

2001

# Utah v. Sergio Renaga-Gutierrez : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
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 Plaintiff/Appellee, :  
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 v. :  
 :  
 SERGIO RENAGA-GUTIERREZ, : Case No. 20010141-CA  
 : Priority No. 2  
 Defendant/Appellant. :

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**BRIEF OF APPELLANT**

Appeal from a judgment of conviction for Distributing or Agreeing, Consenting, Offering or Arranging to Distribute a Controlled Substance, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 2000), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Judith S. Atherton, Judge, presiding.

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**JURISDICTIONAL STATEMENT**

This is an appeal from a judgment of conviction for one count of Distributing or Agreeing, Consenting, Offering or Arranging to Distribute a Controlled Substance, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 2000), in the Third Judicial District Court, State of Utah, the Honorable Judith S. Atherton, Judge, presiding. Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996). See Addendum A (Judgment and Conviction).

**STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW**

I. Whether the trial court erred in denying Appellant's motion for a directed verdict where the State failed to present sufficient evidence to support the distribution charge?

Standard of Review: “An appellate court should overturn a conviction for insufficient evidence when it is apparent that there is not sufficient competent evidence as to each element of the crime charged for the fact-finder to find, beyond a reasonable doubt, that the defendant committed the crime.” State v. Layman, 1999 UT 79, ¶12, 985

P.2d 911 (citations omitted).

II. Whether the trial court erred in failing to give two instructions on the lesser included offenses of solicitation of a controlled substance and attempted possession?

Standard of Review: “Whether a trial court committed error in refusing to give a requested jury instruction is a question of law, which we review for correctness.” State v. Kruger, 2000 UT 60, ¶11, 6 P.3d 1116 (citation omitted).

III. Whether a new trial is merited based on the misconduct of the prosecutor during closing argument?

Standard of Review: “This court will reverse on the basis of prosecutorial misconduct only if defendant has shown that the actions or remarks of [prosecuting] counsel call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, if so, under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result. . . . In determining whether a given statement constitutes prosecutorial misconduct, the statement must be viewed in light of the totality of the evidence presented at trial. Further, because the trial court is in the best position to determine the impact of a statement upon the proceedings, its rulings on whether the prosecutor's conduct merits a mistrial will not be overturned absent an abuse of discretion.” State v. Cummins, 839 P.2d 848, 852 (Utah App. 1992) (citations omitted).

## **PRESERVATION OF THE ARGUMENT**

Appellant Sergio Renaga-Gutierrez's ("Renaga-Gutierrez") motion for a directed verdict is preserved on the record for appeal ("R.") at 102 and 161[125]. His denied request for two instructions on lesser included offenses is preserved at R.161[122-24]. His objections to the prosecutor's inappropriate remarks during closing are preserved at R.161[147-48].

## **STATUTES**

The following statutes are determinative of the issues on appeal. Their text is provided in full in Addendum B.

Distributing or Agreeing, Consenting, or Arranging to Distribute a Controlled Substance - Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 2000);

Possession of a Controlled Substance - Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 2000);

Attempt - Utah Code Ann. § 76-4-101 (1999);

Solicitation of a Controlled Substance - Salt Lake City Ordinance 11.12.100 (1996);

Lesser Included Offenses - Utah Code Ann. § 76-1-402 (1999).

## **STATEMENT OF THE CASE**

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

Appellant Sergio Renaga-Gutierrez ("Renaga-Gutierrez") was charged by information with one count of unlawful distribution, offering, agreeing, consenting or

arranging to distribute a controlled or counterfeit substance, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii). R.5. An arrest warrant was issued. R.1. After a jury trial, Renaga-Gutierrez was convicted as charged. R.101-03. During the State's rebuttal closing argument, the prosecutor made three inappropriate remarks. R.161[147-49]. Renaga-Gutierrez objected to all three. Id. The trial court overruled the objections. Id.

Renaga-Gutierrez moved for a directed verdict after all the evidence was presented. R.161[125]. The trial court denied the motion. Id. Renaga-Gutierrez requested jury instructions on the lesser included offenses of attempted possession, a class B misdemeanor, pursuant to Utah Code Ann. §§ 58-37-8(2)(a)(i) and 76-4-101, and solicitation of a controlled substance, a class B misdemeanor, pursuant to Salt Lake City Ordinance 11.12.100. R.81, 95. The trial court denied the requested instructions. R.161 [122-24].

Renaga-Gutierrez timely appeals. R.143-44.

### **STATEMENT OF THE FACTS**

Detective Brian Purvis (“Purvis”) of the Salt Lake City Police Department was working undercover vice with his sergeant and three other detectives in the late night and early morning hours of August 13-14, 2000. R.160[24]. They were patrolling the area of 900 S. and State Street in Salt Lake City for underage drinkers. Id. They entered a bar located on 900 S. between State and Main. Id.

The bar's security guard at the door told Purvis that he thought drug deals were

occurring in the bathroom. R.160[26]. Purvis, acting alone, walked through the café portion of the bar, a long hallway, and around the crowded dance floor to the men's restroom. R.160[27]. He noted that most of the patrons were in western-style dress. R.160[28].

Purvis entered the men's room. R.160[29]. There were several people in the large restroom. Id. Two men stood in the center of the room. Id. Purvis identified one of the men as Renaga-Gutierrez. R.160[30-31]. Purvis noted that Renaga-Gutierrez was not in western dress like the other patrons, but wore a large football jersey, long shorts, high socks, tennis shoes and a large flat-brimmed hat. Id. The other man wore a cowboy hat and western shirt. R.160[31].

All the people in the men's room, including Renaga-Gutierrez and the man he spoke to, left the restroom about the same time. R.160[32]. Purvis followed and went into the bar area to keep an eye out for underage drinking. R.160[32-33]. After approximately ten minutes, Purvis observed Renaga-Gutierrez go back into the men's room followed by two other men. R.160[35]. Purvis considered following the men back into the restroom, but did not do so because he figured they would all scatter as they did before. R.160[35].

Purvis was called away by one of the other officers who had picked up two underage drinkers. R.160[35]. He exited the bar with the other officers to issue citations to the minors. R.160[36]. The sergeant instructed Purvis to patrol the parking lot for more illicit drinking. R.160[36].

Purvis eventually noticed Renaga-Gutierrez and another man, Ignacio Acevedo (“Acevedo”), in the parking lot. R.160[39]. He watched them but had no reason to approach them. R.160[40]. Renaga-Gutierrez led as the two men walked a short distance and then stopped by a small delivery truck. R.160[40,42]. Renaga-Gutierrez turned to face Acevedo. R.160[41]. Purvis suspected a drug deal at that point based on his previous observations of Renaga-Gutierrez. Id.

Purvis testified on direct examination that he saw both men facing one another and that both had their hands extended in front of them. R.160[43]. Both men were looking down at their hands. Id. Purvis testified that he could not clearly see what the men were holding. R.160[44]. After they made a two-handed hand shake, Renaga-Gutierrez pulled his left hand away. Id. His right hand remained between Acevedo's hands. Id. Purvis said he saw cash in Renaga-Gutierrez's hand, and something white in Acevedo's hand. R.160[44-45]. He never saw the white package in Renaga-Gutierrez's hand. R.160[73]. The first time he noticed the white package was when Acevedo carried it in his hand after walking away from Renaga-Gutierrez. R.160[73]. He did not hear any conversation between Renaga-Gutierrez and Acevedo regarding a drug deal. R.160[74].

Upon cross-examination, Purvis testified that he saw “one person holding [the money], push it across, and the other person take it.” R.160[72]. He did not see who originally held the money before it passed hands, only that it was being held between them as he approached. Id. He also testified that he wrote in his incident report that he

saw Renaga-Gutierrez pull the money from Acevedo's hand. R.160[59]. Purvis' testimony at the preliminary hearing differed. There, he testified that he never saw Acevedo with the money in his hands. R.160[72-73].

Purvis surmised that a hand-to-hand drug transaction had occurred based on his experience as an undercover agent and his observations of other such deals. R.160[47]. Acevedo and Renaga-Gutierrez walked away in opposite directions. R.160[46]. Purvis saw Acevedo put his hand in his pocket. Id. Purvis stopped Acevedo while two other officers stopped Renaga-Gutierrez. Id. Purvis searched Acevedo and found a twist containing white powder in his front pocket. Id. Two more twists were found when he was searched at the jail. R.160[52]. The substance in each of the packets was identified as cocaine. R.160[51].

Detective Cade Martin ("Martin") testified that he and Detective Woodbury ("Woodbury") were the arresting officers who stopped Renaga-Gutierrez. R.160[81]. Woodbury ordered Renaga-Gutierrez to put his hands up. R.160[82]. He held money in his left hand. Id. Woodbury took it and gave it to Martin. Id. The officers frisked Renaga-Gutierrez and found a folded wad of money in his pocket. R.160[83]. The officers found another large sum of money in his wallet. R.160[85]. The officers found a total of \$1426.00 in \$10 and \$20 denominations on Renaga-Gutierrez. R.160[85].

Acevedo testified for the defense. He admitted that he bought four twists of cocaine earlier in the day at a different location. R.160[99-100]. He consumed one while in the bar and had three left over when he was stopped and searched. R.160[100]. He

testified that he had been using drugs for one-to-two years. R.160[109].

