

1992

# Utah v. Harris : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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920139-CA

STATE OF UTAH,

:

Plaintiff/Appellee, : Case No. 920139-CA

v.

:

ANTHONY HARRIS,

:

Priority No. 2

Defendant/Appellant, :

BRIEF OF APPELLEE

- - - - -

THIS IS AN APPEAL FROM A CONVICTION OF THEFT,  
A SECOND DEGREE FELONY, IN VIOLATION OF UTAH  
CODE ANN. § 76-6-404 (1990), AND BURGLARY, A  
THIRD DEGREE FELONY, IN AND FOR SALT LAKE  
COUNTY, STATE OF UTAH, THE HONORABLE SCOTT  
DANIELS, PRESIDING.

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee, : Case No. 920139-CA  
v. :  
ANTHONY HARRIS, : Priority No. 2  
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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee, : Case No. 920139-CA  
v. :  
ANTHONY HARRIS, : Priority No. 2  
Defendant/Appellant.:

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

Defendant Anthony Harris appeals his convictions of theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (1990), and burglary, a third degree felony, in violation of Utah Code Ann. § 76-6-202 (1990). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

ISSUES PRESENTED ON APPEAL AND  
STANDARDS OF APPELLATE REVIEW

This appeal involves a warrantless police entry into Michael Nichols' apartment no. 4B to seize Dexter Davis. After Davis was seized, the police conducted a protective sweep of the apartment and seized defendant. Stolen goods were in plain view and defendant was arrested. The issues raised on appeal are:

1. Did the trial court correctly deny defendant's motion to suppress the evidence seized from apartment 4B on the grounds that exigent circumstances justified the warrantless entry and that reasonable concerns for the officers' safety permitted the protective sweep?

Whether exigent circumstances justify a warrantless entry and whether a reasonable suspicion of danger supports a protective sweep are questions of fact. Maryland v. Buie, 110 S. Ct. 1093, 1095 (1990); State v. Morck, 821 P.2d 1190, 1194 (Utah App. 1991) (citing State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987)). The trial court's factual findings must be affirmed on appeal unless clearly erroneous. Ibid.

2. Does the state constitution require an officer to have probable cause to believe that danger to life or limb exists before the officer may take protective measures?

Whether a separate state constitutional standard is applicable is a question of law which is accorded no deference on appeal. State v. Larocco, 794 P.2d 460, 465-66 (Utah 1990). When a defendant fails to assert a particular ground for suppression in the trial court, an appellate court will not consider that ground for the first time on appeal. State v. Schnoor, 204 Utah Adv. Rep. 22, 24 (Utah App. 1/7/93); State v. Sims, 808 P.2d 141, 150 (Utah App. 1991), cert. granted, No. 910218 (Utah 2/5/93).

3. Did the trial court abuse its discretion in denying defendant's motion to sever the Banana Republic charges from the Mr. Mac charges?

A trial court's denial of a motion to sever will only be reversed if the refusal is "'a clear abuse of discretion in that it sacrifices the defendant's right to a fundamentally fair trial.'" State v. Lee, 831 P.2d 114, 117 (Utah App.), cert.



denied, 843 P. 2d 1042 (Utah 1992) (quoting State v. Lopez, 789 P.2d 39, 42 (Utah App. 1990)).

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The full text of any constitutional provisions, statutes or rules determinative of the outcome of this appeal are reproduced in Addendum A.

#### STATEMENT OF THE CASE

Defendant and codefendants Michael Beavers, Michael Nichols and Terrence Flemmings were charged with burglaries and thefts at Banana Republic and Mr. Mac (R. 7-8, 23-24) (Addendum B). Nichols pled guilty to a third degree felony; Flemmings' charges were dismissed (R. 29, 897). Defendant and Beavers were bound over for trial (R. 26-29).

Defendant and Beavers filed motions to suppress (R. 51, 55-56). After an evidentiary hearing, only Beavers' initial statement to the police was suppressed; the motions were otherwise denied (R. 87, 91, 93, 101-08) (Addenda C & D).

Defendant filed a motion to sever his trial from that of Beavers; the motion was granted (R. 220, 229-33, 234). Defendant then moved to sever the Banana Republic counts from the Mr. Mac charges; the motion was denied (R. 234, 530-32) (Addendum E).

In October, 1991, Beavers was convicted after a jury trial of misdemeanor theft by receiving, burglary and felony theft (R. 244-45, 248-49, 352-56,). Defendant then entered conditional guilty pleas to second degree theft and third degree

burglary; the remaining charges were dismissed (R. 365, 367-73). Defendant was sentenced to the statutory terms of imprisonment to run concurrently with a prior prison sentence (R. 396, 398). Defendant and Beavers timely appealed (R. 384-85, 401). See State v. Beavers, No. 920056-CA (effectively treated as consolidated).

#### STATEMENT OF THE FACTS<sup>1</sup>

During the early morning of November 12, 1990, a shopping cart was thrown through the front window of Banana Republic in Trolley Square (R. 830-31). The burglars attempted to take leather coats, but the coats were attached by chains to the wall and could not be removed (R. 832-33). Instead, 52 canvass or cloth coats were stolen (R. 834).

Within minutes, defendant, Beavers and Flemmings knocked on Michael Nichols' apartment door (no. 4B) (R. 804, 830, 889, 1274). When Nichols opened the door, they brought in armfuls of coats which they said were stolen from Banana Republic (R. 890, 917). They "talked about going to some other store" (R. 893).

All four drove to a Mr. Mac store on Fort Union Boulevard (R. 813, 893-94). Beavers backed the car up to the store's front doors and pushed the doors in, breaking the bolt

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<sup>1</sup> The facts are taken from the evidentiary hearing on the joint motion to suppress. When necessary to explain the substantive offenses, the transcript of Beavers' trial has been cited. The trial occurred prior to the entry of defendant's pleas and defendant has cited to the Beavers' transcript in his brief.

lock (R. 814, 893-94). Defendant and Nichols grabbed 39 leather coats from a wall directly in front of the door (R. 806-08, 894). When Beavers drove out, he caught the left rear side of the car on the hanging doors and tore off part of the car's taillight (R. 813-17). When they returned to Nichols' apartment, the Mr. Mac coats were hung with the Banana Republic coats (R. 895). Nichols left for work and the others stayed at the apartment (R. 895-96).

Later that morning, David Hunt, the apartment manager, heard a loud argument coming from no. 4B (R. 1110-11). It "sounded like people were being hit in the apartment, like there was an assault occurring" (R. 1112). Someone said, "Don't kill me" (R. 1110). Hunt had not seen Nichols all morning, but he earlier had seen two black males go into the apartment (R. 1111, 1120, 1147). Hunt was concerned because the night before two black males had "burglarized or broken into" the apartment and stolen a television (R. 1111, 1126, 1144). Hunt "felt one of the people he had seen [in the morning] was similar to the person the night before[,] but he wasn't [sic] positive" (R. 1111). Other than the two black males, Hunt did not know who was currently in no. 4B (R. 1120, 1147).

Hunt called the police (R. 1110). When three officers responded, he told them that the argument was still going on, related what he had observed and heard, and gave the police the description and license number of the car which had dropped off the two males in the morning (R. 1110-12).

The complex had three floors and no. 4B was in the

middle of the second floor (R. 1110). As the police came up the stairs, they could hear "male voices arguing inside the apartment" (R. 1112-13, 1149). Officer Foster remained in the stairwell while Officers Humphries and Beger approached no. 4B's door (R. 1113). The door was ajar two to three inches; "the doorjamb and latching mechanism were broken away[,] . . . the jam being splintered" (R. 1113). The officers did not know if the door had been kicked-in the night before in connection with the television theft or that morning during the assault (R. 1112, 1128, 1152).

Without announcing their presence, the officers stood on either side of the door (R. 1113, 1134). In Officer Humphries' view, "the argument that was occurring was violent enough in temperament that [he] felt [the officers] should ascertain as to exactly what was occurring" (R. 1148). Officers are trained to assess the nature of a disturbance or domestic dispute before intervening; otherwise if an officer simply announces his presence while a violent argument is occurring, the combatants' reaction may jeopardize the officers' safety (R. 1148-49).

The police listened outside the door for two to four minutes (R. 1113). They could hear two males arguing:

The first individual was saying he wanted to take the coat, show the coat. "I will give you \$10 and I will be back later." The other voice was objecting to that arrangement, was saying, "No, you are not leaving with the coat. I am not going to let you walk with the coat for \$10."

(R. 1114). A third male interjected:

They have got a lot of coats in there. You have seen the coats they have in there.

(Id.). The first male responded:

Well, I am leaving. I will see you later.

(Id.) With that, Dexter Davis, a black male, stepped through the doorway into the complex's hallway (R. 1114). He was wearing a leather jacket and carrying another tan jacket with store tags on a store hanger (R. 1114).<sup>2</sup> After Davis stepped out of the apartment, he turned and saw the uniformed officers (R. 1115). He said, "Oh, shit," and "started to step back into the apartment" (R. 1114-15). Officer Humphries reached through the open door and grabbed Davis by the shoulder, flipping his feet out from under him (R. 1115, 1130, 1142).

As soon as Davis started back through the door, Officer Humphries could see into the living room. He knew that the

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<sup>2</sup> Officer Humphries testified that when he first observed Davis he could identify the tags and hanger as Banana Republic's (R. 1114, 1131). The court questioned whether the officer could make this connection during the few seconds he saw Davis before seizing him; the court voiced that it was more probable that after the officer entered the apartment and saw the stolen coats, he made the connection to the Banana Republic burglary which the officer knew about before coming to the apartment; the prosecutor agreed (R. 478-80, 544).

Contrary to defendant's assertion, the court did not dispute that Officer Humphries saw the tags and hanger and, therefore, could reasonably discern that the coat was "contraband." The officer consistently testified that he could observe store tags and a store-type hanger (R. 1114, 1117, 1131). He also testified that based on his undercover experience in fencing operations, it was his belief that the argument was over stolen coats (R. 1117, 1119). The court did not question this testimony; it only questioned whether, prior to seizing Davis, the officer could identify the source of the stolen coat.

tenant of no. 4B was a white male, but the only persons he could see were two black males, later identified as defendant and Flemmings, and a female black juvenile, Deandra Hurd (R. 1024-25, 1111, 1115-16, 1146-47). Defendant ran out of view towards the back of the apartment (R. 1116). Flemmings began fumbling with a pile of clothing on the floor (R. 1115-16). Officer Humphries called to Officer Foster and the two entered the apartment with guns drawn as Officer Beger secured Davis on the floor (R. 1119). Flemmings and Hurd were then ordered to the floor and Humphries seized defendant (R. 1116). Officer Humphries quickly made a cursory check of the rest of the apartment to determine if anyone else was inside (R. 1120). In plain view were the stolen coats (R. 103, 106, 1120-21).<sup>3</sup>

After providing the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), defendant was questioned (R. 1047-48, 1053, 1056). He admitted his involvement in the Mr. Mac burglary, claimed that he knew about the Banana Republic stolen coats only after the fact, and implicated Beavers in both crimes (R. 1049-51, 1068-75). When questioned the next day, defendant repeated his confession (R. 1076-77).

At the same time, the police located the Mazda used in the Mr. Mac burglary behind the apartment. It was missing a taillight similar to the one found inside Mr. Mac (R. 798, 823-24). Karen Hull, the car's owner, walked up and explained that

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<sup>3</sup> A search warrant was subsequently secured; the trial court found that no property search took place before execution of the warrant (R. 103, 106, 478-79, 552-53).

she had reported the car stolen; she said Beavers had stolen the keys the night before while she was intoxicated at a party (R. 1178-79, 1181-83). Beavers was subsequently arrested.

At Beavers' trial, Nichols testified for the State. (R. 914-30). One month after Beaver was convicted, defendant entered his conditional guilty pleas (R. 365, 367-73).

#### SUMMARY OF ARGUMENT

##### A. Search and Seizure Issues

The issue raised in this appeal is whether the warrantless entry into apartment 4B to seize Dexter Davis was justified. If the police were not lawfully on the premises, the contemporaneous protective sweep of the apartment was not proper and the plain view observations impermissible. Since these observations created the probable cause for the subsequent search warrant, invalidity of the observations would mandate suppression of the property seized pursuant to the warrant. On the other hand, as defendant conceded below, if the entry is valid, the subsequent police action at the apartment is constitutionally permissible.

Determination of whether the warrantless entry into apartment 4B is constitutionally permissible does not expand existing fourth amendment law as claimed by defendant. Instead, the resolution is factual: Was the warrantless entry to seize Dexter Davis justified by the exigencies of the police investigation; and, was the subsequent protective sweep justified by a reasonable belief that the occupants of the apartment

presented a danger to the officers or others?

The police were legitimately investigating an assault in progress when they became aware that the suspected participants were also engaged in fencing stolen property. It is uncontested that the police had a reasonable basis to stop and question Davis; a closer question is whether they had probable cause for his arrest. But whether the police had reasonable suspicion for a temporary detention or probable cause for a full arrest is not controlling; for in either case, the police had the right to seize Davis. The issue is whether the police could effectuate that seizure by reaching into the apartment.

The trial court properly found that the exigencies of the field investigation justified the warrantless entry. The apartment had been burglarized the night before; a person resembling one of the "burglars" had returned in the morning and was still in the apartment. Sounds of someone being assaulted and responding, "Don't kill me," had been reported. The lawful tenant of the apartment had not been seen. The door to the apartment appeared kicked-in and a loud argument was still occurring. These investigations had not been resolved when Davis stepped through the door, saw the police, reacted by saying, "Oh shit," and attempted to retreat into the apartment. The trial court correctly found that under these circumstances, allowing Davis to retreat into the apartment created greater danger to those at the scene.



When Davis retreated through the door, the other occupants became aware of the police and responded: one began fumbling with items on the floor, the other ran further into the apartment and out of police view. The trial court properly found that the officers reasonably viewed these actions as presenting a danger to their safety and, for this reason, were justified in conducting a limited protective sweep of the premises to secure the occupants.

Defendant argues for the first time on appeal that the proper standard to judge a protective sweep under the state constitution is whether the officers had probable cause to believe that they were in danger. This is contrary to federal and Utah case law which have consistently allowed protective sweeps when officers reasonably believed they were in danger. Further, since defendant did not challenge the level of certainty needed for a protective sweep below, the issue is waived for purposes of appeal.

