

2000

# State of Utah v. Jose Morales-Torres : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellant, : Case No. 20000680-CA  
v. :  
JOSE MORALES-TORRES, : Priority No. 2  
Defendant/Appellee. :

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*BRIEF OF APPELLANT*

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APPEAL FROM A CONVICTION FOR ARRANGING  
TO DISTRIBUTE COCAINE, A SECOND DEGREE  
FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-  
37-8(1)(a)(ii) (1998 & Supp. 2000), IN THE THIRD  
JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,  
UTAH, THE HONORABLE SHEILA MCCLEVE,  
PRESIDING

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**FILED**  
Utah Court of Appeals

DEC 12 2000

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
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 JOSE MORALES-TORRES, : Priority No. 2  
 :  
 Defendant/Appellee. :

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**BRIEF OF APPELLANT**

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**JURISDICTION AND NATURE OF PROCEEDINGS**

The State appeals from the district court's quashal of one count of arranging to distribute controlled substances (cocaine), a second degree felony, in violation of UTAH CODE ANN. § 58-37-8-(1)(a)(ii) (1998 & Supp. 2000). This Court has jurisdiction under UTAH CODE ANN. § 77-18a-1(2)(a) (1999) and UTAH CODE ANN. § 78-2a-3(2)(e) (1996).

**ISSUE ON APPEAL, PRESERVATION, AND STANDARD OF REVIEW**

**Issue.** Did the district court erroneously quash the bindover order on a charge of arranging to distribute a controlled substance in the face of evidence from which a trier of fact could reasonably infer that defendant intended to arrange for the undercover officers to purchase cocaine?

**Preservation.** This issue was preserved by the district court's granting of the motion to quash the bindover order (R. 113-118).

**Standard of Review.** “[T]he ultimate decision of whether to bind a defendant over for trial presents a question of law” which is reviewed “de novo without deference.” *State v. Hutchings*, 950 P.2d 425, 429 (Utah App. 1997); *State v. Jaeger*, 896 P.2d 42, 43 (Utah App. 1995).

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any pertinent constitutional provisions, statutes and rules are quoted below:

Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally: . . . distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance.

UTAH CODE ANN. § 58-37-8(1)(a)(ii) (1999 & Supp. 2000).

## STATEMENT OF THE CASE

Defendant was charged with arranging to distribute cocaine, a second degree felony (R.2-5). The preliminary hearing was held on 6 April 2000 and defendant was bound over as charged (R. 131:18) (a complete copy of the transcript is contained in **addendum A**). Thereafter, on 7 June 2000, defendant moved to quash the bindover in district court, claiming that the State had failed to establish a prima facie case of arranging under *State v. Hester*, 2000 UT App 159, 3 P.3d 725, *cert. denied*, 9 P.3d 170 Utah 2000), which was issued on 2 June 2000 (R. 35-40) (copies of the motion and supporting memorandum are contained in **addendum B**). The State filed a memorandum opposing the motion and distinguishing *Hester* (R. 91) (a complete copy of the State’s opposing memorandum is contained in **addendum C**). The district court

granted defendant's motion and entered an order quashing the bindover order (R. 113-114) (a copy is contained in **addendum D**). An order of dismissal was entered thereafter (R. 118-119). The State timely appealed (R. 120).

### STATEMENT OF THE FACTS

On 8 March 2000, Officer Portel of the Salt Lake City Police Department was working in an undercover narcotics operation in the downtown area (R. 131: 4). Specifically, Officer Portel and another undercover officer watched defendant and two other males standing by a pay phone located at 575 West and 200 South, in Salt Lake City Utah, leave and return within a 30 minute time frame (R. 131: 5-6). After observing this conduct, the officers pulled over next to the sidewalk and Officer Portel, the passenger, gave defendant a "nod," a method of communication Officer Portel uses to contact drug dealers (R. 131:6-7). Defendant nodded back to Officer Portel and approached the truck (R. 131: 7). Officer Portel asked defendant if he could "hook [them] up" (*id.*). When defendant asked what they needed, Officer Portel said "Coca," meaning Cocaine (R. 131: 8). Defendant then asked for thirty-five cents to use the pay phone, which Officer Portel declined to give him (*id.*). Instead, Officer Portel offered to let defendant use her cellular phone and he accepted (R. 131: 8-9).

With Officer Portel's help, defendant called a pager number and then waited for a return call (R. 131: 9). Within one minute the cell phone rang and defendant had a conversation in Spanish with the caller (*id.*). Officer Portel does not speak Spanish and



did not understand the phone conversation (R. 131: 9, 16). When defendant finished the call, he said they needed to drive to 700 South and 900 West because the man who had the drugs was at that location eating lunch and he wanted them to drive out there to meet him (R. 131: 9). Defendant asked to ride with the officers, but the officers would not allow him to get in their truck (R. 131: 10). Officer Portel asked if the other man could meet them at their present location, or if the officers could meet the man without defendant (*id.*). Defendant, however, insisted on going, stating that the dealer knew him and would not deal with the officers without him (*id.*). When Officer Portel declined to participate in the deal, defendant walked away (R. 131: 11). Shortly thereafter, he was arrested (*id.*).

After observing defendant's arrest, the undercover officers drove to 700 South and 900 West to meet the dealer (R. 131: 12). Officer Portel used the same cellular phone she had loaned to defendant and hit redial (R. 131:13). She observed that "there was a guy standing in the parking lot, picked (sic) up the phone and started talking on it, so we said, 'Oh, that's him'" (*id.*). The dealer then approached the officers truck and said, "Oh, are you guys looking for something[?]" (*id.*). Thereafter the officers purchased narcotics from the dealer (*id.*).

### **SUMMARY OF THE ARGUMENT**

Evidence presented at the preliminary hearing established that defendant used a cellular phone belonging to two undercover officers to contact a cocaine dealer on their

behalf, and also arranged a meeting with the dealer at a specified downtown location. Further, defendant asked to accompany the officers to the location in order to complete the transaction, but was refused. Thereafter, defendant walked away and was arrested. Meanwhile, the officers traveled to the meeting location where they identified the dealer by hitting redial on their cell phone, and watching to see who responded to the call. Thereafter, they completed the drug transaction with the dealer. Viewing this evidence in the light most favorable to prosecution and drawing all inferences in favor of the prosecution, defendant should have been bound over on a charge of arranging to distribute cocaine.

### ARGUMENT

**THE DISTRICT COURT ERRONEOUSLY QUASHED THE  
BINDOVER ORDER ON A CHARGE OF ARRANGING TO  
DISTRIBUTE A CONTROLLED SUBSTANCE DESPITE  
EVIDENCE FROM WHICH A TRIER OF FACT COULD  
REASONABLY INFER DEFENDANT'S INTENTION TO  
ARRANGE FOR THE DISTRIBUTION OF COCAINE**

The district court's quashal of the bindover order on a charge of arranging to distribute controlled substance on these facts misapprehends what is required by the bindover standard, the arranging statute, UTAH CODE ANN. § 58-37-8(a)(1)(ii) (Supp. 1998), and *State v. Hester*, 2000 Utah App 159, 3 P.3d 725. The district court's erroneous rulings quashing the bindover order and dismissing the information should therefore be reversed.

**Bindover standard.** At a preliminary hearing, “the prosecution must present evidence sufficient for the magistrate to find [p]robable cause to believe that the crime charged has been committed and that the defendant has committed it.” *State v. Talbot*, 972 P.2d 435, 437 (Utah 1998) (citations and internal quotations omitted).

“Furthermore, [t]he prosecution is not required to introduce enough evidence to establish the defendant’s guilt beyond a reasonable doubt, but must present a quantum of evidence sufficient to warrant submission of the case to the trier of fact.” *Id.* (citations and internal quotations omitted). This probable cause standard “is lower, even, than a preponderance of the evidence standard applicable to civil cases.” *Id.* (citations and internal quotations omitted).