Acevedo had known Renaga-Gutierrez for one month prior to this incident. R.160[101]. He described him as a “friend[.]” R.160[105]. He could not recall that he could not remember Renaga-Gutierrez's name at the preliminary hearing. R.160[106]. Acevedo went to the bar on August 13<sup>th</sup> around 11:00 p.m. to go dancing. R.160[99]. He drank six beers. Id. He left the bar and saw Renaga-Gutierrez in the parking lot. R.160[101]. Acevedo went up to him, said “hello,” and the men started talking. R.160[102]. Acevedo said he did not get the drugs later found on him from Renaga-Gutierrez. R.160[101]. He never offered to sell drugs to Renaga-Gutierrez, nor did Renaga-Gutierrez offer to sell them to him. R.160[102].

Acevedo pled to attempted possession of cocaine as a result of this incident. R.160[107]. At the time of trial, Acevedo was incarcerated and was to be deported to Mexico. Id. He asserted at trial that he had nothing to gain or lose by testifying on behalf of Renaga-Gutierrez. R.160[111].

Maria Renaga, Appellant's mother, also testified for the defense. R.160[113]. She asserted that Renaga-Gutierrez had a large sum of cash on him because he sold his 1989 Honda to her brother for \$2000. R.160[114]. She observed the transaction because it took place at her house. Id. She explained that her son lives with her. R.160[115]. Although she did not want him to go to jail, she testified that she would not lie for her son and that her testimony was true. Id.

During his rebuttal closing argument, the prosecutor made three inappropriate



statements. The following colloquy between counsel and the court ensued:

Prosecutor: [Ignacio Acevedo] said it was closing time and everybody was leaving. No. That's not what I heard. What I heard is that they were seeing the two of them, not a crowd of people leaving, the two of them were leaving. And what was [] Ignacio's explanation? They were going to [Mr. Renaga-Gutierrez's] car. The car they brought his mother in to tell you he had sold. Now he sold that -

Defense: Judge, I'm going to object to the statement that his mother said that he sold that car.

Court: The jury's been instructed that arguments of counsel are not to be considered. They've listened to that. I'm not going to address that. They've been properly instructed as to their job.

Defense: Very well. Thank you.

Prosecutor: . . . If they really wanted you to believe that he had sold the car, don't you think they would have brought in the bill of sale? Don't you think they'd have brought in a transfer of title? Don't you think -

Defense: Judge, I'm going to object. He's trying to switch the burden to the defense. I don't have the burden of proof in this case.

Court: Jury's been instructed as to the duty and to the arguments of counsel. Go forward.

Prosecutor: Next, the testimony of Ignacio. He's admitted to you that he's a drug user for two years. He had used that night. And he was looking for more. He sat there and told you in no uncertain terms that there's really nothing that we could do once he was deported and that, yes, he would lie for his friends.

Defense: Well, objection, Your Honor. There's no evidence to support that assertion.

Court: . . . I'm not going to repeat it. Arguments of counsel are not facts. The jury has listened to all the evidence and they can weigh the evidence and if it's inconsistent with what argument of counsel is they are aware that they are the fact finders in this case.

R.149.

### **SUMMARY OF THE ARGUMENT**

The trial court erred in failing to grant Renaga-Gutierrez's motion for a directed verdict where the State failed to present sufficient evidence of the crime of distribution. See State v. Layman, 1999 UT 79, 985 P.2d 911; State v. Hester, 2000 UT App 159, 3 P.3d 725.

In addition, the trial court erred in failing to give the requested lesser included instructions on attempted possession, see Utah Code Ann. §§ 58-37-8(2)(a)(i) (Supp. 2000) and 76-4-101 (1999), or solicitation of a controlled substance, see Salt Lake City Ordinance 11.12.100 (1996), where the elements of the lessers are included in the greater offense of distribution, see Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 2000), and there is a “rational basis” in the evidence for acquitting on the greater and convicting on the lessers. State v. Kruger, 2000 UT 60, ¶14, 6 P.3d 1116 (quotation omitted).

Finally, a new trial is merited on account of the prosecutor's prejudicial and inappropriate remarks made during closing argument. See State v. Cummins, 839 P.2d 848, 852 (Utah App. 1992) (citations omitted).

### **ARGUMENT**

#### **I. THE TRIAL COURT ERRED IN DENYING RENAGA-GUTIERREZ'S MOTION FOR A DIRECTED VERDICT WHERE THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE OF DISTRIBUTION.**

The trial court erred in denying Renaga-Gutierrez's motion for a directed verdict where the State failed to present sufficient evidence to support the charge of distribution

of a controlled substance beyond a reasonable doubt. R.102 (Minute Entry); 160[95-97].

“An appellate court should overturn a conviction for insufficient evidence when it is apparent that there is not sufficient competent evidence as to each element of the crime charged for the fact-finder to find, beyond a reasonable doubt, that the defendant committed the crime.” State v. Layman, 1999 UT 79, ¶12, 985 P.2d 911.

In order to convict Renaga-Gutierrez under Utah Code Ann. § 58-37-8(1)(a)(ii), the State had to present sufficient competent evidence that he “knowingly and intentionally . . . distribute[d] a controlled or counterfeit substance, or [] agree[d], consent[ed], offer[ed], or arrange[d] to distribute” cocaine. Utah Code Ann. § 58-37-8(1)(a)(ii). The following evidence was presented at Renaga-Gutierrez's trial<sup>1</sup>:

- Detective Purvis was on patrol as an undercover agent in the late evening and early morning hours of August 13-14, 2000. R.160[24]. He and three other officers entered a bar at 900 S. between State and Main. Id. The security guard at the door alerted Purvis that he thought drug deals were going on in the men's bathroom.

R.160[26]. Purvis proceeded to the men's room. R.160[27].

- Purvis observed several men in the large bathroom. R.160[29]. Renaga-

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<sup>1</sup> "It is well established that a defendant's burden on appeal when challenging the sufficiency of the evidence after a jury trial is to "marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict."" State v. Rudolph, 2000 UT App 155, ¶18, 3 P.3d 192 (citations omitted).

Gutierrez and another man stood in the center of the bathroom. Id.

- Purvis noted that most of the patrons in the bar were dressed in western-style clothing. R.160[28]. Renaga-Gutierrez, by contrast, wore a large football jersey, long shorts, high socks, tennis shoes, and a large flat-brimmed hat. R.160[30-31]. The man that Renaga-Gutierrez was with wore a western shirt and a cowboy hat. R.160[31].

- All the people in the men's room dispersed after Purvis entered, including Renaga-Gutierrez. R.160[32]. Purvis also exited the restroom and went back into the bar area. R.160[32-33]. After ten minutes, Purvis observed Renaga-Gutierrez reenter the men's room with two other men. R.160[35]. He did not follow the men into the restroom. R.160[35].

- Purvis next observed Renaga-Gutierrez outside the bar in the parking lot. R.160[39]. He was with Acevedo. Id. They were walking but eventually stopped by a truck. R.160[40,42]. Renaga-Gutierrez turned to face Acevedo. R.160[41].

- Purvis saw the two men make a two-handed handshake. R.160[44]. Renaga-Gutierrez pulled his left hand away, but his right remained between Acevedo's hands. Id. Purvis then saw something white in Acevedo's hand, and cash in Renaga-Gutierrez's hand. R.160[73]. Purvis first noticed the white object in Acevedo's hand as he walked away from Renaga-Gutierrez. R.160[73].

- Purvis' testimony concerning the money varied. On cross-examination, he testified that he saw "one person holding [the money], push it across, and the other person take it." R.160[72]. He did not see who originally held the money. Id. He wrote

in his incident report that Renaga-Gutierrez pulled the money from Acevedo's hand.

R.160[59]. At the preliminary hearing, Purvis asserted that he never saw Acevedo with the money in his hands. R.160[72-73].

- Purvis testified that he suspected a hand-to-hand drug deal based on his experience as an undercover vice agent and his observations of similar drug transactions. R.160[47].

- The two men walked their separate ways. R.160[46]. Purvis saw Acevedo put his hand in his front pant pocket. Id. He stopped Acevedo and searched his person, finding a twist containing white powder in his pocket. Id. Two more twists containing white powder were found on Acevedo during a more thorough jailhouse search.

R.160[52]. The substance in all three packets was identified as cocaine. R.160[51].

- Renaga-Gutierrez was stopped by Detectives Martin and Woodbury. R.160[81]. Woodbury ordered Renaga-Gutierrez to put his hands up. R.160[82]. Renaga-Gutierrez held some money in his left hand. Id. Another large sum of money was found wadded in his pocket. R.160[83]. Yet another large sum of money was found in his wallet.

R.160[85]. Renaga-Gutierrez had a total of \$1426.00 in \$10 & \$20 denominations. Id.

This evidence, even when viewed in a light most favorable to the jury's verdict, is not competent enough to support the conviction. See State v. Anderton, 668 P.2d 1258, 1262 (Utah 1983) (viewing evidence in light most favorable to jury verdict in holding that evidence was insufficient to support conviction for possession of marijuana with intent to distribute) (footnote omitted). Indeed, the evidence presented at trial is “so lacking and

insubstantial that reasonable men could not possibly have determined guilt beyond a reasonable doubt.” Id. (footnote omitted).<sup>2</sup>

As an initial matter, the State did not present evidence that Renaga-Gutierrez had direct or constructive possession of the drugs that he allegedly sold to Acevedo or, by extension, the requisite intent to commit the crime charged. See Layman, 1999 UT 79 at ¶16 (insufficient nexus between controlled substance and defendant to support possession conviction); State v. Hester, 2000 UT App 159, ¶11, 3 P.3d 725 (reversing conviction for arranging to distribute controlled substance where circumstances were too speculative to support inference of intent)<sup>3</sup>. Purvis testified that he did not see Renaga-Gutierrez with the drugs in his hands at any point during his encounter with Acevedo. R.160[73]. Moreover, when Renaga-Gutierrez was searched, Detectives Martin and Woodbury did not find any drugs on him, see generally R.78-89, let alone quantities of drugs suggesting that he was a dealer. See State v. Gurr, 904 P.2d 238, 241 (Utah App. 1995) (“[g]enerally, triers of fact must infer the intent to distribute from evidence such as . . . quantities larger than those typically purchased for personal use”).

