

2015

**State of Utah, Plaintiff/Appellee, v. Abisai Martinez-Castellanos,
Defendant/Appellant**

Utah Court of Appeals

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Case No. 20130432-CA

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Plaintiff/Appellee,

v.

ABISAI MARTINEZ-CASTELLANOS,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for two counts of controlled substance possession, third degree felonies, and one count each of possession of drug paraphernalia and driving with a controlled substance in the body, both class B misdemeanors, in the Fourth Judicial District, Juab County, the Honorable James Brady presiding

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Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals his convictions for two counts of controlled substance possession, third degree felonies, Utah Code Ann. §58-37-8(2)(b)(ii); and one count each of possession of drug paraphernalia, Utah Code Ann. §58-37a-5; and driving with a controlled substance in the body, Utah Code Ann. §41-6a-517; both class B misdemeanors. This Court has jurisdiction under Utah Code Ann. §78A-4-103(2)(e) (West Supp. 2014).

INTRODUCTION

After stopping Defendant for a license plate violation, a highly-trained and experienced UHP Trooper observed that Defendant's fast and jittery speech and movements were inconsistent with typical nervousness and more likely explained by controlled substance use. The Trooper also learned that

Defendant had a history of drug possession. Based on these facts, the Trooper conducted field sobriety tests which Defendant failed. The Trooper discovered drugs, paraphernalia, and knives in Defendant's car and THC metabolite in Defendant's blood. Trial counsel unsuccessfully moved to suppress this evidence. Defendant argues that his counsel was ineffective in litigating that motion.

During jury selection, the trial court questioned individual jurors in chambers without Defendant. Defendant argues that his counsel should have objected to this procedure and should have removed three jurors, including a retired highway patrol trooper.

STATEMENT OF THE ISSUES

1. Was trial counsel ineffective during jury selection?
2. Was trial counsel ineffective in litigating the motion to suppress?

Standard of Review for issues 1-2. An ineffective assistance of counsel claim initially raised on appeal presents a question of law. *State v. Beckering*, 2015 UT App 53, ¶18, 346 P.3d 672.

3. After trial, the trial court sua sponte raised issues of ineffective assistance of trial counsel and appointed Defendant conflict counsel to address them. Conflict counsel filed a document captioned "Amicus Brief," arguing that trial counsel performed adequately.

Did the trial court plainly err in appointing conflict counsel for Defendant?

Standard of Review. Plain error is obvious, prejudicial error. *See id.* ¶19.

4. The trial court entered Defendant's conviction on Count II as a third degree felony even though the prosecutor had amended Count II to a class B misdemeanor.

Should this Court remand to allow the trial court to correct this clerical error?

Standard of Review. None applies.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

No interpretation of any constitutional provision, statute, or rule is required.

STATEMENT OF THE CASE

A. Facts.

UHP Trooper John Sheets stopped Defendant's car on I-15 after noticing that Defendant's California license plate was missing a required sticker showing the registration month. R436:3-4;R440:43-45; State's Exhibit (SE) #7. The car's registration, which was valid, also showed that the year sticker on Defendant's plate was invalid. R436:6-8. For identification, Defendant could produce only an expired Colorado driver's license. R436:6-8.

While discussing Defendant's license and registration, Sheets observed that Defendant was "a little bit jittery," "had jittery ... fast speech," and was "bouncing around a little bit." R436:8-9. In Sheets' experience of having stopped "thousands of cars," Defendant's behavior was inconsistent with typical "nervousness." R436:9. Rather, it suggested that Defendant "was on some type of stimulant." R436:8-9;R440:56.

When he stopped Defendant in June 2010, Sheets had been an officer for about 20 years and on UHP's drug interdiction squad for about 9 years. R436:2. Sheets had taken several classes on drug recognition, and had been a certified Drug Recognition Expert (DRE) for about 6 years, and a certified DRE instructor for about 4 years. R436:2,13.

Sheets returned to his car to check Defendant's license, registration, and criminal history. R436:8. He learned that the car had been properly registered to Defendant about three months earlier and that Defendant had been issued a valid Utah driver's license. R436:6,8. He also learned that Defendant had a history of drug offenses. R436:8;R440:48-49. Defendant had a 2001 charge for controlled substance possession; a felony conviction for controlled substance possession entered later in 2001; a 2006 felony charge for controlled substance possession; and a 2007 probation violation for again possessing controlled

substances. R460:3-5. This history "heightened" Sheets' "suspicions" that Defendant was under the influence of drugs. R436:8.

Sheets administered field sobriety tests which Defendant failed. R436:12-15. On the eye gaze test, Defendant demonstrated a "lack of convergence in both eyes," which suggested marijuana use. R436:12;R440:58-60. Defendant demonstrated a "[o]ne inch ... sway" on the Rhomberg test. R436:13. Defendant also demonstrated "eyelid tremors," which indicates "drug use." R436:14. On the walk and turn test, Defendant raised his arms on his third step and did not turn properly. R436:14. On the one-leg stand test, Defendant had a "swaying balance." R436:14. Defendant's pulse was elevated and he also had "red eyed conjunctiva," which indicates marijuana use. R436:14.

Before administering these tests, Sheets asked Defendant if he had any weapons; Defendant replied that he had two knives. R436:9-11. Because Defendant had a felony conviction, Sheets concluded that Defendant could not possess the knives. R436:9-10,15.

Sheets arrested Defendant based on the field sobriety tests and his possessing the knives. R436:14-15. Sheets searched Defendant's car and found: (a) two knives; (b) a hand grenade-shaped marijuana grinder that smelled of raw marijuana and had greenish residue; (c) a hand grenade-shaped lighter; (d) a "bindle" of methamphetamine; (e) three cellophane-wrapped hydrocodone or

Lortab pills; (f) seven cellophane-wrapped prescription anti-seizure medication pills; (g) two glass pipes, one with burnt residue; (h) a safety pin with residue; and (i) three empty “twists” made from plastic bag pieces with burned ends which resembled typical drug packaging. R435:6-11;R436:18-19;R440:66-83.

Defendant refused to submit to a urine test because he admitted having smoked marijuana. R436:21. He claimed to have a California “medical marijuana card.” R436:29;R440:90. Sheets obtained a warrant for a blood draw. R436:23. Defendant’s blood tested positive for a tetrahydrocannabinol (THC) metabolite, marijuana’s primary metabolite. R440:89; SE #3.

Defendant admits using marijuana

At trial, Defendant admitted using marijuana in California two days before the stop. R440:134. He also admitted that the marijuana grinder and lighter were his. R440:137,143. Defendant claimed he had obtained a California medical marijuana permit after injuring his back. R440:131-33,137.

Defendant also admitted that the knives were his. R440:143. He said he used them at his job to cut open pallets of cardboard. R440:145.

Defendant claimed to know nothing about the other drugs and paraphernalia in his car. R440:137-38,143-44. He said that he purchased the car “[a]bout” a month before the stop but had never cleaned it. R440:138,142. He said he registered the car “about a couple of days” after buying it. R440:143.

Defendant actually registered his car in March 2010, three months before the stop. R440:148.

B. Summary of proceedings.

The State charged Defendant with:

Count I—possession of methamphetamine, a third degree felony;

Count II—possession of hydrocodone, a third degree felony;

Count III—possession of a dangerous weapon by a restricted person, a class A misdemeanor;

Count IV—driving with a measurable controlled substance in the body, a class B misdemeanor;

Count V—possession of drug paraphernalia, a class B misdemeanor; and

Count VI—possession of a controlled substance without a valid prescription, a class B misdemeanor.

R2-1. At the preliminary hearing, the prosecutor moved to amend Count II (hydrocodone possession) to a class B misdemeanor after Trooper Sheets testified that the hydrocodone pills were Lortab, a schedule III substance. R2,27;R435:10. The trial court granted the motion.¹ R2,27;R435:10. The State dismissed Count VI before trial. R147.

¹ Before the preliminary hearing, the State filed an amended information correcting Defendant's last name, but not changing the original charges. R12-11. The trial court amended Count II to a class B misdemeanor only on the original Information. R2,12.

At his arraignment, Defendant initially pled guilty to Count I (methamphetamine possession), but when his counsel interjected, Defendant changed his plea to not guilty on all charges. R435:24.

The motion to suppress

Before trial, Defendant moved to suppress the evidence found in his car and blood, arguing that the initial search violated his constitutional rights. R33-32. No memorandum accompanied the motion. The trial court held a hearing on the motion and Trooper Sheets testified and was cross-examined. R35;R436:1-37. Trial counsel had not requested, and therefore had not reviewed, Sheets' dash-cam video before the hearing. R436:34-35. The trial court therefore did not review that video during the hearing. R436:34-35.

Following the hearing, the trial court set a briefing schedule on the motion. R35. Trial counsel never filed a supporting memorandum, despite requesting and receiving an extension to do so. R40-37. The State filed a memorandum opposing the motion. R56-41. The trial court denied the motion without explanation. R57.

Trial counsel moved to set aside that order and for additional time to file a supporting memorandum. R83. The trial court granted the request. R83. Rather than filing a memorandum, however, trial counsel filed a transcript of the preliminary hearing and a notice to submit the suppression motion for

decision. R82-57,85. The trial court thereafter reinstated its prior order denying the suppression motion, noting that Defendant had never filed a supporting memorandum. R86.

Two days before trial, defense counsel moved to dismiss, arguing that the dash-cam video demonstrated that there was “no basis” for the stop. R143. According to him, the video showed that Sheets did not inspect Defendant’s license plate until after stopping him. R143-42. The trial court denied the motion. R440:124-25.

The trial

Jurors Paul Mangelson, Carolyn Sachra, and Lucy Jones were questioned in chambers and sat on the jury. Br.Aplt. 29-30. Defendant was not present during the in-chambers questioning. R431,428. The argument section below contains additional detail about jury selection.

The jury convicted Defendant of Counts I, II, IV, and V. R263-58;R440:206-07. The jury acquitted on Count III (dangerous weapon possession). R263-58;R440:206-07.

Post-trial proceedings

After trial, the trial court notified the parties that it was sua sponte considering granting a new trial based on trial counsel’s possible ineffective assistance. R268-67. The court was concerned that trial counsel did not (1) “file

any memorandum following an evidentiary hearing on defendant's motion to suppress"; or (2) "challenge or remove a potentially biased juror." R268. Although the court stated that the trial testimony presented "at least an arguable basis to have pursued defendant's motion to suppress," the court did not identify any specific testimony. R268. On the juror issue, the court expressed concern that trial counsel did not remove a former highway patrolman. R268. The court identified no concern with any other juror. R268. The court later withdrew the jury selection issue. R285 n.1;R441:2;442:4,7-8.

After appointing Defendant conflict counsel and receiving a memorandum from that attorney, the trial court withdrew its remaining concern about litigation of the suppression motion. R274,286-78;R441:6;R442:8-9.

The trial court sentenced Defendant to 0-5 years in prison on Counts I and II, and 6 months in jail on Counts IV and V, all to run concurrently. R442:13-14. The trial court suspended those sentences and placed Defendant on 24 months' probation on several conditions, including that he serve 30 days in jail with credit for 15 days served and pay various fines and fees. R295-93;R442:13-14. The court stayed the sentence pending a new trial motion. R442:16.

Trial counsel filed a motion for new trial arguing that Trooper Sheets changed his testimony about the reason for the stop. R297-96;R393;R443:1. The motion did not specify how the testimony changed, but rather included unofficial transcripts of the preliminary hearing, suppression hearing, and trial. R360-296.

At the new trial motion hearing, trial counsel argued that Trooper Sheets conducted a “profile stop” and did not discover the license plate violation until after the stop. R443:4. The trial court denied the motion without elaborating. R394. Defendant timely appeals. R396.

SUMMARY OF ARGUMENT

I. Defendant claims that his counsel was ineffective during jury voir dire because he did not: (1) ensure that Defendant was present during in-chambers questioning of individual prospective jurors; and (2) remove Jurors Mangelson, Jones, and Sachra. Defendant’s claims fail out the outset because he relies on the wrong prejudice standard. Defendant does not assert that a biased juror actually sat.

Defendant does argue that Juror Sachra expressed bias, but he has not shown that her single, equivocal statement that a person who has drugs in their car “is probably guilty,” established actual bias. Nor has Defendant shown that

follow-up questioning did not dispel any potential bias. The jury's acquittal on count III also demonstrates that no juror was actually biased.

Alternatively, Defendant has not rebutted the strong presumption that his counsel's jury selection decisions were strategic. The record of the in-chambers questioning is inaudible. Defendant attempted to reconstruct the record with declarations from his trial counsel and the prosecutor. But he provides no declaration himself. The record that he does provide does not rebut the presumption of effective assistance.

Defendant provides no non-speculative evidence that he and his counsel did not discuss the in-chambers questioning or that Defendant did not waive his presence. Counsel's inability to recall such discussions does not establish that the discussions and waiver did not occur.

Nor has Defendant rebutted the strong presumption that his counsel's jury selection decisions were strategic. He has not shown that his counsel was inattentive or indifferent to any juror, or that a juror expressed bias so strongly that all reasonable attorneys would have removed that juror. Juror Sachra did not express actual bias. And Defendant has not shown that Juror Jones' alleged reservations about serving as a juror related to potential bias, as opposed to concerns about her health or employment.

Nor has Defendant shown that his counsel lacked any plausible reason for keeping Juror Mangelson. Although Juror Mangelson was a retired highway patrol trooper, he unequivocally affirmed that he would not give Trooper Sheets' testimony more weight and that he would decide the case based on the evidence and the law. Trial counsel had also worked with Juror Mangelson when counsel was a prosecutor, and counsel believed that Juror Mangelson would be sympathetic to Defendant based on what he perceived to be Trooper Sheets' questionable tactics. This was a legitimate reason not to remove Juror Mangelson that arguably proved partially successful, because the jury acquitted Defendant on one count.

II. Defendant faults his trial counsel for not raising additional arguments in the suppression motion. Defendant now asserts that Trooper Sheets lacked reasonable suspicion to extend the stop because: (1) the dash-cam video of the stop refuted Sheets' observations of Defendant's speech and manner; (2) Defendant's criminal history of controlled substance possession was too stale; and (3) Sheets' trial testimony undermined his suppression hearing testimony.

Trooper Sheets was a highly-trained and experienced Drug Recognition Expert who observed that Defendant's speech and behavior was fast and jittery and not typical of normal nervousness. He also learned that Defendant had long a history of controlled substance possession. Defendant also could not

produce a valid driver's license. The constellation of these factors established reasonable suspicion to extend the stop.

The dash-cam video does not refute Sheets' observations because, in the less-than-two minute portion capturing Defendant's initial interactions with Sheets, Defendant's speech and movements are mostly indiscernible. Defendant's behavior outside the car is largely irrelevant because it occurs after Sheets decided to extend the stop, and it is not necessarily indicative of Defendant's earlier behavior. In any event, Defendant failed the field sobriety tests.

Nor is Defendant's criminal history too stale to support reasonable suspicion. Defendant's criminal history showed a long and recurring pattern of controlled substance possession.

Finally, although Defendant alleges that Sheets' testimony materially changed between the suppression hearing and trial, trial counsel could not have relied on that fact in litigating a pre-trial motion to suppress. Regardless, there is no material difference between descriptions of Defendant's speech as "fast" and "jittery," and "rapid." Ad while Sheets' testimony about how he first encountered Defendant's car changed from the suppression hearing to the trial, that change would affect only the validity of the initial stop, which Defendant does not challenge.

III. Defendant argues that when the trial court sua sponte raised issues of ineffective assistance of trial counsel, it plainly erred by not appointing independent, conflict counsel to represent Defendant. But that is exactly what the trial court did. The fact that conflict counsel viewed himself as only a friend to the court is an issue of counsel, not trial court error. Regardless, Defendant could not show that his conflict counsel was ineffective because he has not shown that conflict counsel could have proven that his trial counsel was ineffective.

IV. Defendant's sentence contains a clerical error because it records his conviction on Count II (hydrocodone possession) as a third degree felony, even though the prosecutor had amended that charge to a class B misdemeanor. Clerical errors are correctable at any time. This Court should thus remand for the limited purpose of correcting the error.

ARGUMENT

I.

DEFENDANT HAS NOT REBUTTED THE STRONG PRESUMPTION THAT HIS COUNSEL PERFORMED EFFECTIVELY DURING JURY SELECTION

During jury selection, the trial court and counsel individually questioned several potential jurors in chambers. R416-412,431-28. Defendant argues that because he was "not allowed to attend or to participate" in this in-chambers questioning, he was "denied the opportunity to be present at a critical stage" of

his trial. Br.Aplt. 16-17. Because he did not raise this issue below, Defendant argues that his trial counsel was ineffective for not insisting that Defendant be present. Br.Aplt. 17, 21. Defendant further contends that his counsel was ineffective for not removing three jurors who were questioned in chambers. Br.Aplt. 21-37.

After the prospective jurors completed a questionnaire, the trial court questioned them in open court. R189,461;R440:1-21. The court then explained that it would “meet with counsel in my chambers” to question prospective jurors individually. R440:21.

The trial court questioned several jurors in chambers. R416-412,431-28. The record of the in-chambers questioning is unintelligible, however, because the courtroom microphone was left on during the questioning. R440:22. After the in-chambers questioning, counsel passed the panel for cause and made peremptory challenges in open court. R412,431;R440:22-24.

In light of the missing record, Defendant obtained “declarations” from his trial counsel and the prosecutor. R417-08,432-24. These were prepared over fifteen months after trial. R424(a),410. Trial counsel’s declaration states that Defendant was not present during the in-chambers questioning and “was not invited in chambers.” R431,428. Defendant concedes that his “counsel failed to object” to Defendant’s absence. Br.Aplt. 17.

Jurors Paul Mangelson, Carolyn Sachra, and Lucy Jones were questioned in chambers and sat on the jury. Br.Aplt. 29-30. Juror Mangelson was a retired highway patrol trooper that trial counsel had worked with when counsel was the Juab County attorney. R430-29. Juror Mangelson said that he would base his decision solely on the evidence and the law as instructed by the trial court and that he knew of nothing that would prevent him from being fair and impartial. R430,461:Questionnaire 2.

The prosecutor recalled Juror Sachra saying that "if a person had drugs in the car, they were probably guilty." R415. Although neither declaration from counsel details any specific follow-up questions to her, the prosecutor could "not recall any discussion about striking her for cause." R415. Juror Sachra said that she would "try" her "best" to base her decision on the evidence and the law and "to put strong feelings aside." R461:Questionnaire 3.

When Juror Jones was asked "whether she could be fair and impartial," she expressed "reservations about her ability to function as a juror." R429. She was 68 and worked at an elementary school. R461:Questionnaire 13. When the trial court repeated the question, Jones "replied that she understood what the judge wanted and she believed she could serve as a juror." R429. Jones also said she would base her decision solely on the evidence and the law and knew

of nothing that would prevent her from being fair and impartial.

R461:Questionnaire 13.

