleged meth lab operated in the home of the child she was sent to protect.

In short, Lund rendered ineffective assistance since Milburn's testimony is not properly admissible as lay opinion for lack of personal experience substantiating it. See U.S. Const. amend. VI; Bluff, 2002 UT 66, ¶29; Strickland, 466 U.S. at 687-88; Utah R. Evid. 701. Lund's omission cannot be perceived as tactical in any way given that he could have made an objection outside of the presence of the jury and briefly on the record without undue inconvenience to the court and without overemphasizing her testimony to the jury. See Bryant, 965 P.2d at 542 (citations omitted)

B. Milburn's Testimony Is Not Admissible as Expert Opinion Under Rule 702.

Alternatively, Lund rendered ineffective assistance of counsel for failing to object to Milburn's testimony as inadmissible under Rule 702, which allows for expert testimony. See Bluff, 2002 UT 66 at ¶29; Strickland, 466 U.S. at 687-88. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Utah Rule Evid. 702.

Under Rule 702 of the Utah Rules of Evidence, the trial court has discretion to determine the qualification of an expert witness to give an opinion on a particular matter, Wessel v. Erickson Landscaping Co., 711

P.2d 250, 253 (Utah 1985); State v. Wight, 765 P.2d 12, 14 (Utah App. 1989), and the admissibility of the expert's testimony. Craig Food Indus. v. Weihing, 746 P.2d 279, 283 (Utah App. 1987). The expert's opinion may be based upon facts or data he or she perceived or were made known to him or her at or before the hearing. Wight, 765 P.2d at 15. The critical factor is whether the expert has knowledge that can assist the trier of fact in resolving the issues before it. Utah R. Evid. 702.

Schindler v. Schindler, 776 P.2d 84, 89 (Utah App. 1989)

As an initial matter, Milburn does not qualify as an expert witness under Rule 702.

See Handbook of Federal Evidence at § 702.1 p.426 (expert must first be qualified on basis of knowledge, skill, experience, training and/or education). As noted above, Milburn had four hours of meth lab training prior to her visit to Clark's house. R.284[84]. She had never smelled a meth lab at the time. R.284[104]. Her area of expertise lay in child sex abuse detection. R.284[87]. In the two years between Milburn's visit and Clark's trial, she had received more generalized training, including some instruction in meth lab detection. R.284[87].

A review of case law indicates that witnesses qualified as experts in the investigation and detection of meth labs have much more experience than Milburn. For example, in U.S. v. Howard, 169 F.3d 1127 (8th Cir. 1999), an expert was qualified to testify that meth production occurred in the co-defendant's trailer because the witness had conducted “investigations of over 300 methamphetamine labs.” Id. at 1129. Another expert was qualified to testify that defendant was producing meth since she had a “master's degree in chemistry and eighteen years' experience in the criminalistic

laboratory with specialized training in forensic chemistry and clandestine laboratories.” Iowa v. Casady, 597 N.W. 2d 801, 806 (Iowa 1999); see also U.S. v. Anderson, 61 F.3d 1290, 1297-98 (7th Cir. 1995) (expert witness qualified to testify about presence of clandestine PCP laboratories where he was a “group supervisor of the DEA's Clandestine Lab Enforcement Team with specialized training in clandestine laboratory operations and twenty-five years of experience”). Milburn's qualifications fall far short in comparison.

Since she lacks the qualifications of an expert on meth lab detection, Milburn's testimony is additionally inadmissible under Rule 702 because it is unhelpful. "The critical factor is whether the expert has knowledge that can assist the trier of fact in resolving the issues before it. Utah R. Evid. 702." Schindler, 776 P.2d at 89. Without the proper qualifications, Milburn's baseless opinion did not assist the jury in its deliberations and was irrelevant. See U.S. v. Solis, 923 F.2d 548, 550 (7th Cir. 1991) (noting that "helpfulness" analysis subsumes a "relevancy analysis"); see Utah R. Evid. 403. Her testimony is also unhelpful considering the testimony of the other State witnesses who were qualified in meth lab investigation and detection, or who were trained chemists or fingerprint analyzers. See supra Point I.A. With all their testimony, the jury had sufficient scientific and practical explanation of the items that Milburn testified about to render a decision; it did not require Milburn's untrained opinion to reach a verdict. See Utah R. Evid. 403 (evidence inadmissible if cumulative).

