2010

State of Utah v. Todd Jeremy Little : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee,	:	
	:	Case No. 20100885-CA
vs.	:	
TODD JEREMY LITTLE, Defendant/Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM CONVICTIONS FOR POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(a)(i), AND POSSESSION OF DRUG PARAPHERNALIA, A CLASS B MISDEMEANOR VIOLATION OF UTAH CODE ANN. § 58-37a-5(1), IN THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY, THE HONORABLE SCOTT M. HADLEY, PRESIDING.

ORAL ARGUMENT IS REQUESTED

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from convictions for possession of a controlled substance, a third degree felony violation of Utah Code Ann. § 58-37-8(2)(a)(i), and possession of drug paraphernalia, a class B misdemeanor violation of Utah Code Ann. § 58-37a-5(1). This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(e) (2009). The defendant initially filled an appeal in this matter, though the Court of Appeals deemed the notice of appeal untimely and dismissed the appeal accordingly. State v. Little, 2010 UT App. 222. Counsel subsequently filed a motion to reinstate the time frame for appeal (R. 154), which was subsequently granted (R. 164). The defendant then filed a timely notice of appeal (R. 167).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

1. **Where any suspicion of a theft had been thoroughly dispelled, did the subsequent twenty minute detention of the defendant exceed the permissible scope of detention?**

Challenges to suppression rulings present questions of law that are reviewed for correctness. State v. Wilkinson, 197 P.3d 96, 97 (UT App. 2008); Layton City v. Oliver, 2006 UT App 244, ¶ 1, 139 P.3d 281 ("We review the trial court's ruling on a motion to suppress for correctness, without deference to the trial court's application of the law to the facts.").

2. **Did the district court err in determining that the investigative detention de-escalated into a consensual encounter?**

Challenges to suppression rulings present questions of law that are reviewed for correctness. State v. Wilkinson, 197 P.3d 96, 97 (UT App. 2008). In search and seizure cases, no deference is granted to the district court regarding the application of the law to the underlying facts. State v. Alverez, 147 P.3d 425, 430-31 (Utah 2006).

3. **Did the government meet its heavy burden of showing that the defendant's consent was purged of any taint from the illegal detention?**

"Whether a person's consent was obtained by police exploitation of a prior illegality is ultimately a legal conclusion reviewed for correctness." State v. Hansen, 63 P.3d 650, 665

(Utah 2002) (citing State v. Thurman, 846 P.2d 1256, 1271-72 (Utah 1993)).

4. **Did the district court error by failing to meaningfully consider the defendant's state constitutional arguments and by failing to suppress the evidence under the Utah Constitution?**

Because interpreting the Utah Constitution is a question of law, the trial court's determination is reviewed for correctness and no deference is given to its legal conclusions. Grand County v. Emery County, 52 P.3d 1148, 1151 (Utah 2002).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Utah Constitution, Article I, section 14.

STATEMENT OF THE CASE

Todd Little was charged by Information with two counts of possession of a controlled substance, both third degree felonies, and one count of possession of drug paraphernalia, a

class B misdemeanor (R. 5). The defendant moved to suppress evidence seized as a result of his unlawful detention, alleging that the police violated the Fourth Amendment of the United States Constitution and article I, section 14 of the Utah Constitution (R. 38). Following an evidentiary hearing, the defendant submitted a supplemental memorandum in support of his motion to suppress which provided analysis under the Utah Constitution (R. 46), and the parties further briefed the issue.[1]

After consideration of the parties' arguments, the district court denied the defendant's motion to suppress. The defendant subsequently entered a conditional plea to one count of possession of a controlled substance, a third degree felony, and one count of possession of drug paraphernalia, a class B misdemeanor (R. 90, 94). The court sentenced the defendant to 180 days in the Weber County Jail as a result of those convictions (R. 111).

STATEMENT OF THE FACTS

Factual Background:

On December 29, 2007,[2] Officers Casey Warren and Brandon Peterson of the Riverdale City Police Department received a call from dispatch regarding suspicious activity at a nearby Target store (R. 171: 5; R. 173: 11). The call was received at approximately 6:56

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[1] The State filed a response to the defendant's motion and supplemental memorandum (R. 63), and the defendant likewise filed an additional responsive pleading (R. 73).

[2] The district court's findings of fact erroneously noted that the criminal conduct at issue in this case occurred on December 19, 2008 (R. 134). Counsel assumes that this was a typographical error as the date of the offense was December 29, 2007 (R. 171: 4, 56, 76).

p.m. (R.171: 57). Dispatch indicated that two males were acting suspiciously inside the store, and the officers responded to the store (R. 171: 5). Officer Peterson later indicated that he believed it took him approximately five minutes after receiving the dispatch to arrive at the store (R. 171: 57). Once they arrived, Warren waited for the suspects at the store's south exit while Peterson waited at the north exit (R. 171: 5, 58). The officers waited somewhere between five and fifteen minutes for the suspects to exit the store (R. 171: 16). Before the defendant and his companion, Mark Hodgson, exited the store, the officers communicated with Jose Leon, the Target loss prevention officer (R. 173: 11). Mr. Leon indicated that the suspects inside the store were acting suspiciously, but he had not observed any theft (id.). Leon did indicate that one of the suspects had fiddled with a television inside the store, causing the picture to become scrambled (id.).

Mr. Hodgson exited the north door of Target, where he was met by Officer Peterson, handcuffed, and placed in Peterson's patrol car (R. 173: 12). Mr. Little exited the south door, and he was approached from behind as he was walking toward the parking lot (R. 171: 6; R. 173: 12).[3] Officer Warren tried to get Little's attention, telling the defendant from behind, "Hey, hey, you know, psst." (R. 171: 47). The defendant turned to talk with Warren, and he consented to a Terry pat down, which revealed "nothing in terms of weapons or any stolen merchandise." (R. 173: 12). Further, Officer Warren did not notice any bulges in Little's pockets, nor was there any indication that he was attempting to conceal merchandise (R. 171:

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[3] The contact with the suspects occurred between roughly 7:05 and 7:10 p.m. (R. 171: 65).

18).

Officer Warren then had the defendant accompany him to the north doors, where Officer Peterson was with Hodgson (R. 173: 12). Warren told the defendant to be patient, and that they needed to get in touch with loss prevention (R. 171: 20). While the officers and suspects were together, loss prevention confirmed that the suspects didn't take anything, but indicated that they did something to the television (R. 171: 27). Significantly, none of the officers went inside the store to check the television (R. 171: 27, 65), and no evidence was presented that loss prevention checked the television. At some point during the conversation between the defendant and Warren, the defendant indicated that he didn't drive to the store (R. 173: 13).

At roughly 7:30 p.m., a third officer, Sergeant Curtis Jones, arrived at the Target store. He was informed that there may be a woman involved and that the woman hadn't been located (R. 173: 13). Jones then contacted the defendant's mother, Ellen Little, and he learned from her that the defendant drove to the store himself (R. 173: 13). Suspicious about her possible role, Jones escorted Ms. Little to her car, where he looked inside the vehicle's interior and the trunk (R. 173: 13; R. 171: 84), though he did not locate any stolen merchandise.

In its oral findings, the district court observed:[4]

Officer Jones, as [counsel] mentioned, makes contact with Ms. Little in the store, and

[4] The district court's oral findings were incorporated by reference in its findings of fact. See R. 138 (noting that "[t]he Court's February 17, 2009 oral pronouncement of these findings, conclusions and order are incorporated herein by reference.").

as part of his questioning of her–in addition, he searches her vehicle, but as part of that discussion with Ms. Little, he learns that from her that the defendant drove to the premises. ¶ Now he doesn't know at that point what Mr. Little has said, but then Officer Jones comes back and the three officers discuss the information. They have the inconsistency now of Mr. Little saying he did not drive, his mother saying he did drive, but nonetheless, the officers conclude they don't have enough to hold these two suspects any longer.

(R. 173: 13).

After his interaction with Ms. Little, Jones returned to the area where Peterson was speaking with the defendant (R. 171: 82). Jones then began to ask the defendant questions based on the information he gathered from Ms. Little (id.). This conversation took place at approximately 7:35 p.m. (R. 171: 85). During this conversation, Jones asked the defendant how he had gotten to the store, and he indicated that he had been given a ride to the store (R. 171: 88). Jones relayed this information to the other officers, and told them to look for the vehicle (R. 171: 88). Jones testified that:

> As I *confronted* the defendant, I said to the other two–obviously because now I'm more suspicious not knowing what they have discovered when mom's telling me he might be involved in theft, it doesn't surprise her if he was. He tells me he didn't drive, she tells me he did, so I turned to the other two officers and said, 'Go look for this white Toyota pickup. Maybe there's something in this vehicle.'

(R. 171: 88) (emphasis added). The officer located the defendant's vehicle, and observed drug paraphernalia in plain view (R. 173: 14).

The trial court concluded that the detention of the defendant lasted twenty minutes, and it constituted a Level Two encounter (R. 173: 13). The court further concluded that the encounter deescalated to a Level One encounter when the suspects were told they were free to leave (R. 138), and it predicated its decision in part on the defendant's ability to leave. As

the court observed, the defendant "was free to go. He simply could have walked away, and he chose not to. So I don't find that his rights were violated." (R. 173: 15). The trial court did not explicitly address the defendant's arguments regarding the excessive scope of detention or whether the consent later given was sufficiently attenuated from that unlawful detention.

Procedural Background:

The initial motion to suppress filed by the defendant argued that there had been a violation of the Fourth Amendment of the United States Constitution and article I, section 14 of the Utah Constitution (R. 38). Following the evidentiary hearing on the motion, the defendant filed a supplemental memorandum in support of the motion to suppress (R. 46). In that memorandum the defendant presented arguments, in part based on the unique historical underpinnings of the Utah Constitution, that the actions of the officers in this case contravened the search and seizure provision of the state constitution. In its reply memorandum, the State addressed the defendant's Fourth Amendment claims at length, but only parenthetically addressed the defendant's state constitutional claims. The State's reply to the defendant's state constitutional argument was, in its entirety, the following:

> The Defendant provides an excellent summary of the origins of the Utah Constitution. However, he falls short in providing little, if any, guidance as to how this Court should interpret the Utah Constitution more narrowly than the United States Constitution. It is the State's position that while the Utah Supreme Court might encourage the defense bar to appeal cases so that the Utah Constitution can become more defined, this Court should follow established and sound legal precedent. The shaping and defining of the Utah Constitution should be left to the appellate courts.

(R. 70-71).

In response to the State's reply memorandum, the defendant took issue with the State's reply, noting that:

> Where, as here, the defendant has raised more than just a cursory examination of state constitutional claims, it should be incumbent on the State to address those claims; a dismissive paragraph should not suffice. Because the State has an independent burden under the Utah Constitution to show that the officers' actions did not violate the state constitution, the defendant submits that the State's failure to present a meaningful argument fails to meet its burden.

(R. 83). Despite the defendant's attempts to raise a state constitutional challenge, the court offered virtually no analysis of the defendant's separate Utah constitutional challenge. In its oral ruling, the court noted only that "it wasn't an unreasonable search and seizure under either the Fourth Amendment or the Utah Constitution." (R. 173: 14-15). Similarly, in its written order the court held simply that "[t]here was no violation of the Fourth Amendment to the U.S. Constitution or of Article I, Section 14 of the Utah Constitution." (R. 138).

SUMMARY OF THE ARGUMENTS

Law enforcement officers detained the defendant for roughly twenty minutes so that they could investigate a possible theft. Almost immediately, however, the officers had sufficient information to dispel their suspicions. Not only was the defendant frisked by one of the officers, the loss prevention officer specifically informed the officers that he had not observed either of the suspects attempt to steal anything. Despite this information, law enforcement continued to detain the defendant. Only after this lengthy and unreasonable detention were the officers made aware of the inconsistency in the

defendant's travel plans, and any finding that the investigative detention de-escalated into a consensual encounter is belied by the unique circumstances of this case. Because of the unreasonable detention and the insufficient attenuation of the defendant's consent, the fruits of the subsequent search of his vehicle should be suppressed.

Second, suppression is warranted under the Utah Constitution, which provides greater protection that its federal counterpart. The State's failure to meaningfully address the defendant's state constitutional arguments and the Court's cursory consideration of the same cannot satisfy the more stringent requirements of the Utah Constitution. Further, consideration of the unique historical underpinnings of the state constitution warrants broader constitutional protection in this case.

ARGUMENT

POINT I.

BECAUSE ANY SUSPICION OF THEFT WAS ALMOST IMMEDIATELY DISPELLED BY THE FRISK OF THE DEFENDANT AND THE INFORMATION PROVIDED BY LOSS PREVENTION, THE LENGTHY DETENTION IN THIS CASE WAS UNREASONABLE.