A. This Court must presume that trial counsel's jury selection decisions were strategic and therefore effective.

To prove that he was denied his Sixth Amendment right to the effective assistance of counsel, Defendant bears the "heavy burden" of showing both that his counsel's performance was deficient and that he suffered prejudice as a result. *State v. Stidham*, 2014 UT App 32, ¶18, 320 P.3d 696 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). To be deficient, counsel's performance must "f[a]ll below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688. Reasonableness is measured by the "prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

Showing that counsel's performance during jury selection was objectively unreasonable is especially difficult because a Defendant must rebut several presumptions. *Strickland* mandates "a strong presumption" that all of counsel's actions are reasonably based on "sound trial strategy." 466 U.S. at 689 (quotation and citation omitted). Thus, to show deficient performance in any context, a defendant must prove that "there was *no conceivable tactical basis*" for his counsel's actions. *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (quotation and citation omitted).

This is especially difficult to do in the jury selection context because “jury selection is a highly selective, judgmental, an intuitive process” that is “more art than science.” *State v. Litherland*, 2000 UT 76, ¶¶20-21, 12 P.3d 92. Defense counsel “clearly have the right to identify and prefer particular jurors without regard to any particular objective criterion or philosophy of jury selection.” *Id.* ¶23. This discretion includes the ability to make decisions based on a prospective juror’s “demeanor, interaction with others in the courtroom, and personality in general,” or even on the nature of the juror’s “eye contact” with the attorney. *Id.* ¶21.

Given the highly subjective nature of jury selection, “the *Strickland* standard requires the appellate court to make two distinct presumptions” in addition to *Strickland*’s general presumption of strategic, reasonable performance. *Id.* ¶20. First, a court must presume that “trial counsel’s lack of objection to, or failure to remove, a particular juror is ... the product of a conscious choice or preference.” *Id.* Second, “trial counsel’s presumably conscious and strategic choice to refrain from removing a particular juror is further presumed to constitute effective representation.” *Id.*

Finally, in addition to these presumptions, this Court must “presume that any argument of ineffectiveness presented to it is supported by all the relevant evidence of which [the] defendant is aware.” *Id.* at ¶17. This presumption

arises because Defendant bears the burden to provide a record that affirmatively rebuts the *Strickland/Litherland* presumptions of strategic, effective performance. *See id.* ¶¶16-17.

Because Defendant bears the burden of proof, “[i]t should go without saying that the absence of evidence cannot overcome the ‘strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance.’” *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013). Thus, if “the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively.” *Litherland*, 2000 UT 76, ¶17.

B. Defendant relies on the wrong prejudice standard.

Defendant has not shown that his counsel was ineffective during jury selection, because Defendant analyzes his argument under the wrong prejudice standard. Although a defendant must prove both *Strickland* elements, a reviewing court need not address both “if the defendant makes an insufficient showing on one.” *Strickland*, 466 U.S. at 697. Because he relies on the wrong standard, Defendant has not shown prejudice. This Court may therefore affirm on that ground alone. *See id.* (court can reject ineffectiveness claim based on lack of prejudice alone).

To prove *Strickland* prejudice, a defendant must ordinarily demonstrate that the alleged deficient performance “affected the outcome of the case.” *Litherland*, 2000 UT 76, ¶19. But that is not the standard for proving ineffectiveness during jury selection. In *State v. King*, 2008 UT 54, ¶¶15-36, 190 P.3d 1283, the Utah Supreme Court held that to prevail on a claim that counsel was ineffective during jury selection, a defendant “must show that his counsel’s actions ... allowed the seating of an actually biased juror.” Thus, to prevail here, Defendant must show that at least one of his jurors was actually biased. See *id.*; see also *State v. Sessions*, 2014 UT 44, ¶31, 342 P.3d 738 (showing of “actual juror bias” required to prove ineffective assistance for lacking neutral ground for peremptory challenge); *State v. Arriaga*, 2012 UT App 295, ¶13, 288 P.3d 588 (counsel’s deficient performance during jury selection prejudicial only if biased juror sat).

Showing “actual bias,” of course, requires more than merely showing potential or even presumptive bias. See *King*, 2008 UT 54, ¶¶30-39. As the supreme court recognized, “stretching ... the bounds of jury bias error” to include only “possible juror bias” would be “illogical” and “lead to perverse results.” *Id.* ¶18. Thus, even though two jurors in *King* had “made disclosures that suggested potential bias,” *King* could not show *Strickland* prejudice

without showing that his counsel's failure to remove the jurors "allowed the seating of an *actually biased juror*." *Id.* at ¶¶19, 47 (emphasis added).

Defendant begrudgingly acknowledges that he is "forced" to challenge the selection of his jury under an ineffective assistance of counsel analysis. Br.Aplt. 34. But he refuses to acknowledge the correct prejudice analysis. Defendant argues that to show prejudice he "must show 'a reasonable probability' that with the effective assistance of counsel, the jury would have had 'a reasonable doubt respecting guilt.'" Br.Aplt. 34 (quoting *State v. Hales*, 2007 UT 14, ¶¶86, 92-93, 152 P.3d 321). Defendant later asserts that the "question here is whether there was at least a reasonable probability of a different result had [he] been allowed to participate in jury voir dire and selection." Br.Aplt. 37.

As explained, however, the correct standard requires a showing that "counsel's actions ... allowed the seating of an *actually biased juror*." *King*, 2008 UT 54, ¶47 (emphasis added). Defendant cites *King* to support his claim that one juror expressed bias. Br.Aplt. 36. But he does not acknowledge *King's* holding that prejudice in this context requires a showing of actual bias. Br.Aplt. 36. Because Defendant fails to analyze his claim under the correct prejudice standard, this Court should reject it on this ground alone.

1. Defendant has not shown that any juror was actually biased.

Despite his failure to analyze his ineffectiveness claim under the correct standard, Defendant does argue that Juror Sachra, “revealed a strong bias or impression.” Br.Aplt. 35. But the only evidence of bias that Defendant cites to support this assertion is the prosecutor’s recollection that during in-chambers questioning, Juror Sachra stated that “if a person had drugs in the car, they were probably guilty.” Br.Aplt. 35 (quoting R415). Even assuming that this amounts to an argument that Juror Sachra was actually biased, Defendant has not made that showing.

As noted, the declarations of Defendant’s trial counsel and the prosecutor are the only record of the in-chambers questioning. R432-24,417-08. Defendant’s trial counsel recalled that Juror Sachra was questioned in chambers, but could not recall any details about that questioning. R430,428. The prosecutor recalled that Juror Sachra said she had been a victim of rape, that her son had been prosecuted in California for drugs, and that “she was against drugs.” R415. The prosecutor also recalled Juror Sachra saying “that if a person had drugs in the car, they were probably guilty.” R415. The record contains no other details about Juror Sachra’s individual questioning.

Her questionnaire reveals that she was 71 years old. R461:Questionnaire

3. When asked whether she would “be able and willing to make [her] decision

solely based on the evidence presented at trial” she wrote, “I would try.” *Id.* She also wrote that she would “do [her] best” “to follow the judge’s instruction” on the law even if she believed otherwise. *Id.* Finally, when asked, whether there were any reason she “could not be an impartial and fair juror” she responded, “I would do my best to put strong feelings aside.” *Id.*

Juror Sachra’s single statement that someone with drugs in their car is “probably guilty” does not show actual bias. First, the statement was equivocal. Second, Defendant has not rebutted the presumption that his counsel strategically, and therefore effectively chose to leave Juror Sachra on the jury because any potential for bias was dispelled by further questioning. Finally, the jury’s split verdict demonstrates that no juror was actually biased against Defendant.

a. Juror Sachra’s single equivocal statement does not show actual bias.

Juror Sachra’s single, equivocal statement does not show actual bias. The juror said only that a person who had drugs in their car was “*probably* guilty.” R415 (emphasis added). Far from showing actual bias, such a statement reveals only a common-sense conclusion likely shared by the overwhelming majority of people.

The statement was also equivocal. Juror Sachra did not say that everyone who is caught with drugs in their car was necessarily guilty. Rather, she said

only that they were “probably guilty.” R415. Thus, Juror Sachra’s statement did not establish that she was unwilling to base her ultimate decision on the facts and the law. On the contrary, that was something she said she would “try” her “best” to do. R461:Questionnaire 3. That uncontradicted statement from her questionnaire—unlike the prosecutor’s recollection of her statement during individual questioning—was unequivocal. R461:Questionnaire 3. Thus, Defendant has not shown that Juror Sachra’s equivocal statement demonstrates actual bias.

b. Defendant has not rebutted the presumption that follow-up questioning dispelled any potential bias.

Second, Defendant has not proven that follow-up questioning did not dispel any potential bias. Because Juror Sachra sat, this Court must presume that counsel strategically decided to keep her on the jury because any potential prejudice she exhibited was dispelled to counsel’s satisfaction. *See Litherland*, 2000 UT 76, ¶¶17, 20.

Defendant provides no evidence that any potential bias Juror Sachra may have exhibited was not dispelled through follow-up questioning. On the contrary, the available record demonstrates, or at least does not rebut, the strong presumption that follow-up questioning dispelled any potential bias.

The trial court questioned each juror brought into chambers about their ability to be impartial. After allowing counsel to question the individual jurors, the trial court asked each “juror if he or she could be fair and impartial.” R431.

True, the available record does not show how Juror Sachra answered this question. But the record supports the presumption that she answered it affirmatively for two reasons. First, an affirmative answer would have been consistent with her answers in her questionnaire that she would “try” her “best” to decide the case based on the law and the evidence presented at trial. R461:Questionnaire 3.

Second, neither side moved to strike her for cause even though, after questioning each juror, the trial court asked whether either side desired to strike that juror for cause. R431,416,412. The prosecutor recalled that if a juror had answered in a manner indicating bias, he would have moved to strike that juror. R415. The parties’ and the trial court’s failure to strike Juror Sachra support the inference that she was not actually biased. *See Uttecht v. Brown*, 551 U.S. 1, 18 (2007) (inferring that “the interested parties present in the court room all felt that removing” a juror “was appropriate” based on the parties’ and trial court’s actions).

The record also demonstrates, or at least does not rebut, the strong presumption that had Juror Sachra expressed potential bias, the attorneys

would have asked her follow-up questions to probe the extent of that potential bias. The available record shows that both counsel followed up with other prospective jurors who revealed potential bias. R431,416. Defense counsel recalled asking follow-up questions of prospective jurors Sperry and Richardson. R429-28. The prosecutor recalled posing follow-up questions to prospective jurors Laird, Jones, and Wood. R413. The record thus supports the presumption that Juror Sachra was asked any necessary follow-up questions and answered them to everyone's satisfaction.

A single statement that a juror believes a defendant is "probably" guilty is not enough to establish actual bias when follow-up questioning dispels any potential bias. For example, in *State v. Hughes*, 691 S.E.2d 813, 824 (W. Va. 2010), a juror unequivocally answered "Yes" when asked whether she believed that "when someone is charged, they're more likely than not to be guilty." But in follow-up questioning, the juror explained her understanding that an arrest warrant could issue only after a magistrate had made a probable cause finding. *Id.* Hughes argued that the trial court erroneously refused to remove the juror for cause because her answers revealed actual bias. *See id.* at 822. The West Virginia Supreme Court disagreed, holding "that a prospective juror is not subject to removal for cause merely because he/she affirmatively answered a question which, in essence, asked whether the juror believes that a person is

arrested or charged because there is probable cause that the person is guilty.”

Id. at 824.

In so holding, the court noted that at least five other courts had rejected claims of actual bias based on prospective juror statements that the defendants were “probably” or “more likely than not” guilty. *Id.* at 823-24; see *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999) (follow-up questioning dispelled any potential bias where juror said he “leaned” towards believing defendant guilty because he had been arrested and indicted); *Pressley v. State*, 770 So.2d 115, 126-27 (Ala. Crim. App. 1999) (follow-up questioning dispelled any potential bias where juror said defendant was “probably guilty” because he had been charged); *Raulerson v. State*, 491 S.E.2d 791, 799 (Ga. 1997) (same); *Commonwealth v. Sweeney*, 347 A.2d 286, 288 (Pa. 1975) (follow-up questioning dispelled any potential bias where jurors said defendant “was more likely than not” guilty because he was arrested); *Cressell v. Commonwealth*, 531 S.E.2d 1, 10 (Va. App. 2000) (follow-up questioning dispelled any potential bias where juror said defendant was “probably guilty of something” because he was on trial).

Quoting *State v. Saunders*, Defendant argues that “a bare assertion suggesting rehabilitation ‘is not sufficient’” where a juror has expressed potential bias. Br.Aplt. 31 (quoting *State v. Saunders*, 1999 UT 59, ¶36, 992 P.2d 951). But *Saunders* involved a preserved challenge to the trial court’s refusal to

allow counsel to ask follow-up questions of jurors who indicated possible bias, not an argument that trial counsel was ineffective for not removing particular jurors. See 1999 UT 59, ¶32. Thus, while it is true that a juror's assurances of impartiality may be insufficient to show that a trial court did not err in refusing to strike that juror for cause, that principle is inapplicable to a claim that counsel was ineffective for not removing a juror. See *Litherland*, 2000 UT 76, ¶20 (reviewing courts must presume counsel's jury selection decisions are strategic and therefore effective).

Finally, the fact that the trial court did not raise any post-trial concerns about Juror Sachra supports the presumption that she was not actually biased. Although the trial court sua sponte raised a concern with trial counsel's performance during jury selection, that concern involved only counsel's decision to leave Juror Mangelson on the jury, not Juror Sachra. R268. The trial court raised its concern just one week after trial. R268. The trial court's omission of any concern about Juror Sachra, even though the jury selection proceedings would have been fresh on the court's mind, supports the presumption that Juror Sachra was not actually biased. Defendant has not rebutted that presumption.

c. The jury's split verdict shows that no juror was actually biased.

Finally, the jury's split verdict shows that no juror was actually biased. Although the jury convicted Defendant of drug and paraphernalia possession, and driving with a measurable controlled substance in the body, it acquitted him of possessing a dangerous weapon by a restricted person. R263-58;R440:206-08. The jury did so even though Defendant admitted that the two knives in his car were his, and even though the jury convicted him of possessing a Schedule II controlled substance, which necessarily made him a Category II restricted person. R259-58;R440:143; *see* Utah Code Ann. §58-37-4(2)(b)(iii)(B) (listing Methamphetamine under Schedule II); Utah Code Ann. §76-10-503(1)(b)(iv) (defining Category II restricted person as person in possession of a Schedule I or II controlled substance). The jury apparently believed Defendant's claim that the knives were not weapons, but merely tools that he used at his job. R440:145; *see* Utah Code Ann. §76-10-501(6)(a)(vi) (listing the "lawful purposes for which the object may be used" as a factor for evaluating whether object is a dangerous weapon). The jury's split verdict therefore demonstrates that it based its verdicts on the evidence, not bias.

2. This Court must construe ambiguities and omissions in the record in the prosecution's favor.

Defendant cannot complain that the record is inadequate for him to demonstrate actual prejudice. As explained, he has the burden to provide a record affirmatively rebutting the strong presumptions of effective assistance in jury selection. *See Litherland*, 2000 UT 76, ¶¶17, 20.

Assuming that Juror Sachra, or any other juror was actually biased, Defendant had the means to provide a record showing that bias. Given the recording error here, the State stipulated to, and this Court granted, Defendant's motion to supplement and correct the record. R407. Defendant provided declarations from the prosecutor and his trial counsel. R407,417-24. But he chose not to provide declarations from the trial court or from any juror. Defendant did not request a hearing to attempt to reconstruct the record. Nor did he move for a remand under rule 23B, Utah Rules of Appellate Procedure, to create a record to support his ineffectiveness claims, even though the supreme court has recognized that Rule 23B "offers the most effective method to determine" post-trial whether jurors "were actually biased." *State v. King*, 2008 UT 54, ¶¶41-46, 190 P.3d 1283.

This Court must presume that the record contains all of the evidence that Defendant could marshal in support of his ineffectiveness claim. *See Litherland*, 2000 UT 76, ¶17. As demonstrated, that evidence does not show that Juror

Sachra was actually biased. Thus, Defendant has not shown that his counsel was ineffective during jury selection. *See King*, 2008 UT 54, ¶47.

C. Alternatively, Defendant has not rebutted the strong presumption that his counsel's jury selection decisions were strategic and therefore effective.

Defendant also has not rebutted the strong presumption that his counsel performed adequately during jury selection and that he strategically decided to keep jurors Sachra, Mangelson, and Jones. Defendant asserts that he has rebutted this presumption because counsel did not "involve [him] in the voir dire proceedings." Br.Aplt. 22. He also contends that he has shown that his counsel's jury selection decisions were not strategic because: (1) his counsel was "inattentive or indifferent" during jury selection; (2) Juror Sachra expressed "unequivocal bias"; and (3) his counsel's choices were "implausible and unjustifiable." Br.Aplt. 30-33.

But the record does not rebut the presumption that counsel adequately advised Defendant of his right to participate in the in-chambers questioning and that Defendant waived that right. Nor does it rebut the strong presumption that counsel's jury selection decisions were strategic.

1. Defendant has not rebutted the presumption that his counsel advised him of the right to participate in the in-chambers questioning and that Defendant waived the right.

Absent affirmative evidence to the contrary, this Court must presume that trial counsel effectively involved Defendant in jury selection. *See Strickland*, 466 U.S. at 689 (mandating “a strong presumption” that counsel’s decisions are strategic); *Litherland*, 2000 UT 76, ¶17 (record deficiencies are “construed in favor of a finding that counsel performed effectively”). Defendant has not provided any non-speculative evidence to rebut the presumption that he and his counsel discussed his presence during the in-chambers questioning and that Defendant waived any right to be present.

Assuming that Defendant had a right to be present during the in-chambers questioning, he waived that right by failing to assert it. The “right [to be present at trial] is not absolute and may be waived by word or act of the person claiming it.” *State v. Hubbard*, 2002 UT 45, ¶34, 48 P.3d 953 (quoting *State v. Glenny*, 656 P.2d 990, 992 (Utah 1982)).

In *Hubbard*, the defendant argued that the trial court plainly erred by not including him in sidebar discussions between the trial court, prospective jurors, and counsel. *Id.* ¶31. The Utah Supreme Court disagreed, holding that even assuming that [Hubbard] possessed a state constitutional and statutory right to be present during all discussions with potential jurors, Hubbard waived that

right “by failing to assert it.” *Id.* ¶¶31-34. Relying on United States Supreme Court precedent, the *Hubbard* court held that “a trial court ‘need not get an express “on the record” waiver from the defendant for every trial conference which a defendant may have a right to attend.’” *Id.* ¶34 (quoting *United States v. Gagnon*, 470 U.S. 522, 528 (1985)). “A defendant knowing of a discussion must assert whatever right he may have to be present.” *Id.*

Here, the trial court announced in open court that it would question individual prospective jurors in chambers. R440:21. There is no evidence that Defendant expressed any desire to be present during that portion of jury selection. Absent such evidence, this Court must presume that Defendant waived any right to be present in chambers. *See Hubbard*, 2002 UT 45, ¶¶31-34.