Moreover, “in determining whether this standard of probable cause has been satisfied, the magistrate should view the evidence in a light most favorable to the prosecution and resolve all inferences in favor of the prosecution.” *Id.* at 437-38 (citations and internal quotations omitted). Additionally, “[u]nless the evidence is wholly lacking and incapable of reasonable inference to prove some issue which supports the [prosecution’s] claim, the magistrate should bind the defendant over for trial.” *Id.* at 438 (citations and internal quotations omitted). Finally, Utah law recognizes a “presumption that the State will strengthen its evidence at trial.” *State v. Pledger*, 896 P.2d 1226, 1230 (Utah 1995) (quoting *Diaz v. State*, 728 P.2d 503, 510 (Okla. Crim. App. 1986)).

**Elements of Arranging to Distribute Controlled Substance.** Defendant was charged with arranging to distribute cocaine. A person commits the offense of arranging if he knowingly and intentionally distributes a controlled or counterfeit substance, or agrees, consents, offers, or arranges to distribute a controlled or counterfeit substance. UTAH CODE ANN. § 58-37-8(1)(a)(ii) (1999 & Supp. 2000).

In Utah, “any witting or intentional lending of aid in the distribution of drugs, whatever form it takes,” amounts to the criminal offense of arranging. *State v. Harrison*, 601 P.2d 922, 923 (Utah 1979). *See also State v. Pelton*, 801 P.2d 184, 185 (Utah App. 1990) (recognizing that “any act in furtherance of ‘arrang[ing] to distribute . . . a . . . controlled substance’ constitutes a criminal offense pursuant to the statute”) (quotation omitted), *cert. denied*, \_\_\_ P.2d \_\_\_ (Utah February 21, 1991). The “agreement” to arrange distribution is thus the actus reus of the offense of arranging. *State v. Scott*, 732 P.2d 117, 120 (Utah 1987). This is true even if nothing of value is ultimately exchanged or distributed. *Harrison*, 601 P.2d at 924 n.5. Rather, “[a]ll that is needed is the arrangement of such distribution, coupled with knowledge or intent.” *Id.* *See also State v. Clark*, 783 P.2d 68, 69 (Utah App. 1989).

**Ruling below.** The district court’s quashal of the bindover order makes clear that it found the evidence insufficient to establish that defendant agreed and/or intended to arrange for the distribution of cocaine because

- (1) the conversation that defendant had with a so called dealer was not understood by Officer Portel because it was in the Spanish language and she did not understand what was said nor to whom;
- (2) it was clear that defendant never had any drugs;
- (3) defendant never mention[ed] cocaine or any drug;
- (4) police officers broke off negotiations with defendant and he walked off;
- (5) officers made further contact with drug dealer(s) on their own, conducted negotiations; and
- (6) there was no evidence that defendant had anything to do with the dealers that the officer eventually consummated a drug transaction

(R. 113-114), **add. D.**

**Analysis.** Contrary to the district court's reasoning, defendant's conduct clearly falls within the wide range of culpable conduct prohibited in section 58-37-8(1)(a)(ii). Indeed, defendant's conduct reasonably suggests his agreement to arrange for the distribution of cocaine even if he never had drugs on his person, never said the word coca, or cocaine, and was ultimately cut out of the transaction before its completion. As set out previously, nothing more than the agreement to arrange for the distribution is required. *Scott*, 732 P.2d at 120; *Clark*, 783 P.2d at 69.

Viewed in the light most favorable to the State, evidence presented at the preliminary hearing was sufficient to infer that defendant paged a cocaine dealer on the officers' behalf (R. 131: 8-10). Even though defendant's phone conversation was conducted in Spanish, the reasonable inference is that the caller was the cocaine dealer

defendant had just paged (*id.*). This is because the officers told him they wanted cocaine immediately before defendant placed the page, and at the conclusion of the call, defendant announced in English that he and the officers needed to travel to a specified location to meet with the dealer to conclude the drug transaction (*id.*). Thus, while defendant did not himself utter the words coca or cocaine, the reasonable inference is that he arranged for the officers to purchase such. This inference is not negated by the fact that defendant was “stopped short” of his intended purpose when the officers refused to allow him to accompany them to the dealer’s location. *See Francis v. State*, 890 S.W.2d 510, 513 (Tex. App. 1994) (affirming arranging conviction even though defendant was inadvertently “stopped short of his intended purpose of an actual delivery” of controlled substance).<sup>1</sup>

Because the district court failed to view the evidence in the light most favorable to the prosecution and to draw the reasonable inference that defendant intended to arrange for the distribution of cocaine, it erred as a matter of law in quashing the bindover order.

***Hester distinguished.*** In addition to misapplying the bindover standard, the district court also erroneously relied upon this Court’s recent opinion in *State v. Hester*,

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<sup>1</sup>Specifically, as in this case, Francis did not expressly state he had cocaine for sale, but rather offered to obtain such when the undercover officers requested it. *Id.* at 513. While the officers agreed to let Francis accompany them to the location where he claimed he could get “some,” Francis unexpectedly opened the sliding door to the surveillance van, exposing the surveillance team, before the transaction could be completed. *Id.* at 511.

2000 Utah App 159, 3 P.3d 725. Although the district court did not elucidate his reason for relying on *Hester* (R. 113), *Hester*'s resemblance to the case at bar is superficial.

In *Hester*, the State argued unsuccessfully in the preliminary hearing court and on appeal that Hester should have been bound over on a charge of arranging because "Hester told the undercover officer that he had cocaine, accepted money from the officer, and told the officer to 'wait there.'" *Id.* at ¶ 5. On appeal, this Court emphasized, on the other hand, that Hester was arrested before the drug transaction was concluded, and police found no cocaine on his person at that time. *Id.* at ¶ 3. Additionally, Hester had spoken to no one, nor had he made any phone calls after leaving the undercover detective in that case. *Id.* Therefore, this Court found that there was "no particular indication that [Hester] was going to meet a supplier or otherwise actually procure cocaine or arrange for its delivery to [the undercover detective]." *Id.*

Rather than allowing events to unfold a while longer, the police moved to quickly to apprehend Hester without even knowing if he had any controlled substances on him (he did not), or if any other party was involved in the transaction (none was identified), or if he had some other means to get the cocaine delivered to [the undercover detective] (none was shown).

*Id.* at 14. The Court thus upheld the magistrate's refusal to bind over.

In so ruling, however, the Court acknowledged that, "Even absent proof of a completed distribution, there are other types of evidence which can be used to reveal the defendant's intent by showing that the defendant took active steps to facilitate the completion of an illicit transaction." *Id.* at ¶ 12. The Court further acknowledged that

even an “aborted transaction can serve as the basis for an ‘arranging’ conviction, if the surrounding facts indicate that the defendant intended to facilitate a completed drug sale.” *Id.* The problem in *Hester*, where there was no evidence of a completed sale, was the State’s failure to produce “evidence that Hester took active steps to facilitate the distribution of cocaine[.]” *Id.* at ¶ 13. In a footnote, the Court indicated that

Such evidence could include that Hester made phone calls seeking drugs, drove around looking for drugs, commented to Cardon on how the drugs were to be acquired, was seen conferring with known drug suppliers, or was shown to be a ‘link in a chain’ of distribution.

*Id.* at ¶ 13, n.6 (citations omitted).

Here, unlike *Hester*, the State presented evidence that defendant not only took active steps to facilitate the distribution of cocaine, but was also a critical “link in a chain” of distribution leading to the *completed* transaction. *Id.* at ¶ 12 (citation omitted). Indeed, as set forth previously, defendant facilitated the transaction by paging the dealer, arranging a meeting, and providing the dealer’s location to the undercover officers (R. 131:8-10). Moreover, the transaction in this case was ultimately completed despite defendant’s absence, precisely because he had already told the officers where to find the dealer, and because the officers were able to redial on their cell phone the same pager number defendant initially used to contact the dealer (R. 131: 9, 13). Given these distinctions, illustrating that what was absent in *Hester* was present here, the district court erroneously relied on *Hester* to quash the bindover order.