If anything, the jury heard substantial, credible evidence to the contrary: Acevedo testified that he had bought the drugs that were the subject of the alleged sale earlier that

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<sup>2</sup> The jury was instructed on reasonable doubt. R.109 (Reasonable Doubt Instruction No. 5)

<sup>3</sup> The jury was instructed on the theory of "constructive possession." R.117 (Instruction No. 13 concerning "constructive possession").

day, at a different location and from someone other than Renaga-Gutierrez. R.160[99-101]. He admitted to using cocaine for one-to-two years, R.160[109], had bought four twists of cocaine all together, R.160[99-100], used one earlier in the bar, and was found with the remaining three when he was arrested and searched. R.160[100]. Acevedo, a defense witness, did not receive preferential treatment in exchange for his testimony and therefore had no reason to lie. See generally R.160[99-111]. In fact, he pled guilty to attempted possession of cocaine and was facing deportation as a result. R.160[107]. Accordingly, he had nothing else to lose by telling the truth.

The presence of a large sum of money on Renaga-Gutierrez (\$1426.00) does little to tip the balance of the evidence toward guilt. R.160[85]. His mother testified that he had sold his 1989 Honda to her brother on August 11, 2000, two days prior to the alleged crime, for \$2000 cash. 160[114]. It is not unusual for people to carry such a large amount of money under these circumstances. This is especially true where the suspect may not have a bank account or, if he did, he likely did not have an opportunity to deposit the money prior to the alleged crime; the sale occurred on a Friday before the weekend that the alleged crime occurred and banks are traditionally closed on Saturdays and Sundays.

The fact of the money is even less consequential given Purvis' inconsistent testimony. Purvis initially testified at the preliminary hearing that he never saw Acevedo holding money, as he would if he were actually paying Renaga-Gutierrez for drugs. R.160[72-73]. In his incident report, by contrast, he wrote that he saw Renaga-Gutierrez

pull the money from Acevedo's hand. R.160[59]. He similarly testified at trial that he saw “one person holding [the money], push it across, and the other person take it.”

R.160[72]. In short, Purvis' testimony is too confused and inconsistent to positively establish that Renaga-Gutierrez took money from Acevedo for the supposed purchase of drugs.

The sufficiency of the State's evidence is further undermined given that Renaga-Gutierrez did not attempt to flee or exhibit any furtive movements as someone might if he was actually guilty of dealing drugs. See generally R.160. Rather, he was behaving normally before and after the arrest, casually walking and talking with another person through the parking lot of a crowded bar, and then complying with the stop and arrest when told to do so by Detectives Woodbury and Martin, and did not manifest any signs of using drugs. R.160[40-42,81-82]; Cf. Layman, 1999 UT 59 at ¶6,16 (insufficient evidence of possession with intent to distribute although defendant was visibly agitated, “upset, fidgety, and had red, watery, bloodshot eyes”). In fact, Purvis testified that he had no reason to approach Renaga-Gutierrez and Acevedo as they stood talking in the parking lot, and that it was not until they walked their separate ways that he decided to intervene. R.160[40,47].

This Court and the Utah Supreme Court have held that drug-related convictions and bindovers were not supported by sufficient evidence under far more incriminating circumstances than those at play here. For example, in Hester, this court held that there was insufficient evidence to bind a defendant over on a charge of arranging to distribute a



controlled substance. 2000 UT App 159 at ¶13. In that case, an undercover narcotics agent “made contact with defendant.” Id. at ¶2. The agent pulled up in a car and said something to the defendant. Id. Defendant walked over to the agent's car. Id. The agent asked whether the defendant had “chiva.” Id. Defendant replied, “No, baby, I don't[;] only coke.” Id. The agent responded that she wanted heroin, “but if he had any cocaine she had a twenty.” Id. Defendant took the agent's money and told her to wait. Id. He walked away and was arrested by officers a block away from the agent's car. Id. at ¶2-3. Defendant did not have any cocaine on him at the time of arrest, “had spoken to no one, nor had he made any phone calls after leaving” the agent. Id. at ¶3. “[T]here was no particular indication that [defendant] was going to meet a supplier or otherwise actually procure cocaine or arrange for its delivery to” the agent. Id.

Based on this evidence, this Court stated, “trying to discern Hester's intentions at the time of his arrest would be an exercise in pure speculation. Only speculation, ungrounded in the evidence, points to his intention to actually facilitate [the agent's] securing cocaine.” Id. at ¶14. This Court went on to say, “[w]hen the correlation between the predicate facts and the conclusion is slight, then the inference is less reasonable, and 'at some point, the link between the facts and the conclusion becomes so tenuous that we call it 'speculation.'” Id. at ¶17 (quotations omitted). Accordingly, this Court held that the evidence was insufficient to support a bindover. Id. at ¶20.

The Utah Supreme Court reached a similar conclusion in Layman, 1999 UT 79. In that case, the defendant was convicted of possession with intent to distribute and this

Court reversed the conviction for insufficient evidence. Id. at ¶¶1,11. The defendant drove his father, Hobart, and his father's friend, Gina, to Vernal in his car. Id. at ¶3. Hobart was going there to sell methamphetamine and had invited Gina along to do the same. Id. Defendant, Hobart and Gina checked into a motel in Vernal. Id. at ¶4. Defendant went into the bathroom for a while, then came out. Id. Hobart went into the bathroom next and remained there for a long time measuring out the drugs. Id.

Gina and Defendant drove Hobart to another location. Id. at ¶5. Hobart handed Gina a pouch containing methamphetamine and varied drug paraphernalia and exited the car. Id. Gina believed that the pouch and its contents belonged to her and Hobart. Id. She attached it to her waistband. Id. After leaving Hobart, Defendant and Gina were stopped in Defendant's car for a malfunctioning taillight. Id. at ¶6. Defendant “jerked his car to the right and then jerked it back to the left so that [it] was perpendicular to the police car when it stopped.” Id. Defendant got out of the car and “walked briskly toward the deputy, and asked why he had been stopped.” Id. Defendant appeared fidgety and nervous as he tried to fix the taillight. Id. He also had “blood-shot eyes.” Id.

Suspecting that Defendant was under the influence, the officer asked him if he had any controlled substances, paraphernalia or alcohol in the car. Id. at ¶7. Defendant responded negatively and consented to a search of the car. Id. The officer asked Gina to step out of the car. Id. at ¶8. He asked if he could search the pouch. Id. “When the deputy asked Gina for the pouch, Gina was looking at [Defendant] and he shook his head in a negative fashion for an unspecified length of time.” Id. The officer searched the

pouch, found the drugs and paraphernalia, and arrested Gina. Id. Defendant was arrested and taken to the hospital to have his blood drawn. Id. at ¶9. The officer noticed needle marks on his arm. Id. No drugs were found on Defendant. Id.

The Utah Supreme Court found this evidence insufficient to support a possession with intent to distribute charge and affirmed this Court's holding. Id. at ¶16. Since no evidence showed that Defendant had actual possession of the drugs, the Court focused its analysis on whether the facts showed “constructive possession of Gina's pouch and its contents.” Id. at ¶11 (citation omitted). In finding that the evidence was insufficient, the Court reasoned:

When all the brush is cleared, the critical fact is that there was little evidence to prove that [Defendant] had such control over Gina's person that one could reasonably infer beyond a reasonable doubt that he knowingly and intentionally possessed the drugs and paraphernalia in her pouch. The only fact tending to prove [Defendant's] control over Gina is that she looked at him when the deputy requested to see the pouch and that [Defendant] shook his head in a negative fashion. This simply is not enough. All the other evidence in this case does nothing to address this critical factual issue. Neither her presence in his vehicle, his erratic behavior after the traffic stop, nor his use of drugs at some earlier time make up for this critical lack of evidence.

Id. at ¶16.

As in Hester and Layman, the evidence in this case suffers from the same fatal lack of sufficient and competent evidence. Notwithstanding the fact that Renaga-Gutierrez was seen associating with someone later found to be in possession of three twists of cocaine, there is not a sufficient nexus between Renaga-Gutierrez and the drugs such that his conviction can be sustained on appeal. See Hester, 2000 UT App 159 at ¶¶

14-20; Layman, 1999 UT 79 at ¶16. Far more incriminating evidence was not enough to support even a bindover order in Hester, 2000 UT 159 at ¶21. Hence, under the less compelling circumstances here, any connection between Renaga-Gutierrez and the drugs is too speculative and conjectural to legally support the inference of intent. See Hester, 2000 UT App 159 at ¶¶17-20; Layman, 1999 UT 79 at ¶16. Accordingly, the trial court erred in denying the motion for a directed verdict where the State failed to present sufficient evidence to support the distribution charge pursuant to Utah Code Ann. § 58-37-8(1)(a)(ii).