An investigative detention is permissible only when officers "have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." Brown v. Texas, 443 U.S. 47, 51 (1979). Further, the reasonableness of an officer's actions in the context of an investigative detention requires a dual inquiry. State v. Worwood, 164 P.3d 397, 407 (Utah 2007). Courts must first consider "whether the officer's action was

justified at its inception." Id. (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)). Second, courts consider whether the length and scope of the detention are " 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Id. (citing Terry, 392 U.S. at 19); State v. Chism, 2005 UT App 41, ¶ 15 ("No person may be detained except upon reasonable suspicion, and the scope of the detention must be limited to addressing the articulated grounds for the stop."). When challenged, the state has the burden of proving the reasonableness of the officer's actions during an investigative detention. Florida v. Royer, 460 U.S. 491, 497-500 (1983) (holding that the state must prove that the seizure was "sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure"); Worwood, 164 P.3d at 410 ("It has long been the law that once a defendant adequately challenges a warrantless seizure, the State bears the burden of proving the reasonableness of law enforcement's action."); Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.2(b), at 42 (4th ed. 2004) ("[I]f the police acted without a warrant the burden of proof is on the prosecution.").

In evaluating the permissible scope of an investigative detention, "the court should foremost consider 'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.'" Worwood, 164 P.3d at 407 (citing United States v. Sharpe, 470 U.S. 675, 686 (1985)). Further, "[i]nvestigative acts that are not reasonably related to dispelling or resolving the articulated grounds for the stop are permissible only if they do not add to the delay already lawfully experienced and do not represent any further intrusion on the detainee's rights." Chism, 2005 UT App at ¶ 15

(citation, internal quotation marks, and brackets omitted).

While Utah courts have declined to adopt a bright-line rule as to an accepted length of detention, this Court has "treated the length of an investigatory detention as a significant factor in determining its reasonableness." Layton City v. Oliver, 139 P.3d 281, 285 (UT App. 2006). Indeed, lengthy detentions can weigh heavily in favor of reversal. Id.[5] Further, a court should consider whether it was "essential to the investigation that the suspect's presence be continued during that interval." Id. at 286 (citation omitted). Such consideration will depend on the "seriousness of the offense being investigated and whether the police are inching closer to having probable cause for arrest." Id. (citation omitted).

In this instance, the officers never had reasonable suspicion of criminal activity. The only conceivable bases for concluding that there was reasonable suspicion of criminal wrongdoing were the information provided by the loss prevention officer that the suspects inside the store were acting suspiciously and that one of the suspects may have scrambled the picture on a television inside the store. This information was tempered, however, by the fact that the loss prevention officer had not seen the suspects attempt to conceal any merchandise, a fact that he relayed to the police. While it may have been proper for Officer Warren to make contact initially with Mr. Little in an attempt to engage in a consensual encounter, he did not have the reasonable suspicion necessary to warrant any additional intrusion.

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[5] In assessing the length of the detention at issue in Oliver, this Court relied in part on the typical length of investigative detentions provided by one scholar's treatise. See 4 Wayne R. LaFave, *Search and Seizure* § 9.2(f), at 60 n. 168 (3rd ed. 1996) (citing study concluding that half of suspects were detained for less than ten minutes, three-fourths for less than twenty minutes, and more than nine-tenths for less than forty minutes).

Even assuming, *arguendo*, that the officers had reasonable suspicion of criminal activity, that suspicion dissipated almost immediately. According to the district court's own oral findings, Officer Warren conducted a pat-down of the defendant soon after Little exited the store, and the pat-down revealed neither weapons nor stolen merchandise. Mark Hodgson, the other suspect who was with the defendant in the store, was quickly handcuffed and placed in Officer Peterson's patrol car after exiting the store.[6] Again, a loss prevention officer had indicated that neither suspect had taken any merchandise while they were in the store. When the officers were aware that neither suspect had merchandise on their person as well as the fact that neither suspect had been seen taking merchandise, any conceivable reasonable suspicion ended and the suspects should have been free to go. Indeed, "it is axiomatic that once the officer's suspicion has been alleviated the officer must allow the detainee to go on his way without further interference by the officer." State v. Vialpando, 89 P.3d 209, 212 n. 2 (UTApp. 2004); see also State v. Godina-Luna, 826 P.2d 652, 654-55 (UT App. 1992) ("Once the reasons for the [temporary detention] have been satisfied, the individual must be allowed to proceed on his or her way"). Despite the absence of reasonable suspicion, the defendant was detained for roughly twenty minutes. If the standard of reasonable suspicion is to have any constitutional meaning, it cannot exist where all

[6] It is difficult to imagine what the legal basis for taking such action entailed, yet the potentially unlawful arrest of Hodgson is not at issue in this case. Officer Peterson's immediate handcuffing of Hodgson and placing him in the patrol car without significant justification may, however, be relevant to this Court's inquiry into the purpose and flagrancy of the police conduct. See Brown v. Illinois, 422 U.S. 590 (1975) (purpose and flagrancy of illegal police conduct may impact assessment of whether consent was attenuated from such misconduct).

objective facts suggest that the defendant did not commit a criminal offense.

The State's suggestion raised below that there was reasonable suspicion of criminal activity because the suspects had been seen scrambling the picture of one of the televisions inside the store likewise fails to establish a basis for such a prolonged detention. None of the officers involved in the investigation actually went inside the store to investigate the television, nor did the State introduce any evidence suggesting that Target loss prevention officers investigated that suspicion. Put simply, the State cannot justify a prolonged detention on the basis of a suspicion that was never investigated. Such a construction of investigative detentions eviscerates the limitations placed upon law enforcement, essentially allowing the officers to extend a detention simply because there may have been a suspicion of wrongdoing without imposing the burden of actually investigating that suspicion. See, e.g., Sharpe, 470 U.S. at 691 (Blackmun, J., concurring) ("Regardless how efficient it may be for law enforcement officials to engage in prolonged questioning to investigate a crime, or how reasonable in light of law enforcement objectives it may be to detain a suspect until various inquiries can be made and answered, a seizure that in duration, scope, or means goes beyond the bounds of *Terry* cannot be reconciled with the Fourth Amendment in the absence of probable cause.").

In addition to the concerns noted above, the minor nature of the crime investigated in this case as well as the fact that the police did not receive any information that would heighten their suspicion until Sergeant Jones spoke to Ms. Little should be considered. In Oliver, this Court held that a detention was unreasonable in part because of the minor nature

of the suspected crime and the absence of any evidence that a crime had been committed. As this Court noted,

> [T]he officers did not have evidence that Oliver had even committed a crime, much less a serious crime that presented a developing situation or an immediate threat of danger to the public. Moreover, because they knew Oliver's identity and home address, nothing prevented the officers from releasing Oliver while they conducted their investigation into possible burglaries. Oliver need not have remained while Erickson scoured the neighborhood for anything that might suggest wrongdoing.

139 P.3d at 286. Similarly, the officers here "investigated"[7] a possible retail theft. While it is undeniable that retail theft constitutes a criminal offense, the reasonableness of any detention should take into account the nature of the crime and the immediacy of any threat posed by the detainee. There is nothing to suggest that the crime investigated in this case–retail theft–posed a significant threat to others or that it could not have been investigated without requiring such a lengthy detention.

Without any information suggestive of ongoing criminal activity, the detention of the defendant should never have lasted so long. See State v. Chapman, 921 P.2d 446, 453 (Utah 1996) (determining that continued detention of the defendant was impermissible when "no independent facts surrounding the encounter with [the defendant] created suspicion that he was involved in any illegal activity beyond [the reason he was initially stopped]"); State v. Hansen, 2002 UT 125 at ¶ 35 ("A level two encounter involves an investigative detention

[7] Other than speaking with the suspects and loss prevention, it is unclear whether the officers engaged in any additional investigation until Sergeant Jones asked Officers Warren and Peterson to look for the defendant's vehicle. The search for the defendant's vehicle, however, occurred at roughly 7:35 p.m., approximately 20 to 30 minutes after Warren initially contacted the defendant.

that is usually characterized as *brief and non[]intrusive.*") (emphasis added).[8] As noted above, it is the State's burden to establish that the detention was "sufficiently limited in scope and duration." Royer, 460 U.S. at 500. Because the State cannot meet its burden, it is clear that the continued detention of the defendant was unlawful.

POINT II.

THE INVESTIGATIVE DETENTION NEVER BECAME A CONSENSUAL ENCOUNTER BECAUSE A REASONABLE PERSON WOULD NOT HAVE BELIEVED HE WAS REALLY FREE TO LEAVE WHEN OFFICERS WERE SEARCHING THE PARKING LOT FOR HIS VEHICLE.

An investigative detention de-escalates to a consensual encounter when a reasonable person would believe, based on the totality of the circumstances, that he or she is free to end the encounter and depart. State v. Higgins, 884 P.2d 1242, 1244 (Utah 1994); United States v. Mendenhall 446 U.S. 544, 554 (1980) (expressing minority opinion that has since become the majority opinion of the Court). If a reasonable person would not believe that he is free to leave or disregard questioning, the encounter remains an investigatory detention. Hansen, 63 P.3d at 661. Although no single factor is dispositive, factors tending to show de-escalation include informing a person he is free to leave, or that he does not have to answer additional questions. Ohio v. Robinette, 519 U.S. 33, 39-40 (1996). Conversely, a "coercive show of authority, such as the presence of more than one officer," or an officer's "use of a

[8] Such a requirement obviously stems from the Supreme Court's observation that a detention based on reasonable suspicion "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500 (1983).

commanding tone of voice indicating that compliance might be compelled" also weighs against de-escalation. Hansen, 63 P.3d at 662 (citations omitted).

In Hansen, *supra*, the court considered whether a traffic stop had de-escalated into a consensual encounter. The court first considered whether the factual differences between the initial encounter and the additional questioning were significant enough to convey that the encounter had de-escalated. The court considered the fact that there was no evidence of a coercive atmosphere in either the initial detention or the subsequent interaction. The court noted that "[s]ince these factors were never present to begin with, a reasonable person would not be able to discern that a seizure had de-escalated to a consensual encounter..." Id. at 662. The court then considered the presence of multiple officers, finding that the arrival of another officer may have conveyed "that the encounter was escalating rather than de-escalating." Id. In addition, the court observed that the officer's questioning beyond the scope of the initial detention supported the conclusion that the defendant was still seized, observing that the officer "did not address the illegal lane change before he started questioning [the defendant] about contraband." Id.

In this case, the defendant was being detained and questioned by Officers Warren and Peterson when Sergeant Jones, a third law enforcement officer, arrived.[9] When Jones arrived, he went to seek out the defendant's mother, and he located her in the store. After questioning her briefly, he went with her to check her vehicle to make sure there was no stolen merchandise. After that brief encounter with Ms. Little, Jones returned to discuss the

[9] As the court in Hansen observed, the presence of an additional officer on scene seems to suggest escalation, rather than de-escalation, of the initial detention.

information with the other officers. According to the district court, the officers now "ha[d] the inconsistency of Mr. Little saying he did not drive, his mother saying he did drive, but nonetheless, the officers conclude[d] they d[id]n't have enough to hold these two suspects any longer." (R. 173: 13). Based on the information that Jones received, however, he directed the other officers to search for Little's vehicle. As Jones testified,

> As I *confronted* the defendant, I said to the other two–obviously because now I'm more suspicious not knowing what they have discovered when mom's telling me he might be involved in theft, it doesn't surprise her if he was. He tells me he didn't drive, she tells me he did, so I turned to the other two officers and said, 'Go look for this white Toyota pickup. Maybe there's something in this vehicle.'

(R. 171: 88). Presumably while the officers are looking for Little's vehicle, Hodgson leaves the scene.

It is difficult to surmise how a reasonable person would have felt free to leave when two officers are searching the parking lot for his car while one of the officers is standing right beside him. Theoretically, the defendant may have been able to leave on foot, but that simple fact overlooks the reality that virtually all people who drive to a store also drive away from that store. Indeed, a reasonable person would not infer that they were truly free to leave when officers were looking for his or her vehicle. In addition, it is clear from the language used by Sergeant Jones that he had just had a confrontational encounter with the defendant. Telling someone that they are free to leave, but then confronting them immediately after hardly conveys the notion that one is in fact free to leave. Moreover, just as the officer in Hansen asked about contraband rather than the reason for the detention, Sergeant Jones did not ask the defendant about any possible theft, but rather asked about his vehicle. Lastly, the

presence of three officers, two of whom are actively searching for Little's vehicle, hardly supports the finding that the investigatory detention had in fact de-escalated into a consensual encounter. When considered in its totality, it is clear that the encounter had not de-escalated into a consensual encounter. The fact that Little is told he is free to leave is stripped of its significance when viewed in the entire context of the encounter.

POINT III.

THE STATE CANNOT DEMONSTRATE THAT LITTLE'S CONSENT WAS SUFFICIENTLY ATTENUATED FROM THE ILLEGAL DETENTION DUE TO THE ALMOST IMMEDIATE REQUEST FOR CONSENT AND THE FLAGRANCY OF THE OFFICERS' CONDUCT.[10]

The defendant set forth the relevant framework for engaging in an analysis of attenuation in his reply memorandum submitted after the evidentiary hearing, and believes that the record below is insufficient for the State to establish that the consent given by Little is attenuated from the constitutional violation that prompted such consent. In its reply memorandum and oral argument, the State appeared to rely exclusively upon its assertion that the encounter with the defendant de-escalated from a Level two encounter to a Level one encounter in order to justify the search of the defendant's vehicle. Such a response seems to suggest that the mere fact of de-escalation obviates the need for any further analysis of attenuation under the relevant framework of Brown v. Illinois, 422 U.S. 90 (1975). While de-escalation of the investigative detention may indeed be a factor in an attenuation analysis, one consideration alone fails to comport with the analytical framework employed by the

[10] Clearly, if the encounter never de-escalated into a consensual encounter, the defendant's consent would have occurred *during* the Level two detention.