Finally, defendant's conduct is not analytically distinguishable from that of the defendant in *Pelton*. Like Pelton, defendant "was one link in a chain of events," which eventually led to the sale of cocaine. *Id.* at 185. Pelton directed an undercover agent to drive to a 7-Eleven store where they were to make a phone call and then "the man would bring the cocaine to that location." *Id.* Once at the 7-Eleven, Pelton and another individual got out of the car and spoke to a man in a telephone booth, who turned out to be the dealer. *Id.* Pelton, however, did not further participate in the drug transaction, which was "consummated" only *after* he left the area. *Id.* This means that Pelton, like defendant, never possessed the cocaine at issue, never discussed prices or handled money, and was not present at the time of the purchase. *Id.* at 185-186. Therefore, defendant's conduct in similarly linking up the officers in this case with a cocaine dealer is as culpable as that of Pelton's, who was ultimately *convicted* for arranging under the higher, reasonable doubt standard applicable at trial. *See also State v. Gallegos*, 851 P.2d 1185, 1189-90 (Utah App. 1993) (affirming conviction for arranging based solely on Gallegos' representations as to the availability of narcotics made over the telephone to potential buyers); *Clark*, 783 P.2d at 70 (affirming arranging conviction in absence of completed transaction where defendant made incriminating statements to undercover officers, attempted to contact dealer, was present during negotiations with dealer, and warned of a tailing car).


At the preliminary hearing, the State presented abundant evidence which, when viewed “in a light most favorable to the prosecution” was not “wholly lacking and incapable of reasonable inference to prove” that defendant agreed to arrange the distribution of cocaine. *Talbot*, 972 P.2d at 437-38. The district court thus erred in quashing the bind over order.

### CONCLUSION

The district court’s orders quashing the bindover order and dismissing the information should be reversed and the case remanded for entry of an order binding defendant over for trial on a charge of arranging to distribute cocaine.

RESPECTFULLY SUBMITTED on 12 December 2000.

JAN GRAHAM  
Utah Attorney General

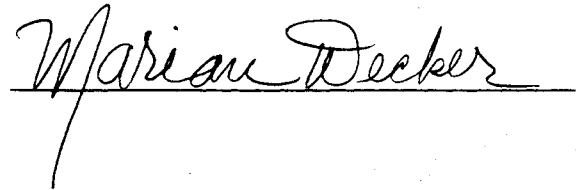
  
MARIAN DECKER  
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## CERTIFICATE OF MAILING

I certify that on 12 December 2000, I mailed (U.S. Mail, postage pre-paid), two accurate copies of the *BRIEF OF APPELLANT* to the following:

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Attorneys for Appellee

A handwritten signature in cursive script, reading "Marian Decker", is written over a horizontal line.

# Addenda

# Addendum A

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IN THE THIRD DISTRICT COURT - SALT LAKE CITY  
SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH,	)	
	)	
Plaintiff,	)	Case No. 001904616
	)	
vs.	)	<u>PRELIMINARY HEARING</u>
	)	
JOSE MORALES-TORRES,	)	<u>(Videotape Proceedings)</u>
	)	
Defendant.	)	

-000-

BE IT REMEMBERED that on the 6th day of April, 2000, commencing at the hour of 4:05 p.m., the above-entitled matter came on for hearing before the HONORABLE SHEILA K. McCLEVE, sitting as Judge in the above-named Court for the purpose of this cause, and that the following videotape proceedings were had.

-000-

A P P E A R A N C E S

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FILED DISTRICT COURT  
Third Judicial District

OCT 16 2000

SALT LAKE COUNTY  
*K. Stupe*

**FILED**  
Utah Court of Appeals

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OCT 23 2000

*Paulette Stagg*  
Clark of the Court

**ORIGINAL**



PROCEEDINGS

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THE COURT: State vs. Morales-Torres, Jose  
Morales-Torres.

MR. VALDEZ: That's mine, Judge. That's a quick  
prelim, but--

THE COURT: But we don't have a prosecutor?

MR. VALDEZ: We don't have an interpreter.

THE COURT: We have--oh, you're doing it? Okay.  
We just need an interpreter. We lost--who was the  
interpreter that was here? Tell me that one was ordered.

MR. WILLIAMS: Why don't we call him out and  
let's--ask him some questions, see--how is your English?  
Is your English good enough that you don't need an  
interpreter? Huh?

MR. MORALES-TORRES: I don't think so.

MR. WILLIAMS: You don't think so.

MR. VALDEZ: I asked him, he said he didn't need  
one.

THE COURT: Well--

MR. WILLIAMS: You don't need an interpreter or  
you need one?

MR. MORALES-TORRES: (Inaudible)

THE COURT: You don't need it?

MR. VALDEZ: Okay. Any problems, you let me

1 know, all right?

2 MR. MORALES-TORRES: Uh huh.

3 MR. VALDEZ: Okay.

4 THE COURT: Okay. The same here, Mr. Morales-  
5 Torres. You're--we can get an interpreter, we'll look for  
6 one if you want to wait.

7 MR. MORALES-TORRES: No. That's okay.

8 THE COURT: Okay. You understand?

9 MR. MORALES-TORRES: Yeah, I understand, Judge.

10 THE COURT: Okay. If you don't understand, you  
11 just speak up.

12 MR. MORALES-TORRES: Uh huh.

13 THE COURT: Okay? All right. We don't need one,  
14 I guess. If we can get one...

15 All right. Let me go on the record then and say,  
16 this is the State of Utah vs. Jose Morales-Torres, who's  
17 present and--and uncuffed, so you can write a note there to  
18 Mr. Valdez if you need to.

19 Mr. Valdez represents you and Mr. Nielsen's here  
20 for the State. You have the second-degree felony,  
21 distribution, offering, agreeing or arranging to distribute  
22 and I'm assuming again, you waive reading of that.

23 MR. VALDEZ: We do, Judge.

24 THE COURT: Okay. Go ahead, Mr. Nielsen.

25 MR. NIELSEN: Your Honor, the State would call



1 Officer Portel.

2 THE COURT: All right. Have her come forward and  
3 be sworn.

4 Go ahead.

5 ANGELINE PORTEL,

6 called as a witness by and on behalf of the State in this  
7 matter, after having been first duly sworn, assumed the  
8 witness stand and was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. NIELSEN:

11 Q Officer, would you please state your full name,  
12 spell your last and state with whom you're employed?

13 A Angeline Portel, P-o-r-t-e-l. I'm a police  
14 officer with Salt Lake City Police Department.

15 Q And how long have you been so employed?

16 A Three-and-a-half years.

17 Q And have you had formal training in regard to  
18 narcotics investigations?

19 A I have.

20 Q Okay. Were you on duty on March 8th of the year  
21 2000?

22 A I was.

23 Q Okay. And did you have occasion to be in the  
24 area of approximately 15--575 West 200 South?

25 A Yes. I was.

1 Q And what were you in that area for?

2 A We were working in an undercover narcotics  
3 operation, we were targeting street level narcotics  
4 distribution in the downtown area.

5 Q Okay. Did you see a particular individual in  
6 that area that caught your attention as being someone  
7 involved?

8 A Yes. I noticed--I noticed Mr. Morales.

9 Q Okay. And is that person present in the  
10 courtroom today?

11 A He is.

12 Q Would you point to him and describe what he's  
13 wearing?

14 A There, wearing that orange jumpsuit.

15 MR. NIELSEN: May the record reflect  
16 identification?

17 THE COURT: Yes.

18 MR. NIELSEN: Thank you.

19 Q (By Mr. Nielsen) And what was it that caught  
20 your attention to the defendant?

21 A When I saw him, he was standing at a pay phone at  
22 that address with two white males that I had never seen in  
23 the area before and I work in this area every day. And  
24 they were making a phone call and then standing by the  
25 phone, as if waiting for a call to be returned. And they

1 were there for quite some time.

2 Q Okay. Did at some point these three people  
3 leave?

4 A Yes. One of the white males left separately and  
5 then one walked off later, in the same direction, with Mr.  
6 Morales.

7 Q Okay. Did you later again see Mr. Morales?

8 A I did. I saw him about maybe 30 minutes later,  
9 by himself, standing by the same pay phone.

10 Q Okay. Was he using the phone?

11 A No.

12 Q Okay. Did at some point you approach Mr. Morales  
13 or did he approach you?

14 A He was walking down the sidewalk starting to, you  
15 know, leave the pay phone that he'd been standing by and we  
16 pulled over next to the sidewalk and I kind of gave him a  
17 head nod.