#### B. Severance Issue

Defendant presumes that his conditional guilty pleas permit him to challenge on appeal the denial of the motion to sever. But using a Sery conditional plea to raise issues outside of the fourth amendment context is improper. Preservation of issues for purposes of appeal through use of a conditional guilty plea must be limited to those cases which "ultimately hinge" on the admissibility of the challenged evidence: a ruling of inadmissibility would bar the State from proceeding with the

prosecution. Resolution of a denial of a severance motion involves complex considerations of the admissibility of other crimes evidence and the balancing of any prejudicial impact to defendant. For these reasons, appellate review of a denial of severance cannot properly be undertaken in the context of a guilty plea but must be viewed in light of trial evidence.

Should this Court nevertheless consider the merits of defendant's argument, prejudice for purposes of vacating an otherwise voluntary guilty plea occurs only when a defendant can establish that but for the ruling of the court, the defendant would have insisted upon proceeding to trial. Under this standard, defendant has failed to establish prejudice.

#### POINT I

THE TRIAL COURT CORRECTLY FOUND THAT THE WARRANTLESS ENTRY INTO APARTMENT 4B WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES AND THAT LEGITIMATE CONCERNS FOR SAFETY PERMITTED A PROTECTIVE SWEEP; THEREFORE, THE STOLEN PROPERTY WAS LAWFULLY OBSERVED IN PLAIN VIEW.

The denial of defendant's motion to suppress the evidence seized from apartment 4B is consistent with established law. The warrant requirement of the fourth amendment renders a warrantless entry and search of a home *per se* unreasonable, State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987) (citing Katz v. United States, 389 U.S. 347, 358, 88 S. Ct. 507, 514 (1967)), and mandates a warrant to enter a home to effectuate a routine arrest, Payton v. New York, 455 U.S. 573, 576, 100 S. Ct. 1371, 1374-75 (1980); Steagald v. United States, 451 U.S. 204, 213-14, 101 S. Ct. 1642, 1648 (1981). But when the police are faced with

exigent circumstances demanding immediate action, the federal and state constitutions permit warrantless searches and seizures.

Payton, Steagald, Ashe, id.; State v. Larocco, 794 P.2d 460, 470 (Utah 1990). For this reason, the trial court properly concluded that the warrantless entry into apartment 4B was lawful.<sup>4</sup>

This appeal challenges the application of only one subcategory of the exigent circumstances doctrine: a warrantless entry into a home to seize a person which is necessitated by a risk of injury or harm to other persons present at the scene. The exception is based on a different rationale than in a warrantless search for property. 2 W. LaFave, Search and Seizure, § 6.5(d) (1987). In the latter, the exigent circumstances doctrine permits a warrantless search on the basis that evidence will be destroyed or removed before a warrant can be secured. Larocco, 794 P.2d at 470; Ashe, 745 P.2d at 1258 n.10.

A more compelling rationale underlies the safety exception to the warrant requirement:

[T]he business of policemen . . . is to act,

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<sup>4</sup> There is no evidence that defendant had a reasonable expectation of privacy in apartment 4B sufficient to challenge the warrantless entry. Rakas v. Illinois, 439 U.S. 128, 143 99 S. Ct. 421. 430 (1978); Minnesota v. Olson, 110 S. Ct. 1684, 1688 (1990). However, the trial prosecutor conceded that defendant had "standing" to contest the entry (R. 1096). On appeal, the State is bound by the prosecutor's factual concessions. Steagald, 451 U.S. at 208-09. But see State v. Marshall, 791 P.2d 880, 887 (Utah App.), cert. denied, 800 P.2d 1105 (Utah 1990) (on appeal, State challenged defendant's expectation of privacy in the searched premises as an alternative grounds for affirmance; trial prosecutor had failed to raise the legal argument but had made no factual concession that defendant had an expectation of privacy).

not to speculate or meditate on whether [a report of an emergency] is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process.

Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963) (emphasis in original). Accord State v. Whittenback, 621 P.2d 103, 105 (Utah 1980) (officers not only have the right but the duty to respond to suspicious activity). For this reason,

"[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."

Mincey v. Arizona, 437 U.S. 393, 392, 98 S. Ct. 2408, 2413 (1978) (quoting Wayne, 318 F.2d at 212). Accord Provo City v. Warden, 844 P.2d 360, 364 (Utah App. 1992) (adopting "imminent danger to life or limb" criteria to justify community caretaker automobile stop). Recognition that seizures of persons, as opposed to property, create special risks to law enforcement underlies the permissibility of all protective police measures. Warden v. Hayden, 387 U.S. 294, 298-99, 87 S. Ct. 1642, 1646 (1967) (recognizing "hot pursuit" exception to warrant requirement); Terry v. Ohio, 392 U.S. 1, 23, 88 S. Ct. 1868, 1881 (1968) (frisks for weapons permissible); State v. Belgard, 840 P.2d 819, 822 (Utah App. 1992) (officer's safety justifies warrantless entry); State v. Chapman, 841 P.2d 725, 731-32 (Utah App. 1992) (weapons search permissible for officer's safety); State v. Strickling, 201 Utah Adv. Rep. 69, 70-71 (Utah App. 12/3/92) (weapons search permissible in traffic stop); State v. Carter, 707 P.2d 656, 659 (Utah 1985) (pat down during investigative stop

permissible).

In this appeal, the question is whether the exigencies of the field investigation justified the police reaching into apartment 4B to seize and detain Dexter Davis. Resolution is two-fold: first, did the police have a legitimate basis to seize and detain Davis; and second, did the exigencies of the circumstances permit this seizure to be accomplished by a *de minimis* entry into the apartment? The issues are factual; the trial court's findings must be given deference on appeal and affirmed unless clearly erroneous. State v. Chapman, 841 P.2d at 727; State v. Dorsey, 731 P.2d 1085, 1088 (Utah 1986); State v. Morck, 821 P.2d 1190, 1194 (Utah App. 1991) (citing Ashe, 745 P.2d at 1258); State v. Belgard, 840 P.2d at 822.

A. The Police Had a Reasonable Basis to Seize and Detain Davis.

The trial court found Davis' seizure to be valid but did not articulate whether it viewed the seizure as a level two temporary detention or a level three arrest (R. 102, 105, 551) (Addenda C & D). See State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987). The distinction between a temporary detention and an arrest is not controlled by the degree of force used because in either case the person is seized and not free to leave. Terry, 392 U.S. at 16, 88 S. Ct. at 1877; United States v. Merritt, 695 F.2d 1263, 1274 (10th Cir. 1982); State v. Trujillo, 739 P.2d 85, 87 (Utah App. 1987). Instead, the degree of certainty of criminality dictates the scope of detention permissible. State v. Higgins, 837 P.2d 9, 11 (Utah App. 1992)

(citing Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325 (1983)).

To temporarily detain a person, the officer must have objective facts that "would lead a reasonable person to conclude the subject had committed or was about to commit a crime." Chapman, 841 P.2d at 727. Accord Utah Code Ann. § 77-7-15 (1990) (Addendum A). The facts should not be judged in isolation but must be considered as a whole. Strickling, 201 Utah Adv. Rep. at 70. The officer's experience and training is also a factor. State v. Miller, 740 P.2d 1363 n.2 (Utah App.), cert. denied, 765 P.2d 1277 (Utah 1987).

Here, the officers were called to the scene to investigate an assault in progress (R. 1110, 1145). Defendant characterizes this as only a simple assault, relying on Officer Humphries' statement that officers were not placed behind the apartment building because he "was not terribly concerned about people jumping out the second story over a simple assault" (R. 1145-46). But this response is not indicative of Officer Humphries' characterization of the nature of the investigation. Officer Humphries testified that the argument he overheard was "violent in temperament" (R. 1148-49). Because of his concerns for the nature of the altercation, he posted officers in the stairwell and on either side of the door as protective measures (id.). Defendant's assertion that Officer Humphries became placated when he overheard only a verbal argument is incorrect. The officer stated that when the verbal argument continued

without sounds of a physical assault, he believed that the victim may have already been seriously injured or incapacitated based on Hunt's report that someone said, "Don't kill me," while being struck (R. 1148). The trial court properly found the assault investigation to be on-going and potentially dangerous (R. 102, 106, 551) (Addenda C & D).

It is uncontroverted that Hunt told the police that one of the black males in the apartment looked like the person who had "burglarized or broken into" the apartment the night before and stolen a television (R. 1111, 1126, 1144). While the court did not enter a formal finding on this information, he orally credited it (R. 551) (Addendum C). Hunt's information, coupled with the broken door, provided reasonable suspicion of a residential burglary. This burglary was distinct from the Banana Republic burglary; it is the latter burglary which the trial court found was not being investigated prior to Davis' seizure (R. 552-53).

Prior to Davis stepping into the hallway, there was reasonable suspicion to suspect the occupants of the apartment possessing stolen property (theft). Again, the court did not specifically address this investigation but did not question the credibility of the underlying facts.<sup>5</sup> Officer Humphries, with

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<sup>5</sup> Only the State presented witnesses during the hearing on the motion to suppress and their testimony was uncontroverted. The court implicitly found the officer's testimony credible except in the one instance where the court questioned whether the officer consciously made a connection to the Banana Republic burglary before entering the apartment. (See footnote 2 for complete discussion.)

two years of experience in fencing operations, concluded that the argument in the apartment concerned fencing (R. 1118-19). Defendant attempts to discredit the officer's belief by asserting that the overheard argument was equally consistent with innocence; this assertion is meritless in light of the surrounding circumstances. Accord Strickling, 201 Utah Adv. Rep. at 70; Chapman, 841 P.2d at 728 (innocent explanation for each fact in isolation is overcome by consideration of totality of facts to establish reasonable suspicion). A burglary and theft had been reported as occurring at the apartment the night before; one of the suspects was in the apartment and was present during a reported physical assault; the door was kicked-in; three males were loudly arguing over a coat which one wanted to take for \$10.00 to "show" and "a lot" of similar coats were in the apartment (see Statement of Facts at 6-7). Accord State v. Menke, 787 P.2d 537, 542 (Utah App. 1990) (defendant's removal of item from underneath clothing and placing item in sack while standing in front of retail store provided reasonable suspicion of shoplifting).

Defendant admits that the police had reasonable suspicion to detain Davis outside the apartment, yet inconsistently claims that the only reason the police seized him was because he retreated into the apartment. This is contrary to Officer Humphries' testimony. The officer stated that he seized Davis because of the on-going assault investigation coupled with the officer's belief that the coat Davis possessed was contraband



(R. 1117-18). When Davis observed the uniformed officers, said, "Oh shit," and retreated into the apartment, Officer Humphries reasonably believed that Davis was attempting to evade the police because of his present criminal involvement (R. 1115, 1141-42). The negative verbal response coupled with the immediate retreat was not ambiguous; rather, it was indicative of Davis' recognition that he had been "caught." While flight alone may not be an indicator of guilt, flight coupled with "other indicia of criminality" can establish reasonable suspicion. Compare State v. Talbot, 792 P.2d 489, 493 (Utah App. 1990) (alone, the act of avoiding a roadblock does not establish reasonable suspicion), with State v. Ramirez, 814 P.2d 1131, 1134 n.1 (Utah App. 1991) (flight may be considered with other facts to determine reasonableness of seizure), and State v. Elliott, 626 P.2d 423, 427 (Utah 1981) (flight may elevate reasonable suspicion to the level of probable cause).

Here, the action of flight coupled with the other objective facts provided more than reasonable suspicion to detain Davis; taken as a whole, the facts provided probable cause for arrest. Ramirez 814 P.2d at 1134 n.1; Elliott, 626 P.2d at 427. See also California v. Hodari D., 111 S. Ct. 1547, 1549 (1991); Sibron (Peters) v. New York, 392 U.S. 40, 66, 88 S. Ct. 1889, 1904 (1968) ("deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea* and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are

proper factors"). Probable cause exists when

from the facts known to the officer, and the inferences which fairly might be drawn therefrom, a reasonable and prudent person in his position would be justified in believing that the suspect had committed the offense.

Rocha, 600 P.2d 543, 545 (Utah 1979). The officer "need not have 'certain knowledge of the guilt of the suspect.'" State v.

Ayala, 762 P.2d 1107, 1111 (Utah App. 1988) (citation omitted).

Instead,

[a] valid arrest occurs whenever "a crime under which the arrest is made and a crime for which probable cause exists are in some fashion related. . ."

Id. (citation omitted).

As previously discussed, the trial court did not articulate if it had found reasonable suspicion or probable cause to support Davis' seizure. However, this Court may consider any alternative grounds for affirmance where the underlying facts are necessarily established by the record. State v. Ramirez, 817 P.2d 774, 787-88 n.6 (Utah 1991); State v. Gray, 717 P.2d 1313, 1316 (Utah 1986). Here, the police had reasonable suspicion to investigate an assault, a residential burglary and fencing or possession of stolen property. The first two investigations were based on Hunt's information and corroboration was obtained when the police went to the second floor. They observed the kicked-in front door which supported a forcible entry in connection with either the burglary or the assault; they heard the occupants of the apartment engaged in a loud and "violent" argument; and based on the officer's experience, he believed the argument was about

stolen property. These observations provided increasing indicia of criminality.

The officers also knew that the potential suspect in the burglary was a black male, the missing tenant of the apartment was a white male, and the assault and arguments began only after the black males had returned to the apartment in the morning (see Statement of Facts at 5). The police then observed Davis, a black male, exit the apartment. He was wearing a coat and carried what appeared to be a stolen coat on a hanger. When he saw the police, he made a negative exclamation and attempted to retreat. In light of these circumstances, a reasonable and prudent officer would be justified in believing that Davis was involved in theft by receiving. Accord State v. Jonas, 793 P.2d 902, 904 (Utah App. 1990), cert. denied, 804 P.2d 1232 (1990); State v. Pappas, 705 P.2d 1169, 1173 (Utah 1985) (a defendant may be convicted of theft by receiving even if the property is not in fact stolen if the defendant acted under the belief that the property was stolen). It was not necessary for the police to verify the source of the suspected stolen property before acting. Morck, 821 P.2d at 1193 (probable cause only requires the "probability, and not a prima facie showing, of criminal activity") (citation omitted); Rocha, 600 P.2d at 545 (arrest standard does not require an "absolutely certain judgment" before the police act).

Finally, a basis existed to detain Davis apart from his possession of contraband: Davis was present in the apartment when

the assault was reported to have occurred and during the ensuing argument over stolen property.