## II. THE TRIAL COURT ERRED IN FAILING TO GIVE THE REQUESTED INSTRUCTIONS ON LESSER INCLUDED OFFENSES.

The trial court erred in failing to give Renaga-Gutierrez's requested instructions on the lesser included offenses of attempted possession of a controlled substance, see Utah Code Ann. §§ 58-37-8(2)(a)(i) (Supp. 2000) & 76-4-101 (1999), or solicitation of a controlled substance, Salt Lake City Ord. 11.12.100 (1996). R.81-82 (Proposed Instructions on Attempted Possession); 95 (Proposed Instruction on Solicitation of Controlled Substance);160[93-94].

The State did not oppose the requested instructions. R.160[94]. The trial court nonetheless denied the request, stating with regard to the instruction on solicitation:

I'm not going to give it on two bases. I don't think we have jurisdiction over it. On consideration, you know, it becomes to me a question partly of whether or not . . . a jury would come back with a verdict on Class B Misdemeanor it would impose potentially a burden on Salt Lake City that they . . . haven't participated in [] an issue of probation.

So I believe there is a substantial jurisdictional issue not with regard to

this court being able to address that issue but with regard to it being part of this case and I can't resolve that.

You know, I feel comfortable in having jurisdiction over those offenses. I do not feel comfortable in that part of it and I believe it . . . falls into a general jurisdictional state. . . . Okay. And this is a state case and we're proceeding under state statute and the state statute does not incorporate that.

. . . Also, with regard to the solicitation of [sic] with intent, I don't see any evidence supporting that whatsoever. There is no evidence that I've seen brought forward in this case suggesting that this defendant intended - attempted to purchase a controlled substance. The evidence that's before the court has to do with a transaction. No drugs were found on this defendant. No evidence of any drugs in his hand. The only evidence, I think, that the jury can consider is with regard to . . . his distribution part.

R.161[122-24].

The court additionally denied the instruction on attempted possession, stating:

Court: And with regard to that, that's not a criminal offense under the statute, is it?

State: . . . [T]hat is . . . what the other defendant pled to but it's not a crime. I think it's a fiction we create.

Court: It's a fiction that we do by way of the disposition of the case.

State: Right.

Court: It is not an offense that is something that can be sent tot he jury. I'm going to deny that motion.

R.161[123].

When a lesser included instruction is requested by the defendant, the trial court must apply an “evidence-based” standard to decide whether the instruction is appropriate. See State v. Piansiaksone, 954 P.2d 861, 869 (Utah 1998) (citing State v. Baker, 671 P.2d 152, 157 (Utah 1983)). This standard, clearly outlined by th[e Utah Supreme C]ourt in Baker, provides a two-pronged analysis that mirrors the statutory framework set out in section 76-1-402 [(1999)]. First, the court must determine whether the claimed lesser offense is an offense “included” in the charged offense. See State v.

Crick, 675 P.2d 527, 529 (Utah 1983); Baker, 671 P.2d at 158-59. An offense is included when it falls within one of the definitions of section 76-1-402(3), as interpreted by our case law. [footnote omitted] See Crick, 675 P.2d at 529; Baker, 671 P.2d at 158. Section 76-1-402(3) states that a lesser offense is included when:

- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; . . .

After determining that the offense is “included” under section 76-1-402(3), the court must decide whether “there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.” § 76-1-402(4); see also State v. Pearson, 943 P.2d 1347, 1350 (Utah 1997); State v. Hansen, 734 P.2d 421, 424 (Utah 1986); Crick, 675 P.2d at 530-31 (holding that it is not enough to find that the evidence would support a conviction for the lesser offense, but that “the evidence must provide a rational basis for both acquitting of the charged offense and convicting for the lesser included offense”); Baker, 671 P.2d at 159.

In determining whether there is a “rational basis” in the evidence to support both acquittal of the greater and conviction of the lesser offense, a trial judge, though he or she cannot weigh the credibility of the evidence, must nevertheless decide whether there is “a sufficient quantum of evidence” to send the issue to the jury. Baker, 671 P.2d at 159. To make this determination, the trial court must “view the evidence and the inferences that can be drawn from it in the light most favorable to the defense.” Crick, 675 P.2d at 532 (citing State v. Gillian, [] 463 P.2d 811, 814 (1970)).

State v. Kruger, 2000 UT 60, ¶¶ 12-14, 6 P.3d 1116. Under the analysis detailed in Kruger, the instructions on the lesser included offenses of attempted possession and solicitation were warranted. Id.

As an initial matter, and contrary to the court's assertion, the offense of attempted possession is not a legal fiction and it is a lesser included offense of distribution. See Utah Code Ann. §§ 58-37-8(2)(a)(i) (possession) & 76-4-101(attempt); Kruger, 2000 UT 60 at ¶¶ 12-14. First, attempted possession is not a “legal fiction” because it is

specifically defined in the Utah Code. Section 58-37-8(2)(a)(i) states in pertinent part, “[i]t is unlawful for any person knowingly and intentionally to possess or use a controlled substance.” Section 76-4-101(1) defines attempt, stating, “[f]or purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the offense, he engages in conduct constituting a substantial step toward the commission of the offense.” Reading the two provisions together, the Utah Code includes the offense of attempted possession for purposes of this appeal; it is not a “legal fiction” as the court stated.

Given that attempted possession is an actual crime, the trial court erred in failing to give the requested instruction on that offense because “[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged,” distribution. Utah Code Ann. § 76-1-402(3)(a). The trial court similarly erred in failing to give an instruction on the lesser included offense of solicitation of a controlled substance. See Salt Lake City Ordinance No. 11.12.100 (1996); Utah Code Ann. § 76-1-402(3)(a).

The elements of attempted possession are: [1] a “substantial step,” Utah Code Ann. § 76-4-101(1); [2] that is “strongly corroborative” of a knowing or intentional state of mind, Utah Code Ann. § 76-4-101(2), see also Utah Code Ann. § 58-37-8(2)(a)(i); [3] to “possess a controlled substance.” Utah Code Ann. § 58-37-8(2)(a)(i). Under the solicitation statute, “[i]t is unlawful for any person to request, or solicit a controlled substance . . . from another person.” Salt Lake City Ordinance No. 11.12.100(A)(1). The

elements of distribution are: [1] knowingly or intentionally; [2] “distribut[ing] a controlled . . . substance.” Utah Code Ann. § 58-37-8(1)(a)(ii).

The offense of distribution presupposes attempted possession or solicitation because one has to procure a drug, either actually or constructively, in order to distribute it. See, e.g., Utah Code Ann. § 58-37b-2(2) (1999) (defining “distribution” under the Imitation Controlled Substances Act as “actual, constructive, or attempted sale, transfer, delivery, or dispensing to another of an imitation controlled substance”). A person establishes the requisite nexus between a drug for purposes of distribution either through an attempt to possess or solicitation of a drug. Consequently, the trial court abused its discretion in failing to give an instruction on the lesser included offense of attempted possession or solicitation.

Attempted possession and solicitation are lesser included offenses of distribution for the added reason that there is a “rational basis” in the evidence, viewed in a light most favorable to Renaga-Gutierrez, for acquitting of the greater and convicting on either of the lessers. Kruger, 2000 UT 60 at ¶13 (citing Utah Code Ann. § 76-1-402(4)). In this regard, the Tenth Circuit Court of Appeals opinion in United States v. Humphrey, 208 F.3d 1190 (10<sup>th</sup> Cir. 2000), is instructive. The Humphrey Court held that the defendant, Regan, charged with possession with intent to distribute, was entitled to an instruction on the lesser included offense of possession because “the evidence would permit a jury rationally to find [her] guilty of the lesser offense and acquit [her] of the greater.” 208 F.3d at 1207 (citing Beck v. Alabama, 447 U.S. 625, 635 (1980) (quoting Keeble v.



United States, 412 U.S. 205, 208 (1973)).

The evidence in that case included information that the defendant lived in a house as a cook and housekeeper to a man who was ill. Id. at 1195. The codefendant Humphrey also visited the house frequently. Id. at 1196. The sick man's wife, Patty, contacted an investigator and reported that the codefendants were dealing methamphetamine. Id. Patty contacted the investigator again to report that Humphrey had a large amount of methamphetamine and was driving a green truck. Id. Patty contacted the investigator a third time informing him that she was meeting the codefendants at a specified diner. Id.

The officers observed codefendants in a green truck at the diner. Id. The officers stopped the truck and observed Regan “ducking down and moving as if she were moving something on the floorboard of the pickup.” Id. The officers conducted a search in which they found \$3492 cash and a money order for \$500. Id. In a subsequent search, the officers also found addition large amounts of drugs and paraphernalia. Id.

The officers arrested Humphrey on an outstanding warrant and detained Regan to speak to her. Id. In the meantime, officers discovered a tan satchel on the floor of the truck on the passenger side that contained over 600 grams of methamphetamine. Id. Regan was then arrested. Id. She had a small amount of cash on her and three grams of methamphetamine in her purse. Id. Humphrey's second car was searched and an additional \$4000, a loaded pistol, and a notebook with handwritten numbers and notations were found. Id. at 1197. Patty identified the handwriting as that of Regan. Id.

Another purse belonging to Regan was also found at Patty's house and searched. Id. The purse contained documents “identified as records of drug transactions.” Id.