Supreme Court in Brown. Because the defendant clearly raised the issue of an unlawful detention, it should have been incumbent on the State to present and argue the possible exceptions to the unlawful detention. The State's failure to address the attenuation argument other than to simply suggest that the encounter de-escalated into a consensual encounter means that it did not meet its "heavy" burden in the trial court. The State should be precluded from attempting to justify a search based on attenuation on appeal when it failed to make such an argument in the trial court.[11] As explained below, even if this Court reaches the issue of attenuation, the State cannot meet its burden in this case.

Because the prolonged detention of the defendant was unlawful, the State must demonstrate that Little's consent was sufficiently attenuated from the unlawful detention. Indeed, in order for evidence to be admissible as a result of a consent to search, that consent must be voluntary and must also be attenuated from any prior illegal search or seizure. State v. Shoulderblade, 905 P.2d 289 (Utah 1995); State v. Sims, 881 P.2d 840 (Utah 1994). Significantly, when the State attempts to prove that there was voluntary consent after an illegal detention, it has a much heavier burden to satisfy than consent given after a permissible detention. State v. Arroyo, 796 P.2d 684 (Utah 1990).[12] Under Brown, *supra*,

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[11] Further, review of whether the defendant's consent was obtained by exploitation of a prior illegality is complicated by the fact that the district court made no findings in this regard. The district court simply found that the "encounter de-escalated to a Level One encounter when the suspects were told they were free to leave." (R. 138).

[12] See also State v. Thurman, 846 P.2d 1256, 1262 (Utah 1993) (citing United States v. Melendez-Gonzalez, 727 F.2d 407, 414 (5th Cir. 1984)). In Melendez- Gonzalez, the Tenth Circuit required the government "to demonstrate that any taint of an illegal search or seizure has been purged or attenuated not only because we are concerned that the illegal seizure may affect voluntariness of the defendant's consent, but also to effectuate

and its progeny, unless a defendant's consent to search "had become so attenuated as to dissipate the taint" from the illegal acts leading up to that search, any evidence must be suppressed as the fruit of the poisonous tree. Id. at 599. In determining whether a defendant's putative consent has been sufficiently attenuated from a Fourth Amendment violation, courts must consider the temporal proximity of the illegal conduct and the consent, the purpose and flagrancy of the official misconduct, and the presence of intervening circumstances. Arroyo, *supra*.

Any evaluation of the temporal proximity of the illegal conduct and the consent must recognize that "[a] brief time lapse between a Fourth Amendment violation and consent often indicates exploitation because the effects of the misconduct have not had time to dissipate." Shoulderblade, 905 P.2d at 293 (citation omitted). In Hansen, *supra*, the arresting officer asked for consent to search almost immediately after exceeding the permissible scope of detention. In finding that this factor weighed in favor of suppression, the Hansen court noted that "no appreciable time passed between the illegal detention and the consent that would have allowed the taint of the misconduct to dissipate." Id. at 666. Similarly, there was only a brief time lapse in this case between the illegal detention and the eventual consent. In fact, Sergeant Jones dispatched Officers Warren and Peterson to look for the defendant's vehicle almost immediately after he discovered the inconsistencies between Little's version of events and his mother's version. While the record does not contain a specific amount of time that transpired, it appears that little time transpired between the end of the illegal detention and

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the purposes of the exclusionary rule."

the request for consent to search, supporting suppression in this case. See Brown, 422 U.S. at 604-05 (finding that two hour break between illegal police conduct and consent was insufficient to purge the taint of the prior illegality).

In evaluating the purpose and flagrancy of the officers' conduct, courts must be mindful that this factor "directly relates to the deterrent value of suppression." Id. at 608-12. In this case, the officers clearly disregarded the limitations imposed by the Fourth Amendment. Similarly, despite having been advised by loss prevention that neither suspect had taken anything and observing that neither had concealed anything on their person, the officers detained Little and Hodgson. Despite having no indication that Hodgson had taken anything, Officer Peterson handcuffed Hodgson and placed him in his patrol car for questioning. While such flagrant disregard for the Fourth Amendment protections was admittedly directed at Little's companion, it should bear on this court's analysis as it is clear that both suspects were detained as part of the same investigation. Further, even though the record is devoid of any investigative acts taken by the officers other than interrogation of the suspect and a discussion with loss prevention, the suspects were detained for twenty minutes. The pattern of disregard for the defendant's constitutional rights supports the contention that Little's consent was obtained by exploitation of an illegal detention.

With regard to the presence of intervening circumstances, the State will undoubtedly argue that the fact that the defendant was told he was free to leave constitutes an intervening circumstance. Such advice, however, should not carry much weight in this instance. In State v. Garcia, 123 S.W.3d 335 (Tenn. 2003), the court addressed whether the intervening

circumstance of telling a defendant he was free to leave but then questioning him shortly after that advisement was entitled to much weight in an attenuation analysis. The court ultimately afforded "little weight" to this factor, particularly "given the immediacy with which [the officer] began questioning the defendant after telling him he was free to leave and the presence of the other police cruiser." Id. at 347. The leading Fourth Amendment treatise commented on the court's decision in Garcia, noting that "[w]hile several courts have held that communication to a driver that he is free to go is an intervening circumstance that attenuates the consent from an illegal traffic stop, [citations omitted], in actuality this factor deserves 'little weight." Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.2(d), at 84 n.145 (4th ed. 2004). In this case, little weight should be given to the fact that Little was told he was free to leave. He was so advised only after a third officer responded to the scene, and very quickly after being advised of that right, he was "confronted" by Sergeant Jones. In addition, placing undue emphasis on this factor fails to meaningfully account for the practical reality of the defendant's situation. As noted above, informing a suspect that he is free to leave and dispatching two officers to search for his means of departure–his vehicle–renders such advisement effectively meaningless.

POINT IV.

THE FAILURE OF THE STATE TO MEANINGFULLY ADDRESS THE DEFENDANT'S STATE CONSTITUTIONAL ARGUMENTS DID NOT SATISFY ITS BURDEN ON THE DEFENDANT'S MOTION TO SUPPRESS. EVEN INDEPENDENT OF THIS FAILURE, SUPPRESSION IS WARRANTED UNDER THE UTAH CONSTITUTION.

The appellate courts in Utah have long encouraged attorneys to advance arguments under the Utah Constitution. State v. Earl, 716 P.2d 803, 806 (Utah 1986) ("It is imperative that Utah lawyers brief this Court on relevant state constitutional questions."). It is therefore unsurprising that the Utah Supreme Court follows the primacy approach in reaching its decisions. Under the primacy approach, the Court "looks first to state constitutional law, develops independent doctrine and precedent, and decides federal questions only when state law is not dispositive." West v. Thompson Newspapers, 872 P.2d 999, 1005-06 (Utah 1994). A court's failure to undertake a state constitutional analysis "contributes to a paucity of precedent and the absence of an independent and adequate state ground" for the decision. State v. Briggs, 2008 UT 83, ¶ 52 (Durham, C.J., concurring).

Where a party develops a state constitutional argument, it should be incumbent on the State to carry its burden with respect to such an argument. Likewise, if the primacy model is to be taken seriously and the development of a state constitutional jurisprudence realized, courts should be required to meaningfully address state constitutional claims. In the district court, the State suggested that the shaping of the Utah Constitution should be left to the appellate courts. Such an approach constitutes an unwarranted abdication of its responsibility

under the Utah Constitution. If the Utah Constitution is to have any meaning independent of its federal counterpart, it is imperative that district courts–courts that hear the overwhelming majority of all the cases throughout the state–participate in defining the contours and boundaries of the state constitution.

In this case, it is clear that the State did not substantively address the defendant's arguments under the Utah Constitution. It is not enough to simply transfer the responsibility of responding to defendants' state constitutional claims to the appellate courts. The State's failure to address the defendant's state constitutional claim should be viewed for what it represents–a failure to carry its burden on the motion to suppress. Because the State had amply opportunity to respond and failed to do so, suppression is appropriate under the Utah Constitution. If, however, this court does not view the State's obvious failure as fatal in this instance, suppression is still warranted under the Utah Constitution, as detailed below.

Historical and Social Context of the Utah Constitution[13]

It is generally undisputed that Utah's history is unique. The original (non-native) settlers of Utah were literally driven out of settlements in three other states (primarily for

[13] Much of this historical framework is borrowed from Kenneth Wallentine's research. The historical analysis is intended to buttress the defendant's contention that the Utah Constitution was informed by specific concerns that suggest greater protection was intended under the state constitution. It should be noted, however, that a determination under state constitutional grounds does not depend on historical analysis. See State v. Tiedemann, 162 P.3d at 1114 (noting that "[h]istorical arguments may be persuasive in some cases, but they do not represent a sine qua non in constitutional analysis") (emphasis in original).

their religious practices and incidentally because of jealousy of their economic successes and mistrust of their tight-knight ecclesiastically oriented society) while governments in the other states at best turned a blind eye to their banishment and at worst acted with complicity. The settlers came to the west in an attempt to isolate themselves from persecution and to create an autonomous society. Their migration to the great basin was one of the largest mass migrations in the history of America.[14] The initial government of the immigrants when they arrived here was comprised of the leaders of their religion (The Church of Jesus Christ of Latter Day Saints [Mormons]) until the first of seven attempts at a constitution was drafted in 1849 (The Constitution of the State of Deseret).

"[The] Constitution of the State of Deseret was as much a public relations piece as an application for statehood, a document designed to show that the traditional political processes were alive and well in Deseret. ...Although the federal constitution was the ultimate prototype, there is little doubt that [it] was derived from the Iowa Constitution of 1846. In many respects the constitution of 1849 was similar to the Illinois Constitution of 1818, the constitution the Mormons had lived under in Nauvoo, Illinois.[15] From this first attempt at a written constitution followed six more attempts in 1856, 1862, 1872 (which used the Nevada Constitution of 1864 as a model), 1882, 1887, and 1895 (which borrowed heavily from earlier attempts at a Utah constitution as well as from the Constitutions of Nevada,

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[14] John J. Flynn, Federalism and Viable State Government– The History of Utah's Constitution, 1966 Utah Law Review 311.

[15] Flynn, at 315.

Washington, Illinois, and New York). This final draft was approved by voters on November 5, 1895. President Grover Cleveland proclaimed Utah a state on January 4, 1896.[16]

Heavily influencing the effort at arriving at a constitution that would be acceptable both to the inhabitants of the area and the U.S. Congress was the Mormon church's official pronouncement embracing the practice of plural marriage (polygamy) in 1852.[17] All drafting attempts after 1852 were undoubtedly affected by federal displeasure with such official practice.[18]

The U.S. Congress officially attempted to prosecute polygamy with the Morrill Act of 1862 and the Edmunds-Tucker Act of 1882.[19] These Acts were not directed at the disenfranchised. Rather, [b]y indicting the [Mormon] Church's leading figures, the government sought to set a vivid example for rank and file members, paralyze the Church's leadership, and cow the Mormon populace into submission to federal policy."[20] The federal plan ultimately worked – the Church's leadership was cornered into renouncing its endorsement of polygamy if any hope of statehood was to be realized. By 1893, after the

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[16] Flynn, at 316-325.

[17] Linford, The Mormons and the Law: The Polygamy cases, 9 Utah Law Review 308 (1964).

[18] Flynn, at 316.

[19] Firmage, Religion & the Law: The Mormon Experience in the Nineteenth Century, 12 Cardozo Law Review 765, (1991).

[20] Firmage, at 772.

Church had renounced polygamy and prosecutions had largely ceased, there had been 1,004 convictions for unlawful cohabitation and thirty-one for polygamy.[21] The 1887 Constitution contained a criminal law punishing polygamy[22] and the Constitution of 1895 included Article III, providing, inter alia, "polygamous or plural marriages are forever prohibited."[23] Statehood quickly followed in two months.

Mormons, a close and self sufficient society, suffered from organized persecution that was not held in check (and quite probably was encouraged) by three separate state governments. They undertook an arduous mass migration over great distances to both avoid the persecution and maintain their monolithic religious-based society. Once they arrived here they were made the further target of almost forty years of official federal legal pressure because of Congress' disapproval of their belief in polygamy. Ultimately, before the citizens of Utah were accepted into the union, the church which formed the foundation of their society was forced to take the step of publicly denouncing what had been a basic religious tenet (polygamy).

In this setting, for the fifty years immediately preceding acceptance into the union, several attempts were made at drafting a state constitution that would placate Congress. The seventh draft, prohibiting polygamy, finally secured statehood. The development of the State's present constitution and the intent of its various provisions, cannot be assessed

[21] Firmage, at 775.

[22] Flynn, at 320.

[23] Constitution of Utah, Article III, First: (1896).

without an appreciation of these dynamics.