"Where a crime may have been committed and a suspect or important witness is about to disappear, it seems irrational to deprive the officer of the opportunity to 'freeze' the situation for a short time, so that he may make inquiry and arrive at a considered judgment about further action to be taken. To deny the police such a power would be to pay a high price in effective policing and in the police's respect for the good sense of the rules that govern them."

Watkins v. State, 420 A.2d 270, 274 (Md. App. 1980) (quoting ALI, Model Code of Pre-Arrest Procedure § 110.2 at 272). Until the officers could determine the whereabouts of the lawful tenant and/or the safety of the occupants, they had the duty to "freeze" the situation by preventing witnesses or suspects from leaving the scene.

B. The De Minimis Entry into the Apartment to Seize Davis Was Justified by Exigent Circumstances.

Having implicitly found a lawful basis for the seizure, the trial court ruled that: (1) reaching into the apartment to grab Davis was an entry; and (2) the entry was justified by the dangerousness of the situation (R. 102, 105, 551) (Addendum D).

While dispute exists, the better view is that whether an entry has occurred is controlled by the location of the person seized and not the location of the officer. LaFave, Search and Seizure, § 6.1(e). An overly analytical approach is, however, disfavored; fourth amendment issues should not be determined by "metaphysical subtleties." Frazier v. Cupp, 394 U.S. 731, 740,

89 S. Ct. 1420, 1425 (1969). Instead, where an officer "merely reaches in to manifest the fact of arrest, such a de minimus breaking of the vertical plane above the threshold should not itself make the warrantless arrest unlawful; otherwise the legality of doorway arrests would have to be determined by resort to plum bob and quaint distinctions drawn from the 'entry' ingredient of common law burglary," LaFave, Search and Seizure, § 6.1(5) at 590-91. But see Payton, 445 U.S. at 590, 100 S. Ct. at 1382 ("The fourth amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."). For purposes of argument, the State assumes a *de minimis* entry was made when the officer reached in and seized Davis.

Defendant asserts that unless the entry was supported by probable cause to arrest, the exigent circumstances doctrine is inapplicable. Defendant, further, argues that even if the doctrine is applicable, no exigencies existed. Both contentions are incorrect.

#### 1. Applicability of the Exigent Circumstances Doctrine.

The exigent circumstances doctrine is traditionally predicated on probable cause in the sense that a warrantless search may occur where there is probable cause to believe that the place searched contains the object of the search and exigent circumstances justify the failure to obtain a warrant. Larocco, 794 P.2d at 467-68. Similarly, if there is probable cause to arrest, the police may make a warrantless entry to effectuate the

arrest where exigent circumstances exist which would eliminate the reasonable opportunity to secure a warrant without creating danger to the police or others. United States v. Santana, 427 U.S. 43, 96 S. Ct. 2406, 2409 (1976); State v. Ramirez, 814 P.2d at, 1134. The doctrine, however, does not mandate that the officers have probable cause to arrest plus probable cause to search plus exigent circumstances before acting; yet, this is what defendant effectively argues.

The warrant requirement is founded on the premise that a person's home should be "free from unreasonable governmental intrusion." Payton, 455 U.S. at 590, 100 S. Ct. at 1382.

"Differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic; the breach of the entrance to an individual's home." Id. at 589, at 1381.

However, while an arrest warrant and a search warrant both serve to subject the probable-cause determination of the police to judicial review, the interests protected by the two warrants differ. An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure. A search warrant, in contrast, is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police.

Steagald, 451 U.S. at 212-213, 101 S. Ct. at 1648.

Davis was seized in a third-party's home, therefore, the constitutional interests to be protected are: (1) Davis' right to be protected against an unreasonable seizure regardless of the location; and (2) the "homeowner's"<sup>6</sup> right to be protected against an unreasonable intrusion.

Turning to Davis' interest, the constitution does not protect what is exposed to public view: by carrying the stolen coat into the public hallway, Davis diminished any expectation of privacy in protecting observations of himself or his possessions. Katz, 389 U.S. at 350, 88 S. Ct. at 516; State v. Lee, 633 P.2d 48, 51 (Utah 1981). Where the police have a lawful basis to seize a person, that person cannot evade the seizure by retreating inside a home. Santana, 427 U.S. at 42-43, 96 U.S. at 2409-10 (recognizing "hot pursuit" doctrine); Ramirez, 814 P.2d at 1135 (exigent circumstances justify seizure of misdemeanor in home); State v. Hamilton, 710 P.2d 174, 175 (Utah 1985) ("hot pursuit" doctrine applicable to traffic offense of failing to yield the right of way). A defendant "cannot reduce a legitimate arrest attempt to a game of 'tag' by reaching 'home' a few steps ahead of the police." Ramirez, 814 P.2d at 1135.

The cases cited are typical of the majority of exigent circumstance seizure cases: either the trial court found probable cause for the seizure or the appellate courts elevate the trial

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<sup>6</sup> Homeowner is used to connote anyone with an expectation of privacy in the premises sufficient to challenge the entry. The trial prosecutor conceded that defendant had an expectation of privacy in the home. See footnote 4.

court's finding of reasonable suspicion to probable cause based on the defendant's flight from the attempted stop. Compare Edwards v. United States (Edwards I), 364 A.2d 1209, 1214 (D.C. App. 1976) (in effectuating a Terry stop, police may follow fleeing suspect into home), with Edwards v. United States (Edwards II), 379 A.2d 976, 978 (D.C. App. 1979) (rehearing en banc) (facts support probable cause for arrest; no discussion of validity of original panel decision that entry was permissible to effectuate Terry detention). See also Ramirez, 814 P.2d at 1135 n.3 (finding probable cause for arrest and noting that court was not deciding if a home entry could be predicated on reasonable suspicion); State v. Flowers, 789 P.2d 333, 338 (Wash. App. 1990) (commenting that court need not decide if police actions were also justified on reasonable suspicion and exigent circumstances since court found probable cause to arrest).

The few jurisdictions that have directly addressed the issue have concluded that an warrantless entry for the purpose of effectuating a level two seizure is not *per se* unreasonable if otherwise justified by exigent circumstances. People v. Rivera, 598 N.E.2d 423, 427 (Ill. App. 1992); United States v. Pace, 898 F.2d 1218, 1228-29 (7th Cir. 1990), cert. denied, Cialoni v. U.S., 110 S. Ct. 3286 (1990); Commonwealth v. Daniels, 421 A.2d 721, 724-25 (Penn. Super. 1980). See also Oregon v. Davis, 666 P.2d 802, 812 (Oregon 1983) (finding no exigent circumstances to justify entry but recognizing that doctrine may permit an entry supported by less than probable cause).



Implicit in these decisions is the recognition that since the fourth amendment permits an officer to follow a fleeing arrestee into a home to effectuate an arrest, Santana, 427 U.S. at 43, 96 S. Ct. at 2410, there is no logical reason for a different result simply because the basis for the seizure is predicated on reasonable suspicion. LaFave, Search and Seizure, § 9.2(d) at 369-70. The level of "reasonableness" to support the seizure will dictate the length and scope of detention, but it is the probable cause to believe that the suspect is in the place to be searched which supports the entry. Compare Payton, 445 U.S. at 589-91, 100 S. Ct. at 1381-83, with Steagald, 451 U.S. at 212-215, 101 S. Ct. at 1647-49. For this reason, the police do not need to simply walk away from an incomplete Terry stop but may follow the fleeing suspect into a private home under the same limited circumstances that they may follow a fleeing arrestee. Edwards I, 364 A.2d at 1214 (reasoning cited with approval by LaFave, id.). Just as Santana, Payton, and Steagald limit entries made for purposes of arrest,

the police, in certain limited circumstances, may be authorized to make a warrantless entry into a private premises for the purpose of effectuating a Terry stop provided the police have a lawful basis to stop a suspect in a public place and the suspect reacts by suddenly fleeing to a private sanctuary, thereby thwarting any opportunity to conduct the detention at a public place.

Rivera, 598 N.E.2d at 427. Accord Pace, 898 F.2d at 1228-29 (distinguishing Payton on grounds that it involved only a routine arrest and applying exigent circumstances doctrine to justify

entry into private garage to effectuate a temporary detention); Daniels, 421 A.2d at 724-25 (recognizing "intermediate response" permitting an exigent warrantless entry for the limited purpose of questioning occupants pursuant to Terry where no probable cause for arrest). See also Servis v. Commonwealth, 371 S.E.2d 156, 162 (Va. App. 1988) (permitting officers to take protective actions when making Terry type seizures in a home on the basis the "dangerousness" of a suspect remains the same whether arrested or temporarily seized and no matter on which "side of the threshold the defendant is standing") (citations omitted).

Similarly, the "homeowner's" constitutional interest was not affected by whether the police had reasonable suspicion or probable cause for Davis' seizure. For even if the police had an arrest warrant for Davis, they could not have entered Nichols' apartment without a search warrant absent exigent circumstances. Steagald, 451 U.S. at 213 101 S. Ct. at 1648. It is the probable cause to believe that the object of the search is in the third-party home which protects the homeowner from impermissible generalized searches. Id. at 215, at 1649. Here, the police had probable cause to believe that Davis was in the home; he was standing right at the door. Thus, this case is most similar to "hot pursuit" cases, which since common law have permitted forcible entries into homes to effectuate the seizure of a fleeing suspect. Id. at 218-19, at 1651. Accord Ramirez, 814 P.2d at 1134.

## 2. Existence of Exigent Circumstances.

Whether exigent circumstances exist is question of fact: Under the totality of the circumstances, would the procurement of a warrant have jeopardized the safety of the officers or others at the scene? Larocco, 794 P.2d at 470; Ashe, 745 P.2d at 1258. Judicial hindsight is not the test; rather, consideration must be given for the officer's reasonable concerns for safety and the spilt-second nature of their decisions during evolving field investigations. Ramirez, 814 P.2d at 1136.

Factors generally considered are: (1) the nature of the offense under investigation, including whether it is a violent offense; (2) reasonable suspicion that the suspect is armed or dangerous; (3) the trustworthiness of the information that the suspect has or is committing an offense; (4) the strength of the belief that the suspect is on the premises; (5) the likelihood of the suspect escaping if not quickly apprehended; and (6) the nature of the entry made. Flowers, 789 P.2d 338 (citing Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970)). Other relevant factors are: (7) whether the officers were in hot pursuit of a fleeing suspect; and (8) whether the seizure was planned or unplanned. Flowers, id. (citations omitted). See also LaFave, Search and Seizure, § 6.1(f) at 598-601.

The trial court found that the officers were faced with a "very dangerous scenario" (R. 647). The police had received "very certain information" that the apartment had been broken into the night before and that an assault was now "in progress";

a person inside the apartment had said, "Don't kill me," and the apartment's front door was broken and appeared kicked-in (R. 102, 647). When Davis retreated into the apartment, the court found that the officers had a reasonable suspicion that he was getting a weapon or getting the remaining occupants to resist the police (R. 105, 647). As such, the court concluded that Davis' immediate seizure was "a safety measure for the police" (R. 105).

The trial court's findings are fully supported by the record and, therefore, must be given deference on appeal. Morck, 821 P.2d at 1192; Ashe, 745 P.2d at 1258. Additionally, this Court may consider any alternative basis to support the court's ruling in light of the uncontroverted evidence presented below. State v. Ramirez, 817 P.2d at 787-88 n.6 (appellate court may find facts to support judgment where there is competent and reasonable evidence to do so). The facts to support the trial court's finding of exigency are:

1. The assault investigation was still ongoing and the police had not located the lawful occupant of the apartment, a white male. The police knew that at least 3 males were in the apartment, any one of which could be the assault victim, a potential hostage, or a criminal compatriot.

2. The crimes being investigated assault, burglary of the apartment, and fencing all were crimes for which the police could reasonably conclude the participants were violent. Carter, 707 P.2d at 660 (burglary is a crime of violence). This was supported by Hunt's report of hearing people struck and the officers' observations of the forcibly broken front door and the loud continuing argument in the apartment.

3. The apartment was on the second floor in a multiple apartment complex. It was ten o'clock in the morning on Veteran's Day when it could be assumed that many of the other apartments were occupied (R. 1144). If the occupants of the apartment decided to barricade themselves, the police would not be able to isolate the confrontation.

4. When Davis exited the apartment, he was aware of the officers' presence and attempted to flee. His action of fleeing alerted the other occupants to the police presence.

5. The basis of any information to support criminality was either from Hunt, a private citizen, or based on the officers' personal observations.

6. The police had certain information that Davis was on the premises because they could observe him.

7. Because it was Veteran's Day, it took over 4 hours to subsequently secure a search warrant.

8. The entry made was de minimis; the door was already open and the officer reached in to seize Davis while still standing outside the door.

9. The officers never planned to seize anyone when they first responded to the assault call. Their investigation escalated while on the scene.

Based on the facts of this case, the officer's warrantless entry to seize Davis was justified.

C. Since the Police Were Lawfully in the Apartment, They Had the Right to Conduct a Protective Sweep.

The trial court found that once Davis was seized, the police were lawfully in the apartment and had the right to conduct a protective sweep for their safety (R. 102-03, 105,

552). As the court recognized, a protective sweep must be limited to a brief inspection of the premises solely for the purpose of securing other persons on the premises. Maryland v. Buie, 110 S. Ct. at 1099. It is not a full search and no areas which could not secrete a person may be inspected. Id. Here, the court found that the police did not conduct a full search, did not open drawers or other impermissible areas, and limited their inspection in time and purpose to the detainment of persons; for these reasons, the sweep was permissible (R. 103, 105, 552) (Addenda C & D).

While Buie was based on a warrant-authorized entry, the holding regarding protective sweeps is predicated on the concept of any lawful entry. If the police enter lawfully, whether by warrant, by consent, or under the exigent circumstances doctrine, the determinative factor is their reasonable need to protect themselves while making that lawful entry. State v. Kelly, 718 P.2d 385, 391 (Utah 1986) (protective sweep permissible where police are leaving home following warrantless arrest); Rocha, 600 P.2d at 546 (protective sweep reasonably following "hot pursuit" and seizure of suspect just inside back door). Nor is the permissibility of a protective sweep contingent on an entry having been made. United States v. Soria, 959 F.2d 855, 857 (10th Cir.), cert. denied, 113 S. Ct. 236 (1992) (arrest made outside but protective sweep of premises permissible); United States v. Hoyos, 892 F.2d 1387, 1397 (9th Cir. 1989), cert. denied, 111 S. Ct. 80 (1990) (protective sweep permissible

following warrantless arrest outside premises); United States v. Bowdach, 561 F.2d 1160, 1168 (5th Cir. 1977) (if reasonable fear of safety, protective sweep allowed regardless of location of arrestee); People v. Febus, 566 N.Y.Supp.2d 1000, 1002 (N.Y. App. 1990), cert. denied, 567 N.Y.Supp.2d 203 (1991) (where seizure made just outside partially opened door, fear of safety permitted police to fully open door and seize persons in view). But see Hayes v. State, 797 P.2d 962, 965-68 (Nev. 1990) (in a split decision, court adopts Buie as state constitutional standard but finds no reasonable suspicion to support protective sweep where arrest occurred outside home). Since the permissibility of the sweep is driven by the reasonableness of the concern for safety, there is no policy reason to permit a protective sweep when the entry is made by warrant, but refuse to permit sweeps when the entry is lawfully made otherwise.