18 Q Okay. Who was with you?

19 A Officer Charman.

20 Q And what kind of vehicle were you in?

21 A We were in a Ford pickup truck.

22 Q And were both of you undercover?

23 A Yes.

24 Q Plain clothes?

25 A Yes.

1 Q Okay. And you gave a head nod to Mr. Morales?

2 A I did.

3 Q And what did he do back?

4 A He nodded to me, he stopped and walked over to  
5 the truck.

6 Q Okay. Based on your experience and training,  
7 what usually are head nods used for on the street?

8 A They're just used by buyers to communicate with  
9 drug dealers. Frequently, you need to make some sort of  
10 eye contact, head nod, wave.

11 MR. VALDEZ: Well, I'll object to that  
12 conclusion, I think she can testify as to what she uses it  
13 for when she's working in an undercover capacity.

14 THE COURT: You think she can testify to what?

15 MR. VALDEZ: What she uses head nods for when  
16 she's working in an undercover capacity, but everybody--

17 THE COURT: Oh. Overruled.

18 MR. VALDEZ: --nods their heads.

19 MR. NIELSEN: All right.

20 Q (By Mr. Nielsen) Did you--

21 THE COURT: Overruled.

22 Q (By Mr. Nielsen) Did you ask Mr. Morales  
23 anything when he approached the vehicle?

24 A I think that I asked him, Can you hook us up?

25 Q Okay. Were you the passenger in this truck?

1           A     I was.

2           Q     Okay. And he approached the passenger side?

3           A     Yes.

4           Q     Okay. And what did he say after you asked him if  
5 he could--if he could hook you up?

6           A     He--he asked what we needed.

7           Q     And did you tell him?

8           A     I told him coca.

9           Q     Did--

10          A     Meaning cocaine.

11          Q     Did you tell him how much?

12          A     I don't remember.

13          Q     Okay. Was this in--

14          A     Probably.

15          Q     Probably?

16          A     Probably, but I don't remember.

17          Q     Was this in English or Spanish?

18          A     English.

19          Q     Okay. What was Mr. Morales' response to your  
20 request for some coca?

21          A     He asked me for thirty-five cents for the pay  
22 phone.

23          Q     And what did you tell him?

24          A     We didn't have any change with us, so we let him  
25 use one of our cell phones.

1 Q Okay. Did he in fact use that cell phone?

2 A He did.

3 Q And did he make a call on that?

4 A Yes. He--I helped him, he--we paged a number  
5 together on the police cell phone and waited for the call  
6 to come back. About 30 seconds later, the phone rang and  
7 he had a conversation in Spanish with somebody.

8 Q Were there any other phone calls or paging or  
9 just that one paging and one returned call?

10 A Just the one.

11 Q Okay. After he got off the phone, having the  
12 conversation in Spanish, what did he do?

13 A He told us that we needed to go to 700 South and  
14 Ninth West and--because the guy that had the drugs was  
15 eating lunch and he wanted us to drive out there and meet  
16 him.

17 Q Okay. Did he specifically say that you would  
18 have to meet the guy there for drugs or for cocaine or to  
19 do the deal? Do you remember what language he--

20 MR. VALDEZ: That's leading. I will object.

21 THE COURT: Yeah.

22 Q (By Mr. Nielsen) Do you remember what his  
23 specific words were?

24 A I--I think that he just said, we need to go to  
25 that address and meet the guy 'cause he's eating right now

1 and I don't think that he said anything specifically about  
2 drugs or cocaine at that point.

3 Q Okay. What did you tell Mr. Morales at that  
4 point?

5 A Well, we have a rule where we can't--we can't  
6 ride with the guy that's going to set us up--

7 MR. VALDEZ: That's non--that's non-responsive.

8 THE COURT: Sustained.

9 Q (By Mr. Nielsen) Okay. What--what did you tell  
10 Mr. Morales after he told you you'd have to go to that  
11 other location?

12 A I let him walk over to the truck and then Officer  
13 Charman told him that we couldn't ride with him.

14 Q Okay. He wanted to get in the truck?

15 A Yeah. He wanted to get in the truck and ride  
16 with us over there.

17 Q Okay. Did, at any point, he get in the truck?

18 A No.

19 Q Okay. Did you tell him something in regard, that  
20 you'd meet him somewhere or how were you going to meet at  
21 the other location?

22 A We tried to negotiate the deal where maybe we  
23 could call the guy back and get him to come to where we  
24 were and he didn't want to do that. And we said, well, can  
25 we just go on our own and go meet him and he said that he

1 had to come with us because the guy knows him, the dealer  
2 would know him and not us.

3 Q Okay. Did he make any particular comments at any  
4 time about what exactly would go on when you went to this  
5 other location?

6 A No.

7 Q And based on your conversations with Mr. Morales,  
8 what was the reason for going--that you understood to be  
9 for going to this other location?

10 A To purchase cocaine.

11 Q Okay. And when these negotiations failed, what  
12 then did you do?

13 A We told him that we weren't going to do the deal  
14 then, that we weren't going to drive out there and he said  
15 okay and he walked up--down the sidewalk and we just had  
16 him picked up then.

17 Q Okay. Who picked him up?

18 A Officer Smith and Officer Budea.

19 Q Okay. Did you see the officers when they picked  
20 him up?

21 A We did.

22 Q So you maintained a visual on him the whole time?

23 A We did.

24 Q Okay. So you were able to identify that the  
25 person they stopped was in fact the same person who had--



1           A     Yes.

2           Q     --been talking to you?

3           A     Yes.

4           Q     Okay.  What did they do with the defendant, do  
5 you know?

6           A     They searched him real quick and then put him in  
7 the back of the police, had him held in there for awhile.

8           Q     You had no more--

9           A     Before taking him to jail, I guess.

10          Q     You had no more involvement with him?

11          A     No.  I didn't.

12          Q     Okay.  Did you later look at the cell phone that  
13 Mr. Morales had used?

14          A     Yes.

15          Q     Okay.

16          A     We decided that we were going to go to the  
17 Seventh South Ninth West address.

18          Q     And that was because your conversation about the  
19 meeting there?

20          A     Yeah.

21          Q     Okay.

22          A     He said that his dealer was there and since we  
23 couldn't ride with him, we decided that we would just go  
24 there on our own anyway and try to find the guy.

25          Q     Okay.  Did you go to that location then?

1           A     Yes.

2           Q     Okay. Did you find anybody there?

3           A     Yes. We did.

4           Q     How did you find that person?

5           A     The number that he paged on the cell phone was  
6 saved in the cell phone's memory, so we just paged it  
7 again.

8           Q     Okay.

9           A     And when--there was a guy standing in the parking  
10 lot, picked up the phone and started talking on it, so we  
11 said, Oh, that's him.

12          Q     So, you made eye contact with the person who  
13 answered that number which you paged?

14          A     Yeah. He approached our truck and he came over  
15 and he said, Oh, are you guys looking for something and we  
16 started working a deal with him and he said, yeah, you just  
17 paged me.

18          Q     Okay.

19          A     So--

20          Q     And just--just briefly, was a drug transaction,  
21 did a drug transaction later develop out of that incident?

22          A     Yes. It did.

23          Q     Okay. And narcotics were purchased?

24          A     Yes.

25          Q     Okay.

1 MR. NIELSEN: I have nothing further, your Honor.

2 THE COURT: Mr. Valdez?

3 CROSS-EXAMINATION

4 BY MR. VALDEZ:

5 Q Did that latter drug transaction, was that  
6 person--did that person look like he spoke Spanish?

7 A Yes, he did.

8 Q With the latter drug transaction that you made?

9 A Yeah.

10 Q Same phone number?

11 A Yes, he did.

12 Q The first guy that when he--when you called and  
13 you said a guy picked it up and he came over to you, did--  
14 is he a person that you think might speak Spanish?

15 A Yes.

16 Q Okay. And what was his name? Was he arrested?

17 A He was arrested and I think his name was Victor  
18 Clinton.

19 Q Okay. And he's listed on the Information; isn't  
20 that correct?

21 A Yes.

22 Q Along with two other people?

23 A Yes.

24 Q Those other people are Ronald Wooley and Roger  
25 Willy?

1           A     Yes.

2           Q     Okay.  And do you see at least one of those

3 people in Court today?  Those--

4           A     Of the three you just listed?

5           Q     Yes.

6           A     No.

7           Q     You haven't seen any of them here today?

8           A     Oh, I've--yeah.  We saw Willy.

9           Q     Okay.

10          A     Mr. Willy.

11          Q     All right.

12          A     I guess.

13          Q     Now, Mr. Morales, you never gave him any money?

14          A     No.

15          Q     Okay.  He never gave you any--anything that might

16 look like a controlled substance?