In determining that a lesser included instruction on possession was necessary, the Humphrey Court stated, “[u]nder settled principles . . . [Regan] is entitled to an instruction on a lesser included offense if there is any evidence fairly tending to bear upon the lesser included offense., *'however weak' that evidence may be.*” Id. at 1207 (quoting United State v. Thornton, 746 F.2d 39, 47 (D.C. Cir. 1984) (emphasis original). The Court went on to note that Humphrey was seen carrying a satchel similar to the one found in the truck containing 600 grams of methamphetamine on the morning of his arrest. Id. at 1207. Patty also testified that “Humphrey habitually carried a satchel which he called his 'dope bag.’” Id. Another witness testified that Humphrey “borrowed her scales three or four times to weigh one pound quantities of methamphetamine and that after weighing the drug and dividing it into smaller quantities, he would put all the bags into a tan bag” like the satchel. Id. “Thus, the evidence tied the satchel much more closely to Humphrey than to Regan.” Id. In sum, the Court asserted that “the evidence in the case implicated Humphrey more strongly than Regan.” Id. at 1208.

Additionally, the Humphrey Court noted that although Regan was seen moving something around on the floor of the truck, other testimony established that there were many items on the floor that she may have been moving around. Id. at 1207. The Court also stated that testimony established that the 3 grams of methamphetamine found in Regan's purse was “indicative of somebody who is a user . . . along with other items

found in the purse,” as well as evidence that Regan was using methamphetamine at the time. Id. at 1208 (quoting testimony of witness officer).

As in Humphrey, the evidence in this case is sufficiently weak against Renaga-Gutierrez that a jury might rationally acquit him of distribution and instead convict him of attempted possession. First, Acevedo, not Renaga-Gutierrez, was the one found with the drugs. No drugs at all were found on Renaga-Gutierrez. In fact, Acevedo admitted to buying all the drugs found on his person earlier that day. R.160[99-100]. Renaga-Gutierrez's association with other people in the bathroom of the bar is consistent with someone who is attempting to procure drugs. A person trying to buy drugs may solicit a number of people in his or her quest. He or she may even make a few buys, use the drugs, and attempt to buy more (i.e. from Acevedo) later on. Consequently, the jury could reasonably infer that he was guilty of attempted possession or solicitation.

Moreover, the fact that Renaga-Gutierrez was found with a large sum of money is reasonably susceptible of differing interpretations in light of the other evidence. For instance, he could have been flush with cash after the sale of his car and, consequently, out to splurge some of his wealth on drugs. The existence of the money is not so compelling of his intent to distribute that a jury must necessarily find that he was guilty of that offense. See United States v. Burns, 624 F.2d 95, 104 (10<sup>th</sup> Cir.), cert. denied sub nom Reynolds v. United States, 449 U.S. 954 (1980) (reversal where evidence that defendants had flown from San Diego to Denver to purchase a potentially distributable quantity and purity of cocaine was “sufficient to support the jury's inference that

[defendants] possessed cocaine with intent to distribute, but the jury was free also *not* to draw such an inference”).

The only evidence that may conceivably lead to the inference that Renaga-Gutierrez was distributing rather than buying is Purvis' testimony that he wrote in his incident report that he saw Renaga-Gutierrez pull money from Acevedo's hand. R.160[59]. However, that testimony was contradicted by his preliminary hearing testimony where he stated that he never saw money in Acevedo's hand. R.160[72-73]. The rest of Purvis' testimony is ambiguous on the point and actually provides a “rational basis” for convicting of attempted possession or solicitation. For example, he testified that he saw the men shake hands, but could not see what they held. R.160[43-44]. He did not notice any white package until Acevedo was walking away. R.160[73]. He saw Renaga-Gutierrez holding money after the handshake. R.160[44-45]. Although he claimed to see the money pass between hands, he could not say who held it first. R.160[72].

Given the ambiguity of Purvis' testimony, there is a reasonable basis for the jury to infer that Renaga-Gutierrez tried to solicit drugs from Acevedo, and that the sale did not go through for some reason. Moreover, in light of the evidence presented by Renaga-Gutierrez's mother explaining the existence of the money and Acevedo's testimony explaining his possession of twists of cocaine, the jury has the privilege in this case to discredit the State's evidence in whole or part to convict of attempted possession or solicitation. See Humphrey, 208 F.3d at 1208.

[T]he court may not intrude on the province of the jury which may find credibility in testimony that the judge may consider completely overborne by the simply overwhelming evidence of the prosecutor. And there may be some evidence of a lesser offense even though this depends on an inference of a state of facts that is ascertained by believing defendant as to part of his testimony and prosecution witnesses on the other points in dispute.

Id. (quoting Belton v. United States, 382 F.2d 150, 155 (D.C. Cir. 1967)).

In sum, there is a “rational basis” in the evidence to support the lesser included offense instructions on attempted possession and solicitation. Kruger, 2000 UT 60 at ¶13 (citing Utah Code Ann. § 76-1-402(4)). Regardless of “however weak” the evidence may be, the evidence “fairly tend[s] to bear upon the lesser included offense[s].”

Humphrey, 208 F.3d at 1207-08 (quotation omitted). In fact, the evidence quite strongly supports acquittal on the distribution charge and conviction on the lesser offenses. Consequently, the trial court erred as a matter of law in failing to give the requested instructions on the lesser included offenses of attempted possession and solicitation.

As a final matter with regard to the crime of solicitation, the trial court erred in failing to give the requested instruction on solicitation under the faulty rationale that it did not have jurisdiction to do so. First, Renaga-Gutierrez was entitled to the instruction as a constitutional matter. The lesser included instruction on solicitation would protect his due process right to present his defense theory to the jury. See Utah Const. Art. I, § 7 (due process); U.S. Const. amend. XIV (same).

Moreover, “[b]y having the jury instructed regarding a lesser included offense, the defendant is afforded the full benefit of the reasonable doubt standard.” State v. Baker,

671 P.2d 152, 156 (1983). A lesser included instruction guards against the risk that juries may convict of the offense charged despite insufficient evidence where a lesser offense is not offered. See id.

“True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction . . . precisely because he should not be exposed to the risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.”

Id. at 156-57 (quoting Keeble v. United States, 412 U.S. 205, 212-13 (1973)) (emphasis original). It would be unreasonable for any court to “require[] of our juries [such] clinical detachment from the reality of human experience.” Id. at 157 (quoting Beck, 447 U.S. at 642).

Additionally, the court in fact had jurisdiction to give the instruction based on a Salt Lake City ordinance although the Salt Lake City Prosecutor's Office was not involved in this case. Article VIII, Section 5 of the Utah Constitution states, “[t]he district court shall have original jurisdiction in all matters except as limited by this constitution or by statute.” See also Utah Code Ann. § 78-3-4(1) (Supp. 2000) (“district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law”).

Section 78-5-104(1) (Supp. 2000) provides that, “[j]ustice courts have jurisdiction over class B and class C misdemeanors, [and] violation of ordinances.” Nonetheless, §

78-3-4(8)(d) retains the district court's jurisdiction over ordinances “if: . . . they are included in an indictment or information covering a single criminal episode alleging the commission of a felony or a class A misdemeanor.”

In the present case, the trial court had the jurisdiction to give a lesser included instruction on solicitation as defined by Salt Lake City Ordinance No. 11.12.100 because that offense, as a lesser included, was impliedly included in the information that charged the greater offense of distribution of a controlled substance in violation of § 58-37-8(1)(a)(ii). The legal elements of solicitation are included in the greater offense of distribution; distribution cannot be committed without also committing the lesser offense of solicitation. See infra (discussing how solicitation is a lesser included offense of distribution under the elements standard). Hence, solicitation is “necessarily included” in the offense of distribution. Baker, 671 P.2d at 155 (discussing “necessarily included” standard) (citing Utah Code Ann. § 76-1-402(5)).

As a necessarily included offense, the prosecutor could request an instruction on solicitation although it was not explicitly laid out in the information without violating a defendant's right to have notice of the charge against him or compromising his ability to prepare a defense. Id. Similarly, pursuant to § 76-1-402(5), a district court or appellate court may constitutionally set aside or reverse a verdict or judgment of conviction and enter a judgment of conviction for the lesser offense “without necessity of a new trial, if such relief is sought by the defendant.” Accordingly, the trial court had jurisdiction to submit an instruction on the lesser included offense of solicitation to the jury pursuant to

§ 78-3-4(8)(d) because it is “included in [the] indictment or information” as a necessarily included offense of distribution.

In addition, giving a lesser included instruction on solicitation would be consistent with the Utah constitution and statutes concerning the power and authority of salt lake district attorneys and city prosecutors. Article VIII, Section 16 of the Utah Constitution provides for a system of publicly elected prosecutors “who shall have primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah and shall perform such other duties as may be provided by statute.” Under State v. Robertson, 924 P.2d 889 (Utah 1996), Article VIII, Section 16 was interpreted to mean that unelected city attorneys could legally prosecute certain state crimes under the supervision of elected public prosecutors. Id. at 893-94. In essence, the powers of the public prosecutor and a city attorney were made coextensive under certain circumstances. Id.

Utah Code Ann. § 17-18-1.7 (1999) governs the powers and duties of district attorneys and Salt Lake County deputy district attorneys.<sup>4</sup> That statute provides that those attorneys “shall: . . . conduct on behalf of the state all prosecutions for public offenses committed within the county, except for prosecutions undertaken by the city attorney under Section 10-3-928 and appeals from them.” Utah Code Ann. § 17-18-

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<sup>4</sup> According to a telephone conversation with Nick D'Alesandro, a staff member of the Salt Lake County District Attorney's Office, the powers and duties of the criminal division of that office are set forth under § 17-18-1.7.