Here, the officers were confronted with a dangerous situation. This danger escalated when the police attempted to seize Davis. The police could see three other occupants in the apartment, none of which were the lawful tenant, and all of whom were aware of the police presence. Flemmings' action of reaching into a pile of clothing and defendant's action of running farther into the apartment could reasonably support a belief that they were attempting to secure weapons or prepare to resist the police presence. Additionally, in light of the reported assault and the failure to observe the white male occupant, the police could reasonably assume the occupant had

been injured but was still on the premises. Based on these reasonable concerns for safety, the protective sweep was permissible.

## POINT II

**DEFENDANT FAILED TO PRESERVE THE STATE  
CONSTITUTIONAL CLAIM HE NOW ASSERTS;  
DEFENDANT HAS FAILED TO ESTABLISH A RATIONALE  
FOR APPLYING A PROBABLE CAUSE STANDARD TO A  
PROTECTIVE SWEEP.**

The hearing on defendant and Beavers' motions to suppress was held jointly prior to the severance of their trials (R. 87, 91, 93a). Both defendants generally asserted that the entry into apartment 4B was in violation of the state and federal constitutions; Beavers separately asserted that his seizure in the Buzzard home was in violation of both constitutions (R. 463-506). Neither defendant filed a written memorandum in support of their state constitutional argument. Instead, defendant supplied the court with copies of two law journal articles<sup>7</sup> supporting separate state constitutional analysis and then argued that historically the Utah constitution imposed a "higher" standard and "greater protection" than the federal constitution (R. 467). The court stated that while it thought a higher state standard could be applicable in some contexts, under either the state or federal constitution, the issue here was one of fundamental reasonableness (R. 468).

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<sup>7</sup> While the record does not specifically identify the articles, one apparently was Wallentine, *Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I, Section 14*, 17 Utah J. Contemp. L. 267 (1991); the other was only identified as from the William and Mary Law Review.



Under these circumstances, defendant has failed to preserve a state constitutional question. Since 1986, the Utah Supreme Court has made clear that appellants who wish to raise state constitutional claims must do so with specific analysis. State v. Earl, 716 P.2d 803, 805-06 (Utah 1986). This Court has been equally clear by refusing to consider state constitutional arguments which have not been preserved below nor properly analyzed on appeal. State v. Bobo, 803 P.2d. 1268, 1272 (Utah App. 1990) ("proper forum in which to commence thoughtful and probing analysis of state constitutional interpretation is before the trial court"). Accord State v. Carter, 812 P.2d 460, 462 n.1 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1993) (appellant must offer rationale to diverge from federal analysis); State v. Jensen, 818 P.2d 551, 552 (Utah 1991) (where appellant fails to offer a basis for independent reliance on state constitution, appellate court will only consider federal analysis).

Defendant's failure to properly advance and, therefore, preserve a separate state constitutional claim can best be seen by an analysis of his argument below. As noted, defendant asserted on the basis of two articles that Utah was historically concerned with illegal searches and seizures because of the religious persecution of their church leaders. But as defendant admitted, these concerns arose because law enforcement officers "would ignore what were at the time traditional *Fourth Amendment* protections" (R. 469) (emphasis added). The fact that federal

constitutional protections were not being enforced does not provide a historical justification for expansion of state constitutional protections. In commenting on the weakness of a historical argument to support separate analysis of article I, § 14 of the Utah Constitution, Professor Paul Cassell states that Utah's history establishes that the state constitutional framers' fears were not with the scope of the federal amendment governing search and seizure but with the harsh federal criminal prosecutions which followed. Paul G. Cassell, *Taking the Utah Constitution Seriously: An Examination of the Mysterious Creation of Utah's Exclusionary Rule*, 1993 Utah L. Rev. (forthcoming August, 1993).<sup>8</sup> Wanting to prevent the abuses of the polygamy prosecutions, the framers invoked more protective language in article I, § 4, the freedom of religion provision of the state constitution, than found in the federal constitution. This concern, however, did not cross-over to article I, § 14, the search and seizure provision, which was adopted with the identical language of the federal provision. Id.

Below, defendant's legal arguments advocated no different approach than existing fourth amendment law. Defendant argued that a warrant is constitutionally required to enter a home to make a routine arrest. This is beyond dispute. Payton, 455 U.S. at 576 100 S. Ct. at 1375; Steagald, 451 U.S. at 211,

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<sup>8</sup> A complete copy of this article is in the University of Utah College of Law library. Addendum F of this brief contains a copy of that portion of the article which criticizes Kenneth Wallentine's historical approach in the context of article I, § 14 of the Utah Constitution.

101 S. Ct. at 1649; Ashe, 745 P.2d 1255. Defendant asserted that pretextual police conduct which induces an exigency must be disregarded. Existing fourth amendment law so requires. See LaFave, Search and Seizure, § 6.5(b) at 662. Finally, while facially asserting that the state constitution provides "greater protection," defendant advocated adoption of federal exigent circumstances case law (R. 482-83).

Below, defendant argued that the facts did not support a protective sweep, arguing that under Buie, 110 S. Ct. 1093, there was no basis from which to find that the occupants endangered the safety of the officers. On appeal, defendant now asserts that the state constitution requires a departure from the federal standard governing protective sweeps. For the first time, defendant challenges the federal reasonable suspicion standard and advocates that protective sweeps be permitted only where the officers have probable cause to believe their safety is endangered. Because defendant never raised this issue below, he has failed to preserve it for purposes of appeal. State v. Schnoor, 204 Utah Adv. Rep. 22, 24 (Utah App. 1/7/93).

Even if this Court were to consider the merits of defendant's argument, he has failed to establish a need to depart from the federal standards governing protective sweeps. See State v. Thompson, 810 P.2d 415, 417 (Utah 1991) (separate state constitutional standard necessary where federal standard is neither legally nor factually supportable); Larocco, 794 P.2d at 466 (plurality of supreme court asserting that separate state

constitutional standard is appropriate to return to original federal standard which had become confused by ensuing federal case law); State v. Sims, 808 P.2d 141, 149 (Utah App. 1991), cert. granted, No. 910218 (Utah 2/5/93) (state constitution mandates legislative authorization for suspicionless investigatory roadblocks; clarifies federal standard requiring "politically accountable" guidelines). Accord State v. Watts, 750 P.2d 1219, 1221 n.8 (Utah 1988) (state and federal constitutional search and seizure provisions are nearly verbatim and should be construed similarly except possibility to protect state constitutional law from the "vagaries of inconsistent interpretations given the fourth amendment by federal courts"). Here, defendant has not established that federal law governing protective sweeps is so inconsistent or confusing so as to justify departure from the clear federal standard.

Contrary to defendant's assertions, Buie's holding neither modified nor diverged from pre-existing federal law. As discussed in Point I(C), to conduct a protective sweep, the police must first establish a lawful presence and purpose whether by procurement of a warrant or consent or by the existence of exigent circumstances. Only then, will a limited protective sweep be allowed to protect the officers' safety in conducting their lawful business. All Buie did was make clear the standard governing the determination of dangerousness. Accord Rocha, 600 P.2d at 545-46 (approving of pre-Buie protective sweep based on reasonable suspicion that additional persons were on premises and

armed and that evidence would be destroyed); Kelly, 718 P.2d at 391 (approving of pre-Buie protective sweep as proper security measure).

Further, if the police needed probable cause to believe their safety was in danger before conducting protective measures, the safety exception would be nullified. Defendant's position is contrary to long-standing judicial recognition of the need for officers to take reasonable means to protect themselves while conducting lawful searches and seizures. See Point I at 14.

### POINT III

DEFENDANT CANNOT CHALLENGE A DENIAL OF A MOTION TO SEVER THROUGH ENTRY OF A CONDITIONAL GUILTY PLEA; EVEN IF THE MERITS ARE CONSIDERED, DEFENDANT HAS NOT ESTABLISHED THAT THE COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION.

Pretrial, defendant moved to sever his trial from that of Beavers; the motion was granted (R. 220, 229-33, 235, 430). Defendant then moved to sever the Banana Republic burglary and theft charges from the Mr. Mac charges, charges joined in a single information (R. 8, 23, 24, 432). The State argued that the joinder was proper and that judicial economy would not be served by severing the counts since the evidence and witnesses were essentially the same (R. 442-43). The court balanced these factors against defendant's allegation of prejudice, and concluded that

the evidence is so intertwined -- the closeness in time of the two incidents and the fact that all of the evidence for both the crimes was found at the same time -- the evidence being so intertwined and of the same

identity as to make it, as a practical matter, almost impossible to separate it out anyway. I just don't think that this particular situation is so prejudicial to the defendants that it outweighs the need to get the case tried in an efficient manner.

(R. 453). The motion was denied (R. 236-36A) (Addendum E).

Subsequently, Beavers was convicted after a jury trial (R. 224-49, 352-63). Defendant then entered conditional guilty pleas to the burglary and theft of property from Banana Republic (Counts I and II); under the plea bargain, the Mr. Mac charges were dismissed (Counts III and IV) (R. 365, 367-368).<sup>9</sup>

A. A Challenge to a Denial of a Motion to Sever Cannot Properly Be Preserved Through Use of a Conditional Guilty Plea.

There is no question that defendant intended to enter conditional guilty pleas and then appeal the severance denial; however, the use of such pleas to raise issues outside the context of pretrial motions to suppress evidence is improper.<sup>10</sup>

While the Utah Supreme Court has never endorsed the use of conditional pleas, this Court recognized their validity in State v. Sery, 758 P.2d 935, 939-40 (Utah App. 1988). But Sery

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<sup>9</sup> A defendant must affirmatively establish that the prosecutor and court agreed to the entry of a conditional plea. State v. Sery, 758 P.2d 935, 939 (Utah App. 1988). Here, there is no transcript of the entry of the pleas and the judgment and commitment orders do not indicate that the pleas are conditional (R. 396-99). However, an unsigned minute entry indicates that the pleas were conditional and defendant's affidavit in support of his plea refers to the conditional nature of the pleas (R. 365, 367).

<sup>10</sup> Much of the present argument is taken from the State briefs in State v. Donald H. Keitz, No. 920558-CA, and State v. Eugene Montoya, No. 920441-CA; these pending cases challenge the use of Sery pleas outside the fourth amendment context.

only recognized the appropriateness of such pleas to preserve challenges to pretrial motions to suppress evidence since the only issue was whether the State should be "barred from being able to prove its case because of the illegal seizure of evidence." Id. at 939. Appellate review of this procedural question could legitimately be undertaken without regard to the defendant's factual guilt and conserves judicial resources by efficiently resolving the issue which would ultimately terminate future proceedings. If the trial court's denial of the motion to suppress was affirmed on appeal, defendant's otherwise voluntary plea would stand. If the ruling on the motion to suppress was reversed, the prosecutor was prohibited from proceeding with the challenged evidence and further prosecution would be barred. Sery not only limited conditional pleas to cases which "ultimately hinged" on the admissibility of the challenged evidence but relied as authority on cases which expressly limited conditional pleas to such circumstances. Id. at 938.

The problems inherent in expanding the use of conditional pleas beyond the fourth amendment context is exemplified by this case. Here, the issue is whether the trial court abused its discretion in denying defendant's motion to sever the Mr. Mac and Banana Republic charges.<sup>11</sup> Before

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<sup>11</sup> To constitute an abuse of discretion, the trial court's determination must be "beyond the limits of reasonability." State v. Hamilton, 827 P.2d 232, 239-40 (Utah 1992). An appellate court must "presume that the discretion of the trial court was properly exercised unless the record clearly shows the contrary." Goddard v. Hickman, 685 P.2d 530, 534-35 (Utah 1984). Accord State v. Thurman, 203 Utah Adv. Rep. 18 (Utah 1/7/93).

reversal would be warranted, defendant must establish not only that joinder was improper but that the refusal to sever sacrificed his "right to a fundamentally fair trial." State v. Lee, 831 P.2d 114, 117 (Utah App.), cert. denied, 843 P.2d 1042 (Utah 1992) (citing State v. Lopez, 789 P.2d 39, 42 (Utah App. 1990), and State v. Pierre, 572 P.2d 1338, 1350 (Utah 1977), cert. denied, 439 U.S. 882, 99 S. Ct. 219 (1978)).

Utah Code Ann. § 77-8a-1(1) (Supp. 1992) permits offenses to be joined if they are:

- (a) based on the same conduct or are otherwise connected together in their commission; or
- (b) alleged to have been part of a common scheme or plan.

If the trial court finds that a party is prejudiced by the joinder permitted under subsection (1), subsection (4) directs that severance be granted. (See Addendum A for text of any rule or statute cited). In making this latter determination, a trial court may consider whether evidence of both offenses would be admissible pursuant to rule 404(b), Utah Rules of Evidence, in separate trials if no joinder was permitted. Lee, 831 P.2d at 118-19. In turn, a rule 404(b) determination requires the trial court to consider the tendency of the challenged evidence to unfairly prejudice a defendant by determining if its probative value is substantially outweighed by its prejudicial effect. Id. (citing rule 403, Utah Rules of Evidence). The balancing requirement is fact-intensive, involving considerations of

the strength of the evidence as to the commission of the other crime, the



similarities between the crimes, the interval of time that has elapsed between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof and the degree to which the evidence probably will rouse the jury to overmastering hostility.

Morrell, 803 P.2d 292, 296 (Utah App. 1990) (citation omitted).