Defendant argues that he did not waive his right to be present because he “was not invited to participate” and “had no notice of his right to attend” the in-chambers questioning. Br.Aplt. 19. But Defendant provides no non-speculative record evidence to support these allegations.

Defendant has deliberately chosen not to provide his own declaration regarding his involvement in jury selection. This Court must therefore presume that any information he could have provided would not have supported his ineffectiveness claims. *See Litherland*, 2000 UT 76, ¶17.

Instead, Defendant relies entirely on two sentences from his trial counsel's declaration stating: "I do not recall that I had any conversations with [Defendant] about any part of the jury selection process. He was not in chambers and not involved in the process." Br.Aplt. 19; R428.

These statements do not prove that Defendant "was not invited to participate" and "had no notice of his right to attend" the in-chambers questioning. Br.Aplt. 19. Trial counsel's inability to recall discussing whether Defendant wished to be present during the in-chambers questioning does not establish that such discussions did not happen. This is especially true when counsel was attempting to recall events from over fifteen months earlier. Defendant merely speculates that he and his counsel did not discuss his presence during the in-chambers questioning. But, as explained, ambiguity and speculation regarding counsel's performance is inadequate to establish that counsel was ineffective. *See Litherland*, 2000 UT 76, ¶17; *see also Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993)("[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.").

Counsel could have reasonably decided to advise Defendant not to attend the in-chambers questioning because the jurors would likely be more candid if he were not there. *See United States v. Bertoli*, 40 F.3d 1384, 1397 (3d Cir. 1994) ("doubt[ing] whether the jurors would have been as comfortable discussing

their conduct had Bertoli been present.”); *State v. Alexander*, 833 N.W.2d 126, 135 (Wis. 2013) (recognizing that “jurors may very well have been intimidated and deterred from speaking forthrightly about their potential bias with Alexander seated only a few feet away”).

Defendant provides no non-speculative evidence that he and his counsel did not discuss the in-chambers questioning and that, based on that discussion, Defendant chose to waive any right he had to be present. Nor does Defendant provide any evidence of what he would have contributed had he been present, or that he would have insisted that his counsel object to the three jurors that his appellate counsel now challenges. Defendant thus has not rebutted the strong presumption that his counsel adequately involved him in the jury selection process and that he waived any right to be present during the in-chambers questioning.

2. Defendant has not rebutted the presumption that his counsel’s jury selection decisions were strategic.

Defendant also argues that he has rebutted the strong presumptions that his counsel’s jury selection decisions were strategic and therefore effective. Br.Aplt. 30-33; *see Litherland*, 2000 UT 76, ¶20. To rebut these presumptions, Defendant must show that either (1) “defense counsel was so inattentive or indifferent during the jury selection process that the failure to remove a prospective juror was not the product of a conscious choice or preference”; (2)

“a prospective juror expressed bias so strong or unequivocal that no plausible countervailing subjective preference could justify failure to remove that juror”; or (3) “some other specific evidence clearly demonstrating that counsel’s choice was not plausibly justifiable.” *Id.* Defendant argues that he has made all three showings. He has not.

a. Defendant has not shown that his counsel was inattentive or indifferent during jury selection.

Defendant first argues that his counsel was “inattentive or indifferent” during jury selection. Br.Aplt. 30. “To demonstrate actual inattentiveness or indifference, defendant must either prove a specific and clear example of inattentiveness that directly caused the failure to object to a particular juror, or else show that counsel generally failed to participate in a meaningful way in the process as a whole.” *See Litherland*, 2000 UT 76, ¶25 n.10.

Defendant does not contend that his counsel “generally failed to participate” in the process. Br.Aplt. 30-33. Nor could he, where the record shows that counsel actively participated in questioning prospective jurors and exercised all of his peremptory strikes. R431-28,416-12. Rather, Defendant argues only that his counsel’s failure to object to Jurors Sachra and Jones provide “specific example[s] of inattentiveness.” Br.Aplt. 30-31.

Defendant argues that his counsel was inattentive to Juror Sachra because he did not remove her after “she expressed bias.” Br.Aplt. 30. But as explained,

she did not express bias and Defendant has not proven that follow-up questioning did not dispel any potential bias she may have disclosed.

As for Juror Jones, Defendant argues that trial counsel was “indifferent” to her “reservations about her ability to be fair and impartial.” Br.Aplt. 30. In his declaration, defense counsel recalled that Juror Jones was “quite reluctant to disclose what was going on in her own mind” and that, when asked “whether she could be fair and impartial, she had reservations about her ability to function as a juror.” R429. He also recalled that when the trial court asked a second time “whether she could be fair and impartial,” she “replied that she understood what the judge wanted and she believed she could serve as a juror.” R429.

Defendant has not shown that his counsel was inattentive or indifferent to Juror Jones. Rather, the fact that he recalled what he perceived to be a reluctance to disclose her thoughts demonstrates that he paid attention to her. R429.

Defendant has not shown that Juror Jones’ responses were so troubling that all reasonable attorneys would remove her. Contrary to Defendant’s representations, the record does not establish that Juror Jones expressed reservations “about her ability to be fair and impartial.” Br.Aplt. 30. Rather, it establishes only that she expressed “reservations about her ability to function as

a juror.” R429. Those reservations could have stemmed from her age (she was 68) or her employment (she worked at an elementary school), or some other reservation about her personal circumstances unrelated to her impartiality. R461:Questionnaire 13.

The fact that defense counsel recalled that Juror Jones raised her concerns in the context of a question about whether she could be fair and impartial does not resolve this ambiguity in the record. This is especially true where Juror Jones unequivocally declared in her questionnaire that she would base her decision solely on the evidence, that she would follow the law as instructed, and that she had no reason to feel she “could not be an impartial and fair juror.” R461:Questionnaire 13.

Defendant contends that Juror Jones was not successfully rehabilitated. Br.Aplt. 31. But again, while that argument may be sufficient to establish error in the denial of a for-cause challenge, it is irrelevant in the context of an ineffective assistance claim. Under *Litherland*, defense counsel may reasonably decide not to remove a juror even when the juror has expressed potential bias. See 2000 UT 76, ¶22. Defendant therefore has not shown that his counsel’s handling of either Juror Sachra or Jones constitutes a “specific and clear example of inattentiveness.” See *Litherland*, 2000 UT 76, ¶25 n.10.

- b. Defendant has not shown that any juror expressed bias so strong that no attorney could reasonably decide not to remove that juror.**

Defendant argues that Juror Sachra “expressed the sort of strong, unequivocal bias that would cause a reasonable person to second guess counsel’s actions in failing to remove her.” Br.Aplt. 31. Again, the record does not support Defendant’s contention that Juror Sachra was biased. He therefore fails to rebut the *Litherland* presumptions on this basis. See 2000 UT 76, ¶20.

- c. Defendant has not shown that his counsel had no plausible or justifiable reason for keeping Juror Mangelson on the jury.**

Finally, Defendant argues that that there was “no plausible or justifiable reason for keeping [Juror] Mangelson on the jury.” Br.Aplt. 32. Defendant notes that Juror Mangelson was a retired highway patrol trooper who had worked in drug interdiction on I-15 for many years and who knew Trooper Sheets. Br.Aplt. 20, 32.

The record reveals that Juror Mangelson had about 40 years’ experience as a highway patrolman and had been involved in many jury trials over his career. R430,415. Juror Mangelson knew Trooper Sheets, but had not supervised him. R415. Although he could not remember “specific questions or answers,” trial counsel did recall that Juror Mangelson “would have assured us that he knew how to be fair, and that he could be fair, if selected as a juror.”

R430. The prosecutor recalled that defense counsel specifically asked Juror Mangelson if he would give Trooper Sheets' testimony more weight, that Juror Mangelson said that "he would not," and said that "he would make up his mind based on the facts presented in court." R415.

On his questionnaire, Juror Mangelson wrote that he had been employed by a law enforcement agency. R461:Questionnaire 2. He also unequivocally affirmed that he would base his decision solely on the evidence, that he would follow the law as instructed by the trial court, and that there was no reason that he "could not be an impartial and fair juror." R461:Questionnaire 2.

Defendant faults Juror Mangelson for not revealing on his questionnaire "his years of experience as a highway patrolman," "his assignments relating to drug interdiction on I-15," and that he knew Trooper Sheets. Br.Aplt. 20. The questionnaire, however, did not ask for such specific information. R461:Questionnaire 2. But Juror Mangelson did reveal this information during in-chambers questioning. R415. Both sides passed Juror Mangelson for cause. R430.

The record shows that trial counsel made a strategic decision to keep Juror Mangelson. Counsel not only knew Juror Mangelson personally, counsel had also worked with him when counsel was a prosecuting attorney for Juab County and Juror Mangelson was a highway patrol supervisor. R430. Counsel

knew that Juror Mangelson “had done a lot of work on freeway stops.” R429. Counsel believed that Juror Mangelson would be critical of the Trooper’s tactics in this case and therefore be favorably disposed to the Defendant. R429. In his words, counsel “thought” that Juror Mangelson “would hear the evidence of how this stop occurred and know that it was not proper.” R429.

Defendant argues that counsel’s strategic reasons “were implausible” because the propriety of the stop was not for the jury to decide. Br.Aplt. 32. Granted, the jury was not directly tasked with deciding the constitutionality of the stop. But counsel could nevertheless reasonably strategize that a juror who might reasonably conclude that the stop was problematic, might also be sympathetic to the defense theory. That theory was to concede guilt on the misdemeanor charges involving marijuana, but to contest the felony charges involving other drugs and possession of a dangerous weapon.

Counsel’s trial and jury-selection strategies were reasonable. “It is not necessarily per se ineffective assistance for a defense attorney to advance a nonlegal defense, such as a plea for jury nullification ... when the circumstances of the case render other defensive strategies unavailable.” *People v. Woods*, 961 N.E.2d 466, 473 (Ill. App. 2011). Counsel “may present a defense evoking the empathy, compassion or understanding and sympathy of the jurors.” *Id.*; *Anderson v. Calderon*, 232 F.3d 1053, 1089 (9th Cir.2000) (reliance on nullification

defense can be “‘strategic choice’ that survives under *Strickland*”) *cert. denied*, 534 U.S. 1036 (2001), *disapproved of on other grounds*, *Osband v. Woodford*, 290 F.3d 1036, 1043 (9th Cir.2002)).

Here, trial counsel suggested that Trooper Sheets stopped Defendant only because he was Hispanic and coming from California. R440:98. During cross-examination, counsel suggested that Sheets may not have been able to clearly see Defendant’s license plate until after stopping him. R440:96-98. Counsel also got Sheets to concede that he may have followed Defendant with his lights activated before he could see Defendant’s license plate. R440:93-96.

Then, in closing argument, defense counsel conceded that Defendant was driving with marijuana metabolite in his system and that he possessed paraphernalia for smoking marijuana. R440:184-86. Counsel argued that Defendant’s California medical marijuana authorization explained, but did not legally justify, his actions in Utah. R440:184-86. But counsel also argued that the jury should acquit on the other charges because Defendant did not know of the other drugs and paraphernalia in the car, and the knives were tools, not dangerous weapons. R440:190-96.

Counsel’s strategy was partially successful. As explained, the jury did not convict Defendant of all charges. R263-58. Rather, it acquitted him on the dangerous weapon possession count even though he admitted that the knives

in the car were his and even though the jury's guilty verdicts on the controlled substance possession charges necessarily made Defendant a restricted person.

One possible explanation for the acquittal on this charge is that Juror Mangelson convinced the other jurors to be merciful because the legality of the traffic stop was at least debatable. The jury had watched portions of Sheets' dash-cam video of the stop and, as mentioned, defense counsel cross-examined Sheets' about the details of the stop and the field sobriety tests. R440:46-49,55-65,93-101. Because counsel may reasonably present a defense based on compassion or sympathy, *see Woods*, 961 N.E.2d at 473, Defendant has not shown that his counsel's strategic reason for keeping Juror Mangelson on the jury was "implausible and unjustifiable."

In short, Defendant has not rebutted the strong presumption that his counsel made reasonable strategic decisions during jury selection. Nor has he shown that any juror was actually biased. Consequently, he has not proven that his counsel was ineffective during jury selection.

D. Defendant could not show that the trial court erred, let alone plainly erred, during jury selection.

Although Defendant argues only that his counsel was ineffective during jury selection, he prefaces that argument by implying that the trial court erred when it did not require his presence during the in-chambers questioning. Defendant asserts that he was "denied the opportunity to be present at a critical

stage” of his trial when he was “denied the right to participate” in individual juror questioning. Br.Aplt. 16-17. But had Defendant raised this unpreserved claim as an allegation of plain error, he still could not have prevailed.

To show plain error, a defendant must show that a trial court committed obvious, prejudicial error. *See State v. Beckering*, 2015 UT App 53, ¶19, 346 P.3d 672. Defendant could not do so here because controlling law did not require the trial court to include Defendant in the in-chambers questioning, or to obtain a formal waiver of his presence.

The “absolute right to be present at all voir dire conferences,” including in-chambers individual questioning, “has not been expressly recognized in Utah.” *State v. Zamora*, 2005 UT App 196U, ¶4. This Court has therefore held that a trial court does not plainly err when it questions jurors in chambers without the defendant present. *State v. Hodge*, 2008 UT App 409, ¶19, 196 P.3d 124.

Defendant implies that he had a due process right to be present because jury selection is a critical stage of a trial. Br.Aplt. 15. For support, he relies on *Gomez v. United States*, 490 U.S. 858, 873 (1989), and *Hopt v. Utah Territory*, 110 U.S. 574, 578 (1884). Br.Aplt. 15.

Neither case helps Defendant. *Gomez* was not about a Defendant’s right to be present during jury selection. *See* 490 U.S. 859-62. Rather, it addressed

only whether the Federal Magistrates Act allowed a magistrate to preside “at the selection of a jury in a felony trial without the defendant’s consent.” *Id.* at 859-60.

And while *Hopt* discussed a defendant’s presence during jury selection, the United States Supreme Court has long since recognized that *Hopt* “has been distinguished and limited.” *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1, 2 n.1 (1964). In fact, the *Snyder* court stated that what “was said in *Hopt v. Utah*, ... on the subject of the presence of a defendant was dictum, and no more.” *Id.* at 118 n.2. Defendant mentions *Snyder* once, but only in a one-sentence footnote that does not account for its express limitation of *Hopt*. Br.Aplt. 15 n.7.

As this Court has recognized, *Snyder* “set out the standard for when a defendant has a right to presence under the due process clause.” *State v. Burk*, 839 P.2d 880, 887 (Utah App. 1992). Under *Snyder*, a defendant has a due process right “to be present ... whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *Snyder*, 291 U.S. at 105-06. But this right does not require that a defendant be present at all proceedings. *See id.*; *see also Burk*, 839 P.2d at 886-88 (holding that Burk had no right to be present during post-verdict questioning of jurors about alleged improper contact with witnesses). Instead, a defendant’s constitutional

right to be present exists “to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.” *Id.* at 107-08. Thus, a defendant need not be present during all communications between a judge and a juror. See *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam) (holding that defendant’s absence during in-chambers discussion between judge and a juror to ascertain bias did not violate defendant’s due process rights); *Hodge*, 2008 UT App 409, ¶19 (no plain error in interviewing jurors in chambers without defendant); *Burk*, 839 P.2d at 888. When the defendant’s “presence would be useless, or the benefit but a shadow,” due process does not require his presence at a trial proceeding. *Snyder*, 291 U.S. at 106-07.

No record evidence shows that Defendant’s presence during the individual juror questioning would have been useful or beneficial. As noted, Defendant cites no record evidence establishing: (1) that he even wished to be present during the in-chambers questioning; (2) what his presence would have contributed; or (3) that he would not have relied entirely on his counsel’s jury selection decisions. Thus, Defendant could not establish any right to be present during the in-chambers questioning.

Additionally, as explained, even if Defendant had a clearly-established right to be present during in-chambers questioning, he waived that right by not asserting it. See *State v. Hubbard*, 2002 UT 45, ¶31, 48 P.3d 953. Thus, any error

in not including Defendant the in-chambers questioning would not have been obvious. *See id.*; *Hodge*, 2008 UT App 409, ¶ 19. Defendant therefore could not have shown that the trial court plainly erred. *See Beckering*, 2015 UT App 53, ¶ 19.

II.

DEFENDANT HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE IN HANDLING THE MOTION TO SUPPRESS.

Defendant argues that his trial counsel provided ineffective assistance in handling the motion to suppress the drugs, paraphernalia, and knives found in his car. Br.Aplt. 47. Defendant argues that his trial counsel “failed to make timely and proper arguments for suppression of the evidence.” Br.Aplt. 48-49. Defendant does not argue that his trial counsel should have challenged the legality of the initial stop, nor does he argue that the field sobriety tests did not establish probable cause to arrest him. Br.Aplt. 39. Rather, he argues only that his counsel was ineffective for not persuading the trial court that Trooper Sheets “extended the detention beyond the initial purpose of the traffic stop without sufficient justification.” Br.Aplt. 38; *see also* Br.Aplt. 39 (declaring that this “case involves the officer’s actions under the second prong of the analysis” in *State v. Baker*, 2010 UT 18, ¶ 17, 229 P.3d 650).

Defendant contends that trial counsel should have argued that Trooper Sheets lacked reasonable suspicion to extend the stop because: (1) the dash-cam

video contradicted Sheets' observations of Defendant's speech and mannerisms; and (2) Defendant's history of controlled substance possession was too old. Br.Aplt. 40-42, 44, 49. Defendant also argues that Sheets' trial testimony undermined his prior testimony at the suppression hearing. Br.Aplt. 42, 45-46, 49.

Defendant's new arguments do not prove that his counsel was ineffective in handling the motion to suppress. Defendant improperly parses the evidence, rather than examining it as a whole. The video does not refute Sheets' observations, and Defendant's criminal history validly contributed to Sheets' reasonable suspicion. Moreover, trial counsel could not have relied on Sheets' trial testimony in litigating the pre-trial suppression motion. Regardless, Sheets' trial testimony did not undermine a reasonable suspicion finding. The totality of the circumstances here adequately established reasonable suspicion to investigate whether Defendant was under the influence of a controlled substance.

As explained, to prove ineffective assistance of counsel, Defendant must prove both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Because his ineffectiveness claim hinges on his counsel's handling of a motion to suppress evidence, Defendant "must also prove that his Fourth Amendment claim is meritorious and that there is a

reasonable probability that the verdict would have been different absent the excludable evidence.” *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

A. Defendant has not shown that his counsel performed deficiently in handling the motion to suppress, because the totality of the circumstances established reasonable suspicion.

As explained, to prove deficient performance under *Strickland*, Defendant must show that his counsel’s performance “fell below an objective standard of reasonableness.” 466 U.S. at 688. Put differently, “trial counsel’s error must be so egregious that no reasonably competent attorney would have acted similarly.” *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1239 (11th Cir. 2011).