1.7(1)(c). Nothing in § 17-18-1.7 expressly prohibits deputy district attorneys from prosecuting city ordinances. See generally Utah Code Ann. § 17-18-1.7.

Utah Code Ann. § 10-3-928 (1999) governs the duties and powers of city attorneys, providing,

the city attorney may prosecute violations of city ordinances, and under state law, infractions and misdemeanors occurring within the boundaries of the municipality and has the same powers in respect to violations as are exercised by a county attorney or district attorney, except that a city attorney's authority to grant immunity shall be limited to granting transactional immunity for violations of city ordinances, and under state law, infractions, and misdemeanors occurring within the boundaries of the municipality. The city attorney shall represent the interests of the state or the municipality in the appeal of any matter prosecuted in any trial court by the city attorney.

The Utah Legislature's use of the word “may” indicates that a city attorney's authority to prosecute is discretionary rather than mandatory. Therefore, the statute also implies that a city attorney does not have the exclusive authority to prosecute city ordinances, and that another public attorney may step in and do so when the city attorney elects not to. See, e.g., State v. Robertson, 924 P.2d 889, 893 (Utah 1996) (“[s]hould city attorneys choose not to prosecute particular violations of state law falling within their jurisdiction, a public prosecutor always retains the right to follow through on the matter”). Consequently, the trial court could have given a lesser included instruction on solicitation in conformity with the Utah Constitution and statutes concerning the respective powers and duties of Salt Lake County deputy district attorneys and city attorneys.

**III. A NEW TRIAL IS MERITED GIVEN THE PROSECUTOR'S PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT.**

A new trial is also merited on account of the prosecutor's prejudicial and inappropriate remarks made during closing argument.

This court will reverse on the basis of prosecutorial misconduct only if defendant has shown that the actions or remarks of [prosecuting] counsel call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, if so, under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result. . . . In determining whether a given statement constitutes prosecutorial misconduct, the statement must be viewed in light of the totality of the evidence presented at trial. Further, because the trial court is in the best position to determine the impact of a statement upon the proceedings, its rulings on whether the prosecutor's conduct merits a mistrial will not be overturned absent an abuse of discretion.

State v. Cummins, 839 P.2d 848, 852 (Utah App. 1992) (citations omitted).

In the present case, the prosecutor made three inappropriate remarks during his rebuttal closing argument. The following exchange between counsel and the court ensued:

Prosecutor: [Ignacio Acevedo] said it was closing time and everybody was leaving. No. That's not what I heard. What I heard is that they were seeing the two of them, not a crowd of people leaving, the two of them were leaving. And what was [] Ignacio's explanation? They were going to [Mr. Renaga-Gutierrez's] car. The car they brought his mother in to tell you he had sold. Now he sold that -

Defense: Judge, I'm going to object to the statement that his mother said that he sold that car.

Court: The jury's been instructed that arguments of counsel are not to be considered. They've listened to that. I'm not going to address that. They've been properly instructed as to their job.

Defense: Very well. Thank you.

Prosecutor: . . . If they really wanted you to believe that he had sold the car, don't you think they would have brought in the bill of sale? Don't you think they'd have brought in a transfer of title? Don't you think -

Defense: Judge, I'm going to object. He's trying to switch the burden to the defense. I don't have the burden of proof in this case.

Court: Jury's been instructed as to the duty and to the arguments of counsel. Go forward.

Prosecutor: Next, the testimony of Ignacio. He's admitted to you that he's a drug user for two years. He had used that night. And he was looking for more. He sat there and told you in no uncertain terms that there's really nothing that we could do once he was deported and that, yes, he would lie for his friends.

Defense: Well, objection, Your Honor. There's no evidence to support that assertion.

Court: . . . I'm not going to repeat it. Arguments of counsel are not facts. The jury has listened to all the evidence and they can weigh the evidence and if it's inconsistent with what argument of counsel is they are aware that they are the fact finders in this case.

R.149.

The judge gave a general instruction to the jury concerning the roles of counsel which read:

The lawyers, like you and myself, are officers of this Court. It is the duty of each of them to present the evidence on behalf of their client and to make such objections as they deem proper and to fully argue the client's case. You should, however, bear in mind that each of the lawyers is here in a partisan capacity, and it is both the duty and responsibility of each to be an advocate. If during the trial or in the closing arguments the lawyers make statements concerning the evidence which do not conform with your recollection, you should disregard the statement and rely solely on your own recollection of the evidence. If either attorney's argument includes statements of the law which differ from the law I am now explaining, you should disregard such statements and rely entirely upon these instructions

as given to you.

R.123 (Instruction No. 18). The court informed the jury prior to the commencement of trial that, “[n]o statement or argument of the attorneys is itself evidence.” R.160[10].

With reference to opening and closing arguments, the trial court also said prior to trial, “[t]he statements that the attorneys first make and the arguments that they later make are not to be considered by you either as evidence in the case or as your instruction on the law.” R.160[10-11]. It did not address the particular statements that Renaga-Gutierrez objected to close to the time that they were uttered, either verbally or in writing. See generally R.104-27 (Jury Instructions).

A. The Statements Brought Matters to the Attention of the Jury That it Was Not Justified in Determining the Verdict.

The prosecutor's statements amount to misconduct because they brought matters to the attention of the jury that are not justified in determining the verdict. See Cummins, 839 P.2d at 852. Each of the prosecutor's statements will be discussed in turn.

Statement #1: “*And what was [] Ignacio's explanation? They were going to [Mr. Renaga-Gutierrez's] car. The car they brought his mother in to tell you he had sold.*” R.161[149].

Although “Utah law affords trial attorneys considerable latitude in closing arguments,” Cummins, 839 P.2d at 852 (citation omitted), it does not permit prosecutors to misstate the facts or argue evidence that goes beyond the record. See State v. Palmer, 860 P.2d 339, 344 (Utah App. 1993) (“comment by prosecutor during closing argument that the jury consider matters outside the evidence is prosecutorial misconduct”) (citing

State v. Troy, 688 P.2d 483, 486 (Utah 1984)); Bennet L. Gershman, Prosecutorial Misconduct §§ 11:27, 11:29, 11:31 (2d ed.) (hereinafter “Prosecutorial Misconduct”) (“[i]t is improper for a prosecutor to misstate the evidence . . . or argue facts outside the record”).

The prosecutor's statement is a misrepresentation and reaches beyond the record because Acevedo never testified that he and Renaga-Gutierrez were walking to his car. His testimony consisted of the following: he asserted that he saw Renaga-Gutierrez in the “middle of the parking lot” and approached him. R.160[101]. They exchanged greetings. R.160[102]. They were walking between two cars. R.160[110]. Upon cross-examination, he asserted that they were not going to his car because he did not have one. R.160[110]. Acevedo clarified that Renaga-Gutierrez had his car there, but did not assert that they were walking to it. Id. Rather, Acevedo testified that they stopped by a delivery truck or van and started to talk. Id. Acevedo did not remember what kind of car Renaga-Gutierrez drove that night. Id.

This Court's decision in State v. Day, 815 P.2d 1345 (Utah App. 1991), highlights the difference between a prosecutor's permissible argument stemming from a reasonable inference from the evidence, as opposed to the prosecutor's impermissible misrepresentation and overreaching in the present case. See 815 P.2d at 1350. In Day, the defendant was charged with fatally shooting Kile, one of three men who rode in his truck. Id. at 1347. The defense theory rested on the argument that one of the other men in the truck, Sudweeks, was the murderer. Id. at 1350. After the victim was shot,

Sudweeks

fled the scene on foot to a nearby house, the Morrill residence. Wilshire[, the other man in the truck,] who had passed out, remained in the front of the truck. After fleeing to the Morrill residence, Sudweeks left the home for a disputed amount of time, but returned in a frightened state.

Id. at 1347. Sudweeks testified that he left the Morrill residence for “less than ten minutes;” Morrill testified that he was gone between twenty and thirty minutes. Id. at 1347 n.1. In his closing argument, the prosecutor “stated that Sudweeks was gone from the Morrill residence for a shorter period than [] Morrill’s testimony evidenced” and that “Morrill did not know when Sudweeks left.” Id. at 1350.

This Court held that the prosecutor’s argument was “within prescribed bounds.”

Id. The Court reasoned that

Morrill’s testimony [was] not clear or conclusive as to how long Sudweeks was actually away from the Morrill residence. Morrill testified that he left Sudweeks on the porch and went inside the house to get his children out of the bath. When Morrill returned, Sudweeks was gone, returning ten to fifteen minutes later. When asked by defense counsel if Sudweeks was gone twenty to thirty minutes, Morrill replied, “Yeah. Somewhere in there.” However, Morrill also testified that he “hadn’t looked at the clock.” To the contrary, Sudweeks testified he was only gone five to ten minutes.

Id.

The evidence at issue in the present case does not support the same kind of inference because it is not nearly as ambiguous or disjointed as that in Day. If anything, Purvis corroborated Acevedo’s account. Purvis testified that he saw Acevedo and Renaga-Gutierrez walking in the parking lot, talking, and then stop by a small delivery truck. R.160[39-40]. Purvis did not offer any testimony about the men walking toward a

car, let alone a car that he knew belonged to Renaga-Gutierrez. See generally R.160[23-74]. Hence, the prosecutor's comment that, “[t]They were going to [Mr. Renaga-Gutierrez's] car. The car they brought his mother in to tell you he had sold,” R.161[149], is not a reasonable inference based in the evidence. See Day, 815 P.2d at 1350. Rather, it is a misstatement of the facts that reaches beyond the record, thereby constituting misconduct. Id.