As a final matter, Milburn's testimony is objectionable under Rule 702 because its

admission as expert testimony blurs the necessary distinction between expert opinion and other evidence. Milburn lacked the training and experience necessary to render an expert opinion. If anything, Milburn was a DCFS worker who specialized in child sex abuse detection and had some incidental training in meth labs. This does not set her apart as an expert. A truly expert opinion is one that “results from a process of reasoning which can be mastered only by specialists in the field.” Handbook of Federal Evidence at § 701.1, p.393 (quoting State v. Brown, 836 S.W.2d 530, 549 (Tenn. 1992)). Hence, to label Milburn's testimony as “expert” undermines the distinction set up in Rule 702 for authentic expert testimony.

In addition, due to the specialized nature of expert opinion, a party intending to introduce an expert must provide notice thirty days before trial pursuant to Utah Code Ann. § 77-17-13 (1999). Notice is required in order to provide the opposing party with sufficient time and opportunity to challenge the evidence effectively at trial. See Handbook of Federal Evidence at § 701.1, n.1, p.395 (notice provides opponent “with a fair opportunity to test the merit of the expert's testimony through focused cross-examination”); see also U.S. Const. amend. XIV (due process); Utah Const. art. I, § 7 (same). In fact, the State did not provide notice of Milburn as an expert, limiting its notice instead to witnesses Murdock, Brinkman, Jewkes and Payne. R.44-53,69-74. Hence, Clark did not receive the statutory notice to which he is entitled, and therefore admission of Milburn's testimony as expert opinion under Rule 702 is inappropriate. See

Handbook of Federal Evidence at § 701.1, p.392-93 (noting that notice requirements are integral to proper admission of expert testimony under Rule 702).

For the reasons set forth above, Lund was ineffective in failing to challenge Milburn's testimony under Rule 702 where she does not have expert qualification to provide helpful testimony. See U.S. Const. amend. VI; Bluff, 2002 UT 66, ¶29; Strickland, 466 U.S. at 687-88; Utah R. Evid. 702. And as with an objection under Rule 701, Lund's failure cannot be seen as tactical since a Rule 702 objection could have been made outside the presence of the jury and without undue convenience to the court or risk of highlighting the error to the jury. See Bryant, 965 P.2d at 542 (citations omitted).

II. LUND RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO DAVIS' TESTIMONY UNDER RULE 704.

Lund similarly rendered ineffective assistance of counsel in failing to challenge Detective Davis' testimony as impermissible opinion testimony directing the jury how to decide an ultimate issue of fact, to wit, whether Clark was operating a meth lab. See Utah R. Evid 704 (2001); State v. Tenney, 913 P.2d 750 (Utah App.), cert. denied 923 P.2d 693 (Utah 1996).

Rule 704 provides:

(a) Except as provided in subparagraph (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged. . . . Such ultimate issues are

matters for the trier of fact alone.

Utah R. Evid. 704; see also Patey v. Lainhart, 1999 UT 31, ¶21, 977 P.2d 1193 ("expert opinion is not inadmissible merely because it embraces an 'ultimate fact in issue,' such as the cause of an accident or injury"). Although "[e]xpert testimony concerning ultimate issues is admissible under [Rule 704], . . . 'it [is] clear that questions which would merely allow the witness to tell the jury what result to reach are not permitted. Nor is the rule [] intended to allow a witness to give legal conclusions.'" Tenney, 913 P.2d at 756 (quoting Davidson v. Prince, 813 P.2d 1225, 1231 (Utah App.) (quoting Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983)) (other citations omitted).

In the present case, Detective Davis offered legal conclusions under the guise of expert opinion that the items located on Clark's property were part of a meth lab.¹ He testified in the following manner at trial:

Prosecutor: Were there items found that, in your estimation, were drug paraphernalia?