To obtain a reversal of a conviction arising from a trial in which severance was denied, a defendant must establish that the failure to sever resulted in a denial of due process, that his right to a fair trial was impaired. State v. Velarde, 734 P.2d 440, 445 (Utah 1986); Lee, 831 P.2d at 117. Thus, even where joinder is permissible, denial of a motion may still be erroneous if a defendant establishes that but for the admission of the other crimes evidence, there is "a reasonable likelihood of a more favorable result." Velarde, 734 P.2d at 445 n.10 (no error where evidence of defendant's guilt was substantial). On the other hand, where a misjoinder occurs as a matter of law, admission of the other crimes evidence will be presumed prejudicial and reversal mandated *unless* the admission of the evidence is otherwise permissible. State v. Saunders, 699 P.2d 738, 741-42 (Utah 1985) (due process violation found where admission of otherwise inadmissible prior crimes evidence permitted the jury to infer the defendant's guilt based on his criminal history and disposition); State v. Gotfrey, 598 P.2d 1235, 1238 (Utah 1979) (where appellate court cannot conclude that misjoinder did not effect outcome of the trial, reversible is appropriate).

Appellate review of a denial of a severance motion, therefore, involves more than interpretation and application a procedural statute, i.e., are the joined offenses part of a "common plan or scheme." Utah Code Ann. § 77-8a-1(1). It also requires review of the trial court's assessment of overall prejudice, including the court's balancing of the prejudicial impact of the evidence with its probative value. Utah R. Evid. 403; Utah Code Ann. § 77-8a-1(4). While appellate review of these factors is governed by the reasonableness of the lower court's exercise of its discretion, it is also governed by the impact of the denial of the motion to sever on the ultimate fact-finder's determination of guilt. The latter function can only be undertaken in light of the totality of the evidence presented to support the conviction and a consideration of any permissible use of the other crimes evidence.

Proper analysis of a denial of a motion to sever cannot be undertaken on the basis of a conditional guilty plea. A pretrial record does not provide an adequate evidentiary record to judge the impact of the trial court's ruling on defendant's right to a fair trial. For even assuming the offenses were misjoined, this Court can only speculate as to the impact of that error on the outcome of a future trial. In the guilty plea context, prejudice cannot be assessed by applying the traditional test of whether "but for the substantial error, there is a reasonable likelihood of a different result," for the only result supportable by the record is that defendant chose to voluntarily

enter a guilty plea. Instead, a modification of the prejudice prong is applicable. To establish prejudice in the context of a guilty plea, a defendant must establish that there is a reasonable probability that, but for the substantial error, he would not have pled guilty and would have insisted on proceeding to trial. Cf. Hill v. Lockhart, 474 U.S. 52, 59 (1985) (recognizing this modified test for prejudice in ineffectiveness of counsel claims arising in the context of guilty pleas).

A conditional plea which preserves a severance denial amounts to the metaphysical assertion that the defendant is guilty but if he had proceeded to trial, he would have necessarily been deprived of due process. This is fundamentally different from a plea preserving a pretrial suppression issue, where the defendant asserts he is guilty but the prosecution is barred. Sery, 758 P.2d at 939. For these reasons, this Court should prospectively restrict the scope of conditional pleas by recognizing their application only to the preservation of pretrial motions to suppress evidence. Since defendant entered the conditional pleas with the understanding that any pretrial issue could be raised on appeal, defendant should be allowed to withdraw his guilty pleas and proceed to trial. Accord State v. Riekkoff, 112 Wis.2d 119, 332 N.W.2d 744 (1983) (where prosecutor erroneously agreed to entry of a conditional plea, the defendant was permitted to withdraw it). Alternatively, defendant may dismiss his severance challenge on appeal and proceed solely on his evidentiary suppression issues.

B. The Trial Court Properly Concluded the  
Banana Republic and Mr. Mac Burglaries Were  
So Factually Intermixed that Their Joinder  
was Permissible and Would Not Result in Undue  
Prejudice to Defendant.

Even if this Court considers defendant's substantive argument, defendant has not established that the trial court abused its discretion in denying the motion to sever.

On appeal, defendant attacks the court's ruling on three grounds: (1) that State v. Lee, 831 P.2d at 116 was incorrect in concluding that rule 9 was repealed by Utah Code Ann. § 77-8a-1; (2) that Lee incorrectly defined "common scheme or plan"; and (3) that the admission of evidence of both burglaries and thefts would have caused a jury to view defendant as a "bad person"

**1. Section 77-8a-1 Governs Joinder and  
Severance.**

In State v. Lee, this Court considered the identical argument defendant now makes concerning section 77-8a-1, that is that the legislature did not properly amend or repeal rule 9 in passing the statute and therefore, rule 9 of the Utah Rules of Criminal Procedure still controls joinder and severance. (See Addendum A for the text of statute and rule.) Defendant has advanced no argument or case authority not considered in Lee. This Court should summarily reject defendant's argument and reaffirm that the plain language of the legislative enactment expresses the legislature's intent to repeal rule 9. Lee, 831 P.2d at 116.

2. The Definition of "Common Scheme or Plan"  
as Used in Section 77-8a-1 Encompasses  
Factually Interrelated Crimes.

Contrary to defendant's assertion, Lee did not provide an overly broad definition of "common scheme or plan" as used in section 77-8a-1 or misapply controlling Utah case law. Just the opposite. Lee properly recognized that the legislative enactment was a modification of the previous rule. Since the legislature was clearly repealing rule 9, the linguistic differences between the statute and rule must be presumed intentional. Madsen v. Borthick, 769 P.2d 245, 252 n.11 (Utah 1988) (any statutory amendment not expressly designated as a clarification must be presumed to be change in existing legal rights and liabilities). Former rule 9 permitted joinder when the offenses were part of the same "criminal episode" as defined in Utah Code Ann. § 76-1-401 (1990) (Addendum A). Despite the fact that section 76-1-401 remains in effect, Section 77-8a-1 disregarded the use and limitations of "single criminal episode" by utilizing the new term "common scheme or plan" without reference to any statutory definition.

Lee defined "common scheme or plan" to include those crimes which are so factually interconnected that it is reasonable to assume that their commission arose out of a calculated plan. 831 P.2d at 117-18. This is consistent with the term's usage under the rules of evidence. Rule 404(b), Utah Rules of Evidence, permits the admission of other crimes evidence when it is probative of a defendant's "motive, opportunity,

intent, preparation, *plan*, knowledge, identity, or absence of mistake or accident" (emphasis added). "A common scheme or plan is said to exist, for evidentiary purposes, if the proof of one crime tends to prove or establish the other." State v. Jones, 120 Ariz. 556, 587 P.2d 742, 744 (Ariz. 1978) (en banc). Accord State v. Gallegos, 781 P.2d 783, 791 (N.M. App. 1989) (citing 1 C. Wright, Federal Practice and Procedure: Criminal § 143 (2d ed. 1982)). Under the evidentiary rules, the presumption is that the other crimes evidence is relevant and competent if probative of a material fact. State v. O'Neil, 206 Utah Adv. Rep. 14, 17 (Utah App. 2/12/93).

Here, the trial court was in a unique position in ruling on the motion for severance. It had previously heard extensive live testimony regarding the crimes during the evidentiary hearing on the motions to suppress. As such, there is record support for the trial court's determination that the crimes were factually connected.

As previously discussed (*supra* at 43), where joinder is statutorily permissible, denial of a motion to sever may still be erroneous if the defendant establishes that but for the admission of the other crimes evidence, there is "a reasonable likelihood of a more favorable result." Velarde, 734 P.2d at 445 n.10. On the other hand, where the offenses have been misjoined as a matter of law, admission of the other crimes evidence will be presumed prejudicial and reversal mandated *unless* the admission of the evidence is otherwise permissible. Saunders, 699 P.2d at

741-42; Gotfrey, 598 P.2d at 1238 (Utah 1979).

Here, there was no trial since defendant pled guilty. Yet, defendant asserts that a jury would have accumulated the evidence against him and convicted him simply because he was a "bad man." In light of the overwhelming evidence which the State had of defendant's guilt, this argument is inapposite.

Further (supra at 44), the usual test for prejudice, i.e., there is a "reasonable likelihood of a different result" if separate trials had occurred, is analytically inapplicable to a guilty plea. Instead, the proper test is whether but for the denial of the severance motion, defendant would not have pled guilty and would have proceeded to trial. Hill v. Lockhart, 474 U.S. at 59. This is an objective test, made without regard for the "idiosyncrasies of the particular decisionmaker." Id. at 59-60. Here, defendant pled guilty only after his motion to suppress the seized evidence had been denied, Nichols had pled guilty and testified against Beavers and Beavers had been convicted. Under these circumstances, defendant has not established that the denial of his motion to sever affected his decision to enter his pleas.

CONCLUSION

For the foregoing reasons, defendant's convictions should be affirmed.

RESPECTFULLY SUBMITTED this 1st day of <sup>March</sup>~~February~~, 1993.

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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing brief of appellee was mailed, postage prepaid, to Joan C. Watt, Salt Lake Legal Defender Association, attorney for appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 1 day of March, 1993.



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## **ADDENDA**

## ADDENDUM A

## NOTES TO DECISIONS

Cited in *State v. Wright*, 745 P.2d 447 (Utah 1987).

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d Criminal Law § 227.

**C.J.S.** — 22 C.J.S. Criminal Law § 203.  
**Key Numbers.** — Criminal Law ⇐ 152.

**76-1-305. Lesser included offense for which period of limitations has run.**

Whenever a defendant is charged with an offense for which the period of limitations has not run and the defendant should be found guilty of a lesser offense for which the period of limitations has run, the finding of the lesser and included offense against which the statute of limitations has run shall not be a bar to punishment for the lesser offense.

**History:** C. 1953, 76-1-305, enacted by L. 1973, ch. 196, § 76-1-305.

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d Criminal Law § 225.

**C.J.S.** — 22 C.J.S. Criminal Law § 198.  
**Key Numbers.** — Criminal Law ⇐ 145½.

**PART 4****MULTIPLE PROSECUTIONS AND DOUBLE JEOPARDY**

**76-1-401. "Single criminal episode" defined — Joinder of offenses and defendants.**

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Nothing in this part shall be construed to limit or modify the effect of Section 77-21-31 in controlling the joinder of offenses and defendants in criminal proceedings.

**History:** C. 1953, 76-1-401, enacted by L. 1973, ch. 196, § 76-1-401; 1975, ch. 47, § 1. **Compiler's Notes.** — Section 77-21-31,

cited in this section, was repealed in 1980. For the present comparable provision, see Rule 9, R. Crim. P.

chant who initiated a customer's arrest for purpose of effecting a civil remedy to collect money owed, even if the money was lawfully owed; thus section did not shield auto dealer from liability for false imprisonment where customer drove away in new truck after leaving check for less than purchase price dealer was demanding and dealer called police and asked that truck be picked up, saying there had been a theft. *Greenwell v. Canyon Lincoln Mercury, Inc.*, 575 P.2d 688 (Utah 1978).

#### Probable cause.

##### —Specific cases.

There was sufficient evidence upon which to base a jury verdict denying damages for false arrest, where plaintiff, an eighteen-year-old motorcycle rider, had placed a small article of merchandise in his helmet, justifying a reasonable suspicion that he was shoplifting. *Fuller v. Zinik Sporting Goods Co.*, 538 P.2d 1036 (Utah 1975).

#### —Standard.

The standard applicable to detentions and arrests by merchants is composed of both subjective and objective elements; the merchant must allege and prove not only that he believed in good faith that his conduct was lawful, but also that his belief was reasonable; even if the crime was not in fact being committed or attempted, if the merchant in good faith believes that such facts are present as to lead him to an honest conclusion that a crime is being committed by the person to be arrested then he may not be held liable for false arrest; in determining the reasonableness of the conclusion, the test to be applied is one that is practical under the circumstances, i.e., whether a reasonable and prudent man in his position would be justified in believing facts which would warrant making the arrest. *Terry v. Zions Co-op. Mercantile Inst.*, 605 P.2d 314 (Utah 1979).

### COLLATERAL REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d False Imprisonment §§ 44 et seq., 66.

C.J.S. — 35 C.J.S. False Imprisonment §§ 14, 21-25, 40(4)-(7).

A.L.R. — Defamation: actionability of accusation or imputation of shoplifting, 29 A.L.R.3d 961.

Admissibility of defendant's rules or instructions for dealing with shoplifters in action for

false imprisonment or malicious prosecution, 31 A.L.R.3d 705.

Construction and effect in false imprisonment action of statute providing for detention of suspected shoplifters, 47 A.L.R.3d 998.

Changing the price tags by patron in self-service store as criminal offense, 60 A.L.R.3d 1293.

Key Numbers. — False Imprisonment = 2, 10, 13, 15.

## 77-7-15. Authority of peace officer to stop and question suspect — Grounds.

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

History: C. 1953, 77-7-15, enacted by L. 1980, ch. 15, § 2.

### NOTES TO DECISIONS

#### ANALYSIS

Balancing test.

Reasonable suspicion test.

—Out-of-state licenses.

—Revoked license.

—Vehicles.

Unreasonable detention.

Balancing test.

In traffic violation stops, in balancing the

rights of individuals to be free from arbitrary interference by law enforcement officers and the government's interest in crime prevention and public protection, if a hypothetical reasonable police officer would not have stopped the driver for the cited traffic offense, and the surrounding circumstances indicate the stop is a pretext, the stop is unconstitutional. *State v. Sierra*, 754 P.2d 972 (Utah Ct. App. 1988).

**77-8a-1. Joinder of offenses and of defendants.**

(1) Two or more felonies, misdemeanors, or both, may be charged in the same indictment or information if each offense is a separate count and if the offenses charged are:

(a) based on the same conduct or are otherwise connected together in their commission; or

(b) alleged to have been part of a common scheme or plan.

(2) (a) When a felony and misdemeanor are charged together the defendant is afforded a preliminary hearing with respect to both the misdemeanor and felony offenses.

(b) Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or conduct or in the same criminal episode.

(c) The defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

(d) When two or more defendants are jointly charged with any offense, they shall be tried jointly unless the court in its discretion on motion or otherwise orders separate trials consistent with the interests of justice.

(3) (a) The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants, if there is more than one, could have been joined in a single indictment or information.

(b) The procedure shall be the same as if the prosecution were under a single indictment or information.

(4) (a) If the court finds a defendant or the prosecution is prejudiced by a joinder of offenses or defendants in an indictment or information or by a joinder for trial together, the court shall order an election of separate trials of separate counts, grant a severance of defendants, or provide other relief as justice requires.