Because *Strickland* is grounded in reasonableness, it asks only “whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” *Harrington v. Richter*, 562 U.S. 86, 88 (2011) (quoting *Strickland*, 466 U.S. at 690). The Sixth Amendment creates “no expectation that competent counsel will be a flawless strategist or tactician.” *See id.* at 110. Defendants “have a right to a competent lawyer, but not to Clarence Darrow.” *United States v. Rezin*, 322 F.3d 443 (7th Cir. 2003). Defendant has not shown that any of the arguments that he now raises were so obviously meritorious that every reasonable attorney would have recognized and raised them.

Like any other seizure, a traffic stop is reasonable if it was (1) “lawful at its inception,” and (2) “executed in a reasonable manner.” *Illinois v. Caballes*, 543 U.S. 405, 408 (2005). As explained, Defendant challenges only Trooper Sheets’ decision to extend the stop to conduct field sobriety tests, not his decision to make the initial stop. Br.Aplt. 39.

A traffic stop is reasonable in its execution so long as the officer “diligently pursue[s]” a course of action likely to fulfill the purpose of the stop. See *United States v. Sharpe*, 470 U.S. 675, 686 (1985). Officers are also allowed “to graduate their responses to the demands of [the] particular situation.” *Id.* (citation omitted). Accordingly, if “during the scope of [a lawful] traffic stop, the officer forms new reasonable articulable suspicion of criminal activity, the officer may also expediently investigate his new suspicion.” *State v. Baker*, 2010 UT 18, ¶13, 229 P.3d 650. That occurred here.

While reasonable suspicion requires more than a “hunch,” it does “not require an officer to rule out innocent conduct or establish the likelihood of criminal conduct to the same degree as required for probable cause.” *State v. Worwood*, 2007 UT 47, ¶23, 164 P.3d 397. Simply put, reasonable suspicion exists “when a law enforcement officer has ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity.’” *Navarette v. California*, 134 S.Ct. 1683, 1687 (2014) (citations omitted).

Evaluating whether reasonable suspicion exists requires a court to examine “the totality of the circumstances.” See *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Reviewing “courts cannot evaluate individual facts in isolation to determine whether each fact has an innocent explanation. Rather, courts must look to the ‘totality of the circumstances’ to determine whether, taken together, the facts warranted further investigation by the police officer.” *State v. Alvarez*, 2006 UT 61, ¶14, 147 P.3d 425 (citation omitted). A “‘divide-and-conquer analysis’” is improper. See *Arvizu*, 534 U.S. at 274. The constellation of circumstances here show that this traffic stop quickly, and properly, evolved into a drug-impaired driving investigation supported by reasonable suspicion.

Trooper Sheets was a Drug Recognition Expert (DRE) with years of experience in detecting drug-impaired driving. R436:2,13. He encountered a Defendant who could not produce a valid driver’s license, had “rapid speech and rapid jittery movements” that—in Sheets’ experience—were inconsistent with typical nervousness, and also had a history of controlled substance abuse. R436:8-9;R440:56.

The constellation of these circumstances established “a particularized and objective basis for suspecting” Defendant of controlled substance use. See *Navarette*, 134 S.Ct. at 1687. For example, in *State v. Hogue*, 2007 UT App 86, ¶8, 157 P.3d 826, the defendant’s “dilated pupils, nervous demeanor, and jerky

body movements” established reasonable suspicion to extend a stop to investigate possible impairment. Likewise, in *State v. Stewart*, 2014 UT App 289, ¶16, 340 P.3d 802, the officer’s observations that Stewart was “jittery,” “dancing around in the car,” and had “constricted” pupils and slurred speech created reasonable suspicion justifying further investigation.

Granted, Trooper Sheets did not see dilated pupils or hear slurred speech. But he did hear Defendant’s “jittery ... fast speech.” R436:8.

And he also knew that Defendant had a history of drug abuse. R436:8;R440:48-49;R460:3-4. As this Court has recognized, relevant criminal history “can be a factor in determining reasonable suspicion.” *State v. Humphrey*, 937 P.2d 137, 143 (Utah App. 1997). Defendant’s history of controlled substance abuse is an additional factor not present in either *Hogue* or *Stewart*.

In addition to Defendant’s suspicious speech and manner, and his history of drug abuse, Defendant also could not produce a valid driver’s license. R436:6-8. That fact provided another valid consideration in the reasonable suspicion calculus. See *United States v. Raynor*, 108 Fed. Appx. 609, 610, 613 (10th Cir. 2004) (driver’s inability to produce valid driver’s license was one factor contributing to reasonable suspicion to extend stop). When properly

considered together, these facts established reasonable suspicion. *See Navarette*, 134 S.Ct. at 1687.

1. Defendant's speech and manner were valid considerations.

Defendant argues generally that a suspect's "mannerisms ... when considered alone or even with other factors, fail to support reasonable suspicion." Br.Aplt. 41. Defendant also contends that Sheets' observations of his rapid manner and speech cannot support a reasonable suspicion finding for two reasons. Br.Aplt. 42. First, Defendant argues that Sheets undermined any reliance on Defendant's speech and mannerisms when Sheets testified at trial that "he was not familiar with" Defendant and acknowledged that Defendant's manner may "have been his 'normal way.'" Br.Aplt. 42 (quoting R440:56-57,101). Second, Defendant argues that Sheets' dash-cam video "fails to support that [Defendant's] speech or manners were rapid or unusual." Br.Aplt. 42. Defendant argues that the video "shows that [he] behaved normally." Br.Aplt. 49.

None of Defendant's arguments undermines a reasonable suspicion finding. First, as this Court has held, a suspect's mannerisms and speech can contribute to an officer's reasonable suspicion. *See Stewart*, 2014 UT App 289, ¶16; *Hogue*, 2007 UT App 86, ¶8.

Nor does Sheets' trial testimony acknowledging that Defendant's suspicious mannerisms may have been his "normal way" defeat a reasonable suspicion finding. Most importantly, trial counsel could not have relied on Sheets' trial testimony in opposing a pre-trial motion to suppress. See Utah R. Crim. P. 12(c)(1)(B) (requiring suppression motion to be filed at least five days before trial).

But even if counsel could have raised this argument in a new trial motion, Sheets' acknowledgement of a possible innocent explanation for Defendant's suspicious behavior—made outside the context of a suppression hearing—does not undermine a reasonable suspicion finding. Although an "officer's suspicion must be based on specific and articulable facts and rational inferences," an officer's determination of reasonable suspicion "need not rule out the possibility of innocent conduct." See *State v. Markland*, 2005 UT 26, ¶10, 112 P.3d 507 (quotations and citations omitted); Cf. *State v. Ashcraft*, 2015 UT 5, ¶¶22-24, 779 Utah Adv. Rep. 48 (possible innocent explanations of behavior did not undermine sufficiency of evidence showing constructive possession). Thus, the fact that Defendant's rapid manner may have had an innocent explanation is irrelevant.

Moreover, Sheets emphasized at the suppression hearing that in his highly specialized training and experience, Defendant's behavior was atypical

and suggested drug use. R436:2,8-9,13. Sheets' observations thus provided ample reasonable suspicion to briefly detain Defendant to conduct field sobriety tests. *See, e.g., Hogue*, 2007 UT App 86, ¶8 (dilated pupils, nervous demeanor, and jerky body movements justified brief detention to conduct field sobriety tests); *State v. Richards*, 2009 UT App 397, ¶10, 224 P.3d 733 (emphasizing officer's training and experience in evaluating reasonable suspicion).

Nor has Defendant shown that the dash-cam video refutes Sheets' observations. It is difficult, if not impossible, to accurately evaluate Defendant's manner and speech in the less-than-two-minute portion of the video showing Sheets' interaction with Defendant before Sheets orders him out of the car for field sobriety tests. SE #1 at 11:23:50–11:25:20. Defendant's movements are mostly indiscernible; only the back of Defendant's head is visible. *Id.* Most of what Defendant says is largely unintelligible. *Id.* And at least a portion of what is intelligible arguably supports Sheets' characterization of Defendant's speech as "fast." *Id.*;R436:8. As Sheets explained at trial, the video supports his trained observation that Defendant exhibited rapid speech and mannerisms. R440:99 ("Well, like you saw in the video, it appears that he had fast speech, and he has fast movements.").

Defendant's behavior after he is out of the car does not undermine a reasonable suspicion finding for three reasons. First, Defendant's out-of-the-car

behavior is largely irrelevant because, by then, Sheets had already decided to extend the stop. Second, Defendant's behavior once he knows he is under close scrutiny for field sobriety testing is not necessarily indicative of his behavior during what he would have perceived to be a more spontaneous interaction with Sheets during the initial portion of the stop.

Finally, while it may appear to appellate counsel's untrained eye that Defendant's behavior is unremarkable, appellate counsel is not a DRE. Sheets was. R440:13. Sheets' specialized training and extensive experience is critical here because officers "may draw on their own experiences and specialized training to make inferences from deductions about the cumulative information available to them that might well elude an untrained person.'" *State v. Anderson*, 2013 UT App 272, ¶27, 316 P.3d 949 (quotations and citations omitted).

Moreover, rather than dispelling Sheets' suspicion that Defendant was impaired, the field sobriety tests confirmed that suspicion, something Defendant does not dispute. R436:12-15. Sheets' also observed that Defendant had eyelid tremors during the tests, a fact that is impossible to see on the video. R440:61;SE#1 11:36:15-11:43:39.

Defendant suggests that Sheets "changed" his testimony about the nature of Defendant's speech by describing it at the suppression hearing as "fast" and

“jittery,” and then describing it at trial as “rapid.” Br.Aplt. 40-41. But Defendant does not explain how these two synonymous descriptions are inconsistent.

In sum, Defendant’s rapid speech and mannerisms were valid considerations and Defendant has not shown that the video refutes Sheets’ trained observations. And even if the video arguably refuted some of Sheets’ observations, it does not so clearly do so that all reasonable counsel would have raised that argument in a suppression motion. Defendant therefore has not shown that his counsel performed deficiently by not challenging the validity of Sheets’ observations. *See Strickland*, 466 U.S. at 688.

2. Defendant’s history of drug possession was a valid consideration.

Defendant also argues that his history of convictions and arrests for drug possession cannot support a reasonable suspicion finding because his last arrest was three years before the stop. Br.Aplt. 44. But Defendant cites no authority holding that criminal history can become too stale to be considered in the reasonable suspicion context. Two of the cases he cites involve the more rigorous probable cause standard, not the reasonable suspicion standard at issue here. *See State v. Brooks*, 849 P.2d 640, 644 (Utah App. 1993) (reviewing whether probable cause supported search warrant); *State v. Keener*, 2008 UT App 288, ¶8, 191 P.3d 835 (same).

Defendant also argues that under *State v. Humphrey*, 937 P.2d 137, 143 (Utah App. 1997), this Court held that criminal history must be “ongoing” to be relevant in the reasonable suspicion context. Br.Aplt. 43. But *Humphrey* did not limit relevant criminal history to only that which is “ongoing.” See 937 P.2d at 143. Rather, the *Humphrey* court observed that “information regarding an individual’s past, and in this case ongoing, criminal activity can be a factor in determining reasonable suspicion.” *Id.* The observation that Humphrey’s criminal activity happened to be “ongoing” thus served only to bolster the reasonable suspicion finding in that case, not to limit reasonable suspicion analysis in every case to consideration of only “ongoing” criminal activity. See *id.*

Defendant also argues that an officer must have personal knowledge of a suspect’s criminal history for it to contribute to reasonable suspicion. Br.Aplt. 43. The State does not dispute that an officer must base his suspicion on factors he personally knows. But here, Trooper Sheets did know about Defendant’s criminal history because dispatch informed him of it before he decided to extend the stop and conduct field sobriety tests. R460:4.

Defendant’s criminal history was relevant. A defendant’s “criminal history *contributes powerfully to the reasonable suspicion calculus*” when considered with other factors. *United States v. Simpson*, 609 F.3d 1140, 1147 (10th Cir. 2010)

(quotation and citation omitted) (emphasis in original); *see also Humphrey*, 937 P.2d at 143.

Defendant's history of drug-related arrests and convictions contributed to Sheets' reasonable suspicion. Defendant had a 2001 charge and a later 2001 felony conviction for controlled substance possession; a 2006 felony charge for controlled substance possession; and, in 2007, had violated his probation by again possessing controlled substances. R460:3-4. Although Defendant's probation violation was three years before this stop, five years separated Defendant's initial controlled substance conviction and his 2006 felony possession charge. R460:3-5. His history therefore demonstrated recurring and lengthy involvement with controlled substances. Defendant has thus not shown that his trial counsel was deficient for not challenging Sheets' reliance on his criminal history.

3. Other factors do not undermine a reasonable suspicion finding.

Defendant argues that other factors undermined the reasonable suspicion finding. First, he asserts that he was polite and cooperative and answered Sheets' questions clearly and honestly. Br.Aplt. 45. But Defendant cites no authority holding that these factors negate a highly-trained officer's observations of speech and mannerisms that suggest controlled substance use,

especially when coupled with a suspect's long history of drug abuse and inability to produce a valid driver's license.

Second, Defendant argues that "Sheets changed his story at trial" about how he first encountered Defendant's car. Br.Aplt. 45-46, 49. At the suppression hearing, Sheets testified that he was stopped on the side of northbound I-15 when Defendant passed him and he noticed the missing sticker on Defendant's license plate. R436:31-32. At trial, Sheets testified that he was traveling southbound when he noticed Defendant's car headed northbound and decided to follow it because it initially looked like a Honda, and Hondas are often stolen. R440:93-94. Sheets testified at trial that he drove across the median, caught up to Defendant's car, and then noticed the missing license plate sticker. R440:95-96.

Sheets also acknowledged for the first time at trial that his overhead lights may have been on when he drove through the median and began following Defendant. R440:93-95. Sheets suggested that his dash cam video confirmed this, although he later testified that he may have, at some point, turned his lights off and then on again. R440:93-95. The video, however, shows that Sheets' lights were off for at least 30 seconds as he approached Defendant. SE#1 at 11:22:42-11:23:30. It also shows that, before activating his lights, Sheets pulled alongside Defendant close enough to allow him to examine Defendant's

license plate, and only then pulled directly behind Defendant before activating his lights. SE#1 at 11:22:42-11:23:30.

Sheets' inconsistency about how he first noticed Defendant's car is irrelevant for three reasons. First, as explained, trial counsel could not have relied on Sheets' trial testimony to support his pre-trial suppression motion. Second, this inconsistency goes only to Sheets' justification for the initial stop. As explained, Defendant does not contend that his counsel should have challenged the initial stop. Br.Aplt.38-39. Third, the video confirms that Sheets did not activate his lights until after he had the opportunity to view Defendant's noncompliant license plate. SE#1 at 11:22:42-11:23:30. The stop was therefore justified at its inception. *See State v. Morris*, 2011 UT 40, ¶16, 259 P.3d 116 (stop is justified if officer reasonably believes traffic violation has occurred).

In sum, Defendant has not shown that his counsel performed deficiently for not raising these additional arguments in the motion to suppress.

B. Defendant has not shown prejudice because none of the additional arguments he now raises would have persuaded the trial court to grant a motion to suppress.

For these same reasons, Defendant cannot prove prejudice. As explained, none of the additional arguments Defendant now raises would have persuaded the trial court to grant a motion to suppress. Defendant has not shown that

Sheets lacked a reasonable and articulable suspicion to briefly detain him to conduct field sobriety tests. Defendant thus cannot demonstrate that he was prejudiced by his trial counsel's deficient performance, if any. Defendant therefore fails to prove that his trial counsel was ineffective. *See Kimmelman*, 477 U.S. at 375.

III.

The trial court did not plainly err in appointing conflict counsel to address a possible ineffective assistance of trial counsel claim.

Defendant argues that although the trial court identified potential claims of trial counsel ineffectiveness, it "failed to appoint counsel to represent [Defendant] in the post-trial proceedings." Br.Aplt. 52. Rather, Defendant argues that the trial court "simply appointed an attorney as amicus to address one distinct issue for the court." Br.Aplt. 52. Defendant argues that this was plain error because he had a right to conflict counsel who would represent him "in a meaningful way." Br.Aplt. 52. Defendant misinterprets the record.

The State does not dispute that Defendant had a right to independent counsel to address any post-trial claim that his trial counsel was ineffective. The State disputes, however, Defendant's assertion that the trial court did not appoint him independent counsel.

After trial, the trial court sua sponte raised two issues of possible trial counsel ineffectiveness. R268-67. The court was concerned that trial counsel

did not (1) “file any memorandum following an evidentiary hearing on defendant’s motion to suppress”; or (2) remove Juror Mangelson. R268. The court later withdrew its concern about Juror Mangelson. R285 n.1;R441:2;R442:4,7-8.

The court appointed conflict counsel, Mr. Tate Bennett, to represent Defendant for purposes of the court’s sua sponte notice. R274;R441:6. Bennett filed what he titled an “Amicus Brief” explaining that trial counsel’s failure to file a memorandum supporting the motion was not prejudicial because, once counsel moved to suppress, the prosecution bore the burden to prove that the search was lawful. R286-79. Bennett further noted that the trial court denied the suppression motion on the merits, not merely because trial counsel failed to file a supporting memorandum. R282.

After receiving Mr. Bennett’s memo, the trial court withdrew its sua sponte notice regarding ineffective assistance of counsel issues. R442:8-9. The court explained that although it was initially concerned with trial counsel’s “failure to file a memorandum” supporting the suppression motion, the court was satisfied that the lack of a memorandum did not amount to ineffective assistance of counsel for the reasons Bennett had explained. R442:8. The court noted, however, that it was not ruling on whether it erred in denying the

suppression motion and that trial counsel could address that potential issue in a new trial motion. R448:9,12.

Thus, the trial court did appoint Bennett as “conflict counsel” to independently represent Defendant. R274;R441:6. Bennett, however, apparently viewed his role as only “a friend of the Court.” R286. But that is Bennett’s fault, not the trial court’s. If Bennett failed to effectively address potential ineffective assistance of trial counsel issues, then Defendant’s argument should be that Bennett was ineffective, not that the trial court plainly erred in appointing him.

But, as explained above, Defendant has not proven that his trial counsel was ineffective in any respect. Therefore, even if Defendant had claimed that Bennett was ineffective in his post-trial representation, Defendant still could not have prevailed.

Nor could Defendant prevail even if this were properly viewed as a plain error claim. Plain error requires proof of obvious, prejudicial error. *State v. Beckering*, 2015 UT App 53, ¶19, 346 P.3d 672. Defendant has not shown prejudicial error, because he has not shown that conflict counsel could have proven that his trial counsel was ineffective.

IV.

This court should remand for the limited purpose of correcting a clerical error in Defendant's sentence.

This Court should remand for the limited purpose of correcting a clerical error in Defendant's sentence. The trial court entered Defendant's conviction on Count II (hydrocodone possession) as a third degree felony. R295;R442:13-14. But at the preliminary hearing, the prosecution amended Count II to a class B misdemeanor. R2,27;R435:10. The trial court noted the amendment on the original Information, but not on the Amended Information. R2,12.