Davis: Yes. . . . I remember seeing torches in a drawer in the shed, along with packaging materials, scales a makeshift bong, if you want to call it, or a pipe. . . . And there may have been other, small items of paraphernalia, but I don't recall exactly what they were. . . .

¹ The State did not provide notice of its intent to call Davis as an expert witness although his opinion is the functional equivalent of expert opinion regarding characteristics of meth labs. See Utah Code Ann. § 77-17-13; R.44-53,69-74 (States notice of expert witnesses, excluding Davis). Clark does not challenge the lack of notice on appeal. Moreover, Clark does not dispute Davis' qualification as an expert for purposes of Rule 702. R.285[254] (Davis' testimony regarding his training and experience in drug recognition).

Prosecutor: If you could hold that up for the jury and point out for them the paraphernalia items in there.

Davis: In this photo here, there is a butane torch there, and all these different plastic bags used for packaging. . . .

Prosecutor: What would a torch be used for?

Davis: That type of torch is commonly used for soldering, that I have seen; but , for the most part, I have never encountered it being used for soldering.

Prosecutor: What have you encountered it being used for?

Davis: To heat up drugs and glass pipes, to the point that they can be vaporized and ingested.

R.285[254-55].

On cross-examination, Davis continued to offer legal conclusions that the items in Clark's shed were paraphernalia used in a meth lab. Lund asked Davis whether the butane torch could have legitimate as well as illicit uses. R.285[257]. Davis replied, "[t]hat specific torch, no, [it] did not." Id. Lund also asked what other items "would you rely on in saying that there was a meth lab in there?" R.285[268-69]. Davis replied:

The ice chest that was on the floor, that contained acetone. I believe it had filters and some other items in with it, that I associate with labs. There was [sic] also burn marks on the ceiling. There was also stuff hanging from the ceiling, which would allow a person to hang a vent tube to perform a cook from.

R.285[269]. Davis also asserted that he

believed [the flask with the money in it] . . . was being cleaned out with paper, which I see numerous times with meth labs. . . . [Meth cooks] will wad up paper, after they finish a cook, they want to clean out their glassware, they will throw acetone in that glass, they will throw wadded paper or other items, and use a bent hanger or some other device to shove the paper in, move it around, and pull these

items out.

R.285[270]. Davis similarly testified that he has never seen acetone used in automotive repair. R.285[268].

On redirect, Davis reiterated that incriminating items were found on Clark's property that had no possible legitimate uses.

Prosecutor: [Defense counsel] asked you what evidence that you believe is incriminating to the defendant, in the shed. I would like you to finish. . . . [W]hat evidence [do] you feel is incriminating in the truck, shed and house?

Davis: in the truck, we had the hydrochloric acid; a Mountain Dew bottle with I don't know what was in it; 5.5 pounds of iodine; tow 32-ounce cans of acetone, one was empty. . . . [T]here was also the vent tube. . . . It is the tubing that's connected to the top of a glass reaction vessel used in meth labs. The tubing itself had tape around it. That's how it is commonly attached to the cooking vessel. Such as the round-bottomed flask right here, you could connect the tubing to that with duct tape, and use that as, also, a vent. And if the tubing is longer, you can actually use it to condense the cook back down in. It is not very efficient. But it can be used as a condenser also.

Prosecutor: Is there any use for that type of thing, as far as you know, a vent tube, than in methamphetamine manufacture.

Davis: No.

Prosecutor: . . . [T]ell us what items you found in the shed you feel are incriminating.

Davis: We had paper filters. Those are used to strain out the cook after it is finished, or to strain the precursor chemicals. We had glass jars, coffee filters, jars of unknown liquids. There were liquids that were multicolored, bottles of muriatic acid, thinner, acetone, the scale, quart jars, the bent-neck flask, the packaging materials, the torches, jars with mixed liquids in, a Pyrex glass tube, containers with what I believe was meth at the time, handguns and a torch. . . . In the house I found the military-type respirator.

R.285[285-86].