(b) A defendant's right to severance of offenses or defendants is waived if the motion is not made at least five days before trial. In ruling on a motion by defendant for severance, the court may order the prosecutor to disclose any statements made by the defendants which he intends to introduce in evidence at the trial.

**History:** C. 1953, 77-8a-1, enacted by L. 1990, ch. 201, § 1.

**Compiler's Notes.** — This section is a recodification of former § 77-35-9, which is Rule 9 of the Utah Rules of Criminal Procedure. For

notes to cases construing that rule, see the Court Rules volume.

**Effective Dates.** — Laws 1990, ch. 201 became effective on April 23, 1990, pursuant to Utah Const., Art. VI, Sec. 25.

What constitutes assertion of right to counsel following *Miranda* warnings — federal cases, 80 A.L.R. Fed. 622.

## Rule 9. Joinder of offenses and of defendants.

(a) Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged arise out of a criminal episode as defined in Section 76-1-401, U.C.A. 1953. A felony offense and a misdemeanor offense may be charged in the same indictment or information if:

(1) they arise out of a criminal episode; and

(2) the defendant is afforded a preliminary hearing with respect to the misdemeanor along with the felony offense.

(b) Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or conduct or in the same criminal episode.

Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

When two or more defendants are jointly charged with any offense, they shall be tried jointly unless the court in its discretion, on motion or otherwise, orders separate trials consistent with the interests of justice.

(c) The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants, if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

(d) If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses or defendants in an indictment or information, or by a joinder for trial together, the court shall order an election of separate trials of separate counts, or grant a severance of defendants, or provide such other relief as justice requires.

A defendant's right to severance of offenses or defendants is waived if the motion is not made at least five days before trial. In ruling on a motion by defendant for severance, the court may order the prosecutor to disclose any statements made by the defendants which he intends to introduce in evidence at the trial.

**Cross-References.** — Limited admissibility of evidence, Rule 105, U.R.E.

Multiple prosecutions and double jeopardy, §§ 76-1-401 to 76-1-405.

Right not to be twice put in jeopardy for same offense, Utah Const., Art. I, Sec. 12; § 77-1-6.

## NOTES TO DECISIONS

### ANALYSIS

Denial of severance.  
—Standard of review.  
Discretion of trial court.  
Failure to request severance.  
Joinder or severance of defendants.  
—Antagonistic defenses.  
—Cautionary instructions.

—Specific cases.  
—Waiver of objections.  
Joinder or severance of offenses.  
—In general.  
—Specific cases.  
—Waiver of objections.  
Motions to sever.  
—Timeliness.  
Cited.

overruled on other grounds, *McFarland v. Skaggs Cos., Inc.*, 678 P.2d 298 (Utah 1984).

## COLLATERAL REFERENCES

**Utah Law Review.** — *United States v. Downing*: Novel Scientific Evidence and the Rejection of *Frye*, 1986 Utah L. Rev. 839.

Note, Establishing Paternity Through HLA Testing: Utah Standards for Admissibility, 1988 Utah L. Rev. 717.

**A.L.R.** — Admissibility of voice stress evaluation test results or of statements made during test, 47 A.L.R.4th 1202.

Admissibility and weight of evidence of prior misidentification of accused in connection with commission of crime similar to that presently charged, 50 A.L.R.4th 1049.

Products liability: admissibility of evidence of absence of other accidents, 51 A.L.R.4th 1186.

Thermographic tests: admissibility of test re-

sults in personal injury suits, 56 A.L.R.4th 1105.

Criminal law: dog scent discrimination lineups, 63 A.L.R.4th 143.

Products liability: admissibility of experimental or test evidence to disprove defect in motor vehicle, 64 A.L.R.4th 125.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains, 66 A.L.R.4th 588.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids, 75 A.L.R.4th 897.

Admissibility of hypnotically refreshed or enhanced testimony, 77 A.L.R.4th 927.

Admissibility of DNA identification evidence, 84 A.L.R.4th 313.

### Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**Advisory Committee Note.** — This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 402 [Rule 403]. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." See also *Smith v. Estelle*, 445 F. Supp. 647 (N.D. Tex. 1977) (surprise use of psychiatric

testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314 (Utah 1979); *State v. Johns*, 615 P.2d 1260 (Utah 1980); *Reiser v. Lohner*, 641 P.2d 93 (Utah 1982).

**Compiler's Notes.** — The bracketed reference to "Rule 403" in the Advisory Committee Note to Rule 403 was inserted because Rule 402 does not refer to "unfair prejudice" and Rule 403 appears to be the correct reference.

**Cross-References.** — Admissibility of evidence, Rules of Civil Procedure, Rule 43(a).

## NOTES TO DECISIONS

## ANALYSIS

Balancing test.  
Bias.  
Circumstantial evidence.  
Credibility of witness.  
Cumulative evidence.  
Determination of admissibility.  
Expert testimony.  
Film of murder scene.  
Guilty plea.

Impeachment of witness.  
Inflammatory evidence.  
Offensive remark.  
Other offenses.  
Photographic evidence.  
Prior convictions.  
—Impeachment.  
Scientific evidence.  
Standard of review.  
Tape recordings.

erning exclusion of relevant evidence, did not deprive defendant of his due process right to a fair trial *State v. Fulton*, 742 P.2d 1208 (Utah 1987), cert. denied, 484 U.S. 1044, 108 S.Ct. 777, 98 L.Ed.2d 864 (1988).

*Cited in State v. Bell*, 770 P.2d 100 (Utah 1988), *State v. McGrath*, 749 P.2d 631 (Utah 1988), *Belden v. Dalbo, Inc.*, 752 P.2d 1317 (Utah Ct. App. 1988), *State v. Jamison*, 767 P.2d 134 (Utah Ct. App. 1989), *State v. Eldredge*, 773 P.2d 29 (Utah 1989), *State v. Featherson*, 781 P.2d 424 (Utah 1989), *Ostler v. Albina Transp. Co.*, 781 P.2d 445 (Utah Ct. App. 1989), *State v. Johnson*, 784 P.2d 1135

(Utah 1989), *State v. Gotschall*, 782 P.2d 459 (Utah 1989), *State v. Cox*, 787 P.2d 4 (Utah Ct. App. 1990), *State v. Lopez*, 789 P.2d 39 (Utah Ct. App. 1990), *State v. Rocco*, 795 P.2d 1116 (Utah 1990), *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920 (Utah 1990), *State v. Harrison*, 152 Utah Adv. Rep. 19 (Ct. App. 1991), *State v. Pascual*, 804 P.2d 553 (Utah Ct. App. 1991), *State v. Taylor*, 169 Utah Adv. Rep. 62 (Ct. App. 1991), *State v. Reed*, 172 Utah Adv. Rep. 31 (Ct. App. 1991), *State v. Hamilton*, 174 Utah Adv. Rep. 7 (1991), *Knight v. Ebert*, 175 Utah Adv. Rep. 38 (Ct. App. 1991).

#### COLLATERAL REFERENCES

**Utah Law Review.** — *Chapman v. State* Hypnotically Refreshed Testimony — An Issue of Admissibility or Credibility, 1983 Utah L. Rev. 381.

*United States v. Downing* Novel Scientific Evidence and the Rejection of *Frye*, 1986 Utah L. Rev. 839.

Recent Developments in Utah Law — Judicial Decisions — Criminal Law, 1987 Utah L. Rev. 137.

Uncharged Misconduct Evidence in Child Abuse Litigation, 1988 Utah L. Rev. 479.

Note, Enhancing Penalties by Admitting "Bad Character" Evidence During the Guilt Phase of Criminal Trials — *State v. Bishop*, 1989 Utah L. Rev. 1013.

*State v. Rimmasch* Utah's Threshold Admissibility Standard for Child Sexual Abuse Profile Evidence, 1990 Utah L. Rev. 641.

**Journal of Contemporary Law.** — Comment, Victims of Child Sexual Abuse in the

Courtroom New Utah Rules and Their Constitutional Implications, 15 J. Contemp. L. 81 (1989).

**Am. Jur. 2d.** — 29 Am. Jur. 2d Evidence § 253 et seq.

**C.J.S.** — 31A C.J.S. Evidence § 166.

**A.L.R.** — Noncharacter witnesses in civil case, limiting number of, 5 A.L.R.3d 169.

Noncharacter witnesses in criminal case, limiting number of, 5 A.L.R.3d 238.

Character or reputation witnesses, propriety and prejudicial effect of trial court's limiting number of, 17 A.L.R.3d 327.

Evidence offered by defendant at federal criminal trial as inadmissible, under Rule 403 of Federal Rules of Evidence, on ground that probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, 76 A.L.R. Fed. 700.

**Key Numbers.** — Evidence ⇐ 143.

### **Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.**

(a) **Character evidence generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) **Character of accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other



purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

**Advisory Committee Note.** — This rule is the federal rule, verbatim. Provisions of this rule apply to character evidence to prove conduct, as distinguished from proof of character where character is an essential element of a charge, claim or defense. As to the latter, see Rule 405(b). See also Advisory Committee Note to Rule 404, Federal Rules of Evidence. Rule 47, Utah Rules of Evidence (1971) was comparable. See also *State v. Day*, 572 P.2d 703 (Utah 1977) (character evidence as to the character of the victim of a homicide was admissible to rebut the defendant's contention that the deceased was the aggressor). One significant difference between this rule and Rule 47, Utah Rules of Evidence (1971) is that there is no provision for the use of character evidence in civil cases, except where character is the ultimate issue in question, whereas Rule 47

authorized the use of character evidence in civil cases not only on the ultimate issue but where otherwise substantively relevant. See Boyce, *Character Evidence: The Substantive Use*, 4 Utah Bar J. 13, 18-19 (1976). However, Rule 48, Utah Rules of Evidence (1971) expressly excluded character evidence with respect to a trait as to care or skill. The Advisory Committee to the Federal Rules of Evidence concluded that the remaining justification for the admission of character evidence was so insignificant that character evidence in civil cases should not be admitted unless it was in issue.

Subdivision (b) is comparable to Rule 55, Utah Rules of Evidence (1971). *State v. Forsyth*, 641 P.2d 1172 (Utah 1982). See Boyce, *Evidence of Other Crimes or Wrongdoing*, 5 Utah Bar J. 31 (1977).

#### NOTES TO DECISIONS

##### ANALYSIS

Application of rule.  
Character of accused.  
Character of codefendant.  
Common plan or scheme.  
Harmless error.  
Identity.  
Knowledge and intent.  
Limiting instruction.  
Other crimes.  
—Defense.  
Proof of motive.  
Severance.  
Specific instances of conduct.  
Victim's character.  
Cited.

##### Application of rule.

Admissibility of evidence of an act that constitutes an early step in the effectuation of the crime for which defendant is presently charged and tried is not governed by this rule. *State v. Kerekes*, 622 P.2d 1161 (Utah 1980).

##### Character of accused.

When it becomes apparent from the evidence that the defendant is relying upon the defense of entrapment, the State must be allowed to present any evidence in impeachment or rebuttal that would show the defendant's disposition to commit the crime charged, including prior acts of crime or misconduct. *State v. Hansen*, 588 P.2d 164 (Utah 1978).

By offering witnesses as to his reputation as a truthful person, defendant opens the door for the prosecution to impeach his character wit-

nesses; prosecution may attempt to discredit the testimony of such witnesses by showing that they have not heard specific reports that are relevant to defendant's reputation, but it cannot present evidence of the truth or falsity of specific beliefs or reports pertaining to that reputation. *State v. Watts*, 639 P.2d 158 (Utah 1981).

While evidence of defendant's criminal character may be, and generally is, excluded under Subdivision (b) of this rule when such evidence is elicited or offered by the prosecution to prove its case-in-chief, the same evidence may be admissible when the responsibility for its introduction may be traced to the defendant. *State v. Barney*, 681 P.2d 1230 (Utah 1984).

Since a defendant's character is not an element of the crime of sexual abuse of a child, the court does not err in denying the request of a defendant charged with such crime for admission of past instances of conduct relating to his "reputation for sexual morality." *State v. Mixler*, 709 P.2d 350 (Utah 1985).

##### Character of codefendant.

Proffered testimony as to codefendant's impulsiveness had no bearing on defendant's guilt or innocence and was not admissible. *State v. Stephens*, 667 P.2d 586 (Utah 1983).

##### Common plan or scheme.

In prosecution for violation of § 76-6-404, where it was alleged that defendant had, without authorization, taken a check payable to his employer which came into his possession in the course of his employment, endorsed it in the employer's name, and deposited it to an ac-

## ADDENDUM B

DAVID E. YOCOM  
County Attorney  
RUTH J. McCLOSKEY, Bar No. 2153  
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Salt Lake City, Utah 84111  
Phone: (801) 363-7900

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

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THE STATE OF UTAH,	)	Screened by: R. McCloskey
	)	Assigned to: R. McCloskey
Plaintiff,	)	
	)	BAIL \$10,000.00
	)	(Each Defendant)
v.	)	
	)	INFORMATION
A) MICHAEL DEAN BEAVERS 1/6/66,	)	
<del>B) ANTHONY HARRIS</del> 12/6/71,	)	Criminal No.
C) MICHAEL SEAN NICHOLS 3/26/70,	)	901013012 FS
D) TERRENCE B. FLEMMINGS 6/25/67,	)	901013013 FS
	)	901013014 FS
Defendant(s).	)	901013015 FS

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The undersigned S. Cheever - SLCPD under oath states on information and belief that the defendant(s) committed the crimes of:

COUNT I  
BURGLARY, a Third Degree Felony, at 648 East 500 South, in Salt Lake County, State of Utah, on or about November 12, 1990, in violation of Title 76, Chapter 6, Section 202, Utah Code Annotated 1953, as amended, in that the defendants, MICHAEL DEAN BEAVERS, ~~ANTHONY HARRIS~~, ~~MICHAEL SEAN NICHOLS~~ and ~~TERRENCE B. FLEMMINGS~~, as parties to the offense, entered or remained unlawfully in the building of Banana Republic with the intent to commit a theft;

(Continued on page 2)

INFORMATION

STATE v.