The trial court imposed a 0-5 year prison sentence on Count II, but suspended that sentence and placed Defendant on probation for 24 months. R295-93;R442:13-14. It imposed sentence on 14 February 2013, but suspended the sentence for six weeks to allow the filing of a new trial motion. R293. In September 2014, the trial court terminated Defendant's probation unsuccessfully because, although he had satisfied all other probation conditions, Defendant had not fully paid his fines and fees. R459.

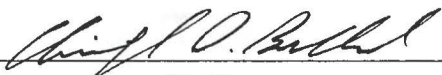
Defendant's conviction on Count II should have been entered only as a Class B misdemeanor. This Court should remand for the limited purpose of allowing the trial court to correct that clerical error. *See* Utah R. Crim. P. 30(b) (allowing for the correction of a clerical error in a judgment "at any time").

CONCLUSION

For the foregoing reasons, the Court should affirm, but nevertheless remand for the limited purpose of correcting the clerical error in Defendant's sentence.

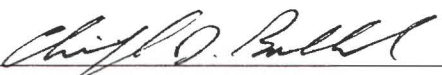
Respectfully submitted on May 13, 2015.

SEAN D. REYES
Utah Attorney General


CHRISTOPHER D. BALLARD
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 13,866 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.


CHRISTOPHER D. BALLARD
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on May 13, 2015, two copies of the Brief of Appellee were

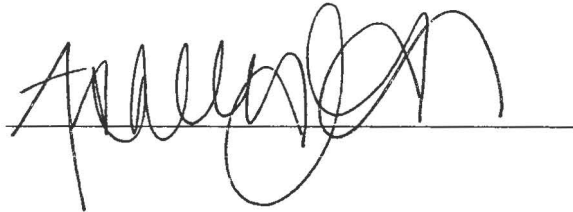
☒ mailed ☐ hand-delivered to:

Linda M. Jones
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ZIMMERMAN JONES BOOHER LLC
Kearns Building, Suite 721
136 South Main St.
Salt Lake City, UT 84101

Also, in accordance with Utah Supreme Court Standing Order No. 8, a
courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

A handwritten signature in black ink, appearing to be "A. M. Jones", is written over a horizontal line.

Addenda

Addendum A

FILED IN
4th DISTRICT COURT
STATE OF UTAH
JUAB COUNTY
13 NOV 22 PH 3:33

IN THE FOURTH JUDICIAL DISTRICT COURT - JUAB COURT
JUAB COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 101600146 FS
	:	
Plaintiff,	:	Appellate Court Case No. 20130432
	:	
v	:	
	:	
ABISAI MARTINEZ-CASTELLANOS,	:	
	:	
Defendant.	:	With Keyword Index

JURY TRIAL NOVEMBER 1, 2012

BEFORE

THE HONORABLE JAMES BRADY

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

ORIGINAL

0440

APPEARANCES

For the Plaintiff: JARED W. ELDRIDGE
Juab County Attorney

For the Defendant: MILTON T. HARMON
Attorney at Law

* * *

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1 NEPHI, UTAH - NOVEMBER 1, 2012

2 JUDGE JAMES BRADY

3 (Transcriber's note: speaker identification
4 may not be accurate with audio recordings.)

5 P R O C E E D I N G S

6 BAILIFF: The Honorable James Brady presiding.

7 THE COURT: Thank you. Please be seated.

8 We're here today on a case of the State of Utah vs.
9 Abisai Martinez-Castellanos. This is case number 101600146.
10 I'll note that the defendant is present with counsel. The
11 State is present with counsel as well.

12 Mr. Eldridge, is the state ready to proceed?

13 MR. ELDRIDGE: Yes, Your Honor.

14 THE COURT: Mr. Harmon is the defendant ready to
15 proceed?

16 MR. HARMON: We are, Your Honor.

17 THE COURT: Thank you.

18 I'm going to ask the clerk now to go through a role
19 call of those of you who are present just as perspective
20 jurors. First, let me say that I appreciate you being here
21 and welcome to our courtroom. We're going to spend a little
22 time this morning go over a jury process, and I'll explain
23 that as we go, but right now we need to have a role call. So
24 as my clerk calls your name, if you would, please, raise your
25 hand so that I can visually see who is responding and also

1 because this is being recorded. Would you simply indicate
2 your present by saying here or present or something to that
3 affect?

4 Go ahead, Cindy.

5 COURT CLERK: Jeffrey Bradley?

6 MR. BRADLEY: Present.

7 COURT CLERK: Paul Mangelson?

8 MR. MANGELSON: Present.

9 COURT CLERK: Karen Sachra?

10 MS. SACHRA: Here.

11 COURT CLERK: Phil Sperry?

12 MR. SPERRY: Here.

13 COURT CLERK: David [inaudible] ?

14 MR. ?: [inaudible]

15 COURT CLERK: Curt Stevens?

16 MR. STEVENS: Here.

17 COURT CLERK: Shelly Richardson?

18 MS. RICHARDSON: Here.

19 COURT CLERK: Leon Greenausch?

20 MR. LEON GREENAUSCH: Here.

21 COURT CLERK: Robert Kauffman?

22 MR. KAUFFMAN: Here.

23 COURT CLERK: Brittany Laird?

24 MS. LAIRD: [inaudible].

25 COURT CLERK: Rodney Steel?

1 MR. STEEL: [inaudible] .
2 COURT CLERK: Lucy Jones?
3 MS. JONES: Here.
4 COURT CLERK: Gary Wood?
5 MR. WOOD: Here.
6 COURT CLERK: Deborah Barnes?
7 MS. BARNES: Here.
8 COURT CLERK: Chet Farr?
9 MR. FARR: Here.
10 COURT CLERK: Mitchell Durban?
11 MR. DURBAN: Here.
12 COURT CLERK: Mark [inaudible] ?
13 MR. ?: Yes.
14 COURT CLERK: Anna Gage?
15 MS. GAGE: Here.
16 COURT CLERK: Kelly Lynn?
17 MS. LYNN: Here.
18 COURT CLERK: Mark Worthington?
19 MR. WORTHINGTON: Present.
20 COURT CLERK: Rod Greenausch?
21 MR. ROD GREENAUSH: Present.
22 COURT CLERK: Lisa Blackett?
23 MS. BLACKETT: Present.
24 COURT CLERK: Jerry Kindle?
25 MR. KINDLE: Here.

1 COURT CLERK: Russell Morgan?

2 MR. MORGAN: Here.

3 COURT CLERK: Kimberly Kay?

4 MS. KAY: Here.

5 COURT CLERK: Lisa Jacobson?

6 MS. JACOBSON: Here.

7 THE COURT: Thank you all very much. As I indicated
8 before, I appreciate your being here today. We welcome you
9 here. I know that for some of you, you've set aside matters
10 that are important to you, whether that's family, or work, or
11 other activities in order to make time to respond to the call
12 to serve today in this jury selection process. Besides
13 voting, which hopefully everybody gets a chance to do here or
14 has already done, serving on a jury is perhaps one of the
15 most interactive ways you have in being involved in our
16 communities government. We often talk about the government
17 as though it's a third party. Somebody out there is our
18 government, and I understand that perspective, but the
19 reality is today you are part of that process, and you are
20 part of that government operation. The role as a perspective
21 juror or as a juror requires a mind that's cleansed of all
22 prejudices and biases. You may be called upon to resolve
23 disputes of facts where different parties are testifying
24 about the same event differently. Your role, if you're
25 selected to serve on the jury, will be to function as the

1 judge of those facts and determine what facts actually
2 happened. The true measure of your service as a juror is
3 your intention in this case, your mature consideration of the
4 facts, and the quality of your verdict. Today, we're going
5 to select eight jurors to hear this case. The reason we have
6 so many of you here is because our experience over the years
7 indicates that we need to start with a group of about this
8 size in order to be able to select eight people to serve
9 finally as jurors. From this group, the attorneys and I will
10 select those final eight.

11 You've filled out questionnaires, and I wanted to
12 express my appreciation. The questionnaires assist us in
13 that selection process. I need to make sure that you
14 understand that by saving us this time with those
15 questionnaires, we also respect your privacy in those
16 questionnaires and the information you provide to us in those
17 documents are kept private. As I indicated earlier, this
18 case should only take one day. After we select the final
19 jury panel to go forward, I'll go over the daily schedule
20 with you.

21 At that point, I'm going to ask all of you various
22 questions. So before I ask you those questions, I'm going to
23 have my clerk place you under oath to answer those questions
24 truthfully. So if you would, I'm going to ask all of our
25 prospective jurors to please stand and raise your right hand.

1 My clerk is going to administer an oath to all of you.

2 (Whereupon the prospective jurors were sworn)

3 THE COURT: Thank you very much. I'm now going to
4 go over what the qualifications are to serve as a juror, and
5 I'm going to ask if anybody feels they're not qualified. To
6 serve as a juror, you must be 18 years of age or older. You
7 must be a US citizen, a resident of Juab County, and be able
8 to read, write, and understand the English language. Is
9 there anybody present who feels that they don't meet one or
10 more of these qualifications? If so, please raise your hand?
11 I'll note that nobody is raising their hand.

12 You are disqualified from serving on a jury if you
13 have been convicted of a felony or if you're serving in the
14 active military service and jury service would interfere with
15 your mission, or if you're not capable of serving because of
16 some physical or mental disability that would interfere with
17 your ability to sit and listen, deliberate, and render a
18 verdict in this case. If any of you believe that you should
19 be disqualified from serving for one of those three reasons,
20 please raise your hand? I'll note that nobody has raised
21 their hand.

22 No qualified prospective juror is exempt for jury
23 service. However, at my discretion, you may be excused upon
24 a showing of undue hardship, extreme inconvenience, or public
25 necessity. A hardship must be a true hardship, and it cannot

1 be excused for slight or trivial causes. You cannot be
2 excused for hardship or inconvenience to your business. Keep
3 in mind that I anticipate this trial will take one day. Is
4 there anybody here who believes that they should be
5 disqualified because of undue hardship, extreme
6 inconvenience, or for public necessity? If so, please raise
7 your hand. I'll note that nobody has raised their hand.

8 At this point, I'm going to acquaint you with the
9 case by reading from the information the charges that we will
10 be dealing with. I'd like you to listen to these charges.
11 I'm going to ask you at a later time if you have heard of
12 this case or if you are acquainted with any of the facts of
13 this case. So let me make certain that you listen closely.
14 The State of Utah vs. Abisai Martinez-Castellanos. Jared W.
15 Eldridge, Juab County Attorney, state of Utah, accuses the
16 defendant, Abisai Martinez-Castellanos, of the following
17 accounts. Count one, possession of methamphetamine, a third
18 degree felony. In that Abisai Martinez-Castellanos on or
19 about June 9th, 2010 in Juab County, Utah knowingly and
20 intentionally possessed methamphetamine, a controlled
21 substance.

22 Count two, possession of hydrocodone, a third
23 degree felony. In that Abisai Martinez-Castellanos on or
24 about June 9th, 2010 in Juab County, Utah knowingly and
25 intentionally possessed hydrocodone, a controlled substance.

1 Count three, possession of a dangerous weapon by a
2 category two restricted person, a Class A misdemeanor. In
3 that Abisai Martinez-Castellanos having been convicted or
4 under indictment for a felony, or within the last seven years
5 having been adjudicated delinquent for an offense, which if
6 committed by an adult, would have been a violent felony, or
7 is under - or is an unlawful user of a controlled substance,
8 or in poss - or is in possession of a controlled substance -
9 Schedule I or II, or has been found guilty by reason of
10 insanity, not guilty by reason of insanity for a felony
11 offense, or has been dishonorably discharged from the armed
12 forces, or has renounced his citizenship on or about June
13 9th, 2010 in Juab County, Utah did possess, transfer, possess
14 - did purchase, transfer, possess, use or had under his
15 custody or control any dangerous weapon other than a firearm.

16 Count four, driving with any measurable controlled
17 substance in the body, a Class B misdemeanor. In that Abisai
18 Martinez-Castellanos on or about June 9th, 2010 in Juab
19 County, Utah did operate or was in actual physical control of
20 a motor vehicle when he had any measurable controlled
21 substance or metabolite of a controlled substance in his
22 body.

23 And count five, possession of drug paraphernalia, a
24 Class B misdemeanor. In that Abisai Martinez-Castellanos on
25 or about June 9th, 2010 in Juab County, Utah did possess with

1 the intent to use drug paraphernalia. Dated this 22nd day of
2 June, 2010. Signed by Jared W. Eldridge, Juab County
3 Attorney.

4 I'm now going to ask each of you to take just a
5 moment and stand and introduce yourselves to us. We'll start
6 up here on the lefthand side with Mr. Bradley. Not - let me
7 get - tell you what I need, and then I'll have you stand up,
8 but we'll start with Mr. Bradley and go across that top row,
9 come down here to Ms. Richardson, go across the front row,
10 then we'll move over to Ms. Jones, go across your row, and
11 then we'll move back to Mr. Lynn, and go down that row. What
12 I'd like you to do is to simply stand, tell us your name, the
13 community that you live in, and your employment. If you are
14 married, give us your spouse's name and the employment that
15 your spouse has. If you forget these items, just ask me, and
16 I'll be glad to go over them again with you.

17 Mr. Bradley, if you would start?

18 MR. BRADLEY: My name is Jeffrey Bradley. I live in
19 Eureka. I'm a [inaudible]. I'm married to [inaudible]. I
20 work in Springville at [inaudible] Tech.

21 THE COURT: Thank you very much. Next?

22 MR. MANGELSON: Paul Mangelson. I live in Levan,
23 Utah. I'm retired. My wife's name is Sandra. She's also
24 retired. I believe that's it.

25 THE COURT: Thank you very much. Ms. Sachra, is it?

1 MS. SACHRA: Uh-huh (affirmative). I'm Carolyn
2 Sachra. I'm a piano teacher. I'm retired. My husband is
3 Henry. I live in (Inaudible).

4 THE COURT: Thank you.

5 MR. SPERRY: Phil Sperry. My wife's name is
6 Dorothy. I'm 70 years old. I live in Nephi. I'm retired
7 after 42 years in [inaudible].

8 THE COURT: Thank you.

9 MS. PREVOST: My name's Stacy Prevost. I'm from
10 Nephi. I'm not married. I'm widowed, and I [inaudible].

11 THE COURT: Thank you.

12 MR. STEVENS: My name is Curt Stevens. I work for
13 Capital [inaudible] Bank. I am married, and my wife's name
14 is Etta.

15 THE COURT: Thank you.

16 MR. STEVENS: I live in Mona.

17 THE COURT: Thank you.

18 MS. RICHARDSON: I'm Shelly Richardson. I'm married
19 to Sam Richardson, and I'm a stay-at-home mother, and he
20 works at [inaudible].

21 THE COURT: Thank you.

22 MR. GREENAUSCH: Leon Greenaush. I live in Nephi.
23 My wife is Kelly. She works in Nephi.

24 THE COURT: Thank you.

25 MR. KAUFFMAN: Bob Kauffman. I live in Nephi. I

1 work at NRP, and my wife's name is Barb.

2 THE COURT: Thank you.

3 MS. LAIRD: Brittany Laird, and I live in Nephi.

4 And I'm a cosmetologist, and that's all.

5 THE COURT: Thank you.

6 MR. STEEL: I'm Rod Steel. I live in Nephi. I work
7 at Novel, and I am married to Tricia who is a stay-at-home
8 mom.

9 THE COURT: Thank you.

10 MS. JONES: I'm Lucy Jones from Nephi. I'm an
11 instructional assistant at Red Cliffs Elementary School here
12 in Nephi. I'm married to Nelson Jones, and he's a retired
13 dentist.

14 THE COURT: Thank you.

15 MR. WOOD: Gary Wood. I live in Levan. I work for
16 Ashco Cement. I'm married to Stephanie, and she works for
17 [inaudible] Town.

18 THE COURT: Thank you.

19 MS. BARNES: I'm Deborah Barnes. I'm from Mona.
20 I'm a stay-at-home mom. My husband's Val Barnes, and he
21 works for the LDS Church.

22 THE COURT: Thank you.

23 MR. FARR: My name is Chet Farr. I live in Mona,
24 Utah. I work for Big D Construction. I'm a superintendent.
25 My wife works at the Nephi Hospital as a housekeeper.

1 THE COURT: Thank you.

2 MR. DURBAN: I'm Mitch Durban. I live here in
3 Nephi. I'm a journeyman electrician. I'm married, and her
4 name's Angie.

5 THE COURT: Thank you.

6 MR. SPELT: I'm Lawrence Spelt. I'm retired from
7 Tooele Army Depot. I work at WalMart now. My wife is
8 Shirley. She sells Avon.

9 THE COURT: Thank you.

10 MS. GAGE: I'm Anna Gage. I live in Nephi. I'm a
11 widow and retired school teacher.

12 THE COURT: Thank you.

13 MR. LYNN: Kelly Lynn. I live in Nephi. I'm a
14 registered nurse.

15 THE COURT: Thank you.

16 MR. WORTHINGTON: My name's Mark Worthington. I
17 live in Nephi. I work for the Utah County Jail as a nurse.
18 My wife's name is Jody. She works for Nebo View Elementary
19 School as a teacher.

20 THE COURT: Thank you.

21 MR. ROD GREENAUSCH: Rod Greenausch. I work for
22 East Stake Consultants. I live in Nephi. My wife's a
23 registered nurse at the hospital.

24 THE COURT: Thank you.

25 MS. BLACKETT: Lisa Blackett. I live in Nephi. I'm

1 married to Morris Blackett. He works at Intermountain Power
2 in Delta. I own a dance studio, and I work for Juab High
3 School.

4 THE COURT: Thank you.

5 MR. KENDALL: Jared Kendall. I work for Tarr
6 Plumbing. My wife's Scarlet. She works for Juab School
7 District.

8 THE COURT: Thank you.

9 MR. MORGAN: Russell Morgan. I live in Nephi. My
10 wife's Betty. We're both retired.

11 THE COURT: Thank you.

12 MS. KAY: Kim Kay. Mona, Utah, and I do mortgage
13 lending.

14 THE COURT: Thank you.

15 MS. JACOBSON: I'm Lisa Jacobson. I live in Nephi.
16 My husband's Brian. We own Sunset Rental, a fabrication
17 company, and I'm a stay-at-home mom, except on Tuesdays I do
18 our payroll.

19 THE COURT: Thank you very much. As jurors in this
20 case, you will be the sole triers of the fact. This means
21 that you're going to determine what the true facts in this
22 matter are. As the judge, I'm referred to as the court. My
23 constitutional and statutory duty is to preside over this
24 case to see that the law and procedures are followed and to
25 instruct you on - as jurors on what the law is that's

1 applicable to this case. I do not personally create this
2 law. I simply instruct on what the law is as set forth in
3 our federal constitution, our state constitution, and the
4 acts of our legislators in passing their laws as well as the
5 laws that are interpreted by supreme courts and courts of
6 appeal. Are you willing to accept all of the statements that
7 I tell you as to what the law is, regardless of what you
8 personally believe the law is or ought to be? If not, please
9 raise your hand. Nobody has raised their hand.