Although there is "no bright line between permissible questions under Rule 704 and those that call for overbroad legal responses," Davis' testimony strays far into the realm of impermissible opinion that tell a jury which conclusion to reach. Davidson, 813 P.2d at 1231; see also Tenney, 913 P.2d at 756. A comparison of case law in this area is instructive. In Utah, expert opinion testimony is improper if it is tied to legal requirements for conviction. For example, in Tenney, expert opinion that defendant's failure to disclose certain information constituted material omissions under Utah law, that his predictions about stock did not comply with Utah law, and that his buy-back agreements constituted securities under the law were impermissible "legal conclusions because the witnesses tie their opinions to the requirements of Utah law." 913 P.2d at 756; see also Davidson, 813 P.2d at 1231 (expert opinion testimony as to whether defendant was negligent properly excluded since jury was "capable of drawing its own conclusions" as to negligence).

With regard to drug cases, other jurisdictions have similarly restricted expert opinion testimony when it goes beyond mere opinion as to what the evidence may suggest and comments directly upon the defendant's involvement in drug activity. In Connecticut v. Vilalastra, 540 A.2d 42 (Conn. 1988), the Connecticut Supreme Court held that an expert could testify whether "drug sellers usually work with the items found and seized in the defendant's apartment, or whether it would be unusual to discover these

items in the apartment of someone who did not sell drugs." Id. at 47. However, the expert could not assert whether the defendant actually possessed illegal drugs for sale and use, especially where other inferences could be reasonably drawn. Id. In a similar decision, the Supreme Court of Maine upheld a trial court's decision to exclude opinion testimony that the amount of narcotics and paraphernalia in the defendants' room indicated that they were trafficking in illegal drugs. See Maine v. Thornton, 414 A.2d 229, 235 (Me. 1980); see also Wesenberg v. Alabama, 504 So.2d 328 (Ala. App. 1986) (affirming exclusion of expert opinion testimony that various quantities of marijuana found at defendant's residence were packaged for sale or individual use since that was a jury question).

Davis' opinion is inappropriate because he offers his testimony in terms of absolutes rather than in a qualified manner as is necessary under Rule 704. For instance, he testified that the butane torch was used to heat meth so that it can be ingested. R.285[255]. He went further to state that Clark's torch in particular had no legitimate uses. R.285[257]. Davis' word choice noticeably lacks any qualifying language, such as, "in my experience, a torch is consistent with cooking meth," or "it is unusual for someone to have a torch if they are not cooking meth." See, e.g., Vilalastra, 540 A.2d at 47.

Similarly, Davis unqualifiedly stated that the acetone located in Clark's truck was used in a meth lab since he has "never" seen it used in automotive repair shops, thereby implying strongly that it could have only been used in a meth lab. R.285[268]. Again,

Davis' word choice lacks any terms that would leave that ultimate issue to the jury, such as, "meth labs I have seen usually utilize acetone."

With regard to the tube connected to a bag, Davis absolutely denied that there was any use for such an item other than use in a meth lab. R.285[285]. Again, Davis' opinion regarding the alleged vent tube is troubling because it is a positive statement that it was used for illicit purposes rather than a qualified opinion that it is similar to something that could possibly be used in a lab based on his training and experience.

Davis offered conclusive statements about the coffee filters, plastic bags and bent-neck flask as well, speaking about them as if he observed Clark actually use them in a lab. Davis stated, "[w]e had paper filters. Those are used to strain out the cook after it is finished, or to strain the precursor chemicals." R.285[285]. With regard to the flask, he stated that he believed it was being cleaned out with paper, not that such flasks are typically cleaned out with paper. R.285[270]. He also made a conclusory remark that he observed "plastic bags used for packaging," as opposed to a qualified statement that such bags may be used in meth labs. R.285[254].

In short, Davis' statements are inappropriate because they do more than "embrace" the ultimate issue in this case, to wit, whether the items located on Clark's property were part of a meth lab or not. Utah R. Evid. 704(a). Rather, they are positive, unqualified conclusions that Clark was in fact involved in manufacturing meth. As such, they are legal conclusions akin to those at issue in Tenney and impermissible because they direct

the jury how to decide the guilt/innocence question. See 913 P.2d at 756.