Article I, Section 14 (prohibition against unreasonable searches and seizures) is no exception. A people who thrice were not protected by their local governments from mob violence, who–at the risk of annihilation–fled to a place of total isolation from other societies and all governments, who endured ridicule and systematic federal prosecution of their membership as well as their leaders for a core religious belief (the evidence for such prosecutions–plural wives and co-habitants–being harbored in their private homes), who maintained a public disagreement with the federal government for four decades, and who were forced to suffer public humiliation before acceptance by the federal government, would not have taken lightly the intrusion of those governments into their persons, houses, papers and effects.

Article I, Section 14 is a reflection of the people's feelings of hostility and distrust of a government perceived as inimical to their beliefs if not their existence. While the people's leaders had the federal text as a model for this section, they were also personally targets of federal polygamy prosecutions.[24] Consequently, the drafters of the various attempts at a state constitution very likely personally experienced searches of their homes and effects in conjunction with Morrill and Edmunds investigations and prosecutions.[25] The totality of this

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[24] Firmage, at 771-778.

[25] See Bradley, Hide and Seek: Children of the Underground, 51 Utah Historical Quarterly 133 (1983) (recounting how a polygamist's home was searched 100 times in a four year period); See also "How They Do It," Deseret News Weekly, January 20, 1886 at 1 (explaining how federal marshals entered a polygamist's home without a warrant and by breaking the door with an axe); Ivans, A Constitution for Utah, 25 Utah Historical

societal and constitutional history of Utah, therefore, strongly suggests a heightened appreciation and valuation of privacy rights. Accordingly, the defendant argues that Article I, Section 14 should be interpreted to provide greater protection against unjustified searches and seizures.

Indeed, Utah courts should adopt a clear cut rule in order to bypass the "labyrinth of rules" governing the search and seizure provisions of the federal constitution where circumstances so warrant. State v. Hygh, 711 P.2d 264, 271-72 (Zimmerman, J., concurring). Rather than employing a multi-factor test to gauge the permissible scope of detention, this Court should establish a bright-line test to determining whether police exceeded the permissible scope of detention. As Justice Marshall observed, setting a per se requirement that stops must be brief "yields the sort of objective standards mandated by our Fourth Amendment precedents, standards that would avoid placing courts in the awkward position of second-guessing police as to what constitutes reasonable police practice." Sharpe, 470 U.S. at 693 (Marshall, J., concurring). Mindful of the Terry Court's admonition that a stop "should be the least intrusive means reasonably available to verify or dispel the officer's

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Quarterly 95, 100 (1957); White, The Making of the Convention President: The Political Education of John Henry Smith, 39 Utah Historical Quarterly 351, 357 (1971) (detailing how John H. Smith, a Mormon apostle and President of the constitution convention of 1895 practiced polygamy and had been the target of federal marshals' searches); Paneck, A Peculiar People and Their Constitution: The Culture and Times of 19th Century Utah, 6, unpublished manuscript in the possession of Mr. Kenneth R. Wallentine (recording how several members of the subcommittee selected to draft the declaration of rights for the 1895 constitution had publicly protested the search and seizure practices of the federal marshals).

suspicion in a short period of time,"[26] defining what means are 'least intrusive' becomes "a virtually unmanageable and unbounded task." Sharpe, 470 U.S. at 694 (Marshall, J., concurring).

The American Law Institute has proposed an outer limit of 20 minutes,[27] the duration of the investigative detention in this case. While Utah courts have recognized this proposal, they have thus far declined to set an outer limit. See, e.g., Oliver, 139 P.3d at 285 n.6. Those courts have refused to set an outer limit based on federal constitutional analysis. Such a limit is justifiable under the Utah Constitution, however, because of the benefits to such a rule and the criticism of the amorphous standard currently in place. Indeed, even the twenty minute limit suggested by ALI has been criticized as too long. As Justice Marshall observed:

> I regard the American Law Institute's suggested maximum of 20 minutes as too long; 'any suggestion that the *Terry* reasonable-suspicion standard justifies anything but the briefest of detentions or the most limited searched finds no support in the *Terry* line of cases.'

Sharpe, 470 U.S. at 694 (Marshall, J., concurring) (citation omitted).

Because the drafters of the Utah Constitution were so fearful of unnecessary government intrusions, it should follow that any governmental intrusion must be necessarily circumscribed to comport with the Utah Constitution. Where, as here, the detention of Mr. Little was needlessly prolonged for 20 minutes without reasonable suspicion, suppression under the state constitution is appropriate.

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[26] Royer, 460 U.S. at 500.

[27] ALI, Model Code of Pre-Arraignment Procedure § 110.2(1) (1975).

CONCLUSION

Based upon the foregoing analysis, the evidence obtained as a result of the unlawful detention of Mr. Little should have been suppressed. Accordingly, the denial of the defendant's motion to suppress should be reversed.

RESPECTFULLY submitted on 21 June, 2011.

JEREMY M. DELICINO
Attorney for Appellant Todd Little

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was mailed/hand delivered on this 21 day of June, 2011, to:

Assistant Attorney General
160 East 300 South 6th Floor
Salt Lake City, Utah 84114

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee,	:	ADDENDUM
	:	Case No. 20100885-CA
vs.	:	
TODD JEREMY LITTLE, Defendant/Appellant.	:	

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A.

MOTION TO SUPPRESS

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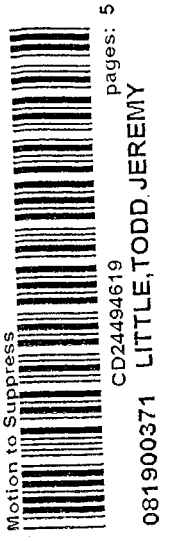

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH, OGDEN

THE STATE OF UTAH, AUG 29 2008	
Plaintiff,	**MOTION TO SUPPRESS**
v.	
TODD JEREMY LITTLE,	**Case No. 081900371**
Defendant.	Hadley

The defendant, through his attorney of record, Jeremy M. Delicino, hereby moves this court to suppress all evidence derived from the unlawful detention and *de facto* arrest of the defendant and the fruits thereof, pursuant to the Fourth Amendment of the United States Constitution and article I, section 14 of the Utah State Constitution. The defendant provides the following details to apprise the court of the pertinent issues, but requests that he be allowed to supplement this instant motion after an evidentiary hearing should the circumstances necessitate further briefing.[1]

Statement of Facts[2]

[1] In addition to the issues raised below, the defendant intends to inquire of the officers whether the statements elicited from the defendant were voluntary and followed appropriate *Miranda* warnings. As there is no discussion regarding these issues in the factual narrative written by the officers, the defendant seeks to preserve these issues for potential review.

[2] The statement of facts for the purposes of this motion are taken from the police reports, which were provided in the State's initial discovery disclosure. Clearly, the factual background will be more fully developed at the evidentiary hearing.

On December 29, 2007, Officer Brandon Peterson was dispatched to a Target store located on Riverdale Road. Officer Peterson arrived at the store at approximately 7:00 pm, and he parked his vehicle near the north doors of the store. Officer Warren also responded to the store, and he parked his vehicle near the south doors of the store. Officer Peterson was in contact with Jose Leon, a loss prevention officer for Target. Mr. Leon informed Peterson that there were two suspects inside the store acting suspiciously and possibly attempting to steal merchandise. Leon, however, also informed the officer that neither of the males had actually attempted to steal merchandise.

The individuals, later identified as Mark Hodgsen and Todd Little, exited the store and were each detained for questioning. Little exited the store and was detained by Officer Warren. Hodgsen exited the store and was detained by Officer Peterson. At the preliminary hearing, Officer Peterson indicated that he and Officer Warren made contact with the defendants at approximately 7:05 to 7:10 p.m. Hodgsen was placed into handcuffs until further questioning could be completed; at one point, Hodgsen was placed in the patrol car. Officer Peterson indicated that he questioned Hodgsen for 5-10 minutes. Little was also placed in handcuffs and was questioned by Officer Warren.

At approximately 7:30 p.m., Officer Curtis Jones arrived at the Target store to assist the other officers. According to his report, he "was made aware that they [the officers] were speaking with two males suspected to be involved." Officer Jones made contact with Ellen Little, the defendant's mother, who indicated that her son met her at the store in his vehicle. Jones then approached the defendant, who was with Officer Peterson at this time, and asked him where his truck was. The defendant indicated that he didn't drive to the store, which contradicted the information provided by his mother. After searching for the defendant's vehicle, officers located the truck and observed suspected drug paraphernalia in plain view. A subsequent search of the vehicle also revealed the presence of controlled substances.

The Arrest of the Defendant Was Unconstitutional Because it Was Not Supported by Probable Cause.

The defendant submits that his arrest was not supported by probable cause. It is anticipated that testimony at the evidentiary hearing will establish that the defendant was placed in handcuffs and questioned by officers. The officers commenced their investigation while the defendant was handcuffed, essentially resulting in a *de facto* arrest of the defendant.[3] Probable cause exists only when the "facts and circumstances within the officer's knowledge ... are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *State v. Henderson*, 159 P.3d 397, 399 (Ut. App. 2007). Although the defendant is somewhat constrained in his analysis by the sparse details set forth in the officers' respective factual narratives, from the details provided there is no justification for the arrest. There is no indication that the defendant had committed any offense whatsoever; indeed information provided by the loss prevention officer indicated that neither of the suspects made any attempt to steal merchandise. Further, the information provided to Officer Peterson indicated that the suspects were in the electronics department; neither of the suspects exited the store with any merchandise, certainly not large and conspicuous electronic equipment. It was only after the unlawful *de facto* arrest of the defendant that potentially incriminating evidence was

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[3] The defendant does not contest the formal arrest that occurred subsequent to the discovery of controlled substances in his vehicle, but contends that the formal arrest was a fruit of the unlawful *de facto* arrest that occurred earlier.

Courts have long recognized that excessive detentions can become *de facto* arrests. *See Hayes v. Florida*, 470 U.S. 811, 815-16 (1985) ("At some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments."); *Florida v. Royer*, 460 U.S. 491, 499 (1983) ("Detentions may be 'investigative' yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not ... seek to verify their suspicions by means that approach the conditions of arrest.").

revealed.[4]

The Officers Did Not Have Reasonable Suspicion to Detain or Extend the Detention of the Defendant.

In addition to the lack of probable cause to support an arrest, the defendant submits that there was no reasonable suspicion to justify the initial investigative detention of the defendant. For purposes of the Fourth Amendment, Utah recognizes three levels of encounters between citizens and law enforcement:(1) an officer may approach a citizen at any time and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; and (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed. *State v. Alverez*, 147 P.3d 425 (Utah 2006). The defendant suggests that the officers' *de facto* arrest made this a level three encounter, thus requiring probable cause. Even if the defendant concedes, however, that the officers did not arrest the defendant, the officers still lacked the articulable suspicion to warrant a level two encounter.

An investigative detention is permissible only when officers "have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51 (1979). Further, the reasonableness of an officer's actions in the context of an investigative detention requires a dual inquiry. *State v. Worwood*, 164 P.3d 397, 407 (Utah 2007). Courts must first consider "whether the officer's action was justified at its inception." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968). Second, courts consider whether the length and scope of the

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[4] While the officers may suggest that the suspects were only detained for questioning, as they do in their reports, the fact that each was placed in handcuffs for an extended period of time at the very least suggests that their freedom was curtailed to a degree associated with formal arrest. In addition, at least one suspect was actually placed in the patrol car while the officers continued to investigate.

detention are " 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.* (citing *Terry*, 392 U.S. at 19); *State v. Chism*, 2005 UT App 41, ¶ 15 ("No person may be detained except upon reasonable suspicion, and the scope of the detention must be limited to addressing the articulated grounds for the stop.").

In this case, the officer did not have reasonable suspicion as he did not have any articulable facts suggesting that the defendant was involved in criminal activity. While there may have been some initial suspicion, any suspicion was dispelled by the loss prevention officer himself, who indicated that the suspects had not attempted to steal any merchandise. In addition, even if there existed reasonable suspicion at the outset, such suspicion dissipated once the officers recognized that the suspects did not have any stolen merchandise. The officers were not justified in handcuffing the defendant and detaining him for additional questioning, particularly where the questioning lasted as long as it did here. As such, the investigative detention was unreasonable and thus unconstitutional. Further, because the evidence located in the defendant's truck was a fruit of the unconstitutional detention, it should be suppressed as a matter of law.

DATED this 22nd day of August, 2008.

JEREMY M. DELICINO
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was mailed/hand delivered on this 25 day of August, 2008 to:

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B.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS

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IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH, OGDEN

THE STATE OF UTAH,	:	
Plaintiff,	:	**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS**
v.	:	**Case No. 081900371**
TODD JEREMY LITTLE,	:	Judge Hadley
Defendant.	:	

SEP 17 2008

The defendant, through his attorney of record, Jeremy M. Delicino, hereby submits the following supplemental memorandum in support of the defendant's motion to suppress. This memorandum is intended to supplement the defendant's initial supporting memorandum by providing an analysis of the basis for suppression under the Utah State Constitution.[1]

I. THE HISTORY OF SEARCH AND SEIZURE PROTECTIONS IN THE UTAH CONSTITUTION SHOULD PROVIDE EVEN GREATER PROTECTION AGAINST INTRUSIONS THAN THE FOURTH AMENDMENT OF THE UNITED STATES

[1] Counsel previously raised the protections of the Utah Constitution in his initial motion to suppress, but did not fully brief the issue in the initial memorandum. Because the State has been directed to file its memorandum before the defendant's reply/supplemental memo, the defendant submits this supplemental memorandum before the State's memo so that the State may respond to the state constitutional arguments raised herein.