10 Under our constitutional system of justice, a
11 person is presumed innocent unless they are proven guilty
12 beyond a reasonable doubt. This is the highest standard of
13 proof known in the law. The mere fact that somebody has been
14 charged with a crime is not evidence that that person has
15 committed a crime, and it creates no presumption that the
16 person has committed a crime. Is there anybody who disagrees
17 with or has any problems with the principle that I just
18 stated? If so, please raise your hand. I'll note that
19 nobody has raised their hand.

20 If chosen as a juror, you must try this case solely
21 upon the evidence that's provided by witnesses appearing
22 before you and the exhibits or physical evidence that's
23 presented in this courtroom today. You are not to rely on
24 any information that's obtained outside of the testimony and
25 the exhibits presented in this case. If there's anybody who

1 believes they cannot try a case solely based on testimony and
2 evidence presented in this courtroom today, please raise your
3 hand? I'll note that nobody has raised their hand.

4 I'm now going to ask the attorneys in this case to
5 stand and introduce themselves. I want them to describe who
6 they represent, and also state what witnesses they intend to
7 call, and I'll also talk about who their associated attorneys
8 are that work with them. Listen closely, because after they
9 introduce themselves, their witnesses, and their associated
10 attorneys, I'm going to ask you about how you might know
11 these people or might have some relationship to them.

12 So let's begin with the State. Mr. Eldridge?

13 MR. ELDRIDGE: Thank you. My name is Jared
14 Eldridge. I'm the Juab County Attorney. I'll be
15 representing the state in this case today. As far as
16 witnesses go, we only intend to call one witness today, and
17 that would be Trooper John Sheets, who is sitting here. And
18 attorneys that are associated with our office, we have Ann
19 Marie Howard, who used to be Ann Marie Trompvine for those of
20 you who have been here a while. She works in our office on a
21 part time basis. We also have Perry Davis who works in our
22 office. He's married to Molly. It used to be Molly Painter
23 for those of you who know the Painter family, and he also
24 works in our office, although he's been recently activated,
25 he's serving in Hawaii right now.

1 THE COURT: Thank you.

2 Mr. Harmon?

3 MR. HARMON: My name is Milton Harmon. I am the
4 defense attorney in this case and represent my client, Abisai
5 Martinez-Castellanos, and I don't speak Spanish well. So I
6 can't pronounce his name exactly, but that's the way I say
7 it, and Mr. Castellanos will be testifying in his own behalf.

8 THE COURT: Thank you.

9 Now, I need to ask of the prospective jurors if any
10 of you are related by blood or as an in-law to any party,
11 witness, attorney, or associated attorney in this case? If
12 so, please raise your hand. I'll note that nobody has raised
13 their hand.

14 Do any of you have a professional, business or
15 financial relationship to any party, witness, attorney, or
16 attorneys associate? These relationships can include such
17 associations as debtor/creditor, employer/employee, partner,
18 landlord/tenant, or so on. If any of you have such a
19 relationship with any of the parties, witnesses, attorneys,
20 or associate attorneys, please raise your hand? I'll not
21 that nobody has raised their hand.

22 Do any of you have a social, religious, neighborly,
23 or other such acquaintance with any of the parties,
24 witnesses, attorneys, or associate attorneys that you were
25 introduced to? If so, please raise your hand. I see a

1 couple of hands coming up. Just so that I can mark all of
2 these down, I'm going to go through it kind of orderly.

3 You're Mr. Sperry? Is that correct?

4 MR. SPERRY: Yes.

5 THE COURT: Thank you, Mr. Sperry.

6 As I ask these questions and as you raise your
7 hands, we're just going to make note of that. I'm not going
8 to ask you to describe anything in open court right now. It
9 may be that the attorneys will want to ask you more questions
10 about that later. We'll go into a place where we can have
11 some privacy and discuss it.

12 So, Mr. Sperry, you've indicated yes to this
13 question.

14 Did I see another hand over here? And that would
15 be Ms. Richardson? Is that correct? Anybody else on this
16 side of the room? Okay. Turning over to the other side of
17 the room, I saw quite a few hands. Mr. Wood, and is that Mr.
18 Farr? No. Mr. Durban? Is that correct, Mr. Durban? Thank
19 you. Anybody else on the front row? Okay. Then on the back
20 row, I see Mr. Greenausch, and is that Mr. Kendal? No. Mr.
21 Morgan? Thank you, Mr. Morgan. And Ms. Jacobson? Thank you
22 very much. Is there anybody who has a relationship, as I've
23 just described, whose name I haven't called? Okay, thank
24 you.

25 Do any of you have a relationship with any other

1 prospective juror in this courtroom where you have a position
2 of authority over that prospective juror or they have a
3 position of authority over you, such as at work, at church,
4 or in organizations, or otherwise? If so, please raise your
5 hand. I'll note that nobody has raised their hand.

6 Do any of you have a family member or a close
7 personal friend who is a law enforcement officer or works for
8 a law enforcement department? If so, please raise your hand.
9 Okay. Mr. Sperry and Ms. Laird; is that correct? Anybody
10 else on this side? Then we'll go over to the other side.
11 Ms. Jones, I see your hand. Mr. Wood, your hand. That would
12 be Mr. Bell? Thank you, Mr. Bell, and Mr. Lynn, Mr.
13 Worthington. Anybody else whose hand is raised whose name I
14 didn't call? Thank you.

15 Have you, a family member, or a close personal
16 friend been a victim of a crime? If so, please raise your
17 hand. Ms. Sachra, Mr. Sperry. Thank you. Anybody else on
18 this side? Then going over to the other side I see on the
19 front row Mr. Bell. On the back row I see Ms. Blackett, Mr.
20 Kendal, and Ms. Kay. Is that correct? Anybody whose name I
21 haven't called? Thank you. Have you, a family member, or a
22 close personal friend been a defendant in a criminal case?
23 If so, please raise your hand. Mr. Steel. Is that Mr. Farr?

24 MR. FARR: Yes.

25 THE COURT: Thank you.

1 I see Ms. Jacobson stand. Anybody else whose name
2 I haven't called? Thank you.

3 Please raise your hand if because of hearing about
4 this case outside of court, you have any knowledge of the
5 facts involved or have formed or expressed an opinion with
6 respect to this case or the facts in this case. I'll note
7 that nobody has raised their hand.

8 Have any of you previously served on a jury? If
9 so, please raise your hand. I see Ms. Gage. Ms. Gage, may I
10 just ask was it a civil or a criminal jury?

11 MS. GAGE: Criminal.

12 THE COURT: And how long ago was that?

13 MS. GAGE: About five years ago.

14 THE COURT: And where was that?

15 MS. GAGE: Bakersfield, California.

16 THE COURT: Thank you.

17 Anybody else? I see another hand back here, and
18 that's Ms. Blackett's?

19 MS. BLACKETT: Uh-huh (affirmative).

20 THE COURT: And, Ms. Blackett, how long ago was
21 that?

22 MS. BLACKETT: It was probably about 15 years ago.

23 THE COURT: And was that civil or criminal?

24 MS. BLACKETT: It was criminal and here.

25 THE COURT: You said that was here in Nephi?

1 MS. BLACKETT: Uh-huh (affirmative).

2 THE COURT: Okay, thank you. Anybody else? Thank
3 you.

4 Have you, a family member, or a close friend been
5 involved with the same alleged conduct which is charged in
6 this case? If so, please raise your hand. That would be Ms.
7 Provost. Is that correct? Anybody else? I see Ms. - excuse
8 me. I'm sorry. Ms. Blackett's hand.

9 MS. BLACKETT: Yes.

10 THE COURT: Thank you.

11 The question is whether you, a family member, or a
12 close friend has been involve with the same kind of conduct
13 that is being discussed in this case? Okay. So Ms. Sachra
14 also. Anybody else? I see Ms. Kay and Ms. Jacobson's hands.
15 Thank you. Anybody else whose name I haven't called? Okay.

16 The statement of counsel - the statements of
17 counsel and their questions are not evidence, and they're not
18 to be considered as evidence. The evidence you will consider
19 is only the testimony and exhibits presented to you by the
20 witnesses inside the courtroom. Please raise your hand if
21 there's any reason best known to you why you could not try
22 this case fairly and impartially based solely on the evidence
23 without any bias or prejudice for or against either party?
24 I'll note that no hands have been raised.

25 If you were a party in this case, either the state

1 or the defendant, would you be fully satisfied to have your
2 case tried by a person of your present attitude and frame of
3 mind towards this case? If not, please raise your hand.

4 I'll note that no hands were raised.

5 Counsel, that concludes the voir dire that I'm
6 going to conduct in court. For members of the prospective
7 jury, I'm going to take a break now and meet with counsel in
8 my chambers, and they will determine any additional questions
9 that they'd like to ask. They may ask questions of each of
10 you or only some of you. You're free to walk about, stretch
11 your legs. Stay in the courtroom, because we may be calling
12 you. I'm going to ask you to not discuss this case or the
13 fact that we're here on this case with each other while we're
14 taking this break. You can talk about the weather. You can
15 talk about sports. You can talk about anything else, but
16 let's not discuss this case at this time. I will be in a
17 brief recess until we come back in, which may be in a few
18 minutes.

19 Counsel, if you'll just join me back in my
20 chambers, I'd appreciate it.

21 (PROCEEDINGS IN CHAMBERS)

22 THE COURT: You can certainly call him in and ask
23 him. Who do you want to start with?

24 COURT CLERK: Mr. Bradley?

25 THE COURT: Counsel may have a few questions for

1 you.

2 TIME 9:38:52 TO 10:31:59 (Microphone left open in courtroom
3 overlapping chamber audio, rendering proceedings in chambers
4 to be unintelligible.

5 PROCEEDINGS IN OPEN COURT

6 THE COURT: Thank you. Please be seated. We
7 appreciate your patience. The processes we go through may be
8 a little bit deliberate and slow, but they're done for a
9 reason. This is the time now for what we refer to as the
10 peremptory challenges. Counsel is going to review the list
11 of prospective jurors. They're going to make some
12 selections. Eventually, they'll return that list to me, and
13 I'll announce those who are going to be remaining as jurors
14 and those who will be excused.

15 While they're going through this process, I tend to
16 take this time just to inform you a little bit about the jury
17 process, because there are some very common questions that
18 people have. I'll address those questions. I know that
19 people oftentimes thinks that a jury consists of 12 jurors,
20 and that may be what happens because we watch movies, and
21 read books, and watch TV shows. The reality is that most of
22 the juries that are called are not 12. In Utah, we do
23 reserve the right to a 12-member jury panels, but that's only
24 for the most serious of all criminal types of cases.
25 Generally speaking, most juries consist of eight. Sometimes

1 juries might consist of six. We even have juries that
2 consist of four jurors, and it depends on the nature of the
3 issues that are being resolved and the severity of the crimes
4 that are charged exactly how we determine the number of
5 jurors. So in this case today, it will be an eight-man jury
6 - an eight person jury.

7 The other question that sometimes comes up is is it
8 necessary for all of the jurors to agree, or is it adequate
9 just to have a majority of the jurors? And I'll tell you
10 that in a civil case, the majority of the jurors can make a
11 determination. In a criminal case, it takes a unanimous
12 verdict. All jurors must come to an agreement, and you've
13 probably seen or heard or read about cases where they talk
14 about a jury that can't come to a unanimous decision as being
15 a hung jury. So in criminal cases, it does require that we
16 have, however many jurors we have, that they come to a
17 unanimous decision before we can announce a verdict, and
18 that's part of the deliberation process, and I'll discuss
19 that a little bit further when we get jury instructions to
20 you. At this time, we really will just be waiting for
21 counsel to make their decisions, and so we'll pass this time
22 kind of quietly meditating. And when they're through, I'll
23 proceed.

24 (10:34:24 to 10:41:30 no proceedings)

25 THE COURT: Thank you.

1 I'll now call off the names of those who will
2 remain as jurors. If I don't call your name, then in advance
3 let me tell you thank you for the time that you have served.
4 Your presence here has made it possible for us to seat a jury
5 today. At an appropriate time, I will excuse those who are
6 not remaining. But those who will remain when I excuse the
7 others will be Mr. Manglesen, Ms. Sachra, Mr. Sperry, Ms.
8 Prevost, Mr. Steel, Ms. Jones, Mr. Farr, and Mr. Durban. If
9 I have not called your name, thank you very much for your
10 time spent this morning allowing us to select this jury.
11 We'll excuse you now and with our appreciation. Thank you.

12 BAILIFF: All arise.

13 (Whereupon the excused jurors left the courtroom).

14 THE COURT: If I could have Ms. Jones, Mr. Farr, and
15 Mr. Durban - if I could have the three of you come over here?
16 I'll have my bailiff seat you. If you'll take - starting
17 with Mr. Manglesen whose number one in the four chairs to the
18 right on the back row and then the front row?

19 (Whereupon the jury was seated)

20 THE COURT: Thank you. Please be seated.

21 Counsel, does this constitute the jury you
22 selected?

23 MR. ELDRIDGE: Yes, Your Honor.

24 MR. HARMON: Yes.

25 THE COURT: Very well. I'm going to have the clerk

1 now take a moment and have you all be administered a
2 different oath. Previously, you took an oath to answer
3 questions concerning your qualifications. Now, you're going
4 to take an oath as the juror selected. It's a different
5 oath. So listen to what it is she's asking you to say.

6 Go ahead.

7 If you'd all rise and raise your right hand?

8 (Whereupon the jury was sworn)

9 THE COURT: Thank you. Please be seated. We're now
10 going to take a brief recess. That will allow you, if you
11 need to, to make phone calls, to make arrangements, if there
12 are any that need to be made, stretch your legs, go to the
13 restroom, get a drink. We'll start in in earnest with our
14 evidence as soon as you return. It's now almost quarter to
15 11:00.

16 Counsel, do we need 10 or 15 minutes? What would
17 you suggest?

18 MR. ELDRIDGE: Ten minutes should be enough.

19 THE COURT: Ten minutes? If I could have everybody
20 back here then at five minutes to 11:00, we'll begin our
21 trial at that time.

22 During any recess, whether it's this one or any
23 other, you're welcome to mull about, talk with each other
24 about sports, weather, public interests, community
25 activities, Halloween, whatever you want. Just not about

1 this case, and you'll hear from me in just a moment other
2 instructions I'll give you. You're not to discuss anything
3 regarding this case with any of the parties, witnesses, or
4 attorneys in the case, or my staff. You can always ask the
5 bailiff if you need directions to facilities in the building,
6 but not to discuss the case. Okay? With that in mind, we'll
7 excuse the jury, and we'll be in recess for another 10
8 minutes.

9 THE COURT: The jury's excused.

10 (Whereupon the jury left the courtroom).

11 THE COURT: Counsel, are there any items that you
12 would like to place on the record before we begin?

13 MR. HARMON: None from the defense.

14 THE COURT: Okay.

15 MR. ELDRIDGE: None.

16 THE COURT: We'll be in recess then for another 10
17 minutes. Thank you.

18 (Whereupon a recess was taken)

19 THE COURT: Thank you. The jury is back. Please be
20 seated.

21 Members of the jury, as you've returned to your
22 seats, you'll see that we've left a copy of preliminary jury
23 instructions for you on your seat. It's my responsibility to
24 instruct you on the laws, not only as to the case, but also
25 as to the procedures that we follow. So if you'll read along

Addendum B

ORIGINAL

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
JUAL COUNTY

Linda M. Jones (5497) 14 MAR 18 PM 12:36
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FILED
UTAH APPELLATE COURTS
FEB 13 2014

*Attorneys for Appellant Abisai
Martinez-Castellanos*

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

ABISAI MARTINEZ-CASTELLANOS.

Defendant/Appellant.

**DECLARATION OF
MILTON T. HARMON**

No. 20130432-CA

Fourth Judicial District Court
Case No. 101600146

I, Milton T. Harmon, declare under criminal penalty of the State of Utah that the foregoing is true and correct:

1. I am an attorney duly licensed to practice law in the State of Utah. I represented Abisai Martinez-Castellanos in the above-referenced proceedings in the Fourth Judicial District Court, Case No. 101600146.
2. I have reviewed portions of the record in the district court file including record excerpts relating to jury selection and the examination of witnesses. No transcript or report is available for three points in the proceedings.
3. **First, no transcript or report is available for portions of the jury voir dire and selection.** The trial transcript indicates that during voir dire, the microphone

was left open in the courtroom, “rendering the proceedings in chambers to be unintelligible” for approximately one hour of time—from 9:38:52 to 10:31:59. (Trial Transcript at 22.) As a result, there is no record of follow up questions to prospective jurors.