17          A     No.

18          Q     Okay.  And then when you kept using the term

19 "dealer", he never said "dealer", did he?

20          A     I couldn't say.  Probably not.

21          Q     Okay.  He said something else, but you assumed it

22 was a dealer?

23          A     Right.

24          Q     Is that correct?  Or his dealer?  All right.

25                 So, the negotiations you say broke off with him

1 and he started walking away and then you had him arrested.

2 A That's right.

3 Q That was before anything else occurred with these  
4 other individuals then; is that correct?

5 A Yes.

6 Q Okay. You never used him to talk to those  
7 individuals thereafter?

8 A No.

9 Q And apparently he was seated in the police car  
10 when those other individuals were arrested?

11 A Yes.

12 Q Okay. You don't speak Spanish?

13 A Very little.

14 Q Okay. So you didn't know what he was talking  
15 about when he was on the phone then; is that correct?

16 A No. I can't remember what he--he--it was a  
17 conversation in Spanish and he turned away from me and I--

18 Q You didn't hear it then?

19 A No.

20 Q Now, all other--all other conversations with Mr.  
21 Morales were in English?

22 A Yes.

23 Q And you used terms like, you asked him, "Can you  
24 hook us up"?

25 A Yeah.

1 Q Is that--is that the exact term that you used?  
2 A Probably.  
3 Q And--and I guess a response was, "For what"?  
4 A Coca.  
5 Q I mean, but his response was "For what"?  
6 And you said--you said "Coca"?  
7 A What--I said coca. He said, What do you need and  
8 I said coca.  
9 Q Okay. Did he ever use the word "coca"?  
10 A Unless he was talking to the guy on the phone,  
11 the one--  
12 Q You didn't hear him use the word "coca"?  
13 A I don't think so.  
14 Q You're the one that used the word "coca"?  
15 A Uh huh.  
16 Q You're the one that used the word "hook--hook us  
17 up" or the--the term "hook us up"?  
18 A Right.  
19 Q And I guess he, in some way, form or way, said to  
20 you, I know somebody down the street? At least later he  
21 indicated he's down the street?  
22 A Right.  
23 MR. VALDEZ: That's all I have.  
24 THE COURT: Anything else?  
25 MR. NIELSEN: No, your Honor.

1 THE COURT: Thank you. You may step down.

2 MR. NIELSEN: State would rest, your Honor.

3 MR. VALDEZ: We--we would rest, your Honor.

4 I'll indicate to Mr. Morales that he has the  
5 right to make a statement. I'll advise him not to make a  
6 statement at this time. Will you take my advice?

7 You have the right to--you have a right to  
8 testify. It's my advice that you not testify.

9 Okay. Take my advice?

10 MR. MORALES-TORRES: Yeah.

11 MR. VALDEZ: All right.

12 THE COURT: Okay. Submit it?

13 MR. NIELSEN: Submit it.

14 (Inaudible)

15 THE COURT: Well, let me, first, before you talk  
16 about all that, find probable cause to believe that the  
17 crime alleged here, Mr. Morales-Torres, was committed, the  
18 offering--distribution, offering or agreeing or arranging,  
19 a second-degree, and also reason to believe that you  
20 committed the offense based upon the testimony. So, I'm  
21 going to order that you stand trial and that would be set  
22 then for sentence--for sentencing--for scheduling, and I'm  
23 going to again assume that you waive reading, enter not  
24 guilty pleas for purposes of arraignment.

25 MR. VALDEZ: Yes.

1 THE CLERK: Before Judge Barrett, on April 17 at  
2 8:30.  
3 THE COURT: Okay. On the 17th of April at 8:30  
4 in the morning before Judge Barrett.  
5 MR. VALDEZ: Thank you, your Honor.  
6 THE COURT: And we'll excuse you on that and you  
7 can talk to him about--I think he was talking drug programs  
8 or something.  
9 MR. VALDEZ: He was--yeah, he was talking  
10 (inaudible)  
11 MR. NIELSEN: That's all I have, your Honor. May  
12 I be excused?  
13 THE COURT: Not that I wanted to hear.  
14 You bet. We'll excuse everybody. We're in  
15 recess.  
16 (Whereupon, this hearing was concluded.)  
17  
18 \* \* \*  
19  
20  
21  
22  
23  
24  
25



TRANSCRIBER'S CERTIFICATE

STATE OF UTAH                    )  
  ):  SS.  
COUNTY OF SALT LAKE        )

I, Toni Frye, do hereby certify:

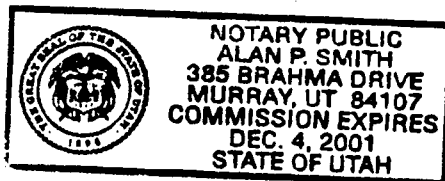
That I am a transcriber for Alan P. Smith, Certified Shorthand Reporter and a Certified Court Transcriber of Tape Recorded Court Proceedings; that I received an electronically recorded videotape of the within matter and under his supervision have transcribed the same into typewriting, and the foregoing pages, numbered from 1 to 19, inclusive, to the best of my ability constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 14th day of October, 2000.

*Toni Frye*  
\_\_\_\_\_  
Transcriber

Subscribed and sworn to before me this 14th day of October, 2000.



*Alan P. Smith*  
\_\_\_\_\_  
Notary Public

( S E A L )

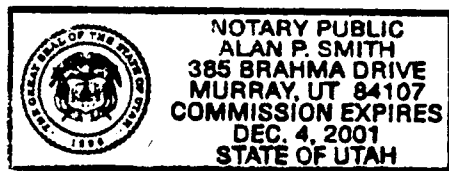
REPORTER'S CERTIFICATE

STATE OF UTAH                                 )  
  :    ss.  
COUNTY OF SALT LAKE                    )

I, Alan P. Smith, Certified Shorthand Reporter, Notary Public and a Certified Court Transcriber of Tape Recorded Court Proceedings within and for the State of Utah, do certify that I received an electronically recorded videotape of the within matter and caused the same to be transcribed into typewriting, and that the foregoing pages, numbered from 1 to 19, inclusive, to the best of my knowledge, constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 17th day of October, 2000.



*Alan P. Smith*  
\_\_\_\_\_  
Notary Public

( S E A L )

## Addendum B

JAMES A. VALDEZ #3308  
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7/20

cc

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH  
IN AND FOR SALT LAKE COUNTY, SALT LAKE DIVISION

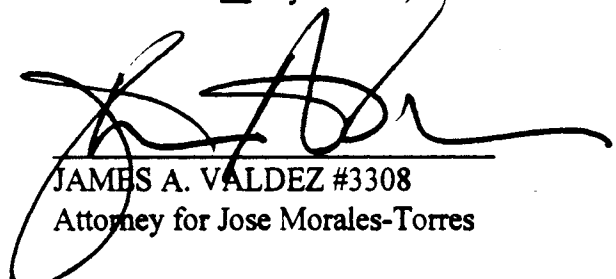
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THE STATE OF UTAH,	:	
	:	
Plaintiff,	:	MOTION TO QUASH BINDOVER
	:	OR DISMISS.
v.	:	
	:	
JOSE MORALES-TORRES	:	Case No. 001904616FS
	:	CAO 00-00-5277
Defendant.	:	JUDGE WILLIAM BARRETT

---

The Defendant, JOSE MORALES-TORRES, by and through counsel, JAMES A. VALDEZ, moves the Court to quash the bindover for trial which was granted April 6<sup>th</sup>, 2000, based upon an opinion by the Utah Court of Appeals filed and released for publication on June 2<sup>nd</sup>, 2000, State v. Hester, 2000 UT App 159, (2000). A supporting Memorandum is filed herewith.

DATED this 7<sup>th</sup> day of June, 2000.



JAMES A. VALDEZ #3308  
Attorney for Jose Morales-Torres

MAILED/DELIVERED a copy of the foregoing to the Office of the District Attorney, 231 East 400 South, Salt Lake City, Utah 84111, this 7<sup>th</sup> day of June, 2000.