CONSTITUTION. GREATER PROTECTION IN THIS CASE WARRANTS SUPPRESSION UNDER THE UTAH CONSTITUTION.[2]

A state may interpret its own constitution in a manner different (and more expansively) than the United States Supreme Court's interpretation of a similar federal provision,[3] so long as it does not reach a result providing its citizens with fewer rights than those guaranteed by the Constitution of the United States. Malan v. Lewis, 693 P.2d 661 (Utah 1984). On several occasions the Utah Supreme Court has shown a willingness to make substantive law based solely on the Utah Constitution.[4]

Utah's Supreme Court has the authority to interpret Utah's constitutional search and seizure provisions differently than the corresponding federal provisions, and it has developed Utah Constitutional law that sometimes diverges from federal law. In this context, the defendant believes that it is proper for a trial court to consider an interpretation that is more expansive than federal interpretations. As Oregon Justice Hans Linde has stated,

A lawyer today representing someone who claims some constitutional protection

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[2] Much of the following discussion comes in large part from analysis by defense attorney Thomas Means as well as Kenneth R. Wallentine, *Heeding the Call: Search and Seizure Jurisprudence under the Utah Constitution, Article I, Section 14*, 17 J. Contemp. L. 267 (1991).

[3] Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Herb v. Pitcairn, 324 U.S. 117 (1945); Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1965).

[4] See, e.g., American Fork City v. Cosgrove, 701 P.2d 1069 (Utah 1985) (scope of privilege against self-incrimination); Malan v. Lewis, 693 P.2d 661 (Utah 1984) (automobile guest statute); State v. Ball, 685 P.2d 515 (Utah 1984) (questioning a juror about drinking alcohol); Gray v. Employment Security, 681 P.2d 807 (Utah 1984) (Durham, J., concurring and dissenting, due process regarding unemployment benefits); State v. Larocco, 794 P.2d 460 (Utah 1990) (automobile exception to warrant requirement); State v. Thompson, 810 P.2d 415 (Utah 1991 (exception of privacy in bank records); Zissi v. State Tax Comm'n of Utah, 842 P.2d 848 (Utah 1992) (Utah Constitutional exclusionary rule prevents admission of illegally seized evidence at Commission hearing).

> and who does not argue that the state constitution provides that protection is skating on the edge of malpractice.

Welsh & Collins, Taking State Constitutions Seriously, 14 The Center Mag. 6, 12 (Sept./Oct. 1981). The Utah Supreme Court has frequently recognized its obligation to evaluate the Utah constitutional protections, recently remarking that

> This court, not the United States Supreme Court, has the authority and obligation to interpret Utah's constitutional guarantees... and we owe federal law no more deference in that regard than we do sister state interpretation of identical state language."

State v. Tiedemann, 162 P.3d 1106 (Utah 2007). Justice Stevens likewise recognized the power of Utah courts to endow its citizens with more protections under the Utah constitution than its federal counterpart. As he noted in Brigham City v. Stuart, 126 S.Ct 1943, 1950 (2006) (Stevens, J., concurring),

> Our holding today addresses only the limitation placed by the Federal Constitution on the search at issue; we have no authority to decide whether the police in this case violated the Utah Constitution.
> The Utah Supreme Court, however, has made clear that the Utah Constitution provides greater protection to the privacy of the home than does the Fourth Amendment.

Given the greater protections afforded under the Utah constitution, the defendant submits that the issue of excessive detention should weigh in favor of the defendant. The basis for this assertion finds support in the unique historical underpinnings of the search and seizure provisions of the Utah Constitution.

Historical and Social Context of the Utah Constitution[5]

[5] Again, much of this historical framework is borrowed from Kenneth Wallentine's research. The defendant provides historical analysis to buttress the defendant's contention that the Utah Constitution was informed by specific concerns that suggest greater protection was intended under the state constitution. The defendant notes, however, that a determination under

It is generally not disputed that Utah's history is unique. The original (non-native) settlers of Utah were literally driven out of settlements in three other states (primarily for their religious practices and incidently because of jealousy of their economic successes and mistrust of their tight-knight ecclesiastically oriented society) while governments in the other states at best turned a blind eye to their banishment and at worst acted with complicity. The settlers came to the west in an attempt to isolate themselves from persecution and to create an autonomous society. Their migration to the great basin was one of the largest mass migrations in the history of America.[6] The initial government of the immigrants when they arrived here was comprised of the leaders of their religion (The Church of Jesus Christ of Latter Day saints [Mormons]) until the first of seven attempts at a constitution was drafted in 1849 (The Constitution of the State of Deseret).

"[The] Constitution of the State of Deseret was as much a public relations piece as an application for statehood, a document designed to show that the traditional political processes were alive and well in Deseret. ...Although the federal constitution was the ultimate prototype, there is little doubt that [it] was derived from the Iowa Constitution of 1846. "In many respects the constitution of 1849 was similar to the Illinois Constitution of 1818, the constitution the Mormons had lived under in Nauvoo, Illinois.[7] From this first attempt at a written constitution

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state constitutional grounds does not depend on historical analysis. See State v. Tiedemann, 162 P.3d at 1114 (noting that "[h]istorical arguments may be persuasive in some cases, but they do not represent a sine qua non in constitutional analysis") (emphasis in original).

[6]John J. Flynn, Federalism and Viable State Government– The History of Utah's Constitution, 1966 Utah Law Review 311.

[7]Flynn, at 315.

followed six more attempts in 1856, 1862, 1872 (which used the Nevada Constitution of 1864 as a model), 1882, 1887, and 1895 (which borrowed heavily from earlier attempts at a Utah constitution as well as form the Constitutions of Nevada, Washington, Illinois, and New York). This final draft was approved by voters on November 5, 1895. President Grover Cleveland proclaimed Utah a state on January 4, 1896.[8]

Heavily influencing the effort at arriving at a constitution that would be acceptable both to the inhabitants of the area and the U.S. Congress was the Mormon church's official pronouncement embracing the practice of plural marriage (polygamy) in 1852.[9] All drafting attempts after 1852 were undoubtedly affected by federal displeasure with such official practice.[10]

The U.S. Congress officially attempted to prosecute polygamy with the Morrill Act of 1862 and the Edmunds-Tucker Act of 1882.[11] These Acts were not directed at the disenfranchised. Rather, [b]y indicting the [Mormon] Church's leading figures, the government sought to set a vivid example for rank and file members, paralyze the Church's leadership, and cow the Mormon populace into submission to federal policy."[12] The federal plan ultimately worked – the Church's leadership was cornered into renouncing its endorsement of polygamy if

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[8]Flynn, at 316-325.

[9]Linford, The Mormons and the Law: The Polygamy cases, 9 Utah Law Review 308 (1964).

[10]Flynn, at 316.

[11]Firmage, Religion & the Law: The Mormon Experience in the Nineteenth Century, 12 Cardozo Law Review 765, (1991).

[12]Firmage, at 772.

any hope of statehood was to be realized. By 1893, after the Church had renounced polygamy and prosecutions had largely ceased, there had been 1,004 convictions for unlawful cohabitation and thirty-one for polygamy.[13] The 1887 Constitution contained a criminal law punishing polygamy[14] and the Constitution of 1895 included Article III, providing, inter alia, "polygamous or plural marriages are forever prohibited."[15] Statehood quickly followed in two months.

Mormons, a close and self sufficient society, suffered from organized persecution that was not held in check (and quite probably was encouraged) by three separate state governments. They undertook an arduous mass migration over great distances to both avoid the persecution and maintain their monolithic religious-based society. Once they arrived here they were made the further target of almost forty years of official federal legal pressure because of Congress' disapproval of their belief in polygamy. Ultimately, before the citizens of Utah were accepted into the union, the church which formed the foundation of their society was forced to take the step of publicly denouncing what had been a basic religious tenet (polygamy).

In this setting, for the fifty years immediately preceding acceptance into the union, several attempts were made at drafting a state constitution that would placate Congress. The seventh draft, prohibiting polygamy, finally secured statehood. The development of the State's present constitution and the intent of its various provisions, cannot be assessed without an appreciation of these dynamics.

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[13]Firmage, at 775; see also L. Arrington, Great Basin Kingdom: An Economic History of the Latter Day Saints 1830 - 1900, (1958).

[14]Flynn, at 320.

[15]Constitution of Utah, Article III, First: (1896).

Article I, Section 14 (prohibition against unreasonable searches and seizures) is no exception. A people who thrice were not protected by their local governments from mob violence, who–at the risk of annihilation–fled to a place of total isolation from other societies and all governments, who endured ridicule and systematic federal prosecution of their membership as well as their leaders for a core religious belief (the evidence for such prosecutions–plural wives and co-habitants–being harbored in their private homes), who maintained a public disagreement with the federal government for four decades, and who were forced to suffer public humiliation before acceptance by the federal government, would not have taken lightly the intrusion of those governments into their persons, houses, papers and effects.

Article I, Section 14 is a reflection of the people's feelings of hostility and distrust of a government perceived as inimical to their beliefs if not their existence. While the people's leaders had the federal text as a model for this section, they were also personally targets of federal polygamy prosecutions.[16] Consequently, the drafters of the various attempts at a state constitution very likely personally experienced searches of their homes and effects in conjunction with Morrill and Edmunds investigations and prosecutions.[17] The totality of this societal and

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[16]Firmage, at 771-778.

[17]See Bradley, Hide and Seek: Children of the Underground, 51 Utah Historical Quarterly 133 (1983) (recounting how a polygamist's home was searched 100 times in a four year period); See also "How They Do It," Deseret News Weekly, January 20, 1886 at 1 (explaining how federal marshals entered a polygamist's home without a warrant and by breaking the door with an axe); Ivans, A Constitution for Utah, 25 Utah Historical Quarterly 95, 100 (1957); White, The Making of the Convention President: The Political Education of John Henry Smith, 39 Utah Historical Quarterly 351, 357 (1971) (detailing how John H. Smith, a Mormon apostle and President of the constitution convention of 1895 practiced polygamy and had been the target of federal marshals' searches); Paneck, A Peculiar People and Their Constitution: The Culture and Times of 19th Century Utah, 6, unpublished manuscript in the possession of Mr. Kenneth R. Wallentine (recording how several members of the subcommittee selected to draft the declaration

constitutional history of Utah, therefore, strongly suggests a heightened appreciation and valuation of the privacy rights. Accordingly, the defendant argues that Article I, Section 14 should be interpreted to provide greater protection against unjustified searches and seizures.

The Utah Supreme Court has already decided a case which is in some ways analogous to the case before this Court. In State v. Thompson, 810 P.2d 415, defendants sought protection under Article I, Section 14 from the government's search of their bank records held by their banks. The banks and not the defendants had been the subject of the searches. Defendants asserted a reasonable expectation of privacy in the bank records held by their banks, notwithstanding that the United States Supreme Court had previously held that no such expectation of privacy was recognized under the Fourth Amendment to the Constitution of the United States.[18] Noting that other state courts had rejected the Miller holding under their state constitutions, and further noting that such other state courts "found the rationale in Katz v United States, that the 'the Fourth Amendment protects people, not places,' to be more persuasive than that of Miller[,]" the Court agreed with the defendants that Article I, Section 14 of the Utah Constitution recognized a right of privacy in the defendants to the bank records held by their banks.

Justice Zimmerman, concurring in the holding of Thompson, stated:

> [w]e are rejecting the argument advanced by the State that we should follow federal standing law and deny those not directly subjected to the search any right to challenge its legality. [Citations omitted]
> I find this entirely appropriate. Even where federal rights are at stake, standing

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of rights for the 1895 constitution had publicly protested the search and seizure practices of the federal marshals).

[18]United States v. Miller, 425 U.S. 435 (1976)

> law is state law, and we are not bound to follow federal precedent. [Citation omitted] In the area of search and seizure, the federal courts have developed extraordinarily restrictive doctrines that have the effect, if not the purpose, of placing a large percentage of illegal activities beyond the scrutiny of the courts. [Citations omitted] I see no reason for us to follow suit, especially when state constitutional rights, which we have a peculiar obligation to protect are at stake.

Because the court in Thompson found defendants had standing to challenge the search, it also necessarily found defendants had a reasonable expectation of privacy in the records left with their banks.[19] Justice Zimmerman emphasized two important points in his concurring opinion: a) standing (and therefore a determination of a claim of a reasonable expectation of privacy) is state law, and b) restrictive federal doctrines that serve to insulate illegal searches from judicial scrutiny should not be adhered to by this State. Thompson therefore stands for the principle that determining the reasonableness of one's expectation of privacy (the issue rased in this case by this defendant) is a state law issue and that the guidelines developed by federal decisions interpreting the Fourth Amendment should not necessarily be followed.