4. I am providing this statement of the proceedings based on my best recollection.

a. After Judge Brady asked general questions to the jury pool, he requested that Mr. Eldridge and I join him in chambers to ask follow up questions of selective venire members. (Trial Transcript at 21.) My client, Mr. Martinez-Castellanos, was not invited in chambers.

b. While in chambers, Judge Brady went through the list of prospective jurors. He read each name and asked if either Mr. Eldridge or I had follow-up questions for the prospective juror. After the judge had compiled the list of individuals we wished to question, he invited each prospective juror on the list into chambers one at a time.

c. Although I do not have a specific recollection of the circumstances surrounding the individual questioning of some of the prospective jurors, Judge Brady generally proceeded in the same fashion. He would explain the process to the prospective juror and then invite Mr. Eldridge or me to ask our questions. The prospective juror would answer and after we completed our questioning, Judge Brady asked the juror if he or she could be fair and impartial. The judge then excused the individual and asked if the attorneys had any objections or whether we passed the prospective juror for cause.

d. To the best of my recollection, the following prospective jurors were called into Judge Brady's chambers for questioning: Paul Mangelson, Carolyn Sachra, Phil Sperry, Shelly Richardson, Brittany Laird, Rodney Steele, Lucy Jones, Gary Wood, Chet Farr, and Mitchell Durbin. There may have been others but I do not recall anything about them.

e. I do not remember any particular in-chambers discussion between Judge Brady, Mr. Eldridge, and me about the individuals listed in paragraph 4.d. either before each individual entered the judge's chambers or after they left. I do remember generally why each prospective juror was called into chambers for further questioning. But I do not remember who asked the questions, I do not remember the specific questions, and I do not recall each prospective juror's answers.

f. I do recall the following as to the list of prospective juror and the missing portions of the voir dire and jury selection.

i. Judge Brady called Paul Mangelson into chambers for further questioning. Although I don't remember who, someone expressed concern about Mr. Mangelson's many years of experience as a highway patrolman and his past involvement in so many jury trials. I do not remember any specific questions or answers, but Paul Mangelson would have assured us that he knew how to be fair, and that he could be fair, if selected as a juror. After Mr. Mangelson left the judge's chambers, I do not recall that we had any particular discussion about him although I recall that he was passed for cause. In addition, I did not object to Mr. Mangelson serving on the jury because he had been a supervisor on highway patrol when I was a district attorney for Juab County. I knew he

had done a lot of work on freeway stops and I thought he would hear the evidence of how this stop occurred and know that it was not proper.

ii. Judge Brady called prospective jurors into chambers because they indicated during general questioning that they were acquainted with someone in law enforcement. I believe those jurors included Phil Sperry, Brittney Laird, Rodney Steele, Lucy Jones, Gary Wood, and Mitchell Durbin, who had also served previously as a juror in a criminal case. For most of those individuals, I cannot recall what they were asked and I cannot recall their responses. I do not recall any of the details of Mr. Durbin's previous service as a juror. I do have some specific recollections about two of the prospective jurors—Phil Sperry and Lucy Jones.

iii. Phil Sperry disclosed that he is a good friend of Paul Mangelson and acquainted with law enforcement. I believe I asked if he could be fair and impartial. I do not recall anything else about Phil Sperry.

iv. As to Lucy Jones, I recall that during in-chambers questioning, she was quite reluctant to disclose what was going on in her own mind. I recall that when Judge Brady asked whether she could be fair and impartial, she had reservations about her ability to function as a juror. Because of her reluctance, Judge Brady asked the question a second time, and Ms. Jones replied that she understood what the judge wanted and she believed she could serve as a juror. After Ms. Jones left the judge's chambers, no one objected to her service as a juror and she was passed for cause.

v. Four prospective jurors were called into chambers for questioning because they indicated they had been or were related to victims of crime or

were otherwise familiar with the criminal justice system. Those jurors included Carolyn Sachra, Phil Sperry, Shelly Richardson, and Chet Farr. I do not have any specific recollection of questioning those prospective jurors, but I do recall that Phil Sperry disclosed that his daughter had been a victim of crime and the crime occurred at his home. In addition, Shelly Richardson ran a business in town and she had been a victim of a crime. One of her employees committed theft. I believe Mr. Eldridge asked if she was satisfied with how his office had handled the case. I do not recall her answers. I believe Judge Brady asked if she could be fair and impartial and she said she could. Also, Chet Farr's son had been involved with criminal law either as a victim or perpetrator. I believe Mr. Eldridge asked if Mr. Farr was satisfied with how the prosecution handled the case. I do not recall Mr. Farr's answer.

vi. After reviewing my notes, I recall that I exercised 4 peremptory strikes to exclude the following individuals from the jury: Jeffrey Bradley, Kert Stevens, Ryan Greenhalgh, and Gary Wood. I have no recollection as to why I wanted any of these individuals excluded from the jury.

5. I do not recall that I had any conversations with my client about any part of the jury selection process. He was not in chambers and not involved in the process.

6. **Second, no recording or transcript is available for several minutes after the court took a recess at the conclusion of Trooper Sheets's testimony and during a portion of Mr. Martinez-Castellanos's testimony.** The record of the trial proceedings shows that from 2:13:02 to 2:47:43, for more than 34 minutes, the recording equipment was off. During that period, "a recess was taken." The trial transcript states

the following: "Docket shows further examination of Mr. Sheets at 2:32 and testimony of Mr. Martinez-Castellanos starting at 2:34 indicating 15 minutes of lost court audio."

(Trial Transcript at 126.)

a. As to those proceedings, I have no recollection of whether a juror had a question of Trooper Sheets or whether Judge Brady asked a question on behalf of a juror after the recess.

b. As to the missing portions of Mr. Martinez-Castellanos's direct examination, I do not recall specifics, but to the best of my recollection, I would have asked him his name, where he lived, how he came to possess the car he was driving, and how long he had owned the car before driving to Utah. I asked him to describe the condition of the car and whether he took time to clean it after buying it. I also asked whether he was aware of any drugs in the car; and I asked him to describe the drive and his encounter with the officer.

c. To the best of my recollection, Mr. Martinez-Castellanos answered as follows:

i. Mr. Martinez-Castellanos lived in California. He worked in a warehouse and used box cutters and a pocket knife in his work.

ii. He had family in Utah and his brother was going to school here. Mr. Martinez-Castellanos was proud of him.

iii. Mr. Martinez-Castellanos was traveling here for his brother's graduation. He needed a working car and he found one at a dealership.

iv. The dealer told him the car was recently brought in and the dealer did not have time to clean it.

v. Although the car was quite cluttered, Mr. Martinez-Castellanos decided to buy it to give to his brother as a gift. He paid \$400 for the car. Also, he did not have time to clean it.

vi. On June 9, 2010, Mr. Martinez-Castellanos left for Utah immediately after he worked a long shift at the warehouse. He did not pack much and he placed items in the console, including the box cutter, the pocketknife, a lighter and a marijuana grinder.

vii. To keep himself alert, Mr. Martinez-Castellanos stopped at a truck stop / gas station and purchased an energy drink for the drive, either Red Bull or Rock Stars. He drank the energy drink while he was on the road.

viii. Mr. Martinez-Castellanos described how he was traveling northbound on I-15 and a Utah trooper was traveling southbound when the trooper made a U-turn with lights engaged to follow Mr. Martinez-Castellanos. In addition, he described how the trooper drove beside him and then pulled back behind Mr. Martinez-Castellanos with his lights on to signal a traffic stop. Mr. Martinez-Castellanos pulled onto the shoulder of the interstate.

ix. He described that later, after the trooper asked him to get out of the car, he told the trooper about his box cutter, the pocketknife, and his marijuana grinder and lighter in the console. He acknowledged to the officer that those items

belonged to him and he explained that he had permission from a California doctor to use medical marijuana, where it is legal in that state.

x. Mr. Martinez-Castellanos testified that other items found in the car, including a white substance wrapped in paper, pills, cellophane with residue, a twist, and a glass pipe with white residue did not belong to him.

xi. He explained that many of the items in the car were there along with the clutter when he purchased the car.

d. I observed from the trial transcript that when the recording starts again after recess, the discussion on the record concerns a certain Exhibit 14—my client's medical marijuana prescription. I do not recall how this discussion was initiated, nor do I remember any conversations on or off the record involving this exhibit.

7. **Third, no recording or transcript is available for a post-trial conference in Judge Brady's chambers.** My best recollection of those proceedings is as follows:

a. After the trial, I filed a Motion for Judgment Notwithstanding the Verdict. I did not file a memorandum supporting this motion because I did not have time to prepare one. As a public defender, I have a very high case load.

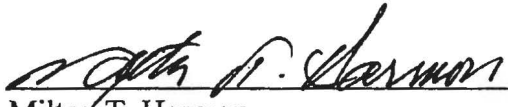
b. Sometime after I filed my motion, during a regular court session, Judge Brady asked the prosecutor and me to join him in chambers to discuss concerns he had with the jury trial. Once in chambers, the judge voiced two concerns. First, the judge expressed concern that Paul Mangelson served on the jury and that I did not strike him. Second, the judge expressed concern that the trooper who testified at trial may not

have had a legal justification for a search and seizure. Judge Brady was also concerned that I did not do more at the trial to bring this fact to light.

c. Although Judge Brady gave both the prosecutor and me an opportunity to respond, I do not recall what, if anything, either of us said.

d. I later learned that Judge Brady spoke to another public defender, Tate Bennett, and he asked Mr. Bennett to prepare an amicus brief for the court.

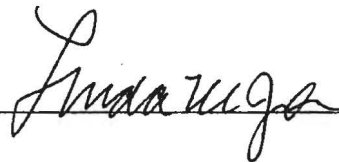
Executed on this 12th day of February, 2014.


Milton T. Harmon

CERTIFICATE OF SERVICE

I certify that on the 13th day of February, 2014, I caused a true and correct copy of the foregoing Declaration of Milton T. Harmon to be served on the following via first-class mail, postage prepaid:

Laura B. Dupaix
Office of the Utah Attorney General
PO Box 140854
Salt Lake City, UT 84114-0854



Addendum C

ORIGINAL

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FILED IN
4TH DISTRICT COURT
STATE OF UTAH
JUAB COUNTY

14 MAR 18 PM 12:36

101600146

FILED
UTAH APPELLATE COURTS

FEB 13 2014

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

ABISAI MARTINEZ-CASTELLANOS.

Defendant/Appellant.

**DECLARATION OF
JARED W. ELDRIDGE**

No. 20130432-CA

Fourth Judicial District Court
Case No. 101600146

I, Jared W. Eldridge, declare under criminal penalty of the State of Utah that the foregoing is true and correct:

1. I am County Attorney for Juab County and duly licensed to practice law in the State of Utah. I represented the State of Utah in the above-referenced proceedings in the Fourth Judicial District Court, Case No. 101600146.

2. I have reviewed portions of the record in the district court file including record excerpts relating to jury selection and the examination of witnesses and my notes. No transcript or report is available for two points in the proceedings.

3. First, no transcript or report is available for portions of the jury voir dire and selection. After Judge Brady asked general questions of the jury pool, he

04117

requested that counsel join him in chambers to ask follow up questions of selective venire members. (Trial Transcript at 21.) At that point, the trial transcript indicates that during voir dire, the microphone was left open in the courtroom, “rendering the proceedings in chambers to be unintelligible” for approximately one hour of time—from 9:38:52 to 10:31:59. (Trial Transcript at 22.) As a result, there is no record of follow up questions to prospective jurors.

4. I am providing this statement of the proceedings based on my best recollection.

5. I believe that while we were in chambers, Judge Brady went down the list of prospective jurors and asked the attorneys if they had questions for anyone on the list. If we did, the judge would call that person into chambers for questioning. The in-chambers proceedings then continued generally as follows.

6. Either Mr. Harmon or I would ask the prospective juror our questions and after he or she answered, the judge would excuse the individual and ask Mr. Harmon and me if we had any concerns with this particular person serving on the jury. If we did not express concerns, that individual remained on the jury list and Judge Brady called the next person into chambers for further questioning.

a. I believe Judge Brady called juror number one, Jeffry Bradley, into chambers. Although I do not recall anything about Mr. Bradley, I believe he disclosed that a family member was charged with a crime. I may have asked about his experience with the criminal justice system and whether he felt either that he was treated fairly or that his family member was treated fairly. I do not have a specific recollection of his

answers. Because I did not object to him, I believe he expressed that he felt the process was fair. If he had answered otherwise, after Mr. Bradley left chambers I would have asked the judge to strike him for cause.

b. I believe Judge Brady next called Paul Mangelson into chambers for further questioning. I recall that the questions involved his work as a trooper for approximately 40 years and his assignments relating to drug interdiction. I may have asked Mr. Mangelson if, in his capacity as a sergeant, he supervised Trooper John Sheets. He disclosed that he knew Trooper Sheets but did not supervise him. I believe Mr. Harmon asked Mr. Mangelson if he would give Trooper Sheets's testimony more weight. Also, the judge may have asked follow-up questions, but I do not recall. I do recall that Mr. Mangelson said he would make up his mind based on the facts presented in court and he would not give the officer's testimony more weight. After Mr. Mangelson left, he remained on the list of jurors as I had no reason to ask the judge to strike him.

c. Judge Brady next called Carolyn Sachra into chambers for further questioning. She indicated she was a victim of rape. In addition, her son had been prosecuted in California for drugs. She said she was against drugs. She also said that if a person had drugs in the car, they were probably guilty. After Ms. Sachra left, I do not recall any conversation about striking her for cause.

d. Judge Brady called Phil Sperry into chambers. He has multiple sclerosis and I recall we had a conversation about his cane because the handle is a baseball. Mr. Sperry is in Mr. Harmon's LDS Ward. Either he or Mr. Harmon disclosed they had known each other for years. I believe I asked whether Mr. Sperry could make a

decision based on the facts and not on his relationship with Mr. Harmon. I may have asked, "if you thought the evidence was sufficient, if you thought the client was guilty, would you feel you have to explain yourself to Mr. Harmon?" I recall that he answered no. Also, Mr. Sperry revealed that his daughter was a dispatcher in law enforcement. I believe I would have asked if he would consider a witness in law enforcement to be more credible. I believe he would have said no. Mr. Sperry also disclosed that he was a victim of crime or he was related to a victim, but I do not remember the crime. I may have asked him whether he felt that the criminal justice system worked or whether it left a bad taste in his mouth. I believe he gave an innocuous answer.

e. Judge Brady called Stacey Provost into chambers. She is a widow. She indicated she is a former drug user. Although she had used methamphetamine and pain medications, she had been clean for 6 years. I believe I asked whether she had an opinion about legalizing drugs. She expressed that medical marijuana should be okay.

f. Judge Brady called Shelly Richardson into chambers. I do not recall the specifics but believe she knew Mr. Harmon socially.

g. Judge Brady called Brittney Laird into chambers. During the in-chambers discussion, it came out that her ex-husband is a former highway patrolman. He worked with Paul Mangelson and John Sheets, and he left the force under a cloud of suspicion. He has had issues with substance abuse. I believe I asked her questions about prosecuting him for violating a protective order. Also, I believe someone asked her whether she knew Mr. Mangelson or Trooper John Sheets. I do not recall her answers

although I believe she would have said that she would make a decision in the case based on the facts.

h. Judge Brady called Rodney Steele into chambers. During the discussion, he indicated he had been convicted twenty-two years ago of poaching. I do not have a specific recollection, but I believe he expressed he was treated fairly.

i. Judge Brady called Lucy Jones into chambers. During the discussion, it came out that she is either related to or close friends with the Chief of Police for Nephi City, Mike Morgan. I believe someone asked whether that relationship would cause her to give more credibility to law enforcement. I do not recall her answer but believe she said it would not influence her.

j. Judge Brady called Gary Wood into chambers. It came out that Mr. Wood had social relationships with the attorneys and associations with law enforcement. He served as an LDS bishop when I served as an LDS Stake Young Men's President and Mr. Harmon was Stake Sunday School President. I believe I asked whether Mr. Wood's relationships and associations would cause him to lean one way or another; whether he would feel a need to justify himself if he believed the evidence was not sufficient to convict; and whether he would consider testimony from law enforcement to be more credible than testimony from a lay witness. I do not recall his answers but I believe he answered no.

k. I believe Judge Brady called Debra Barnes into chambers. She disclosed that her daughter was a victim of sexual assault. I believe we talked about that. I would have asked about her feelings for the prosecution and whether the sexual assault

case left a bad taste in her mouth. I do not remember her response, but I recall it did not cause me to be concerned in any way.

l. Judge Brady called Chet Farr into chambers. His son had been criminally charged. I believe I asked whether he felt his son was treated fairly. Mr. Farr answered, yes, that his son should be held accountable for what he had done.

m. Judge Brady also called Mitchell Durbin into chambers. I know Mr. Durbin as a referee for church basketball. Mr. Durbin may also have an association with Mr. Harmon or law enforcement. I do not recall anything in particular about the in-chambers discussion with Mr. Durbin.

7. After we completed the in-chambers voir dire with the prospective jurors, the judge would have asked whether we passed each prospective juror for cause. I do not have a specific recollection of that conversation, but that is how the judge normally would proceed. I recall we had a discussion as to whether we needed to talk to any additional prospective jurors or if we had enough jurors to exercise peremptory challenges and to seat an eight-person jury. We all agreed that we had talked to enough prospective jurors. The judge then asked whether we passed the panel for cause, and he requested that we return to the courtroom to finish jury selection.

8. **Second, no recording or transcript is available for several minutes after the court took a recess at the conclusion of Trooper Sheets's testimony and during portions of Mr. Martinez-Castellanos's testimony.** The record of the trial proceedings shows that from 2:13:02 to 2:47:43, for more than 34 minutes, the recording equipment was off. During that period, "a recess was taken." The trial transcript states

the following: "Docket shows further examination of Mr. Sheets at 2:32 and testimony of Mr. Martinez-Castellanos starting at 2:34 indicating 15 minutes of lost court audio."
(Trial Transcript at 126.)

9. I have reviewed the transcript pages at issue and my best recollection is as follows.

a. After the recess, Judge Brady advised us that a juror asked to read the toxicology report. I requested that exhibits 2 and 3 be published to the jury for them to review. I then announced to the court that the State would rest.

b. As to the missing portions of Mr. Martinez-Castellanos's direct examination, my best recollection is that he testified to the following:

i. Mr. Martinez-Castellanos was driving from California to Salt Lake City for his brother's graduation. He had been on the road for 12-13 hours.

ii. He had worked in a warehouse for 9 or 10 hours before traveling to Utah.

iii. He did not pack much.

iv. He drove an Acura that he had purchased possibly from an auction or from a used car dealer a month earlier. It was trashy inside. He did not clean it. Nevertheless, he was taking it to his brother as a graduation present.

v. The registration showed that the car had been registered three months earlier.

vi. With the exception of items used for marijuana, including a grinder and lighter which Mr. Martinez-Castellanos admitted belonged to him, he denied knowing anything about drugs or drug items in the car.


vii. Mr. Martinez-Castellanos has problems with his back. He saw a doctor and had a prescription for Percocet but did not like it. He was under doctor's orders to use medical marijuana.

viii. Mr. Martinez-Castellanos described how on June 9, 2010, he was northbound on the interstate. A patrol car was traveling in the opposite direction with emergency lights on, and as the cars reached the same point, the officer made a U-turn. The officer quickly approached Mr. Martinez-Castellanos from behind with his emergency lights on. The officer continued northbound driving beside Mr. Martinez-Castellanos's car. He then turned off his overhead lights, turned them on again and pulled behind Mr. Martinez-Castellanos for the stop.

ix. Mr. Martinez-Castellanos kept the car registration in the glove box.

10. I have attached my notes for jury selection and for Mr. Martinez-Castellanos's direct examination.

Executed on this 12 day of February, 2014.

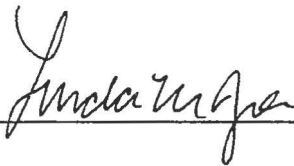


Jared W. Eldridge
Juab County Attorney

CERTIFICATE OF SERVICE

I certify that on the 12 day of February, 2014, I caused a true and correct copy of the foregoing Declaration of Jared W. Eldridge to be served on the following via first-class mail, postage prepaid:

Laura B. Dupaix
Office of the Utah Attorney General
PO Box 140854
Salt Lake City, UT 84114-0854



Defendant

Notebook: Cases

Created: 11/1/2012 1:35 PM

Updated: 11/1/2012 2:15 PM

Location: Juab County, Utah, United States

Going to SLC
Brother graduated
Traveling from CA
TRAVELING 12-13 hrs
Working in a warehouse
Worked 9-10 hrs before left to Utah
Didn't pack much
Drove Acura
Had car 1 mo. (Registration shows 3 mos)
Purchased vehicle from used car dealer
Trash inside
Did not clean the car
Not aware of drugs in car
Trooper came up behind him quick, pulled beside him turned off lights
Had just registered
Kept registration in glove box
Cleaned glove box & center console
Has had problems w/ back
Had Percocet didn't like
Back problems
Saw a Dr.
Began using marijuana as a result of Dr.
Person traded in 2 days before he purchased was not using meth or hydrocodone

Redirect

Would put knives in console for work

Addendum D

FILED IN
4th JUDICIAL DISTRICT COURT
STATE OF UTAH
JUVENILE COURT UNIT

IN THE FOURTH JUDICIAL DISTRICT COURT - JUAB COURT

13 NOV 22 PM 3:34

JUAB COUNTY, STATE OF UTAH

STATE OF UTAH,

: Case No. 101600146 FS

Plaintiff,

: Appellate Court Case No. 20130432

v

ABISAI MARTINEZ-CASTELLANOS,

:

Defendant.