Considering that the sole question in Clark's case is whether the stuff on his property was part of a meth lab or just the innocent belongings of a pack rat, Lund was ineffective for failing to challenge Davis' testimony as inadmissible under Rule 704. See U.S. Const. amend. VI; Bluff, 2002 UT 66, ¶29; Strickland, 466 U.S. at 687-88. Lund's failure to challenge Davis' testimony is not tactical in any conceivable way since he could have made the objection outside the presence of the jury. See Bryant, 965 P.2d at 542 (citations omitted). In this manner, he would have averted the risk of highlighting the issue before the jury. Moreover, he could have made the objection brief so as not to inconvenience the court or anger the judge.

III. LUND'S INEFFECTIVENESS PREJUDICED THE OUTCOME OF CLARK'S TRIAL.

Lund's deficient performance merits a new trial because, absent his errors, the outcome of Clark's trial would have been different. See Bluff, 2002 UT 66 at ¶29; Strickland, 466 U.S. at 687-88.

As an initial matter, the evidence against Clark is weak. Indeed, even the trial court commented on the weakness of the State's case, stating that there was not enough for a conviction even considering the testimony of Milburn, Marshall, Acocks, Denny and Jorgensen. R.285[246]. Although the State presented investigating officers who testified that the items found in the shed and yard were consistent with a meth lab, none of them testified that they saw meth cooking at the time of the search, that they had any

surveillance information that Clark was observed cooking meth in the past, that people came and went frequently from his house as is normal in houses containing meth labs, or that any drug transactions occurred at the house.² R.285[281,382]. The State's witnesses testified that the items had legitimate uses, and that most people have enough stuff in their houses to construct a meth lab since they are made from every-day items.

R.284[149], 285[207-08,224-25,234-35,286-87].

Bickley was the only witness that testified that Clark operated a lab. She said that she was at Clark's house on one occasion when she observed "construction set up where you walked in the door [of the shed]," along with a "tube and tape." R.284[159]. She also observed a "glass ball, and it had this tube, and it had tape wrapped around it."

² The State presented Sargent Acocks and Officer Marshall, who testified that the alleged vent tube, iodine and acetone in Clark's truck were consistent with meth manufacture. R.284[125-26,141,147]. Officer Denney also testified that the vent tube may be used to condense methamphetamine during manufacture. R.285[285]. He also asserted that the muriatic acid and acetone found on Clark's property are consistent with meth manufacture, and that there was enough equipment on Clark's property to construct a lab. R.285[207-08,234]. Officer Jorgensen testified that the odor in the shed was similar to the odor she had experienced in other labs where meth was cooked. R.285[238]. Officer Payne testified that some of the bottles of cloudy liquid resembled pseudoephedrine in the extraction process. R.285[348]. He also noted that the toluene, paint thinner, and acetone found in the shed could be used to clean the meth. R.285[354-55]. He also testified that the sodium hydroxide and muriatic acid could be used to adjust pH levels during cooking, while the hydrogen peroxide could be used to reduce the iodine so it can be used to cook meth. R.285[354-55,360-61]. Finally, Payne opined that the bottle connected by a hose to an orange juice container resembled a hydrochloric gas generator, the turkey baster could be used to extract the meth after it was washed, the vent bag would be used to capture the gas emissions that occur when cooking meth, and the bent-neck flask could be used as a reaction vessel. R.285[357-60,364].

R.284[160]. Bickley initially could not remember what Clark's explanation was for his activity. R.284[161]. But after the prosecutor jogged her memory, Bickley testified that Clark said he was "'cooking.'" R.284[161]. Bickley also testified that she hid a box allegedly containing his lab once he learned that he was under investigation, and that she occasionally bought meth from Clark. R.284[162,164-65].