JAMES A. VALDEZ # 3308  
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*file*  
*WJ*  
*7/3*  
*cmn*

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH  
IN AND FOR SALT LAKE COUNTY, SALT LAKE DIVISION

---

THE STATE OF UTAH,	:	MEMORANDUM AND SUPPORTING
Plaintiff,	:	AUTHORITY EN RE: MOTION TO
	:	QUASH BINDER OR DISMISS.
v.	:	
JOSE MORALES-TORRES	:	Case No. 001904616FS
Defendant.	:	CAO 00-00-5277
	:	JUDGE WILLIAM BARRETT

---

FACTS

Police officer Angeline Portal indicates in her police reports and testified at Preliminary Hearing held on April 6, 2000 before Honorable Sheila McCleve that she and other officers were working in the area of 575 West 200 South when they seen the defendant Jose Morales-Torres. She indicates "we approached him and asked him if he could, 'Hook us up'. He laughed and walked over to the vehicle. He asked us what we needed and I told him I wanted 'coca.' He asked me if I had thirty five cents for the pay phone." Officer Portal testified and wrote in her report that they did not have any change but let him use their police issued cell phone. She then states " I told him if he got us a deal I'd give him ten bucks." [Portal report]

She then walked with him and watched as he paged someone and received a return call a

short time later wherein he conducted a conversation in Spanish which she (officer Portel) was unable to understand. She further reports that he wanted a ride to a location at 700 South 900 West. The officers refused to give him a ride and arrested him for arranging the sale of narcotics.

Officers then went over to the a restaurant "El Popular" at 700 South 900 West and one officer entered in an attempt to locate a "Dealer". None was located so Officers used a different cell phone to call the numbers that were in the memory the cell phone that Morales had used. They made contact with a Victor Clinton outside in the parking lot of "El Popular" Restaurant who noticed that they were on the phone attempting to contact him. At the time he was standing with Ronald Justo Woolery.

Police reports indicate that the negotiations involved Woolery as the main supplier of the narcotic. Clinton was the contact to Woolery and Roger D. Willey was another buyer. [Sharman report].

Negotiations were conducted with Woolery, prerecorded buy money was used to make purchase from Woolery and Clinton after some elaborate efforts at acquiring the substances and transportation to yet other locations and eventually the deal was completed and the take down officers notified and arrests made. Upon arrests being made of Woolery and Clinton some of the pre-recorded buy money was located in Clinton's right front pocket. There is no indication as to whether any of the arrested people other than Mr. Morales spoke Spanish.

#### ARGUMENT

THE PROSECUTION HAS NOT  
ESTABLISHED THE QUANTUM OF  
EVIDENCE NECESSARY TO BIND  
OVER AS SET FORTH IN STATE v.  
HESTER.

Mr. Morales-Torres did nothing more than furnish the undercover a pager and telephone number. Once the officers arrested Mr. Morales, they conducted their own negotiations with Woolery and in fact all remaining transactions did not involve Mr. Morales.

State v. Hester 2000 UT App 159, (2000) the defendant Tracy Raymon Hester was contacted by an undercover police officer when the officer pulled up to a curb near where Hester was standing and said something. When he walked over to the vehicle the officer asked Hester if he had any "chiva.". Hester's reply was "No, baby, I don't [;] only coke." took twenty dollars from the officer told her to "wait there" and walked away. He was arrested and charged with one count of arranging distribute a controlled substance.

At the conclusion of the Preliminary Hearing, defense counsel moved to dismiss on the ground that the State had failed to present evidence sufficient even to support a reasonable inference that Hester actually intended to arrange for the distribution of a controlled substance— as opposed to just stealing the officers money. The magistrate granted the defense motion and refused to bind Hester over. The State appealed the dismissal and the Utah Court of Appeals affirmed the magistrates decision.

To be guilty of arranging, the defendant must have committed some "act in furtherance of arrangement" to distribute controlled substances. As part of its prima facie case of arranging, the State must prove that the defendant acted with the knowledge or intent that his actions would result in the distribution of a controlled substance.

Here police officers closed off any further discussions with Mr. Morales and arrested him. They then made contact with the "Dealers" and conducted and concluded negotiations on their own. Mr. Morales took no part in the completed distribution and the only active step that

Morales can be shown to have taken was an unsuccessful phone call and his unwitting furnishing of the phone number..

The court in Hester, in discussing whether intent to facilitate a drug transaction can logically be inferred from the thin circumstantial evidence in the Hester facts said:

... "While it is sometimes subtle, there is in fact a difference between drawing a reasonable inference and merely speculating about possibilities. An inference is 'a conclusion reached by considering other facts and deducing a logical consequence from them.' Blacks Law Dictionary 781 (7<sup>th</sup> ed. 1999). Stated another way, '[a]n inference is a deduction as to the existence of a fact which human experience teaches us can reasonably and logically be drawn from proof of other facts.' Manchester v. Dugan, 247 A.2d 827, 829 (Me. 1968). On the other hand, speculation is defined as the 'act or practice of theorizing about matters over which there is no certain knowledge.' Black's Law Dictionary 1407 (7<sup>th</sup> ed. 1999).

In reality, there is no black line between inference and speculation -both are way stations along a continuum that has absolute Certainty at one extreme and complete impossibility at the other. 'When the correlation between the predicate facts and 'at some point, the link between the facts and the conclusion becomes so\ tenuous that we call it "speculation." ' " State v. Copas, 746 A. 2d 761, 782 (Conn.2000) (Katz, J. Dissenting) (quoting Goldhirsh Group, Inc. v. Alpert, 107 F.3d 105, 108 (2<sup>nd</sup> Cir. 1997) )."

What if anything Mr. Morales said on the phone is unknown, because is was conducted in Spanish and not understood by the officers. Additionally he was immediately arrested and made to wait in custody for a long period of time whilst the officers made contact on their own, conducted negotiations on their own, transported and traveled to other locations one their own, and finally exchanged money with people other than Mr. Morales, on their own.

## CONCLUSION

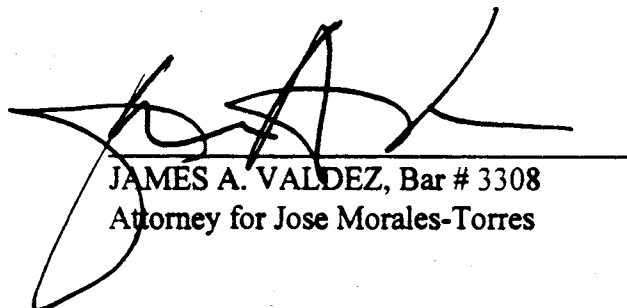
The Prosecution has failed to establish the quantum of evidence necessary to establish



a prima facie case of *arranging* the distribution of a controlled substance, a second degree felony in violation of Utah Code Ann. Section 58-37-8(1) (a)(ii) Supp. 1999). And pursuant to State v. Hester, 2000 UT App 159, (2000). (Released for publication on June 2<sup>nd</sup>, 2000 after the bindover).

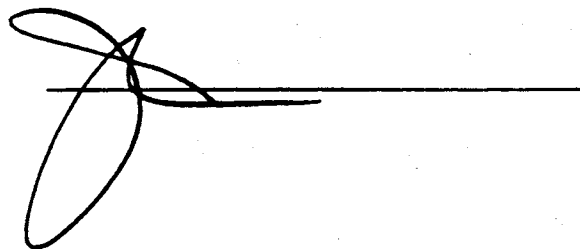
Mr. Morales by and through his attorney James A. Valdez respectfully prays the finding of probable cause and bindover be hereby quashed and the matter remanded to the Magistrate Court for consideration and findings consistent with State v. Hester, or in the alternative, PRAY that this Court make findings consistent with Hester, and dismiss the charges against JOSE MORALES-TORRES with prejudice.

DATED this 26<sup>th</sup> day of June, 2000.



JAMES A. VALDEZ, Bar # 3308  
Attorney for Jose Morales-Torres

MAILED/DELIVERED a copy of the forgoing Memorandum to Matt Nielsen, Deputy District Attorney, 231 East 400 South, Salt Lake City, Utah 84111, this 26<sup>th</sup> day of June, 2000.