Statement #2: *“If they really wanted you to believe that he had sold the car, don't you think they would have brought in the bill of sale? Don't you think they'd have brought in the transfer of title?”* R.161[149].

This statement amounts to misconduct because it is an inappropriate remark on the failure of the defense to present evidence, suggesting that Renaga-Gutierrez was trying to hide inculpatory information and shifting the burden of proof onto him. Although a prosecutor may comment upon a defendant's failure to produce evidence, he may not do so if his “comments [suggest] that the defendant bears the burden of proof.” United States v. Gruber, 990 F.2d 1262, 1262 (9<sup>th</sup> Cir. 1993) (citing United States v. Segna, 555 F.2d 226, 230 (9<sup>th</sup> Cir. 1977)).

In the present case, the comment impermissibly communicated to the jury that Renaga-Gutierrez did not prove his innocence because it was not accompanied by an adequate reminder from the prosecutor that the State, in fact, bore the burden of proof. In United States v. Cabrera, 201 F.3d 1243 (9<sup>th</sup> Cir. 2000), the prosecutor made a similar remark concerning the defendant's failure to present evidence that corroborated his defense theory. Id. at 1249. The Ninth Circuit Court of Appeals held that the “comments

did not shift the burden of proof or persuasion” because they were always backed up with strong assertions from the prosecutor reminding the jury that the State bore the burden of proof. Id. at 1250. For example, the prosecutor in Cabrera stated,

“Now, I am not saying he has--that the burden is ever shifted to him. The Government has the burden of proving this case, but in evaluating his testimony, you can go through his motivation, you can go through his perceptions, the same things that you have to look at all of the witnesses that testify in our case should be applied to him as well.”

The prosecutor reminded the jury that, “again, he doesn't have the burden of proof.” He then stated: “I ask you to evaluate his testimony. Has that been corroborated? Have you heard from his wife that he called the other night? In evaluating his testimony you can evaluate those things.” The prosecutor also asked, “Does his friend come in and corroborate his testimony? Didn't hear from him. Did you hear about--did Armando come in and tell you that he was giving [Cabrera] a favor--or he asked him to do a favor for [Cabrera]?” Finally, during his rebuttal argument, the prosecutor reiterated that:

“The Government has never shifted the burden to the defendant. The Government accepts its burden of proving the case beyond a reasonable doubt ... The Government never asked you to speculate. What we did is ask you to draw inferences based on the evidence ... The Government has never asked the defendant to prove his innocence. In asking about the corroboration, simply we were pointing out--I was pointing out that there could have been corroboration for his story.”

Id. at 1249.

Although the trial court below gave a general instruction on the reasonable doubt standard, R.109 (Instruction No. 5), it did not give an instruction addressing the prosecutor's comment in particular. Moreover, any curative effect that the reasonable doubt instruction had is outweighed by the weakness of the prosecutor's assertions regarding the same. The prosecutor's remarks in the present case were not padded with



the same strong, contemporaneous reminders to the jury of the proof beyond a reasonable doubt standard as those in Cabrera, 201 F.3d at 1250. Rather, the references were slight, not made contemporaneously with the statements, and were presented in such a way as to further confuse the jury. For example, right after Renaga-Gutierrez made his last objection, the prosecutor said,

[a]s for reasonable doubt, you have the instruction. You can read it and determine for yourself. It's not any doubt. It's reasonable doubt. When you look at this defendant's activities that night, in the hall, you are entitled to draw your own conclusions. What was he doing?

R.160[149]. The prosecutor later said,

[w]e're not afraid of the evidence ladies and gentlemen. It's there. The pieces go together. We don't have to put the whole puzzle together. Each of you have a puzzle if you want to draw that analogy. We don't have to put every piece there. That's not what we're required to do. Because you have life experiences, you have common sense, and you can draw conclusions from all the evidence. And that is what we're asking you to do. The pieces go together and you can convict.

R.160[151-52]. These two references to the State's burden of proof, especially when read together, give the jury a watered-down sense of reasonable doubt, i.e., a puzzle with a lot of missing pieces but one where you can still guess what the picture is. This is not the sort of positive and strong explanation of reasonable doubt that was present in Cabrera and that cured the misconduct. See 201 F.3d at 1249. If anything, this explanation of the reasonable doubt standard invites undue speculation as to guilt and compounds the notion that Renaga-Gutierrez is guilty because he did not present a bill of sale or transfer of title. See, e.g., Prosecutorial Misconduct, § 11:28 (“prosecutor must not suggest that additional

inculpatory evidence exists that was not presented at trial. . . . Such insinuations invite the jury to speculate about such phantom proof, and may be even more prejudicial than erroneously admitted specific proof”).

The prosecutor's additional references to the reasonable doubt standard are too remote and weak to overcome the improper statement as well. At the beginning of his closing argument, the prosecutor stated “you must find from all the evidence and beyond a reasonable doubt each and every one of the [] elements of [distribution.]” R.160[132]. He stated once more, “[b]ecause it is my burden I will have one more opportunity to talk with you and I will take advantage of that.” R.160[134]. None of his explanations were strong assertions to the jury that the State, and not the defendant, bore the burden of proof. Cf. Cabrera, 201 F.3d at 1249.

Statement #3: “[*Acevedo*] sat there and told you in no uncertain terms that there's really nothing that we could do once he was deported and that, yes, he would lie for his friends.” R.161[149].

This statement amounts to misconduct because it misstates the evidence and is not a reasonable inference from the record. See Day, 815 P.2d at 1350. Acevedo testified to the following on cross-examination:

State: And you pled guilty to [attempted] possession of a controlled substance?

Acevedo: Yes.

State: And that was cocaine?

Acevedo: Yes.

State: What was your sentence?

Acevedo: Six months [and then] . . . [t]hey're going to give me to immigration to deport me back to Mexico. . . .

State: Do you know what perjury means? . . . .

Acevedo: That you have to tell the truth and only the truth.

State: Okay. You're going to be deported, aren't you?

Acevedo: Yes.

State: So, you really have nothing to gain or nothing to lose by what you tell today, do you?

Acevedo: No.

R.160[107,111].

Contrary to what the prosecutor said, Acevedo did not testify “in no uncertain terms . . . that, yes, he would lie for his friends.” R.161[149]. This is not even a reasonable inference. Cf. Day, 815 P.2d at 1350 (prosecutor's argument was not misconduct where it was drawn from reasonable inference from evidence) (discussed supra). Rather, Acevedo testified that he understood what perjury was and that he was not offered any incentive or disincentive to tell anything but the truth. R.160[107,111]. Once again, the prosecutor overstepped the bounds of permissible argument and infected the jury's deliberations with inappropriate information.

As a related matter, the comment amounts to misconduct because it impermissibly characterizes Acevedo's testimony as false. See Prosecutorial Misconduct §§ 11:21, 11:26. “A prosecutor may not insinuate that [a witness'] is a 'liar' when such remark is

merely the prosecutor's personal impression of the evidence.” Prosecutorial Misconduct § 11:26. Such inference is only appropriate if the witness' testimony is contradicted by other accounts of the event and the prosecutor asks the jury to “draw the inference that one account is more accurate.” Id. Moreover, the prosecutor must couch his assertion in terms such as “unworthy of belief” or “incredible.” Id. (footnotes omitted).

In the present case, the prosecutor went beyond insinuation and stated outright that Acevedo “would lie.” R.161[149]. Nothing in the evidence supported a contrasting theory of the evidence such that his comment was permissible. If anything, Purvis' testimony corroborated Acevedo's: they both stated that the men were walking, stopped in front of a van, and talked. The only difference in Purvis' testimony is that he *suspected* rather than saw a drug transaction, although he never saw drugs in Renaga-Gutierrez's hand and his testimony was inconsistent as to whether he saw money exchanged. Given the largely corroborated testimony of Acevedo and the weak testimony of Purvis in support of the suspected drug deal, the prosecutor's statement that Acevedo “would lie” is improper. Cf. Cummins, 839 P.2d at 854 (“prosecution's reference to defendant as a liar, while intemperate, only disclosed what the jury could have reasonably the evidence” given the widely conflicting testimony). The impropriety of the comment is underscored given that the prosecutor did not couch his comment with a phrase such as “unworthy of belief” and, instead, chose not to mince words when he effectively expressed to the jury his personal opinion that Acevedo was a liar. Prosecutorial Misconduct § 11:26.

B. The Error Was Substantial and Prejudicial And, Therefore, There Is a

Reasonable Likelihood of a More Favorable Result in its Absence.

The prosecutor's misconduct is substantial and prejudicial and under the circumstances of the case there is a reasonable likelihood of a more favorable result in its absence. See Cummins, 839 P.2d at 852.

“[I]n a case with less compelling proof, this Court will closely scrutinize the conduct. If the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible of differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel. . . . [In such cases, the jurors] may be especially susceptible to influence, and a small degree of influence may be sufficient to affect the verdict.”

State v. Span, 819 P.2d 329, 335 (Utah 1991) (quoting State v. Troy, 688 P.2d 483, 486 (Utah 1984)).