The defendant argues that Thompson allows, if not directs, this Court to make an independent determination under Article I, Section 14 of the Utah Constitution, of whether the detention of the defendant in this case is permissible under the Utah Constitution. The defendant believes that Thompson further suggests that federal search and seizure principles and holdings in this regard are not necessarily controlling in such a determination. Indeed, this court may give a more expansive reading to the defendant's rights than provided by the Fourth Amendment.[20]

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[19]See Rakas v Illinois, 439 U.S. 128 (1978)

[20] See, e.g., State v. Larocco, 794 P.2d 460, 467-70 (Utah 1990) (plurality opinion) (recognizing "significant confusion" in federal search and seizure law and taking the opportunity to simplify search and seizure rules under the Utah Constitution by interpreting article I, section 14 to provide greater privacy protections with regard to automobile searches than the federal

The unique history of the Utah Constitution, drafted in part to ward against the frequent encroachments on the settlers' rights, clearly demonstrates that protection augmenting that offered by the Fourth Amendment is warranted in this case.

CONCLUSION

Based on the foregoing, the defendant believes that the detention (and *de facto* arrest) of the defendant in this case contravenes the requirements of the United States and Utah Constitutions. In addition, prudent public policy justifies suppression in this case. The court should not condone the actions of officers who detain an individual to conduct an investigation for which they have no reasonable suspicion. Upholding this detention would provide an incentive to law enforcement officers to simply prolong citizen encounters and detentions and conduct unbridled investigations, potentially subverting the protections of both the Utah and United States Constitutions. Requiring that an officer let an individual proceed when there is no basis for further detention in no way imposes a hardship on the officer, nor does such a requirement unduly impair the objectives of law enforcement in general; indeed, the requirement that an officer have reasonable suspicion before prolonging a detention beyond its permissible scope merely comports with the basic tenets and guarantees of search and seizure jurisprudence. Suppression is an appropriate remedy to deter the misconduct in this case. As the Supreme Court has noted, "the purpose behind excluding evidence obtained by police exploitation [of a prior illegality] is 'to compel respect for the constitutional guaranty in the only effectively available

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constitution); State v. DeBooy, 2000 UT 32, ¶¶ 12 (recognizing that article I, section 14 of the Utah Constitution and the Fourth Amendment contain identical language, but stating that the court "will not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state's citizens").

way–by removing the incentive to disregard it.'" Brown v. Illinois, 422 U.S. 590, 599-600 (1975) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

DATED this 15th day of September, 2008.

JEREMY M. DELICINO
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was mailed/hand delivered on this 15 day of September, 2008 to:

Nathan Lyon
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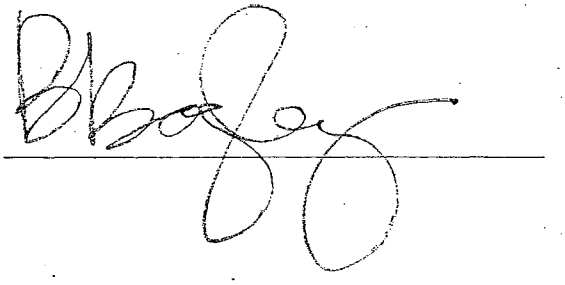

C.

STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRES

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**IN THE SECOND DISTRICT COURT OF WEBER COUNTY,
STATE OF UTAH**

STATE OF UTAH, Plaintiff, vs. TODD JEREMY LITTLE, Defendant.	STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS Case No. 081900371 Judge: Scott M. Hadley

COMES NOW, Nathan D. Lyon, Deputy Weber County Attorney, in and for the State of Utah, and requests that this Court deny Defendant's motion to suppress. The State's argument is set more fully below.

On December 19, 2008, Riverdale police officers Brandon Peterson and Casey Warren responded to Target when Loss Prevention (LP) agent Jose Leon suspected two individuals of shoplifting. Mr. Leon initially spoke with Officer Peterson and articulated what appeared to be two males in the store engaging in conduct consistent with shoplifting. He further stated that he had not yet seen either of the two take anything, but one of the males had done something to a television in the electronics department, and the picture became scrambled.

Officer Peterson positioned his patrol car outside of the North doors, and Officer Warren positioned his patrol vehicle at the South doors and waited for the suspects to exit the store. The

first suspect, later identified as Mark Hodgsen, exited the North doors and was contacted by Officer Peterson. Mr. Hodgsen was detained, and at some point, placed in handcuffs when he was placed in the Officer Peterson's patrol car.

A few minutes after Mr. Hodgsen exited the store through the North doors, the Defendant exited the store through the South doors. Officer Warren believed the Defendant to be the suspect based upon the description given to him and the Defendant's physical appearance. Officer Warren got the Defendant's attention by calling to him. When the Defendant turned around, Officer Warren identified himself as a police officer and asking the Defendant if he would speak with him for a few minutes. The Defendant consented. Officer Warren and the Defendant walked to the North side of the building where Officer Peterson was speaking with Mr. Hodgson in his patrol car. Officer Warren, while he was unable to recall specifically, stated that he was almost certain that the Defendant was not in handcuffs at this time. While waiting for Officer Peterson to finish speaking with the Mr. Hodgson, Officer Warren made casual conversation with the Defendant about what he was doing and his activity in Target. The Defendant stated that he was at Target to help his mother with some shelves that she was purchasing. He also stated that he had not driven to Target, but had received a ride from his girlfriend.

After finishing speaking with Mr. Hodgson, Officer Peterson next spoke with the defendant. At the conclusion of that discussion, Officers Peterson and Warren and Sargent Curtis Jones, who had arrived to provide additional backup, conversed as to how to handle the situation. The officers concluded that there was insufficient evidence to cite or arrest either Mr. Hodgson or the Defendant with any crime. At that point in time the Defendant and Mr. Hodgson were told that they were free to leave. Mr. Hodgson walked away, but the Defendant voluntarily remained

at the scene.

During the course of this investigation, Sgt. Jones had previously spoken to the Defendant's mother. In speaking with her, the officers knew that the Defendant had driven to Target and had given a description of his vehicle. After releasing both the Defendant and Mr. Hodgson, Officer Warren began to drive around the parking lot to locate the Defendant's vehicle. While Officer Warren was looking in the parking lot, the Defendant continued to insist that he had not driven to Target, but watched Officer Warren intently. Once the vehicle was located, he radioed to Sgt. Jones, who was conversing with the Defendant. Sgt. Jones asked the Defendant if the truck Officers Warren and Peterson were standing next to was his. He agreed that it was. Looking through the windows of the truck, Officer Peterson was able to see what appeared to be a marijuana pipe. When confronted about the pipe, the Defendant indicated that it was in fact a marijuana pipe, and there was marijuana in the car as well. A search of the vehicle revealed psilocyn and methamphetamine.

DISCUSSION

The Defense seeks to suppress the evidence discovered in the Defendant's car based upon the lack of reasonable suspicion to initially stop and detain the defendant, and the de fact arrest that occurred when the Defendant was placed in handcuffs.

The State asserts that the initial contact with the defendant was supported by reasonable suspicion. The State does not concede that the Defendant was handcuffed during the stop. However, even if he was, the Defendant would have been uncuffed and permitted to leave after the officers determined there was insufficient evidence to cite or arrest him or Mr. Hodgson. When the Defendant and Mr. Hodgson were told they were free to leave, the Defendant's

voluntary interaction with the officers was a consensual level one encounter. Because it was during this level one encounter that the contraband was discovered, the evidence should not be suppressed.

ARGUMENT

I.

OFFICER WARREN HAD REASONABLE SUSPICION TO STOP THE DEFENDANT

The Utah Supreme Court has outlined the three types of citizen encounters with law enforcement officials:

> A level one citizen encounter with a law enforcement official is a consensual encounter wherein a citizen voluntarily responds to a non-coercive questioning by an officer. Since the encounter is consensual, and the person is free to leave at any point, there is not seizure within the meaning of the *Fourth Amendment*.
>
> A level two encounter involves an investigative detention that is usually characterized as a brief and non-intrusive. Although it is a Fourth Amendment seizure, probable cause is not required. Rather, when specific and articulable facts and rational inferences give rise to a reasonable suspicion a person has or is committing a crime, an officer may initiate an investigative detention without consent.
>
> A level three encounter involves an arrest, which has been characterized as a highly intrusive or lengthy detention that requires probable cause. A level three encounter is also a Fourth Amendment seizure.

State v. Hansen, 63 P.3d 650, 661 (Utah 2002) (Internal quotations and citations omitted).

Therefore, in order to justify a stop of an individual, "the officer's suspicion must be supported by 'specific and articulable facts and rational inferences.'" *State v. Markland, 112 P.3d 507, 509-510 (Utah 2005) quoting United States v. Werking, 915 F.2d 1404, 1407 (10th Cir.*

1990). When analyzing level two stops, Utah courts employ a two-part test: the first step is to determine whether the police officer's action was justified at it's inception. Under the second step, we must determine whether the detention following the stop was reasonably related in scope to the circumstances that justified the interference in the first place. *State. v. Applegate, 194 P.3d 925, P9 (Utah 2008)*. It is important to frame this two-step analysis in reference to the appropriate burden of proof: "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Id. at 274*. Further, a court reviewing whether reasonable suspicion exits "must view the articulable facts in their totality and avoid the temptation to divide the facts and evaluate them in isolation." *Markland, 112 P.3d at 510 (internal quotes and cites omitted)*. It is with these guiding principles that we now turn to the facts of the instant case.

Officer Warren's stop of the Defendant was justified from its inception. Officer Warren had received information from the loss prevention agent via Officer Peterson that there were two males inside Target who appeared to be engaged in shoplifting. Specifically, one male appeared to be acting as a lookout as the other fiddled with the back of a television, which caused the screen to suddenly become scrambled. It was later determined that Mr. Hodgson was the individual believed to be acting as the lookout and the Defendant was suspected of shoplifting. Officer Warren had the description of the suspects, and he stopped the Defendant outside the store when he saw he matched the description of the suspect. Officer Warren identified himself as a police officer and asked if he would speak with him. The Defendant complied with this request. Officer Warren asked if he could pat down him down for weapons. The Defendant again complied. Officer Warren did not thoroughly search the Defendant. Instead, he did a proper *Terry*

pat-down for weapons, which yielded nothing. Up to this point in time, this is a level one stop. Officer Warren has not exercised any show of authority or used any language to suggest that his cooperation might be compelled should he refuse to comply with Officer Warren's requests.

The level one encounter escalates into a level two stop at some point when the Defendant is taken from the South side of the store to the North side, where he joins Mr. Hodgson and Officer Peterson. When the Defendant is taken to the North side of the store, Mr. Hodgson is already handcuffed and sitting in Officer Peterson's truck. Officer Warren tells the Defendant that they need to wait just a minute so Officer Peterson can speak with him. Even though the initial contact with the Defendant was voluntary, a reasonable person would likely not feel free to leave when he is told to wait outside the police car while another officer deals with his friend, who is in handcuffs. Because a reasonable person would believe that they were not free to leave, the Defendant's detention must be supported by reasonable suspicion.

The level two stop was supported by reasonable suspicion from its inception. The LP was watching the Defendant and Mr. Hodgson from the security cameras in the store, which was suspicious to him because it appeared one was keeping a lookout and while the other shoplifted. While watching this behavior, the LP sees the Defendant reach behind a display television and do something that causes the screen to become scrambled. This causes the call to be made to police. These facts describe reasonable suspicion that a crime might have occurred. While it the police do not know what happened, and there might be innocent explanations for why the television became scrambled, it is well settled law that a officers "need not rule out the possibility of innocent conduct." *United States v. Arvizu, 534 U.S. 266, 273 (2002)*. Rather, Officer Warren need only reasonably suspect that the Defendant had violated any number of laws. *See Applegate*

194 P.3d at P12. Given the circumstances that were presented to the officers, it is reasonable for them to suspect that the Defendant either stole an essential part to the television or committed criminal mischief, which caused it to become scrambled. Under either scenario, these facts provide reasonable suspicion for Officer Warren to stop and detain the Defendant. Because the officers had reasonable suspicion, the detention was lawful.

There is a factual dispute as to whether the Defendant was ever placed in handcuffs. The Defendant alleges that he was placed in cuffs when he was walked from the South to the North side of the store. The officers, while not absolutely certain, testified that they believed the Defendant was never placed in cuffs. Officer Warren, who the Defendant alleges placed in him cuffs, testified that he was 95% certain that he never placed the Defendant in handcuffs. While this factual dispute still remains, ultimately it is a moot point because both the Defendant and Mr. Hodgson are not arrested and are released without any citation.

At the conclusion of their investigation, the officers determine that the Defendant and Mr. Hodgson should be released. It is at this time that Mr. Hodgson is uncuffed and is told that he is free to leave. Mr. Hodgson immediately leaves the scene on foot. The Defendant was similarly told that he was free to leave. While Officer Warren was uncertain whether he had handcuffed the Defendant, he is very certain that the Defendant was not in handcuffs when he was told he was free to leave. Therefore, even if handcuffs had been placed on him previously, the handcuffs certainly would have been taken off. Indeed, no reasonable person would leave with cuffs still on their hands, and any officer would not let someone leave with their handcuffs. But instead of leaving as Mr. Hodgson had done, the Defendant remains at the scene. Because he had lied to the officers about receiving a ride to Target, the State assumes he stayed at the scene, anticipating the

officers would leave and he could retrieve his truck. Because he voluntarily stayed after being told that he was free to leave, any incidental contact and conversation with the police was conducted as a level one contact.