## Addendum C

DAVID E. YOCOM  
District Attorney for Salt Lake County  
KELLY R. SHEFFIELD, Bar No. 5869  
Deputy District Attorney  
231 East 400 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 363-7900

*CMC*

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

---

STATE OF UTAH,  
Plaintiff,

-vs-

JOSE MORALES-TORRES,  
Defendant.

MEMORANDUM IN OPPOSITION  
TO DEFENDANT'S MOTION TO  
QUASH THE BINDOVER

Case No. 001904616FS  
CAO 00-00-5277

JUDGE WILLIAM BARRET

---

The State of Utah, by and through its counsel, David E. Yocom, Salt Lake County District Attorney, and Kelly R. Sheffield, Deputy District Attorney, respectfully submits this Memorandum in Opposition to the Defendant's Motion to Quash the Bindover.

**FACTS**

The defendant has been charged with Unlawful Distribution, Offering, Consenting or Arranging to Distribute a Controlled or Counterfeit Substance. Utah Code Ann. 58-37-8(1)(a)(ii) (1953). On March 08, 2000, at 575 West 200 South, in Salt Lake County, Officer Portel with the Salt Lake City Police Department was working on an undercover narcotics operation targeting street level narcotics distribution in the downtown area. Officer Portel made contact with the defendant after observing him and

two other males standing near a pay phone. The defendant left with one of the males and then returned to the area of the pay phone within 30 minutes. Officer Portel and Officer Scharman, both undercover and in plain clothes, pulled over next to the sidewalk near the defendant and gave him a nod, a method of communication Officer Portel uses as a buyer to contact drug dealers. At that point, the defendant approached the vehicle where Officer Portel asked the defendant if he could "hook us up." The defendant responded by asking her what she needed, which she answered by requesting cocaine. The defendant then asked for change to use the pay phone. When Officer Portel declined to give him money, she offered to allow him to use her cellular phone. The defendant used the phone and called a pager number and then waited for a call. Within one minute the phone rang and the defendant had a conversation in Spanish. Officer Portel does not speak Spanish and was unable to understand the phone conversation. When the defendant finished his conversation, he stated that they needed to go to 700 South and 900 West because the man who had the drugs was at that location eating lunch and he wanted them to drive out there to meet him. The defendant wanted to ride with the Officers over to the other location but was not allowed to enter the vehicle. Officer Portel began to negotiate the deal so that the other man could meet them there or if the Officers could meet the other man without the defendant. The defendant insisted on going stating that the other man knew him and would not deal with the Officers without him. Officer Portel declined to participate in the deal and the defendant walked away. The defendant was then picked up by Officers Smith and Farillas.

After observing the arrest of the defendant, Officer Portel went to the location of 700 South and 900 West where the defendant had arranged the meeting between them

and the man that would sell them cocaine. Officer Portel then used the cellular phone the defendant had used and hit redial. She observed the man answering the page then approached him and negotiated a drug deal. A drug sale resulted out of that transaction.

## ARGUMENT

### I. THE STATE MET ITS BURDEN OF ESTABLISHING PROBABLE CAUSE TO BELIEVE THE DEFENDANT COMITTED THE CRIME OF UNLAWFULLY ARRANGING THE DISTRIBUTION OF A CONTROLLED SUBSTANCE.

The magistrate properly bound this case over for trial. The magistrate does not judge the merits of the case, but sits as a gatekeeper to the finder of fact. State v. Talbot, 972 P.2d 435 (Utah 1998). At the conclusion of testimony, any uncertainties created by conflicting evidence concerning elements of the crime charged should be left for the fact finder to resolve at trial. State v. Jaeger, 896 P.2d 42, 45 (Utah Ct. App. 1995). The magistrate has been directed by the Utah Supreme Court to evaluate the evidence in a light most favorable to the prosecution and resolve all inferences in the prosecution's favor. State v. Pledger, 896 P.2d 1226, 1229 (Utah 1995). Unless the evidence is wholly lacking and incapable of reasonable inference to prove some issue which supports the prosecution's claim, the magistrate should bind the defendant over for trial. Pledger, 896 P.2d at 1229.

The State's burden at a preliminary hearing is not a heavy one. "The prosecution is not required to introduce enough evidence to establish the defendant's guilt beyond a reasonable doubt, but must present a quantum of evidence sufficient to warrant submission of the case to the trier of fact." State v. Talbot, 972 P.2d 435, 437 (Utah 1998)(quoting Pledger, 896 P.2d at 1229). Furthermore, "this probable cause standard 'is

lower, even, than a preponderance of the evidence standard applicable to civil cases.”  
Talbot, at 437 (quoting Pledger, at 1229).

Consequently, the State met its burden by producing sufficient evidence to establish probable cause to believe the defendant committed the act of arranging the distribution of a narcotic. Therefore, the defendant’s Motion to Quash the Bindover should be denied.

A. The Prosecution Presented Sufficient Evidence to Establish Probable Cause to Believe that the Defendant Committed the Act of Arranging the Distribution of a Controlled Substance.

The defendant argues that the bindover should be quashed based on State v. Hester, 2000 UT App 159 (2000), which dismissed a case on the grounds that the State had failed to present evidence sufficient to support a reasonable inference that Hester actually intended to arrange for the distribution of a controlled substance, as opposed to just stealing the money. Hester, at 2. However, the Court in Hester, also stated that “[t]he State could have met its burden either by producing evidence of a completed sale of cocaine to [the officer] or evidence that Hester took active steps to facilitate the distribution of cocaine, even if the distribution never actually occurred.” Id. at 6. Consequently, the facts in this case are distinguishable from Hester, in that the State produced evidence that the defendant took active steps to facilitate the distribution of cocaine.

Further, “[t]o be guilty of arranging, the defendant must have committed some ‘act in furtherance of an arrangement’ to distribute controlled substances.” Hester, at 4 (quoting State v. Harrison, 601 P.2d 922, 923 (Utah 1979)). And, “the State must prove

that the defendant acted with the knowledge or intent that his actions would result in the distribution of a controlled substance.” Hester, at 5.

Nevertheless, “[i]ntent to commit a crime can be ‘inferred from the actions of the defendant or from surrounding circumstances.’” Hester, at 5 (quoting State v. Murphy, 674 P.2d 1220, 1223 (Utah 1983)). And it is well settled that questions of intent are strictly within the province of the jury. State v. Singer, 815 P.2d 1303, 1309 (Utah 1991). In this case, the defendant asked Officer Portel what she wanted when she asked for a “hook up”. Officer Portel specifically asked the defendant for cocaine. In response to **Officer Portel’s request, the defendant made a call and set up a meeting at another location with a man who had the cocaine. The defendant made the phone call with the intent to set up a drug transaction.** This is further evidenced by the fact that the defendant insisted on going with Officer Portel to the meeting and then commented that the deal would not transpire without him since the dealer would deal only with him. The actions of the defendant in making the phone call and setting up a meeting with a dealer at a specific place shows the defendant intended to arrange a drug deal. Consequently, the intent of the defendant to arrange the distribution of a controlled substance can be inferred through his actions.

In addition, “there are other types of evidence which can be used to reveal the defendant’s intent by showing that the defendant took active steps to facilitate the completion of an illicit transaction.” Hester, at 5 (See State v. Gallegos, 851 P.2d 1185, 1187, 1190-91 (Utah Ct. App. 1993)). In Gallegos, the defendant made phone calls to find dealers to provide controlled substances to callers. The Utah Court of Appeals stated that the phone call making facilitated the illicit transaction. Also, when the defendant

brings together a buyer and a seller, the Utah Court of Appeals called it a “link in a chain of events.” Hester, at 5 (quoting State v. Pelton, 801 P.2d 184, 185 (Utah Ct. App. 1990)). Thus, when the defendant in this case contacted the dealer, he became the link in the chain of events, which facilitated the drug transaction that resulted and therefore the defendant arranged the sale of drugs. The defendant brought the dealer and the Officers into contact with each other, which facilitated the transaction and whereby the defendant’s intent can be inferred. Therefore, the facts in this case are different than in Hester, such that the defendant in this case took steps to facilitate the drug transaction, which establishes the quantum of evidence necessary to bind this case over for trial.