However, Bickley had a strong motivation to lie or tailor her testimony to suit the State's theory of the case because she faced the same first degree felony meth lab charge herself based on the alleged lab found at Clark's house, which carried with it a possible prison term of five years to life. R.284[170-71,185]. A few days before trial, Bickley accepted a deal whereby she agreed to testify against Clark in exchange for a reduction in charges to a third degree offense with a possible prison term of 0-5 years. R.284[171]. Although she still planned on going to trial on her case, she acknowledged that she anticipated that the State would go easier on her if she testified against Clark. R.284[171-72]. Bickley was also motivated to lie considering that she feared losing her children and her ability to work if convicted. R.284[174,187].

The State's case is not strengthened by evidence that some of the substances found in the shed tested positive for meth. In many of the cases, the "positive" test results were only preliminary findings that were not verified.³ Actual methamphetamine

³ For example, amines were found in a bottle of brown liquid, R.285[318]; a mountain dew bottle, R.285[319]; a bottle of liquid, R.285[321]; a container of brown sludge, R.285[321]; a plastic bag containing a white solid, R.285[322-23]. However, no

was positively identified only in a plastic baggie, in an unmarked sample, and in a container of sludge. R.285[324-25]. However, no tests were conducted to determine how much methamphetamine was in the sludge or the unmarked sample. R.285[341].

In any event, Clark admitted using meth for two years, up until six or seven months before the search. R.286[423]. He claimed ownership of the bottle and baggies containing meth, as well as a bong located in the shed. R.286[431,438,441-42]. Hence, at most, these facts establish that Clark kept the meth that he used stashed in his shed. An inference of a meth lab, however, is not justified.

Other incriminating items similarly lack a compelling connection to Clark. For instance, the 5.5 pounds of iodine and the bag connected to a tube located in Clark's truck were not conclusively linked to him. R.285[206]. Likewise, Clark denied ownership of the bottles connected to hoses found in his shed, one of the jars of brown liquid, the bag with the vent tube located in his truck, the tincture of iodine, the baby jars of liquid, and the baggie containing a pink substance. R.286[433,436,438,442]. Clark testified that people often dropped things into his truck or in his back yard either for repair or because they knew he collected stuff. R.286[419-20]. Consequently, someone could easily dump meth lab paraphernalia in order to get rid of it. R.286[419-20]. Since Clark's shed, yard, and truck were so cluttered, he would not necessarily notice the

other tests verified the actual presence of methamphetamine in those items. R.285[319-23].

dumped items.

Clark's friend, Terry Smith, corroborated Clark's explanation, testifying that her own husband deposited a CB radio and a carburetor in Clark's truck for repair.

R.286[478]. She and Clark's other witness, Jackson, testified that other people left items in his truck or yard as well. R.286[475,478]. Moreover, a receipt for iodine was found in the truck that Bickley drove, which was parked at Clark's house and belonged to her fiancé Dineen. R.285[220,277]. The State could not locate a fingerprint on the receipt that linked Clark to the iodine purchase. R.285[310]. Consequently, the 5.5 pounds of iodine is not convincingly linked to Clark, but rather to Bickley, who was closely linked to the receipt for iodine and who would have known that she could easily dump meth lab paraphernalia on Clark's property to hide it.

By every witness' account, including State witnesses, Clark was a messy pack rat and a prolific tinkerer, which explains the presence of the myriad items in his shed, yard and house. R.284[66-68],285[230,242],286[474,477]. His stuff was strewn all over his yard and piled ceiling-high in his shed. R.285[230,288]. He was involved in auto restoration and repair. R.286[469-70]. He dabbled in computers. R.286[472]. He fixed electronics and radios. R.286[475]. He liked to create things out of salvaged items, such as a tricycle for his son and a wind-chime type of object made from a compact disc and keys. R.286[410]. He made jewelry. R.286[411]. He devised his own surveillance system using baby monitors, a birdhouse on a pole and a computer monitor.

R.284[71,73,112].