As noted supra Point I (discussing insufficiency of evidence), the evidence against Renaga-Gutierrez is slight and “susceptible of differing interpretations.” Span, 819 P.2d at 335 (quoting Troy, 688 P.2d at 486). Only Purvis could testify regarding the alleged drug deal, yet even he did not actually see Renaga-Gutierrez with the drugs in hand. He also offered inconsistent testimony as to whether money actually changed hands. He did not hear any conversation between the two men that indicated a drug deal was underway.

Acevedo testified that he did not buy drugs from Renaga-Gutierrez, and none were found on Renaga-Gutierrez's person. Additionally, his testimony corroborated Purvis' in that they both stated that the two men walked through the parking lot together, stopped in front of a delivery truck and talked for a while. He also explained the presence of the drugs found on him: he had bought four twists earlier that day, used one, and had three

leftover, which were found by the officers after his arrest.

The other evidence that the State presented is equally ambiguous and underscores the prejudicial effect of the prosecutor's remarks. Purvis testified that he observed Renaga-Gutierrez in the men's room in the bar once, and walking into the same men's room another time prior to the encounter with Acevedo. He also noted that Renaga-Gutierrez was wearing different clothing than the patrons, who were in western dress. Nonetheless, Purvis did not observe any illicit activity at that time. Moreover, he was called off to assist in citing two underage drinkers before he could observe any more of Renaga-Gutierrez's activity. Finally, Renaga-Gutierrez's mother explained the presence of \$1426.00 in cash found on Renaga-Gutierrez at the time of arrest: he had sold his car for \$2000 cash to her brother just a few days prior to this event.

The prejudicial effect of the prosecutor's remarks is compounded by the fact that the prosecutor holds a particular position of trust and credibility in the eyes of the jury.

The prosecutor is cloaked with the authority of the . . . [g]overnment; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, but rather of a[n] [] official duty-bound to see that justice is done. The jury knows that he has prepared and presented the case and that he has complete access to the facts uncovered in the government's investigation. Thus, when the prosecutor [injects inappropriate remarks into the fact-finding process], it may be difficult for [the jury] to ignore his [remarks], however biased and baseless they may in fact be.

United States v. Modica, 663 F.2d 1173 (2d Cir. 1981), cert. denied 456 U.S. 989 (1982); see also State v. Horr, 221 P. 867, 877 (Utah 1923) (discussing prosecutor's particular position of influence with jury and the duty to refrain from improper conduct that might

unduly sway the deliberation process). Hence, when a prosecutor misstates the evidence, mischaracterizes a witness as a liar, and makes comments that shift the burden of proof, he “diverts the jury from its proper function, and seriously threatens the defendant's right to a fair trial.” Prosecutorial Misconduct § 11:31.

In addition, the prosecutor's remarks constitute reversible prejudicial error because they were made during his rebuttal closing argument, which left the defense with no opportunity to counter them and mitigate their effect. See Prosecutorial Misconduct § 11:20 (discussing prejudicial effect of “sandbagging” tactics by prosecutor who makes improper statements during rebuttal closing argument). Moreover, they go to the heart of the defense's case by attacking the credibility of Acevedo, shifting the burden of proof and misstating evidence to infer that Renaga-Gutierrez drove the car to court that he claimed he had sold. See Palmer, 860 P.2d at 350 (cumulative prejudicial error where prosecutor's improper closing remarks were calculated to bolster credibility of alleged sexual abuse victim and where case turned on “jury's assessment of the credibility of [the victim] versus the credibility of the defendant”).

Finally, the trial court did not offer any specific, contemporaneous jury instruction, either oral or written, addressing the improper remarks, nor did it sustain Renaga-Gutierrez's objections. Cf. State v. Kohl, 2000 UT 35, ¶6, 999 P.2d 7 (prosecutor's remarks were not reversible error where trial court sustained defendant's objection, gave a general instruction that attorneys' arguments were not evidence, and reminded jury to “remember my admonition”). The only instruction given by the trial court was a general

statement about the attorneys that did not clearly state that the arguments of counsel are not evidence. R.123 (Instruction No.18)<sup>5</sup>. The only other admonition from the court came prior to any of the witnesses testifying when it stated, “[n]o statement or argument of the attorneys is itself evidence.” R.160[10]. However, this admonition was too remote in time to have any appreciable mitigating effect.

In light of the foregoing, a new trial is required because, absent the prosecutor's misconduct, there is a reasonable likelihood of a more favorable outcome for Renaga-Gutierrez. See Cummins, 839 P.2d at 851. Consequently, the trial court erred in overruling Renaga-Gutierrez's objections to the inappropriate remarks. R.161[149].

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<sup>5</sup> Instruction No. 18 reads as follows:

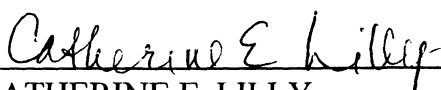
The lawyers, like you and myself, are officers of this Court. It is the duty of each of them to present the evidence on behalf of their client and to make such objections as they deem proper and to fully argue the client's cause. You should, however, bear in mind that each of the lawyers is here in a partisan capacity, and it is both the duty and responsibility of each to be an advocate. If during the trial or in the closing arguments the lawyers make statements concerning the evidence which do not conform with your recollection, you should disregard the statement and rely solely on your own recollection of the evidence. If either attorney's argument includes statements of the law which differ from the law I am now explaining, you should disregard such statements and rely entirely upon these instructions as given to you.



### CONCLUSION

In light of the foregoing, Renaga-Gutierrez respectfully requests this Court to reverse his conviction and remand the case to the trial court.

RESPECTFULLY submitted this 13<sup>th</sup> day of September, 2001.

  
\_\_\_\_\_  
CATHERINE E. LILLY  
Attorney for Defendant/Appellant

### CERTIFICATE OF DELIVERY

I, CATHERINE E. LILLY, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 13<sup>th</sup> day of September, 2001.

  
\_\_\_\_\_  
CATHERINE E. LILLY

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this \_\_\_\_ day of September, 2001.

## ADDENDA

## ADDENDUM A

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

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STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 001914251 FS
	:	
SERGIO RENAGA-GUTIERREZ,	:	Judge: JUDITH S. ATHERTON
Defendant.	:	Date: January 29, 2001

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PRESENT

Clerk: lorip

Prosecutor: SHEFFIELD, KELLY R

Defendant

Defendant's Attorney(s): DELLAPIANA, RALPH

Interpreter: ROSALINDA ALVAREZ

DEFENDANT INFORMATION

Language: Spanish

Date of birth: February 22, 1975

Video

Tape Number: video Tape Count: 11:39

CHARGES

1. DISTRIBUTE/OFFER/ARRANGE TO DIST C/S - 2nd Degree Felony

Plea: Guilty - Disposition: 01/23/2001 {Guilty Plea}

SENTENCE PRISON

Based on the defendant's conviction of DISTRIBUTE/OFFER/ARRANGE TO DIST C/S a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

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

Credit is granted for time served.

Case No: 001914251  
Date: Jan 29, 2001

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SENTENCE FINE

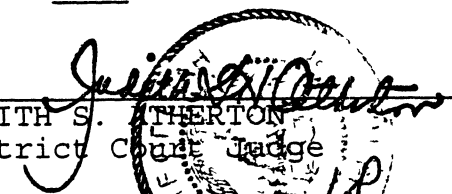
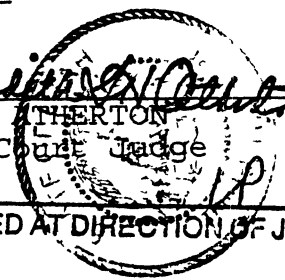
Charge # 1            Fine: \$2500  
                         Suspended: \$0.00  
                         Surcharge: \$1148.65  
                         Due: \$2500.00  
  
                         Total Fine: \$2500.00  
                         Total Suspended: \$0  
                         Total Surcharge: \$1148.65  
Total Principal Due: \$2500.00  
                         Plus Interest

SENTENCE TRUST

The defendant is to pay the following:  
Attorney Fees:            Amount: \$250.00 Plus Interest  
Pay in behalf of: LDA

Pay fine to The Court.

Dated this 29 day of Jan, 2001.

  
JUDITH S. ATHERTON  
District Court Judge  
By   
STAMP USED AT DIRECTION OF JUDGE

## ADDENDUM B

## **STATUTES**

### **Distributing or Agreeing, Consenting, or Arranging to Distribute a Controlled Substance, Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 2000):**

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

### **Possession of a Controlled Substance, Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 2000):**

It is unlawful for any person knowingly or intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice. Or as otherwise authorized by this chapter.

### **Attempt, Utah Code Ann. § 76-4-101 (1999):**

(1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

### **Solicitation of a Controlled Substance, Salt Lake City Ordinance (1996):**

A.1. It is unlawful for any person to request, or solicit a controlled substance, or controlled substance precursor from another person, except as permitted by the Utah Controlled Substances Act, Section 63-37-1 et seq., Utah Code Annotated, or its successor. 2. Definitions. a. "Controlled substance" means a drug, substance, or immediate precursor as defined by Section 58-37-2(4), Utah Code Annotated, or its successor. b. "Controlled substance precursor" means any material defined as a controlled substance precursor by Section 58-37c-3(2), Utah Code Annotated, or its successor. B. Violation of this section is a Class B misdemeanor. (Ord.57-95 § 1, 1995).

**Lesser Included Offenses, Utah Code Ann. § 76-1-402(3) (1999):**

A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when: (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or (b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or (c) It is specifically designated by a statute as a lesser included offense.