While the Defendant voluntarily stays with Sgt. Jones, Officers Warren and Peterson search the parking lot for a truck that matches the description given by the Defendant's mother. At this point, the Defendant is not being detained, and what the Defendant has voluntarily placed and displayed in a public parking lot is not subject to any constitutional protections. As the officers are searching the parking lot, the Defendant is watching them intently. When the officers discover the vehicle, Sgt. Jones asked the Defendant if the truck they were standing next to was his. After hesitating, he responded that it was. Sgt. Jones asked if there was any stolen property, and the Defendant quickly stated "no". Sgt. Jones next asked if there were any drugs or paraphernalia in the truck. The Defendant never answered that question. About that time, Officer Peterson notified Sgt. Jones that they had discovered drug paraphernalia in plain view in the truck. The Defendant had voluntarily agreed to go to the truck with Sgt Jones. However, even if he had not, the officers had probable cause to arrest the Defendant at that point in time.

II.

THIS COURT SHOULD FOLLOW ESTABLISHED LEGAL PRECEDENT

The Defendant provides an excellent summary of the origins of the Utah Constitution. However, he falls short in providing little, if any, guidance as to how this Court should interpret the Utah Constitution more narrowly than the United States Constitution. It is the State's position that while the Utah Supreme Court might encourage the defense bar to appeal cases so that the Utah Constitution can become more defined, this Court should follow established and sound

legal precedent. The shaping and defining of the Utah Constitution should be left to the appellate courts.

CONCLUSION

The officers had reasonable suspicion that the Defendant and Mr. Hodgson had committed a crime inside of Target. Based upon this information relayed to them from the Target LP, the officers detained Mr. Hodgson and the Defendant. The Defendant may or may not have been placed in handcuffs. Regardless of the conclusion, the result is the same. When the Defendant was told that he was free to leave, he was not in handcuffs, and thus permitted to leave. Mr. Hodgson left the scene, but the Defendant chose to stay, presumably to get his car after officers left the scene. While having a consensual encounter with Sgt. Jones, Officers Jones and Warren discover the Defendant's truck, and ultimately the contraband. The Defendant's rights were not violated at the inception because the stop was supported by reasonable suspicion. The discovery of the contraband occurred when he voluntarily spoke with Sgt. Jones while the officers searched a public place where the Defendant had knowingly parked and displayed his truck to the general public. Because this encounter was consensual and the Officers discovered it in a place where they had a legal right to be, there was no violation of his constitutional rights.

Dated this 17th day of December, 2008.

Nathan D. Lyon
Deputy Weber County Attorney

CERTIFICATE OF SERVICE

I hereby certify that the true and correct copy of the foregoing *State's Objection to Defendant's Motion to Suppress* was hand-delivered, mailed with postage paid, or delivered via facsimile transmission to the following:

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A Seamons

D.

DEFENDANT'S REPLY TO STATE'S RESPONSE

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JAN 13 2009

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH, OGDEN

THE STATE OF UTAH,	:	
Plaintiff,	:	**DEFENDANT'S REPLY TO STATE'S RESPONSE**
v.	:	**Case No. 081900371**
TODD JEREMY LITTLE,	:	Judge Hadley
Defendant.	:	

SECOND DISTRICT COURT
2009 JAN -7 P 1:47

The defendant, through his attorney of record, Jeremy M. Delicino, hereby replies to the "State's Response to Defendant's Motion to Suppress."

STATEMENT OF FACTS[1]

On December 19, 2007, police officers Brandon Peterson and Casey Warren, both in police uniform and carrying handguns on their person, responded to the Target store in Riverdale.[2] The officers had obtained information from a loss prevention officer at the store that

[1] The defendant provided a statement of facts in his initial motion to suppress, reserving the opportunity to furnish the relevant background following the evidentiary hearing. See Motion to Suppress at n.2. As such, this statement of facts is derived from the testimony presented at the evidentiary hearing.

[2] Officers indicated that they received a call from dispatch at roughly 6:56 p.m. and arrived at the Target minutes later.

there were two individuals, later identified as Todd Little and Mark Hodgson, acting suspiciously. Significantly, loss prevention at Target had informed the officers that they had not seen the suspects take anything or attempt to conceal anything despite watching the suspects in the store. There was some indication that one of the males had fiddled with a television, causing the picture to become scrambled, but apparently no followup investigation was done to check on the television.

When the officers arrived at the store, they parked outside and waited for the suspects to exit. During this time, the officers were in contact with loss prevention, but again never received any indication that the suspects had attempted to take any merchandise. When Mr. Little exited the store through the south doors, he walked towards the parking lot.[3] Officer Warren called to the defendant and identified himself as a police officer, and he asked Little if he would speak to him. At roughly the same time, Hogdson exited the north doors of the store and was confronted by Officer Peterson, who quickly handcuffed Hogdson and placed him in the patrol car. Meanwhile, Little was patted down, handcuffed, and placed in Warren's police vehicle.[4] A pat-down of the defendant did not reveal anything, and Warren did not observe any bulges in Little's clothing. Likewise, Hodgson did not have anything on his person that would arouse suspicion of

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[3] According to their testimony, the officers made contact with Hodgson and Little some time between 7:05 p.m. and 7:10 p.m.

[4] Counsel recognizes that there is some factual dispute regarding whether Little was patted down, handcuffed, and placed in the patrol car. Both Little and Hodgson testified that Little was handcuffed, and neither Officer Warren nor Officer Peterson could say unequivocally that Little was not handcuffed, though Peterson testified that Little *may* have been handcuffed and placed in the patrol car. Counsel submits that the belief that Little was handcuffed is supported by the officers' respective uncertainty as well as the fact that there is no dispute that Hodgson himself was handcuffed almost immediately after exiting the store. Significantly, Warren prepared no police report detailing his actions.

a theft.

While Warren was not certain that Little was placed into handcuffs, he did testify that he told Little that he should "be patient while we figure this thing out." Officer Warren then escorted the defendant roughly 200 feet over to the North doors where Officer Peterson was with Hodgson. Warren testified that Little was questioned for about ten minutes,[5] during the "investigation"[6] into a suspected theft. In addition to questioning the suspects, the officers conducted a "powwow" with loss prevention. While officers had also received information that one of the suspects may have tampered with a television while in the store, Warren didn't enter the store or conduct followup investigation of the television. In addition, Warren didn't know if any of the officers had actually checked out the television.[7]

During the investigation, officers asked Little about how he had arrived at the store, but

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[5] This testimony is in stark contrast to the testimony of Jones, who indicated that the suspects were being interviewed when he arrived. Jones estimated his arrival at 7:30 p.m., and further indicated that he approached the defendant to speak with him at roughly 7:35. Because the suspects were confronted at roughly 7:05-7:10 p.m., the resulting "investigation" likely lasted at least 25 minutes. Such a time frame more closely comports with the testimony of Hodgson, who indicated that he was detained for 20-30 minutes, than the testimony of Warren.

[6] It is unclear what this "investigation" actually entailed, or why it took so long to conduct. Neither suspect exited the store with merchandise, nor were they observed taking or concealing anything, despite being under surveillance by loss prevention. A pat-down of the defendant turned up nothing, and a subsequent search of the car of the defendant's mother revealed nothing.

[7] Similarly, none of the officers testified that they received any additional information from loss prevention regarding the television, nor did they indicate that they ever inquired about the television. The most that can be said of the officers' effort to investigate the scrambled picture was Officer Warren's statement that they *may* have gone back in to look at the television. Officer Peterson testified that he did not enter the store to investigate. (Logically, had they gone in and actually looked at the television, there must have been nothing illegal about the suspects' actions since there was no other followup investigation or mention of the television.)

officers did not speak to the defendant's mother about Little's travel arrangements until Sergeant Jones arrived on scene at about 7:30 p.m.[8] Jones entered the store and quickly located Ms. Little. He talked with her briefly, and then left the store with her. When Jones exited the store, Peterson was talking to the defendant. Jones then escorted Ms. Little to her vehicle, looking in her vehicle and checking the trunk for suspicious items. There was no indication that the vehicle contained any stolen merchandise or that Ms. Little had any merchandise on her person. Jones then walked over to where the defendant was and began asking him questions. After getting conflicting stories about how the defendant arrived at the store, Sergeant Jones asked the other officers to go look for Little's vehicle. Jones testified that the other officers did not know that Little had driven there until that point.

With respect to the detention of Little and Hodgson, the State notes that:

> After finishing speaking with Mr. Hodgson, Officer Peterson next spoke with the defendant. At the conclusion of that discussion, Officers Peterson and Warren and Sargent [sic] Curtis Jones, who had arrived to provide additional backup, conversed as to how to handle the situation. The officers concluded that there was insufficient evidence to cite or arrest either Mr. Hodgson or the Defendant with any crime. At that point in time the Defendant and Mr. Hodgson were told that they were free to leave. Mr. Hodgson walked away, but the defendant voluntarily remained at the scene.

State's Memo at 2-3. According to the State, the two suspects were detained at least until Jones spoke with the other officers. The State then asserts that the defendant voluntarily stayed with Sergeant Jones while the other officers went looking for the defendant's vehicle. The defendant, however, clearly stated that he began to walk away when Jones, who had learned of the conflict

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[8] Indeed, Officer Peterson indicated that he believed Little's mother was located by Sergeant Jones. Further, Jones himself testified that "to my knowledge, she [Little's mother] hadn't made statements to anyone. They [other officers] said there's a female involved they hadn't contacted yet."

in the defendant's travel, told him to come back to talk.

I. Because the Detention of the Defendant Was Not Supported by Reasonable Suspicion and the Officers Likewise Exceeded the Permissible Scope and Length of Detention, Suppression is Warranted.

In its responsive pleading, the State concedes that the investigation of the defendant became a level two encounter, which requires reasonable suspicion, when the defendant was asked to wait while the officers investigated. See State's Memo at 6. The State suggests, however, that reasonable suspicion existed to continue the investigation. This assertion is belied by the facts of the case, however. First, the only mention of possible criminal activity came from loss prevention. Loss prevention itself indicated that the suspects had not attempted to steal or conceal any merchandise. Second, neither Little or Hodgson exited the store with any merchandise, a fact that was made clear almost immediately as both individuals were frisked. Third, the officers testified that they were in contact with loss prevention while the suspects were in the store, but never testified that they received any indication of criminal activity other than a scrambled television picture.

The State seems to imply that the scrambled picture gave rise to an inference of criminal activity. See State's Memo at 6-7. It remarks that in order to continue the detention, "Officer Warren need only reasonably suspect that the Defendant has violated any number of laws." Id. at 6. The State summarily concludes that "it is reasonable for them [the officers] to suspect that the Defendant either stole an essential part to the television or committed criminal mischief, which caused it to become scrambled." Id. at 7. This argument clearly fails for the simple reason that it is *unreasonable* to suspect that the defendant stole an essential part when he was never observed

stealing or concealing anything despite being watched by loss prevention. Clearly, if loss prevention was able to observe the defendant fiddle with the television, they would have been likely to see him steal a component. Furthermore, the officers were not concerned with investigating this behavior, as there is no indication that any of the officers entered the store to do so. Reasonable suspicion requires objective facts that the individual is involved in criminal activity. *Brown v. Texas*, 443 U.S. 47, 51 (1979). Where, as here, there is virtually no information giving rise to reasonable suspicion of criminal activity, detention of a suspect is unlawful.

Even if this court were to find that reasonable suspicion existed, however, there is no basis for the period of detention to be so extensive. Courts evaluating reasonable suspicion must consider whether the length and scope of the detention are "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968)); *State v. Chism*, 2005 UT App 41, ¶ 15 ("No person may be detained except upon reasonable suspicion, and the scope of the detention must be limited to addressing the articulated grounds for the stop.").

In this case, the defendant was detained for nearly thirty minutes while the investigation was ongoing. The responding officers indicated that the received a call from dispatch at 6:56 p.m., and they were in contact with loss prevention while the suspects were in the store. The defendant exited the store at some time between 7:05 and 7:10 p.m. Significantly, during the ten to fifteen minutes between receiving the dispatch and making contact with the defendant, loss prevention told the officers only that one of the suspects had scrambled a picture on a television

set and that neither suspect had been observed stealing or concealing anything.[9]

The detention of the defendant began at 7:05-7:10 p.m., and the officers asked questions unrelated to whether the defendant had stolen merchandise or tampered with the television, including questions about why he was in the store and how he had gotten to the store. One, if not both, of the suspects was handcuffed and placed in the patrol car despite virtually no information warranting such an action. Neither officer who initially responded bothered to go into the store to check out the television, and the roughly ten minute "powwow" with loss prevention did not result in any incriminating evidence. Despite having virtually no confirmation of ongoing criminal activity, the officers continued questioning the suspects until Sergeant Jones arrived. Jones testified that he arrived at approximately 7:30, and he immediately entered the store to find Ms. Little. He then spoke with Ms. Little, and he soon accompanied her to her car, which likewise revealed no suspicious items. He finally approached the defendant, who was still speaking with officers, at roughly 7:35 p.m. Only after Sergeant Jones speaks with the defendant do the officers began to search the parking lot for his vehicle.