Clark testified that he collected all sorts of things like coins, wire, cans, souvenir spoons, computer circuit boards, and scrap metal. R.284[67-69], 286[414,419]. The State's witnesses verified his collections. He had things like an engine hoist, compressor, and painting equipment. R.285[226,288]. He had four guns in the shed, none of them loaded. R.285[252-53,264]. There were hundreds of items stashed in small drawers throughout the shed, generators, and file cabinets full of manuals for repairing computers and cars. R.284[226,242], R.285[230]. One of the items was the bent-neck flask, which Clark found in a dumpster. R.286[411]. He filled it with old shredded money and hung it from the ceiling because he thought it was interesting. R.286[411-12]. He stored smaller items in small plastic baggies, such as screws and coins. R.286[413,416]. He placed other items, like jewelry, in small bags for sale at swap meets that he attended. R.286[411]. Some of the material that he collected was sold at salvage yards. R.286[286[419-20].

He had a vast array of chemicals that he used in his different projects and hobbies. He had various lawn care chemicals. R.284[67,94]. He used acid to etch metal, which made soldering easier. R.286[413]. He used acetone to remove grease and muriatic acid to remove rust in his auto restoration work. R.286[417]. He used mercury and nitric acid for leaching gold off computer circuit boards. R.286 [419,424]. He used hydrochloric acid to prep metal for plating. R.286[420]. The chemicals are the likely

cause of the odor in the shed and the stain on Clark's pants. In fact, the stain did not prove to be caused by a meth precursor after analysis by the State crime lab. R.285[316]. In addition, Duckworth, an employee of the Salt Lake Valley Health Department who inspected Clark's house, testified that the chemicals could have caused the stains on the shed ceiling. R.286[466-67]. He also testified that the stains did not indicate meth in his experience. Id.

Other items similarly fail to provide proof beyond a reasonable doubt of an operational meth lab when considered within the context of the clutter of an eccentric collector and tinkerer like Clark. For instance, the turkey baster, the butane torch, the coffee filters, the gas mask, the gas cans with the tape on them, are not unusual items considering the circumstances. In fact, Clark explained his uses for each of the items: the baster was used to retrieve the gold that was removed from circuit boards, R.286[424]; the gas mask was used when he painted or used heavy chemicals, R.286[425]; the filters were used to strain automotive paint, ; and the gas cans were wrapped with tape so that they would not leak. R.286[425].

The State's case is weak for the added reason that the investigating officers did not find all the ingredients necessary to cook meth. Phosphorous was not located, although meth requires phosphorous, iodine and ephedrine. R.285[223]. A common source of phosphorous in meth labs is matches. R.285[370]. However, no matches were located on Clark's property. R.285[385]. Moreover, some of the alleged components of

the lab did not seem that they had been used in a long while, or were so scattered that they do not seem to be part of a lab. For example, the bent-neck flask was hanging from the ceiling rather than near any apparatus resembling a lab. R.284[70]. The vent tube, iodine and acetone were in the back of Clark's truck. R.284[125-26,140]. Gas cans with tape on them, as well as the bottle and orange juice container connected by a tube were in the shed. R.285[289,357]. Nothing in the gas cans or the bottles connected with tubes tested positive for meth precursors. R.285[89]. The gas mask was inside the house. R.285[205].

Scales were observed in the shed, but they were filled with souvenir spoons, unlike a scale that is used to weigh drugs. R.284[69]. There was no rock salt present, which is necessary to operate a hydrochloric gas generator in a meth lab. R.285[381]. There were no pH strips, although pH levels are an important aspect of cooking meth. R.285[382]. And although a meth cook only needs one sort of solvent to clean the meth, Clark had several different kinds of solvents in the shed. R.285[381].

In light of the weakness of the State's case, Lund's failure to challenge Milburn's opinion testimony likely swayed the jury toward conviction, thereby prejudicing Clark. Milburn's testimony was important to the State's case because she was the first person at Clark's house and the first witness to speculate before the jury that Clark was operating a meth lab. The jury likely accepted her testimony with heightened deference considering her position as a DCFS worker and someone who frequently comes in contact with

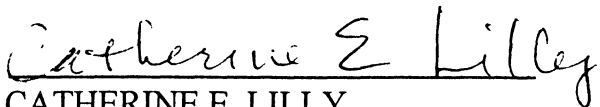
criminal behavior as she makes her home visits. Indeed, a jury is likely to endow Milburn with greater credibility based on the assumption that she has a caring and honest nature to be in that line of work in the first place. Moreover, juries are likely to be very sympathetic to anyone whose profession is to protect children.