B. The Proper Standard for this Case to be Decided Under is State v. Gray.

Even if this Court decides that the facts in this case are not distinguishable from Hester, the State contends that the proper standard to decide this issue is from the Utah Supreme Court in State v. Gray, 717 P.2d 1313 (Utah 1986). The Court in Hester, dismissed the bindover because “the State’s evidence would require the fact-finder to speculate as to Hester’s intent to arrange a sale.” Hester, at 7. This would require the State to offer evidence of the subjective intent of each defendant in every case. ~~The Court in Hester established that the intent of the defendant can be inferred from his actions and the circumstances or if the defendant took active steps to facilitate the crime.~~ These are objective standards of conduct, which have been shown to establish intent in this case.

Moreover, the State contends that under Gray, the subjective intent of each defendant is irrelevant and the objective actions of the defendant should control instead.



“We stated that any witting or intentional lending of aid in the distribution of drugs, in whatever form the aid takes, is proscribed by the act.” State v. Gray, 717 P.2d 1313, 1320 (Utah 1986). In Gray, the defendant was convicted under this statute for driving a third party to the dealer’s home to obtain drugs for the undercover agent and for puffing the drug’s quality. The Court held that the defendant’s involvement was enough to uphold the conviction.

In the case at bar, the defendant arranged a meeting between the dealer and Officer Portel for cocaine. The defendant gave Officer Portel the number to the dealer from which a drug transaction resulted. Consequently, the defendant’s involvement was the link that facilitated the drug transaction, which makes him culpable under this statute. The defendant’s actions aided in the distribution of the drugs, however unwitting his aid might have been. Under an objective view of the defendant’s actions, he aided in the distribution of drugs. Therefore, the actions of the defendant objectively make him culpable under this statute.

Further, “[w]e also pointed out that it is not necessary for the defendant to receive any value in exchange for the drugs to be convicted under the statute.” Id. at 1320. Therefore, the defendant’s intent can be inferred from his involvement in the transaction even though he was not present during the transaction and he was not compensated. “Were it otherwise, the arranging of drug sales would be perfectly legal, so long as it was done gratuitously. The aim of the law is to make the arrangement of drug sales unlawful, whether they be profitable or not.” State v. Harrison, 601 P.2d 922, 924 (Utah 1979).

Therefore, the defendant’s action from an objective standard satisfy the elements of the statute and proved sufficient evidence to bind the defendant over for trial.

C. The Defendant Was Properly Charged as Required by State v. Hill.

The Utah Supreme Court in State v. Hill, required the State to charge the defendant in that case under the Controlled Substances Act in the Utah Code where the State charged Hill with theft by deception for selling baking soda to an agent claiming it to be cocaine. 688 P.2d 450 (Utah 1984). The Court stated that when a statute governs conduct then the defendant should be charged with that offense. In this case, the defendant's actions are specifically proscribed by Utah Code Ann. § 58-37-8 (1)(a)(ii) (1953), where the defendant arranged the distribution of a controlled substance. The defendant arranged a meeting between Officer Portel and a dealer and provided a number by which a drug transaction transpired. "Consequently, where specific conduct is proscribed by the Imitation Controlled Substances Act, its provisions should control as mandated by § 58-37-19." State v. Hill, 688 P.2d 450, 451 (Utah 1984). Further, "§ 58-37-19 of the Controlled Substance Act is applicable to Chapter 37b offenses since the two acts are integrally connected." Id. at 451. Therefore, the defendant's conduct in this act meet the elements under this statute and so has been properly charged.


### CONCLUSION

A magistrate should bind a defendant over for trial unless the evidence is wholly lacking and incapable of reasonable inference to prove some issues, which supports the prosecution's claim. Pledger, 896 P.2d at 1229. At the preliminary hearing, the State produced evidence that the defendant made arrangements by telephone for a drug sale.

The defendant called a dealer and provided a meeting place for the drug transaction to take place. When the Officers refused to give the defendant a ride to the meeting, the defendant stated that the transaction would only occur if he were present. Nevertheless, the Officers used the number to the dealer provided by the defendant and went to the place of the meeting provided by the defendant, which resulted in a drug sale. Therefore, based on these facts, the objective actions of the defendant qualify him to be properly charged under the distributing statute and the defendant's motion to quash the bindover should be denied.

RESPECTFULLY SUBMITTED this 14 day of July, 2000.

DAVID E. YOCOM  
District Attorney

  
KELLY R. SHEFFIELD  
Deputy District Attorney

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Memorandum In Support of the State's Motion in Opposition to the Defendant's Motion to Quash the Bindover was delivered to JAMES A. VALDEZ, attorney for Defendant, JOSE MORALES-TORRES, at 424 East 500 South, Suite 300, Salt Lake City, Utah 84111 on the 14 day of July, 2000.

## Addendum D

**JUDICIAL DISTRICT COURT**  
Third Judicial District

JAMES A. VALDEZ #3308  
Attorney for Defendant  
SALT LAKE LEGAL DEFENDER ASSOCIATION  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-5444  
E-mail: [jvaldez@sllda.com](mailto:jvaldez@sllda.com)

JUL 20 2000

SALT LAKE COUNTY

By [Signature]  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

IN AND FOR SALT LAKE COUNTY, SALT LAKE DIVISION

THE STATE OF UTAH,	:	ORDER QUASHING BIDOVER
	:	AND REMANDING TO PRELIMINARY
Plaintiff,	:	HEARING MAGISTRATE.
	:	
v.	:	
	:	
JOSE MORALES-TORRES	:	Case No. 001904616FS
	:	CAO 00-00-5277
Defendant.	:	JUDGE WILLIAM BARRETT

The above-captioned matter having come on for hearing on the 20<sup>th</sup> of July, 2000, the Defendant JOSE MORALES-TORRES, represented by his attorney James A. Valdez, the States representative Deputy District Attorney, Kelly R. Sheffield.


The evidence presented was the Preliminary Hearing transcript, case law, Memorandums and brief argument by attorneys.

The court having carefully read the transcript, memorandums and case law, finds that in review of State v. Hester, 2000 UT App 159, (2000) released after the preliminary hearing in this matter, the State has failed to so a "Quantum of Evidence" necessary to bind over, in that: (1) the conversation that defendant had with a so called dealer was not understood by Officer Portel because it was in the Spanish language and she did not understand what was said nor to whom; (2) it was clear that defendant never had any drugs; (3) defendant never mention "cocaine or any

other drug; (4) police officers broke off negotiations with defendant and he walked off; officers made further contact with drug dealer(s) on their own, conducted negotiations and; (6) there was no evidence that defendant had anything to do with the dealers that the officers eventually consummated a drug transaction.

IT IS HEREBY ORDERED, that the bind over in the above entitled matter be Quashed and the matter be remanded to the Magistrate Court for further hearing.

DATED this 20 day of July, 2000.

  
WILLIAM BARRETT, JUDGE  
THIRD DISTRICT COURT

APPROVED AS TO FORM:

  
KELLY R. SHEFFIELD

MAILED/DELIVERED a copy of the foregoing to the Office of the District Attorney,  
231 East 400 South, Salt Lake City, Utah 84111, this \_\_\_\_ day of July, 2000.

---

DAVID E. YOCOM  
District Attorney for Salt Lake County  
KELLY R. SHEFFIELD, 5869  
Deputy District Attorney  
231 East 400 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 363-7900  
00005277

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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT  
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

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THE STATE OF UTAH,

Plaintiff,

-vs-

JOSE MORALES-TORRES,

Defendant.

ORDER OF DISMISSAL

Case No. 001904616

Hon. Anthony B Quinn

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Based upon the motion of the Plaintiff and in the interests of justice,

IT IS HEREBY ORDERED that the information in the above-entitled matter be dismissed.

DATED this 3<sup>rd</sup> day of August, 2000.

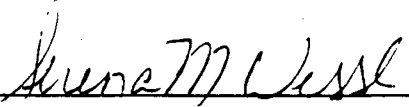
BY THE COURT:

  
\_\_\_\_\_  
ANTHONY B QUINN  
DISTRICT COURT JUDGE



CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing MOTION TO DISMISS and ORDER OF DISMISSAL was delivered to James A Valdez, Attorney for Defendant Jose Morales-Torres at 424 East 500 South, Suite 300, Salt Lake City, Utah 84111 on the 3<sup>rd</sup> day of August, 2000.

  
\_\_\_\_\_