It is clear that the roughly 30 minute detention of the defendant was excessive. Not only was any suspicion of theft dispelled by loss prevention *before* the suspects even exited the store, there was nothing observed after they exited that confirmed any putative suspicion. Further, the detention must be limited to addressing the articulated grounds for the stop. If the basis for the detention was an investigation into criminal mischief, as the State suggests, one would expect an

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[9] The defendant submits that this observation alone should have dispelled any reasonable suspicion. Even if the defendant were to adopt the State's reasoning that the crime of criminal mischief had occurred, however, the permissible scope of the investigation should have been limited to investigating the television, which was never done.

officer to actually investigate that suspicion. Instead, none of the officers even entered the store to do so.[10] Searching for the defendant's vehicle roughly thirty minutes after the detention began only occurred because the stop had been needlessly prolonged. Without any information suggestive of ongoing criminal activity, the detention of the defendant should never have lasted so long. See State v. Chapman, 921 P.2d 446, 453 (Utah 1996) (determining that continued detention of the defendant was impermissible when "no independent facts surrounding the encounter with [the defendant] created suspicion that he was involved in any illegal activity beyond [the reason he was initially stopped]"); State v. Hansen, 2002 UT 125 at ¶ 35 ("A level two encounter involves an investigative detention that is usually characterized as *brief and non[]intrusive*.") (emphasis added).[11] It is the State's burden to establish that the detention was "sufficiently limited in scope and duration." Royer, 460 U.S. at 500. Because the State cannot meet its burden, it is pellucidly clear that the continued detention of the defendant was unlawful.

II. The State Has Not Met Its Burden of Showing that the Taint from the Illegal Detention Had Dissipated.

When the State attempts to prove that there was voluntary consent after an illegal detention, it has a much heavier burden to satisfy than consent given after a permissible detention. State v. Arroyo, 796 P.2d 684 (Utah 1990). Under Brown v. Illinois, 422 U.S. 590

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[10] While Jones entered the store, he did so only to locate Ms. Little.

[11] Such a requirement obviously stems from the Supreme Court's observation that a detention based on reasonable suspicion "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500 (1983).

(1975) and its progeny, unless Little's consent to search "had become so attenuated as to dissipate the taint" from the illegal acts leading up to that search, any evidence must be suppressed as the fruit of the poisonous tree. Id. at 599.

The State contends that "[b]ecause it was during this level one encounter that the contraband was discovered, the evidence should not be suppressed." State's Memo at 4. The discovery of contraband was predicated, however, on the exploitation of a prior illegality, namely the improper detention of the defendant.[12] Indeed, the evidence ultimately discovered cannot be sufficiently attenuated to remove the taint of the illegal police action. The statements made by the defendant were made in response to police inquiries that were completely unrelated to the scope and purpose of the investigation; similarly, Ms. Little's statements were made to Sergeant Jones at least twenty minutes into the detention of the defendant. Indeed, Jones testified that the other officers told him that they had not contacted Ms. Little when he arrived at 7:30, which would mean that no inconsistency in the defendant's travel arrangements would have been known to the officers until Jones re-approached the officers, who were speaking with the defendant, at roughly 7:35 p.m. Absent such a prolonged (and unjustified) detention, there would have been no reason to attempt to locate the defendant's vehicle. Furthermore, the search for the defendant's vehicle in the parking lot was totally unrelated to the basis for the detention in the first place, which was to investigate a possible theft. It is clear that there would have been no basis whatsoever to search for the defendant's vehicle absent the unduly lengthy detention of the

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[12] In addition, the defendant's testimony clearly established that he was told by Sergeant Jones to come back when he attempted to walk away. Such a directive would clearly make this a level two encounter, which would clearly refute the State's argument that Little consented to continued detention and was therefore engaged in a level one encounter.

defendant.

Given that the State has made little attempt to show that the defendant's consent to search was attenuated from the illegal detention, it has failed to meet its burden and suppression is appropriate.

III. The State Has Failed to Meet Its Burden Under the Utah Constitution.

Despite the fact that the defendant asserted a claim under the Utah Constitution, the State provided virtually no analysis under the Utah Constitution. The State's only attempt to address the defendant's state constitutional argument comes in a short paragraph. See State's Memo at 8-9.[13] Instead of fully addressing the defendant's state constitutional arguments, the State maintains that independent review is unnecessary because "this Court should follow established and sound legal precedent. The shaping and defining of the Utah Constitution should be left to the appellate courts." Id. Such an approach constitutes an unwarranted abdication of the duty of Utah courts to interpret the state constitution. The Utah Supreme Court has repeatedly asked litigants to raise state constitutional arguments so that the interpretation of the state constitution may become more fully developed. To simply defer judgment on these matters until the appellate courts can evaluate the arguments undermines the Utah Supreme Court's desire that Utah courts grapple

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[13] The State asserts that the defendant "falls short in providing little, if any, guidance as to how this Court should interpret the Utah Constitution more narrowly than the United States Constitution." State's Memo at 8. While perhaps it is merely a matter of semantics, the core of the defendant's argument is that the protections under the Utah Constitution should be more *expansive* than those provided under the Fourth Amendment. See, e.g., *State v. DeBooy*, 2000 UT 32, ¶¶ 12 (recognizing that article I, section 14 of the Utah Constitution and the Fourth Amendment contain identical language, but stating that the court "will not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state's citizens").

with State constitutional issues *in order to* develop a state constitutional jurisprudence. Trial courts must evaluate state constitutional claims just as they must evaluate the merits of federal constitutional claims.

In fact, it could be argued that it is incumbent on the State to provide an independent analysis of state constitutional claims *before* addressing the claims under the Fourth Amendment. The Court in *Tiedemann* recognized that "it is part of the inherent logic of federalism that state law be interpreted independently and *prior to* consideration of federal questions." *State v. Tiedemann*, 162 P.3d 1106, 1113 (Utah 2007). (emphasis in original). It is readily apparent from the State's memorandum that it has not adequately addressed the defendant's state constitutional arguments. Where, as here, the defendant has raised more than just a cursory examination of state constitutional claims, it should be incumbent on the State to address those claims; a dismissive paragraph should not suffice. Because the State has an independent burden under the Utah Constitution to show that the officers' actions did not violate the state constitution, the defendant submits that the State's failure to present a meaningful argument fails to meet its burden. Accordingly, suppression under the Utah Constitution is warranted.

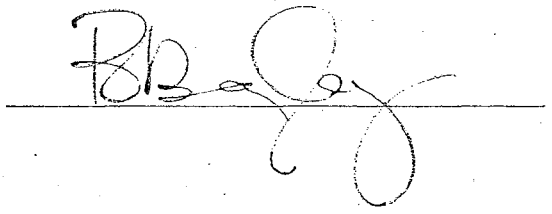
DATED this 5th day of January, 2009.

JEREMY M. DELICINO
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was mailed/hand delivered on this 5th day of January, 2009 to:

Weber County Attorney
2380 Washington Blvd., #230
Ogden, Utah 84401



E.

Finding of Fact, Conclusion of Law and Order of the Court

NATHAN D. LYON, UBN 10171
DEPUTY WEBER COUNTY ATTORNEY
WEBER COUNTY ATTORNEY
2380 WASHINGTON BLVD. STE. 230
OGDEN, UT 84401

IN THE SECOND DISTRICT COURT OF WEBER COUNTY,
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. TODD JEREMY LITTLE, Defendant.	FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER OF THE COURT CASE NO. 081900371 Judge SCOTT M. HADLEY

This matter came before the Court on Defendant's Motion to Suppress Evidence. Both parties prepared briefs and oral arguments were heard February 17, 2009. Having reviewed the briefs and heard the arguments of the attorneys, the Court makes the following findings:

FINDINGS OF FACT

1. On December 19, 2008, Riverdale Police Officers received a call about suspicious activity at Target.
2. The suspects were reported to be two males, wandering in and out of the store.

3. The Loss Prevention agent (LP) at Target contacted and articulated to police that one of the individuals, later identified as Mark Hodgson, was standing at the end of an aisle watching the activity of others. While Mr. Hodgson did so, his companion, later identified as Defendant, reach behind a display television and did something which scrambled the picture on the television.
4. The LP told police that this conduct was consistent with shoplifters, as he believed Mr. Hodgson acted as a lookout while Defendant shoplifted.
5. The LP also relayed that there was short woman with long grey hair that appeared to be with Mr. Hodgson and the Defendant.
6. Two officers initially responded to Target and made contact with the LP.
7. The officers separated and parked at the North and South doors of the building.
8. The suspects simultaneously left the building through two separate exits—Mr. Hodgson through the North doors and the Defendant through the South.
9. When the Defendant exited, Officer Warren called out to get his attention. The Defendant turned his attention toward Officer Warren, who approached and identified himself, and then asked if Defendant would be willing to speak with him.
10. Defendant consented to talking with Officer Warren and to walk toward the North door.
11. When Officer Warren and Defendant got to the North door, Officer Peterson was speaking with Mr. Hodgson, who was handcuffed and being questioned inside Officer Peterson's patrol car.

12. Defendant and Officer Warren engaged in small talk while they waited for Officer Peterson.

13. Defendant disclosed to Officer Warren that he had been given a ride to the store and that he did not drive.

14. At no times during this encounter was Defendant placed in handcuffs.

15. While Officer Warren and Peterson were speaking with the suspects, Sgt. Jones arrived and entered the store in efforts of finding the woman accompanying Mr. Hodgson and Defendant.

16. Sgt. Jones located a woman matching the description previously relayed to him. Sgt. Jones made contact with that woman, who identified herself as Ellen Little, Defendant's mother.

17. Ms. Little stated that Defendant drove to the store to help her with a bookshelf, and brought a friend to help.

18. Sgt. Jones returned to the North exit and located officers Peterson and Warren. The officers conferred with one another and concluded that there was not sufficient evidence to further detain the suspects.

19. Both suspects were told that they were free to leave. This encounter took no more than twenty minutes.

20. Both suspects were told to leave, and Mr. Hodgson did in fact leave.

21. Defendant voluntarily stayed at the scene and spoke with the officers.

22. Sgt. Jones asked Defendant where he parked his truck. Defendant denied driving to the store, and again asserted that he had received a ride to the store.

23. Officer Warren began driving around the parking lot to see if he could locate Defendant's truck.

24. When Warren located what he believed to be Defendant's truck, he radioed to Sgt. Jones.

25. Defendant, who was still standing by the officers and closely watching Officer Warren, indicated that Officer Warren had indeed found his truck.

26. Officer Warren was able to see through the window of the pickup truck that a marijuana pipe was sitting in the vehicle.

27. The Court finds the testimony of the testifying officers credible.

CONCLUSION OF LAW

1. The initial encounter between Officer Warren and Defendant was a Level One encounter.

2. Because Defendant was asked to wait with Officer Warren outside of the police car that contained Mr. Hodgson, who was in handcuffs and being questioned by Officer Peterson inside the patrol car, a reasonable person would not have concluded that they were free to leave. Therefore, this encounter escalated to a Level Two detention once the Defendant and Officer Warren reach the North doors and Defendant was asked to wait for Officer Peterson.

3. The Level Two detention was supported by reasonable suspicion based upon the facts articulated by the store's LP that Mr. Hodgson was acting as a lookout while

Defendant reached behind the television, suddenly causing the screen to become scrambled.

4. The encounter deescalated to a Level One encounter when the suspects were told they were free to leave.
5. The marijuana pipe was sitting in plain view in the truck and officers were able to observe it from a lawful vantage point.
6. There was no violation of the Fourth Amendment to the U.S. Constitution or of Article 1, Section 14 of the Utah Constitution.

ORDER

For each of the above reasons, the Court finds that the evidence is admissible and Defendant's Motion to Suppress Evidence is DENIED. The Court's February 17, 2009 oral pronouncement of these findings, conclusions and order are incorporated herein by reference. SMH

Dated this 13 day of ~~May~~ August, 2009

Scott M. Hadley
District Court Judge

Prepared by:

Nathan D. Lyon
Deputy Weber County Attorney

Approved as to form by:

Jeremy M. Delicino
Counsel for Defendant

CERTIFICATE OF MAILING

I certify that on this 11th day of May, 2009, I caused to be served by U.S. mail a true and correct copy of the foregoing **Findings of Facts, Conclusion of Law and Order of the Court** to the following:

Jeremy M. Delicino
10 West Broadway, Suite 650
Salt Lake City, UT 84101

A Simons

CERTIFICATE OF MAILING

I hereby certify that on the 12 day of [illegible] 200[illegible] a true and correct copy of the foregoing Findings of Fact, Conclusion of Law and Order of the Court, with the Court's handwritten additions, was mailed first class, postage prepaid, to:

Nathan D. Lyon
Deputy Weber County Attorney
Weber County Attorney
2380 Washington Blvd., Suite 230
Ogden, UT 84401

Jeremy M. Delicino
10 West Broadway, Suite 650,
Salt Lake City, UT 84101

[illegible]
Court Clerk