Similarly, Lund's failure to challenge Davis' opinion testimony is prejudicial because Davis is a police officer and jurors tend to place more credence in officer testimony. See Louisiana v. Wheeler, 416 So.2d 78 (La. 1982) (risk of prejudice greater where erroneous opinion testimony comes from an officer in jurors and public hold greater confidence and trust). Jurors are likely to accept his conclusory statements as to Clark's culpable use of the varied items around his house without question. The result is that there is a reasonable likelihood of a more favorable outcome absent Lund's deficient performance. See Bluff, 2002 UT 66, ¶29; Strickland, 466 U.S. at 687-88.

CONCLUSION

In light of the foregoing, Lund rendered prejudicial ineffective assistance of counsel in violation of Clark's Sixth Amendment rights. Consequently, Clark respectfully requests this Court to reverse his convictions and remand for a new trial.

RESPECTFULLY submitted this 26th day of December, 2002.


CATHERINE E. LILLY
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, CATHERINE E. LILLY, hereby certify that I have caused to be hand-delivered ten copies of the foregoing to the Utah Supreme Court, 450 South State Street, Salt Lake City, Utah 84114, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 26th day of December, 2002.


CATHERINE E. LILLY

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this ____ day of December, 2002.

ADDENDA

ADDENDUM A

THIRD DISTRICT COURT SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 001902322 FS
	:	
RONALD K CLARK,	:	Judge: WILLIAM W. BARRETT
Defendant.	:	Date: March 11, 2002

PRESENT

Clerk: mauriem
Prosecutor: COEBERGH, COLLEEN K
Defendant
Defendant's Attorney(s): WATT, JOAN C.

DEFENDANT INFORMATION

Date of birth: February 4, 1961
Video
Tape Number: 2002-10 Tape Count: 8:54

CHARGES

1. OPERATION OF A CLANDESTINE LABORATORY - 1st Degree Felony
Plea: Not Guilty - Disposition: 06/01/2001 Guilty
2. POSS W/INTENT TO DIST CONTR/CNTRFT SUBST - 2nd Degree Felony
Plea: Not Guilty - Disposition: 06/01/2001 Guilty
3. USE OR POSSESSION OF DRUG PARAPHERNALIA - Class B Misdemeanor
Plea: Not Guilty - Disposition: 06/01/2001 Guilty

SENTENCE PRISON

Based on the defendant's conviction of OPERATION OF A CLANDESTINE LABORATORY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of POSS W/INTENT TO DIST CONTR/CNTRFT SUBST a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Case No: 001902322
Date: Mar 11, 2002

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

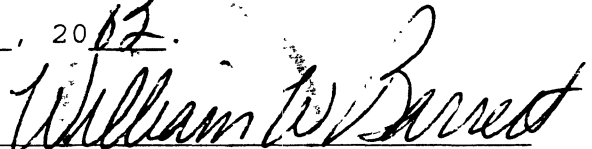
SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

time on F1 Operation of Clandestine Lab and Count 2 F2- Poss
w/intent to run concurrent

SENTENCE JAIL

Based on the defendant's conviction of USE OR POSSESSION OF DRUG PARAPHERNALIA a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s) The total time suspended for this charge is 180 day(s).

Dated this 11 day of March, 2002.


WILLIAM W. BARRETT
District Court Judge

ADDENDUM B

United States Constitution Amendment VI - Rights of Accused:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of counsel for his defence.

United States Constitution Amendment XIV, Section 1 - Citizenship - Due Process of Law - Equal Protection:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Constitution Article I, Section 7 - Due Process of Law:

No person shall be deprived of life, liberty or property, without due process of law.

Utah Rule of Evidence 701 (2001) - Opinion Testimony by Lay Witnesses:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Utah Rule of Evidence 702 (2001) - Testimony by Experts:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Utah Rule of Evidence 704 (2001) - Opinion on Ultimate Issue:

(a) Except as provided in subparagraph (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.