A) MICHAEL DEAN BEAVERS,	#90 1 81906
B) ANTHONY HARRIS,	90 1 81906
C) MICHAEL SEAN NICHOLS,	90 1 81906
D) TERRENCE B. FLEMMINGS,	90 1 81906

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COUNT II

THEFT, a Second Degree Felony, at 648 East 500 South, in Salt Lake County, State of Utah, on or about November 12, 1990, in violation of Title 76, Chapter 6, Section 404, Utah Code Annotated 1953, as amended, in that the defendants, MICHAEL DEAN BEAVERS, ~~ANTHONY HARRIS, MICHAEL SEAN NICHOLS and TERRENCE B. FLEMMINGS~~, as parties to the offense, obtained or exercised unauthorized control over the property of Banana Republic with the purpose to deprive the owner thereof, and that the value of said property exceeded \$1,000.00;

COUNT III

BURGLARY, a Third Degree Felony, at 1090 East 7200 South, in Salt Lake County, State of Utah, on or about November 12, 1990, in violation of Title 76, Chapter 6, Section 202, Utah Code Annotated 1953, as amended, in that the defendants, MICHAEL DEAN BEAVERS, ~~ANTHONY HARRIS, MICHAEL SEAN NICHOLS and TERRENCE B. FLEMMINGS~~, as parties to the offense, entered or remained unlawfully in the building of Mr. Mac with the intent to commit a theft;

COUNT IV

THEFT, a Second Degree Felony, at 1090 East 7200 South, in Salt Lake County, State of Utah, on or about November 12, 1990, in violation of Title 76, Chapter 6, Section 404, Utah Code Annotated 1953, as amended, in that the defendants, MICHAEL DEAN BEAVERS, ~~ANTHONY HARRIS, MICHAEL SEAN NICHOLS and TERRENCE B. FLEMMINGS~~, as parties to the offense, obtained or exercised unauthorized control over the property of Mr. Mac with the purpose to deprive the owner thereof, and that the value of said property exceeded \$1,000.00;

SENTENCING ENHANCEMENT: further, that the offenses were committed in concert with two or more persons in the commission or furtherance of the offenses, giving rise to enhanced penalties as provided by Section 76-3-203.1, Utah Code Annotated, 1953, as amended;

(Continued on page 3)

INFORMATION

STATE v.

A) MICHAEL DEAN BEAVERS,	#90 1 81906
B) ANTHONY HARRIS,	90 1 81906
C) MICHAEL SEAN NICHOLS,	90 1 81906
D) TERRENCE B. FLEMMINGS,	90 1 81906

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THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

Officers: M. Humphries, T. Berger, S. Cheever, Atkinson, G. Yoshikawa, Slagowski, L. Kilpack and D. Knudsen.

Others: Lori Billings, David Hunt, Wayne L. Ware and Stan Christensen.

PROBABLE CAUSE STATEMENT:

Affiant, a Detective with Salt Lake City Police Department bases his information on report, Case No. 90-18176 prepared by Salt Lake City P.D. Officer Humphries and report, Case No. 123183 prepared by Salt Lake County Sheriff's Deputy Slagowski which indicates that at above time and place;

1. Defendants all participated in a break in of a business called Banana Republic by throwing a shopping cart threw a window.

2. Defendants removed 52 canvas coats with a total retail value of \$3,140.00.

3. Defendants later drove to Mr. Mac's, a retail clothing store and broke in to the business by driving their vehicle into the front of the store.

4. Defendants removed over 20 leather jackets retail value of more than \$200.00 a piece.

5. Defendants did not have permission to enter the business nor to remove the clothing.

6. Defendants Beavers, Harris, and Nichols all admitted to affiant as to their involvement with both burglaries.

(Continued on page 4)

## ADDENDUM C

1 tighter look under the Utah Constitution than it does the  
2 federal constitution. Still, the same issue was reasonable  
3 in this particular instance. And even with that higher  
4 standard, I am inclined to believe the initial entry into  
5 the apartment was reasonable.

6           Seems to me they gave the officer very certain  
7 information. They have a report of an assault. Language  
8 like, "Don't kill me." They had a report there had been  
9 some sort of commotion or problem the night before. They  
10 see the door and it's broken, happened the night before,  
11 happened a few minutes sooner, who knows, but it happened.  
12 They hear the voices, sort of an argument going on, and  
13 then as the man comes out, he backs up and tries to go back  
14 in. To me that is a very dangerous scenario for police  
15 officers. Seems to me just reasonable to see when a man is  
16 going back into the apartment, who knows what he is going  
17 to do? Is he going to get a weapon? Is he going to get  
18 some friends, tell the others so they can hole up? They  
19 don't know if there are weapons involved.

20           It seems to me that's just a very dangerous  
21 situation for officers. It's reasonable at that point to  
22 stop them, even if they have to go in a couple of feet, get  
23 them on the floor, subdue them. I think they had the right  
24 to do that.

25           And what comes next? Was it reasonable to go in

1 further again? I have to conclude that it was. They see  
2 another man going into the kitchen. Again, exactly the  
3 same very dangerous situation for police officers. Is he  
4 going in there to get another weapon? There are other  
5 people in there.

6 Now, they are even in a more dangerous situation  
7 because they are in an apartment they don't know about.  
8 They don't know where the rooms are. Who's there? I think  
9 they have a right go through the apartment at that point  
10 and see if all the people aren't accounted for.

11 Now, if they looked in some drawer or some purses  
12 or something small where a person couldn't be hiding, I  
13 think that would be unreasonable. But to look in every  
14 room, in closets, under the beds, places where people could  
15 hide, I don't think is unreasonable at all.

16 At that point, then, they see the coats in plain  
17 view. They know there's been a burglary in the Banana  
18 Republic. Nobody has a whole bunch of brand new coats on a  
19 hanger. The Banana Republic labels, that is a very  
20 suspicious thing, and it seems to me that gave rise to the  
21 search warrant. I don't think there was a question of  
22 destroying evidence, or anything to do with evidence, or  
23 anything to do with a burglary, or information about a  
24 burglary, or whether the coats were leather or cloth, or  
25 anything like that until that point. I don't think the



1 officers were trying to solve a burglary; they were trying  
2 to investigate an assault and they were trying to protect  
3 themselves, and I think they did so reasonably.

4 Then they saw that they had probable cause to  
5 secure the area, to question the witnesses and get a  
6 warrant, and that's what they did, so I don't think  
7 anything they seized there needs to be suppressed. I don't  
8 think they violated any Fourth Amendment rights at the  
9 apartment.

10 Then the question seems to focus on the house.  
11 At the house they see Beavers through the window. Seems to  
12 me they could have just watched all the doors and not let  
13 him out and got a warrant. And I think it was an improper  
14 thing to do. They are within the house. Then what flows  
15 from that? So far as I can see, nothing. Because they  
16 arrest him, they take him out, they shouldn't have done  
17 that. Okay.

18 But then they ask the owner of the place, the  
19 renter, the primary occupant, "Can we look in his room?"  
20 Now, he only lived there for five days. It's really her  
21 house. Apparently, he has standing. I have no question  
22 about that. He has a reasonable expectation of privacy in  
23 the place, but it's her place as well. It's not like he  
24 rented it from her, had the right to exclude her from it.  
25 I don't think there is any evidence he had the right to

1       exclude her from it.

2               There were only some other clothes in there,  
3       children's clothes, things that weren't his, all kinds of  
4       clothes, as I recall the testimony. I think the evidence  
5       is that he did have a right of privacy in there. He had no  
6       right to exclude her, and she had the right to make a  
7       consent, and she consented. I think the evidence is clear  
8       I don't find her consent statement to be hearsay. I think  
9       that it was not hearsay. She said she consents.

10              They searched that apartment, that room, with her  
11       consent and, therefore, there is nothing to suppress there.  
12       I think that supersedes the problem with the warrantless  
13       arrest. They would have searched that room anyway, even if  
14       they had got a warrant and I think the consent does away  
15       with any problem in searching that room.

16              They take him into the car and they ask him about  
17       the coats. He said they were in the car, no Miranda  
18       warning. That's a violation of the Fifth Amendment.  
19       That's a violation of Miranda, I have no doubt of that.  
20       And his statement will be excluded under Miranda. But I  
21       don't think that makes the search of the automobile  
22       unlawful, because the evidence is that they were wondering  
23       whether the coats were in the automobile anyway. They had  
24       been told they were in the automobile and they asked the  
25       owner of the automobile if they could search her car, and

1 she said yes, and she gave her consent. So I don't see any  
2 reason why that should be suppressed.

3 So what it boils down to, it seems to me, in the  
4 end, the only single thing in this whole hearing that  
5 really needs to be suppressed is that one single statement  
6 he made in the car without being given Miranda warnings,  
7 and the rest is all reasonable under both the Fourth  
8 Amendment and the state constitution, for the most part.  
9 With that small exception, the motion to suppress is  
10 denied. I will ask Ms. McCloskey to prepare Findings of  
11 Fact and Conclusions of Law consistent with the statement I  
12 just made.

13 MS. McCLOSKEY: Thank you, your Honor.

14 MR. MOFFAT: Thank you, your Honor.

15 MR. SCOWCROFT: Thank you.

16 THE COURT: Court will be in recess.

17 (Hearing concluded.)

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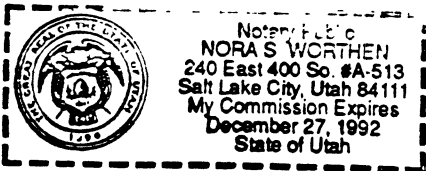
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REPORTER'S CERTIFICATE

STATE OF UTAH                    )  
                                      :   ss.  
SALT LAKE COUNTY                )

I, NORA S. WORTHEN, an official court reporter  
for the Third Judicial District Court in and for Salt Lake  
County, State of Utah, do hereby certify that I reported  
stenographically the proceedings in the matter of State of  
Utah versus Michael Dean Beavers, and Anthony Harris,  
Case No. 901901946, 901901947, respectively, and that the  
above and foregoing is a true and correct transcript of  
said proceedings.

Dated this 23rd day of March 1992.



*Nora S. Worthen*  
\_\_\_\_\_  
Nora S. Worthen, CSR, RPR  
Utah License No. 205

## ADDENDUM D

FILED DISTRICT COURT  
Third Judicial District

MAY 14 1991

SALT LAKE COUNTY  
By H. G. Ellis Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
Plaintiff,	:	
	:	CASE NO. 901901946 FS
vs.	:	901901947
	:	
MICHEAL DEAN BEAVERS,	:	
ANTHONY HARRIS,	:	
	:	
Defendants.	:	

-----

On April 1, 1991, the Court heard evidence pursuant to defendants' Motion to Suppress. Defendants allege that the warrantless entry into Apartment 4B at 837 East 700 South, and a residence located at 1334 South 1000 East were improper and unreasonable under both the Federal and State Constitutions. On April 16, 1991, the Court heard arguments from counsel and, based on the evidence in said arguments, made the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On November 12, 1990, at approximately 9:51 a.m., police officers arrived at the address of 837 East 700 South,

Apartment 4B, on an assault call. Radio dispatches included information to the effect that someone said "don't kill me."

2. Upon arrival at the apartment building, officers met with Mr. Hunt, the apartment manager, who directed the officers to apartment 4B.

3. Upon arrival at apartment 4B, officers found a recently damaged door, and heard an argument coming from inside the apartment. The officers listened at the door briefly, and could hear an argument inside the apartment about a coat. The officers did not knock on the door, or notify the occupants of their presence at the door.

4. A person who came out of the apartment carrying a coat, was later identified as Dexter Davis. As soon as he detected the officers' presence, he tried to retreat into the apartment. Officer Humphries reached into the apartment, grabbed Dexter Davis, and pulled him to the ground.

5. At the same instant that Dexter Davis was taken to the ground, Officer Humphries could see into the apartment, and observed an individual quickly move into the kitchen out of the line of sight.

6. The police then went into the apartment and detained the individuals who were present.

7. Officer Humphries then walked through the apartment searching for other individuals. He searched under the bed, and in closets, and other places where persons could be hiding, but did not search in smaller areas.

8. While looking through the apartment for individuals, Officer Humphries observed a large number of new coats hanging in closets. These were in plain sight and could be seen without opening doors or moving contents.

9. Prior to the time that the officers had arrived at the scene, they were aware of a burglary of coats at Banana Republic.

10. Following the observation of the coats, Officers Humphries, Foster and Beger secured apartment 4B and its contents, and summoned Detectives Cheever and Yoshikawa to the scene.

11. Officer Yoshikawa then left the scene to obtain a search warrant.

12. Detective Cheever was told by people at the scene that defendant Beavers had gone to a house on 10th East.

13. Sergeant Brown then went to the house on 10th East. Upon arriving, he could see defendant Beavers through the window and could have waited for an arrest warrant. Instead, he went into the home to arrest defendant Beavers.



14. In the meantime, Detective Yoshikawa obtained a search warrant and searched apartment 4B.

15. After Beavers was arrested, Karren Buzzard, the owner of the home, consented to allow Sergeant Atkinson to search the room where Mr. Beavers was staying. Beavers had been staying there a day or two, and in addition to items belonging to Ms. Buzzard, the room contained many other items, including children's stuffed animals.

16. Sergeant Atkinson seized several coats from the room where Beavers was staying.

17. Mr. Beavers did not have the right to exclude the homeowner from the room, in that he was not a paying tenant and items belonging to the homeowner were within the room.

18. While Mr. Beavers was in custody, and without advising him of his rights, Sergeant Atkinson asked him if the coats were still in the car, to which Beavers responded in the affirmative.

19. Sergeant Atkinson previously had information that stolen coats were in the car. This information was obtained from the persons at apartment 4B.

20. The owner of the car gave her consent to Sergeant Atkinson to search the car.

21. Several coats were found in the car.

CONCLUSIONS OF LAW

1. The initial entry in apartment 4B at 837 East 700 South was a reasonable search and seizure under both the 14th Amendment of the United States Constitution, and Article I, Section 14 of the Utah Constitution, and no evidence is to be excluded as a result of said entry. The initial detention of Dexter Davis was reasonable in light of the fact that Davis may have had a weapon, may have been retreating into the apartment to secure a weapon, or the like. His detention was necessary as a safety measure for the police officers.

2. The further intrusion into the apartment was also reasonable and not a violation of the Fourteenth Amendment of the United States Constitution, nor Article I, Section 14 of the Utah Constitution, in that this was also required by the officer's safety. The person retreating into the kitchen and out of the line of sight could have been trying to get a weapon or take an offensive position. It was reasonable for the officers' safety at this time that they apprehend the person who went into the kitchen and look through the apartment for other individuals who may have weapons.

3. Because the officers had a right to be in the apartment to look for other individuals, the coats, seen in plain sight, were not found as a result of an unreasonable search.

4. The coats, with new labels, in light of the officers' knowledge of a burglary at Banana Republic, provided sufficient information to form probable cause, secure the apartment, and seek a search warrant. Therefore, the coats and other evidence taken at the scene pursuant to the search warrant will not be suppressed.

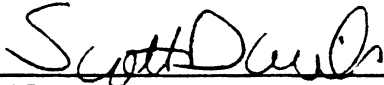
5. Although the entry to effect the arrest of Michael Beavers into the home at 1334 South 1000 East was not reasonable under either the 14th Amendment of the United States Constitution, nor the Utah Constitution, no evidence directly flowed from said entry and subsequent arrest, so none is suppressed.

6. The coats found in the room at the home on 1334 South 1000 East were found as a result of a consensual search. The consent was given by a person having a right to entry to the room, and will not be suppressed.

7. The statement made by Mr. Beavers regarding the coats in the car will be suppressed as a violation of his rights under the Miranda decision.

8. The coats found in the trunk of the car will not be suppressed as evidence due to the fact that police had information from other sources that the coats were in the car, and the owner of the car gave her consent to the search.

Dated this 14 day of May, 1991.

  
\_\_\_\_\_  
SCOTT DANIELS  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law, to the following, this 14 day of May, 1991:

Ruth J. McCloskey  
Deputy County Attorney  
Attorney for Plaintiff  
231 East 400 South, Suite 300  
Salt Lake City, Utah 84111

Roger K. Skowcroft  
Mark A. Moffat  
Attorneys for Defendants  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111

K. E. Ellis

FILED DISTRICT COURT  
Third Judicial District

JUN 6 1991

By Scott Daniels  
SALT LAKE COUNTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

STATE OF UTAH,	:	AMENDMENT TO FINDINGS
	:	OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW
vs.	:	CASE NO. 901901946 FS
	:	901901947 FS
MICHEAL DEAN BEAVERS,	:	
ANTHONY HARRIS,	:	
Defendants.	:	

-----

The Findings of Fact and Conclusions of Law entered by the Court on May 14, 1991 are amended as follows:

1. Paragraph 13 is amended to read as follows: Sergeant Atkinson then went to the house on 10th East. Upon arriving, he could see defendant Beavers through the window, and could have awaited for an arrest warrant. Instead he went into the home to arrest defendant Beavers.

Dated this 6 day of June, 1991.

Scott Daniels  
SCOTT DANIELS  
DISTRICT COURT JUDGE

## ADDENDUM E

SEP 5 1991

DAVID E. YOCOM  
Salt Lake County Attorney  
RUTH J. MCCLOSKEY, Bar No. 2153  
Deputy County Attorney  
231 East 400 South, Suite 300  
Salt Lake City, UT 84111  
Telephone: (801) 363-7900

SALT LAKE COUNTY  
By: [Signature]  
Deputy Clerk

---

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

---

THE STATE OF UTAH,	)	
Plaintiff,	)	O R D E R
v.	)	Case No. 901901946FS
	)	& 901901947FS
MICHAEL D. BEAVERS &	)	
ANTHONY HARRIS	)	Honorable Scott Daniels
Defendants.	)	

---

On August 30, 1991, the Court heard arguments from counsel regarding the severance of the defendants from one another, the severance of Counts I and II from Counts III and IV for each defendant, and Count V from the other counts for defendant Beavers.

Due to the substantial intertwining of the evidence in this case, it was determined by the Court that the defendants would not be unduly prejudiced by having a single trial on Counts I, II, III, IV, for each defendant. Count V, however, should be severed and remanded to the Circuit Court for trial.

Based upon agreement by the State, defendant Beavers and

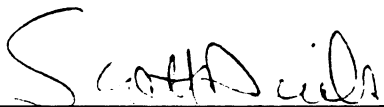


ORDER  
Case No's 901901946FS  
& 901901947FS  
Page two

defendant Harris will be tried separately.

DATED this 5 day of September, 1991.

BY THE COURT:

  
\_\_\_\_\_  
HONORABLE SCOTT DANIELS  
Third District Court Judge

RMc/sc/0431

1 the state of mind of the officers.

2 THE COURT: Well, I think I understand your  
3 position. I appreciate it. They are necessary with what  
4 you have briefed--not briefed, exactly--provided me with  
5 the opinions and the law and laid it out very well. And I  
6 do agree with you, Ms. McCloskey, the facts are pretty well  
7 on the table. I think that it's all there and I think that  
8 I can rule as a result.

9 Okay. The first issue is, was the initial  
10 intrusion into the apartment reasonable within the meaning  
11 of the Utah State Constitution and the federal  
12 constitution. I might just say, for the record, that I  
13 agree with Mr. Moffat's argument that the Utah State  
14 Constitution is, in many instances, broader than the  
15 protection of the federal constitution. The history of our  
16 constitution, both in the early history of the people who  
17 came before they got here and also the prosecutions that  
18 were conducted in the early part of our history, would  
19 indicate to me that they were more concerned about  
20 protecting individual rights than others may have been.  
21 And our founding fathers indicated that we should have  
22 broader protections.

23 Nevertheless, in questions of search and seizure,  
24 the question still comes down to reasonableness. Maybe, as  
25 Mr. Moffat said, what's reasonable may take a little

1 tighter look under the Utah Constitution than it does the  
2 federal constitution. Still, the same issue was reasonable  
3 in this particular instance. And even with that higher  
4 standard, I am inclined to believe the initial entry into  
5 the apartment was reasonable.

6           Seems to me they gave the officer very certain  
7 information. They have a report of an assault. Language  
8 like, "Don't kill me." They had a report there had been  
9 some sort of commotion or problem the night before. They  
10 see the door and it's broken, happened the night before,  
11 happened a few minutes sooner, who knows, but it happened.  
12 They hear the voices, sort of an argument going on, and  
13 then as the man comes out, he backs up and tries to go back  
14 in. To me that is a very dangerous scenario for police  
15 officers. Seems to me just reasonable to see when a man is  
16 going back into the apartment, who knows what he is going  
17 to do? Is he going to get a weapon? Is he going to get  
18 some friends, tell the others so they can hole up? They  
19 don't know if there are weapons involved.

20           It seems to me that's just a very dangerous  
21 situation for officers. It's reasonable at that point to  
22 stop them, even if they have to go in a couple of feet, get  
23 them on the floor, subdue them. I think they had the right  
24 to do that.

25           And what comes next? Was it reasonable to go in

1       exclude her from it.

2               There were only some other clothes in there,  
3       children's clothes, things that weren't his, all kinds of  
4       clothes, as I recall the testimony. I think the evidence  
5       is that he did have a right of privacy in there. He had no  
6       right to exclude her, and she had the right to make a  
7       consent, and she consented. I think the evidence is clear  
8       I don't find her consent statement to be hearsay. I think  
9       that it was not hearsay. She said she consents.

10              They searched that apartment, that room, with her  
11       consent and, therefore, there is nothing to suppress there.  
12       I think that supersedes the problem with the warrantless  
13       arrest. They would have searched that room anyway, even if  
14       they had got a warrant and I think the consent does away  
15       with any problem in searching that room.

16              They take him into the car and they ask him about  
17       the coats. He said they were in the car, no Miranda  
18       warning. That's a violation of the Fifth Amendment.  
19       That's a violation of Miranda, I have no doubt of that.  
20       And his statement will be excluded under Miranda. But I  
21       don't think that makes the search of the automobile  
22       unlawful, because the evidence is that they were wondering  
23       whether the coats were in the automobile anyway. They had  
24       been told they were in the automobile and they asked the  
25       owner of the automobile if they could search her car, and

**ADDENDUM F**

## UTAH EXCLUSIONARY RULE

*e. The history of Mormon polygamy prosecutions does not provide a basis for interpreting article I, section 14*

Sometimes it is argued that the history of polygamy prosecutions of some Mormons means that the framers of the Utah Constitution intended to adopt stronger protections against abusive police practices than other states, protections that are embodied in article I, section 14.<sup>327</sup> To date Kenneth Wallentine has provided the most detailed exposition of this argument for an expansive interpretation of article I, section 14. One can gain the flavor of his thesis in the following excerpt:

As part of the anti-polygamy enforcement, the fourth amendment was often discarded and ignored by U.S. marshals, other law enforcement officers and courts. Early accounts tell of federal marshals who saw little need for the aid of search warrants. . . .

Against this history of unprecedented federal judicial abuse, arises a theory that the search and seizure provision in the Utah Constitution was included as a deliberate, considered act, rather than part of a wholesale importation of constitutional language. . . .

Drafters of Utah's early constitutions were intimately familiar with egregious searches of the sort unknown since the days of King George. Reason dictates that the drafters were acutely concerned with providing protection and remedies against unlawful searches and seizures.<sup>328</sup>

The difficulties with this argument are numerous: First, the argument places too much weight on an unexpressed, subjective intention of the framers of the Utah Constitution. Second, the framers of the constitution adopted specific rights responsive to the freedom of religion concerns raised by the polygamy prosecutions. It is these provisions -- not article I, section 14 -- that were designed to deal with abusive practices. Third, a careful reading of the historical

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from recalling historical tragedies only by pleading that they shall not happen again"). I am suggesting only that justice for criminal wrongdoers is a strong tradition in the state. Indeed, as I have suggested elsewhere, the best way to avoid "self-help" measures may be to insure that a state's criminal law actually imposes just punishment on convicted criminals. See Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 157 (1988).

327. See, e.g., Brief for Appellant Greg Hewitt at 22, *State v. Hewitt*, No. 910335-CA (Utah Ct. App. 1992).

328. Wallentine, *supra* note 226, at 276-79 (citations omitted). For an excellent description of the polygamy prosecutions, see EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, *ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900* 125-260 (1988).

## UTAH EXCLUSIONARY RULE

documents suggests that the framers' primary experience was with harsh *federal* prosecutions rather than abuse at the hands of their own, locally-controlled police forces. Finally, there are competing traditions among the Mormon settlers bearing more directly on the exclusionary rule issue that squarely cut against the rule.

One must approach with caution an interpretive approach that singles out a particular religious segment of Utah society and interprets the Utah Constitution consistently with its views. The Utah Constitution was a product of cooperation among different religious traditions. Both Mormons and Gentiles alike drafted its provisions.<sup>329</sup> If one gives dispositive weight to the views of the Mormon delegates in determining the intent of the Utah Constitutional Convention, how does one handle the opinions of Charles S. Varian, who apparently voted for article I, section 14? Varian aggressively prosecuted many polygamists,<sup>330</sup> but was far and away the most active (and perhaps the most influential) of all of the delegates.<sup>331</sup>

Moreover, several provisions in the Utah Constitution respond directly to the problems raised by the history of the polygamy prosecutions. While also specifically outlawing polygamy, Article III of the Constitution provides directly that "[n]o inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship . . . ."<sup>332</sup> Article I, section 1 affirms the "inherent and inalienable right" of all persons "to worship according to the dictates of their consciences . . . ." Article I, section 4 guarantees that "[t]he rights of conscience shall never be infringed" and that "[t]he State shall make no law . . . prohibiting the free exercise" of religion. Responding specifically to the federal practice of disqualifying Mormons from juries in polygamy trials,<sup>333</sup> that section also provided "nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof." In answer to the federal practice of forcing polygamist wives to testify against their

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329. Stanley S. Ivins, *A Constitution for Utah*, 25 UTAH HIST. Q. 95, 100 (1957) ("in line with the new political truce [between Utah Mormons and Gentiles], there were 28 non-Mormon delegates" of 107 delegates to the convention).

330. *Id.* at 100; see DESERET NEWS, Jan. 27, 1886, at 27 (describing prosecution by Varian).

331. Ivins, *supra* note 329, at 113-14; see also *Another Busy Day*, DESERET NEWS, Mar. 5, 1895, at 5.

332. Wallentine describes this provision as "unique" among the states "insofar as it proscribes disturbance of person or property." Wallentine, *supra* note 226, at 280.

333. See FIRMAGE & MANGRUM, *supra* note 328, at 161, 165-66, 227-31.

## UTAH EXCLUSIONARY RULE

husbands,<sup>334</sup> article I, section 12 enshrined a constitutional marital testimonial privilege: "[A] wife shall not be compelled to testify against her husband, nor a husband against his wife . . . ." Article III directs that "[p]erfect toleration of religious sentiment is guaranteed." Given these provisions, one hardly needs to pour concern about abusive polygamy prosecutions into the vessel of article I, section 14. The framers knew how to speak directly about the problems they had seen, and did so in these specific constitutional stipulations.<sup>335</sup>

In addition, a careful reading of the historical record reveals that the Mormons were particularly disturbed by *federal* criminal prosecutions. The federal judicial machinery was responsible for enforcing anti-polygamy statutes and drew the ire of many of the citizens of Utah.<sup>336</sup> Apart from the peculiar context of these religiously-influenced prosecutions dictated by politicians in Washington, D.C., nothing suggests that the framers of the Utah Constitution -- both Mormon and non-Mormon -- intended to adopt provisions that would increase the burdens on their own state criminal justice system. The drafters of the Utah Constitution knew that with Utah's entry into the Union, the state's citizens would assume responsibility for the day-to-day administration of the criminal justice system and would soon need to prosecute crimes effectively.

This sentiment is expressed, for instance, in a petition signed by 22,626 women of Utah and sent to Congress in 1876:

We ask to be relieved from the unjust and law-breaking officials forced upon us by the Government, and that we may have the jurisdiction of our own courts and the selection of our own officers, as we had in the past, *when our cities were free from dram-shops, gambling-dens, and houses of infamy*. As mothers and sisters, we earnestly appeal to you for help, that our sons may be saved from drunkenness and vice and our daughters from the power of the seducer . . . .<sup>337</sup>

Citizens concerned about ridding their cities of "dram-shops, gambling-dens, and houses of infamy" were not likely to make prosecution of those crimes more difficult.<sup>338</sup>

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334. *Id.* at 130, 138, 149-50, 153, 167, 194-97, 205-09.

335. The delegates to the convention also were apparently aware of expansive protections of privacy in other state constitutions but did not incorporate them into Utah's Constitution. See *supra* note 268 and accompanying text (discussing Washington protection of privacy).

336. See FIRMAGE & MANGRUM, *supra* note 328, at 147-48.

337. A Petition of 22,626 Women of Utah, H.R. Misc. Doc. No. 42 at 1-2, 44th Cong., 1st Sess. (1876).

338. See also Epistle of the First Presidency of the Church of Jesus Christ of Latter Day Saints, in