: With Keyword Index

SUPPRESSION HEARING OCTOBER 28, 2010

BEFORE

THE HONORABLE JAMES BRADY

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way

Sandy, Utah 84092

801-523-1186

ORIGINAL

0436

APPEARANCES

For the Plaintiff:

ANNMARIE T. HOWARD
Juab County Attorney

For the Defendant:

MILTON T. HARMON
Attorney at Law

* * *

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NEPHI, UTAH - OCTOBER 28, 2010

JUDGE JAMES BRADY

(Transcriber's note: speaker identification
may not be accurate with audio recordings.)

P R O C E E D I N G S

THE COURT: We have a 1:30 suppression hearing. Mr.
Harmon and the defendant - it's State of Utah vs. Abisai
Martinez-Castellanos. And Ms. Howard, you do have your
witness here now? Is that correct?

MS. HOWARD: Yes, Your Honor.

THE COURT: Let's go ahead and proceed with the
suppression hearing.

MS. HOWARD: We call Trooper Sheets.

JOHN SHEETS

Having first been duly sworn, testified
upon his oath as follows:

THE COURT: Could you hold on for just one second,
Ms. Howard?

MS. HOWARD: Yes.

THE COURT: I wanted to make certain. I don't
believe I heard the preliminary hearing, but I do recall that
I had Mr. Martinez in my courtroom recently. I was trying to
remember - oh, we were just at a pretrial conference. That's
fine. Thank you.

///

DIRECT EXAMINATION

BY MS. HOWARD:

Q Would you please state your name?

A Trooper John Sheets.

Q And what is your occupation?

A A trooper at the Utah Highway Patrol.

Q Were you working within Juab County on or about June 9th, 2010?

A I was.

Q On that date did you come in contact with the defendant?

A Yes.

Q And you recognize him here today?

A Yes, sitting at the table with a gray and black shirt.

Q Okay, thank you. Would you please state for the court your training and experience with drug interdiction and detection?

A I've been on the Utah Highway Patrol drug and interdiction squad since 2001. I've been an officer for about 20 years in various capacities. I've been through numerous training classes associated with the interdiction squad - Deseret Snow, many classes put on by the state as well as the federal DLT. And then Rocky Mountain High, I've been through several classes with them.

1 Q Okay. And you've been on the drug interdiction
2 team for how long did you say?

3 A 2001.

4 Q 2001? As part of the drug interdiction squad or
5 team, do you familiarize yourself with adjacent state's laws?

6 A Yes. Not just interdiction, but just regular
7 patrol.

8 Q Okay.

9 A You know, we - working the Highway Patrol, you deal
10 with a lot of people from out-of-state coming through. So
11 you have to be familiar with, like Window 10, and
12 registration, and what they're required, and so we can
13 enforce the laws.

14 Q Front plate -

15 A Yes.

16 Q - requirements and things of that nature?

17 A That's correct.

18 Q Does that include experience with the California -

19 A Yes. California is one of our major - it's a close
20 state. So a lot of people coming through are from California
21 as well as Arizona and Nevada.

22 Q Okay. All right. On this date in question, would
23 you state for the court how it is you came in contact with
24 the defendant?

25 A I observed a gold Acura traveling northbound and

1 when it passed me, it appeared to only have one sticker on
2 it. California plates are fairly legible. They have two
3 stickers - one month, one year on each side, and they're
4 fairly - you know, they're good. They're visible. So you
5 can see them. I wish all the states were like that -

6 Q Yeah.

7 A - so you can - but this one only had one, and I'm
8 familiar with California. They require two, the month and a
9 year. So I pulled out and stopped it.

10 Q Okay. Did you take - after the fact, did you take
11 a picture of the vehicle?

12 A Yes.

13 Q A front picture as well as a rear picture of the -

14 A That's correct -

15 Q - of the vehicle?

16 A - as well as the plates so you could see that there
17 was no - the missing sticker wasn't there.

18 Q Okay. And you provided a copy of that to the
19 state?

20 A Yes.

21 Q Is that correct?

22 A Yes.

23 MS. HOWARD: Your Honor, may I approach with
24 Plaintiff's Exhibit 1?

25 THE COURT: Yes.

1 Q (BY MS. HOWARD) I have what's been marked as
2 Plaintiff's Exhibit 1 and ask you if you can identify this.

3 A These are the pictures I took of the car, and then
4 of the driver so I can remember him in court.

5 Q Okay. This first picture - can you state what that
6 is - the one that's in the upper left hand corner?

7 A Okay. This is the license plate I took, and this
8 is the plate that was on the car - the California plate. You
9 can see it's only got the year sticker on there and the -
10 where the month's suppose to be, you can see it either fell
11 off, or was taken off, or...

12 Q Okay. And you have - did you alter or change these
13 pictures in any way?

14 A No. Those are the pictures I took on the scene.

15 Q Do they accurately reflect the scene as you saw it
16 that day?

17 A Yes.

18 MS. HOWARD: May I approach, Your Honor, with this
19 Exhibit 1?

20 THE COURT: Has it been shown to the defense
21 counsel?

22 MS. HOWARD: Yes, it has, Your Honor.

23 THE COURT: Yes, you may.

24 MS. HOWARD: I'd like to offer.

25 THE COURT: Any objections?

1 MR. HARMON: Not for this hearing, Your Honor.

2 THE COURT: Thank you. For purposes of this
3 hearing, the exhibit - Plaintiff's Exhibit 1 will be
4 received.

5 (Plaintiff's Exhibit 1 received)

6 MS. HOWARD: Okay, thank you.

7 Q (BY MS. HOWARD) So you pursued and stopped this
8 vehicle for that violation? Is that -

9 A That's correct.

10 Q Okay. What happened next?

11 A I approached the vehicle and advised the driver why
12 I was stopping him. He was missing his month sticker. He
13 appeared to be a little bit, you know, surprised that it
14 wasn't on there. He provided me the registration and an
15 expired Colorado driver's license, and then I looked at the
16 registration and observed that the registration - the year
17 sticker should have been 2011, cause it expired in March of
18 2011. So he didn't even have the proper year sticker on the
19 plate.

20 Q So the plate was expired as well; is that correct?

21 A Yes.

22 Q Okay. And -

23 A Well, according to the registration, it was
24 properly registered, but the sticker is - the proper stickers
25 weren't put on it yet.

1 Q Okay. So what you saw - and I should rephrase that
2 then. What you saw on the plate showed that the plate itself
3 was showing an improper registration? Is that correct?

4 A Yes. It only had the 2010. It didn't have the
5 month. So I didn't know what month it expired in 2010, and
6 it should have been - had a February - or a March there -
7 sticker there. So according to the - if it hadn't this month
8 sticker on there - according to what was on the plate, it
9 would have been shown to be expired.

10 Q Expired plates; is that correct?

11 A Yes.

12 Q Okay. And so you discover that he has an expired
13 Cali - Colorado driver's license as well as expired
14 registration stickers on the plate; is that correct?

15 A Yes. A 2010 sticker was on there. The 2011
16 sticker wasn't placed on there yet.

17 Q Okay. What happened at that point?

18 A He said he had a valid Utah license. He just
19 didn't have it with him, and then we discussed the, and then
20 I told him the month sticker - or the year sticker wasn't on
21 there. And then the month sticker wasn't on there either.
22 So he - we had a conversation about that, and I believe that
23 he stated it fell off or somebody took it. I wasn't sure
24 exactly.

25 Q Okay. So up to that point, what violations of law

1 did you see?

2 A The improper display.

3 Q Okay.

4 A Plus he gave me an expired driver's license.

5 Q Okay. While you were talking to him then, did you
6 notice anything about him that was suspicious to you?

7 A Yes. He was a little bit jittery. He had jittery
8 speech and fast speech, and it made me a little bit concerned
9 that he might have been on some type of stimulant.

10 Q A stimulant?

11 A Yes, based on what I saw.

12 Q What did you do at that point?

13 A Went back to my car, ran checks, and determined
14 that he did have a valid Utah license, and then that the
15 registration was actually suppose to be 3-2011. He just
16 didn't have the stickers on there like he was suppose to
17 have. He didn't have his drivers license with him like he
18 was suppose to have. So - and then I also ran a criminal
19 history check on him like - while we were running checks on
20 him.

21 Q And what did you discover for purposes of this
22 hearing today?

23 A He had a criminal history including drug offenses,
24 which heightened my suspicions that he might be on the
25 influence of something based on what I saw and in his

1 criminal history.

2 Q You said that he had rapid speech and rapid and
3 jittery movements.

4 A Yes.

5 Q Was that more or less than what you'd expect based
6 upon nervousness of a driver?

7 A Well, this wasn't nervousness. It was just -
8 there's a difference. When you're jittery and you're talking
9 really fast, it - based on my training and my experience as a
10 police officer and dealing with thousands of cars that I've
11 stopped in my career, this made me more like it was - he was
12 under the influence of something.

13 Q Okay. Then what course of action did you take
14 next?

15 A I went back to the car and had him step out. I
16 advised him that I was going to have him do field sobriety
17 tests, cause he was what I called - told him he was bouncing
18 around a little bit.

19 Q And what test did you have him perform?

20 A Well, first of all, I asked him if he had any
21 weapons for my safety, and he said that there's some knives
22 in the car.

23 Q Okay. And did you retrieve those at that point, or
24 did you -

25 A Yes. And the - I advised him - I had determined

1 that he was a convicted felon. So the weapon - when he said
2 he had weapons in the car, that kind of raised my suspicions
3 of whether he's - he was going to be restricted or not.
4 Determine what size of the knife it was. If it was a little
5 teeny one, or a kitchen knife, or something.

6 Q Okay. And this was after you checked the criminal
7 history; is that correct?

8 A Yes.

9 Q Okay. And you had determined he was a convicted
10 felon?

11 A Yes.

12 Q And then you asked him out of the vehicle?

13 A Yes, to do some field sobriety tests.

14 Q And that's when he told that he had weapons in the
15 vehicle?

16 A He had knives in the car in the center console.

17 Q And did you retrieve them at that point?

18 A Yes.

19 Q Did you look any further in the vehicle, or did you
20 just retrieve the knives?

21 A Well, I found the knives, and then I believe - I'll
22 have to read the report here. Okay. Yeah, I retrieved the
23 knives.

24 Q And what sizes were they?

25 A Just medium-sized knives. They weren't the little

1 tiny ones that you'd put in your pocket. They were a little
2 bit - the bigger ones.

3 Q But you didn't search the vehicle any further at
4 that point; is that correct?

5 A Well, the knives were in the center console where
6 he said they were, and then there was some - like a marijuana
7 grinder in there shaped like a hand grenade. So I believe I
8 had him do the field sobriety test to begin with.

9 Q The field sobriety tests were first?

10 A Yes.

11 Q Okay.

12 A Well, I found the knives first, and then I had him
13 do some field sobriety tests. I've got to read my report
14 here.

15 Q Okay. We'll give you just a second to refresh your
16 recollection.

17 A Yeah. I did the reports - or did the field
18 sobriety tests on the scene.

19 Q Field sobriety tests on the scene?

20 A Yes.

21 Q Before or after the knives were found?

22 A Before - or after. Excuse me.

23 Q After the field sobriety tests?

24 A Yes.

25 Q Okay. So just so that this is clear, you checked

1 his criminal history, you'd noted the traffic violations, and
2 then you went back and had him perform field sobriety tests;
3 is that correct?

4 A Yes.

5 Q And at that point, there were no searches of the
6 vehicle? You were still investigating?

7 A I didn't do the inventory yet. I believe I took
8 the knife out first - and found the knife first, and then had
9 him do field sobriety tests, and then I went back to do the
10 big search.

11 Q Okay.

12 A But when I pulled the knife out, I saw the
13 marijuana grinder, cause it was in the same pot.

14 Q Okay. But you didn't seize it at that point; is
15 that correct?

16 A No. They stayed in the car, I believe.

17 Q Okay. What - after you - he told you there was a
18 knife, and so you retrieved that; is that correct?

19 A Uh-huh (affirmative), yes.

20 Q After you retrieved it, then did you have him
21 perform the field sobriety tests?

22 A Yes.

23 Q Okay. Which test did you have him perform?

24 A The first test I gave him was the eye gaze, and he
25 had lack of convergence in both eyes.

1 Q Okay.

2 A And then I gave him the Rhomberg.

3 Q And what did you note on the Rhomberg?

4 A One inch front to back sway, and he estimated 30

5 seconds in 36 seconds, and he had the eyelid tremors.

6 Q I don't believe in this hearing that we've covered

7 your training, Officer, as a drug recognition expert. If you

8 could state that for the record?

9 A I'm a DRE as well as a DRE instructor.

10 Q Okay. And you've been a DRE for how many years?

11 A Since 2004.

12 Q 2004? And an instructor for how many years?

13 A 2006.

14 Q And your currently still certified for both; is

15 that correct?

16 A Yes. I just sent off my stuff this year - this

17 week - or this - to get re-certified. So -

18 Q Okay.

19 A - all this stuff's coming in.

20 Q The Rhomberg is a DRE test; is that correct?

21 A Yes.

22 Q Okay. And you said that you noticed a sway?

23 A Yes.

24 Q Of how far?

25 A One inch.

1 Q Okay. And what happens next?

2 A And then he had the eyelid tremors.

3 Q Are those also a DRE test?

4 A Yeah, there's a clue on the Rhomberg.

5 Q Sure, okay.

6 A Plus an indication of drug use. And then the walk

7 and turn, his number three steps he had his arms up and

8 stopped before the turn in a military turn.

9 Q And what was the next test?

10 A The one-leg stand. He had a swaying balance, and

11 he counted to 23 in 30 seconds, and then I took his pulse.

12 It was 108, which is high. Sixty and 90 is normal.

13 Q And did you check his eyes?

14 A Yes.

15 Q And what did you notice about those?

16 A He had the red eyed conjunctiva.

17 Q Based upon your training and experience, what is

18 that indicative of?

19 A The main thing it's the marijuana use.

20 Q Okay. Any other test that you had him perform?

21 A Well, those are the four I did.

22 Q Okay. Based upon the evidence you found at the

23 scene - his - your conversation with him and anything that

24 was - you saw on the field sobriety tests, did you form an

25 opinion as to whether or not he was driving under the

1 influence of a drug or that he was under - driving with a
2 metabola of a drug in his system?

3 A Yes. So he was placed under arrest for that and
4 the weapons violation.

5 Q Okay. What happened - so at that point, he was
6 arrested?

7 A Yes.

8 Q On the scene?

9 A Yes.

10 Q And was his rights read to him there?

11 A No.

12 Q And you didn't interview him any further there?

13 A No.

14 Q Okay. What did you do after he was arrested?

15 A I went back to search the car.

16 Q Was that pursu - what was that pursuant to?

17 A I did an inventory. It could have been a
18 contraband search, cause there was a knife. And then when I
19 was getting the knife out - check - or checking the knife, he
20 said he had - I saw the marijuana or grinder in the console
21 with the knives.

22 Q Okay. Did you use an inventory form?

23 A Yes.

24 Q Okay.

25 A Well, the state tax form, which is also an

1 inventory form.

2 Q And that - is that - was that following procedure
3 for an inventory?

4 A Yes.

5 Q And it's completed there?

6 A Yes.

7 MS. HOWARD: Does the Court wish to see that?

8 THE COURT: Yes.

9 MS. HOWARD: May I approach?

10 THE COURT: Yes.

11 MS. HOWARD: May I approach with Plaintiff's Exhibit

12 2?

13 THE COURT: Yes.

14 Q (BY MS. HOWARD) I have what's been marked
15 Plaintiff's Exhibit 2 and ask you if you can identify this?

16 A This is a copy of the inven - or the - here's the
17 original here on front, and this is a copy of the inven - the
18 state tax/inventory form.

19 Q And where was this filled out at?

20 A At the scene.

21 Q Okay. And so all of the writing on here is from
22 what was done at the scene; is that correct?

23 A Yeah.

24 Q Nothing further was added once you -

25 A I don't believe so.

1 Q - [inaudible]? Okay.

2 A Yeah.

3 MS. HOWARD: I'd like to offer Plaintiff's Exhibit
4 2.

5 THE COURT: Any objections, Mr. Harmon?

6 MR. HARMON: Not for this hearing.

7 THE COURT: Thank you. It'll be received.

8 (Plaintiff's Exhibit 2 received)

9 MS. HOWARD: Thank you, Your Honor.

10 Q (BY MS. HOWARD) On that form then that you have
11 also in front of you as well as the Court - as you inventory
12 the vehicle, what did you do with that form?

13 A Well, I take it up to the car. And as I find
14 stuff, I write the belongings on the first line, and then I
15 write the damage that's on the second line.

16 Q Okay. So you're noting the exterior of the
17 vehicle?

18 A Yes.

19 Q And then what happened?

20 A And while I'm doing this, I'm looking for the con -
21 taking whatever contraband. Based on finding marijuana - or
22 the marijuana grinder. So I'm also looking for contraband
23 too.

24 Q Okay.

25 A And the knife, of course.

1 Q And so what did you find in that vehicle?

2 A Well, in that same console, there was I believe the
3 two knives that he said he had, and then there was the
4 marijuana grinder. It was shaped like a little hand grenade,
5 and then there was a little - another little hand grenade
6 looking thing. I had to ask him what it was, and he said it
7 was a lighter. So there's the marijuana grinder shaped like
8 a hand grenade. The lighter is shaped like a hand grenade in
9 the center console, and then I found some other things.

10 Q And what were those things?

11 A There was a bindle containing a white, crystal like
12 substance under the center console. It was between the
13 center con - sticking out kind of on the center console on
14 the driver's side seat, and the substance tested positive for
15 meth. And there was also a cellophane like you wrap the
16 cigarette paper - or cigarette box cellophane, and it
17 contained three oblong, white pills, and it was also under
18 the console with - next to the other substance, and these
19 were identified as Hydrocodone.

20 Q Okay.

21 A And the two - like I said, the two knives were
22 located in the center console, and there was a cellophane
23 wrapper with seven pills under the left front driver's seat,
24 and these were just not prescription, non-scheduled anti-
25 seizure medication.

1 Q Okay.

2 A And a glass pipe with a burnt residue was under the
3 left - up underneath the driver's seat, and a black case with
4 a pipe was located in the glove box, and three twists with a
5 residue were located on the right front floorboard.

6 Q So all of these things that were found, Officer,
7 were found in the passenger compartment of the vehicle?

8 A That's correct.

9 Q Okay.

10 A Nothing was located in the trunk. No contraband
11 was located in the trunk.

12 Q All right. After you did your inventory of the
13 vehicle, did you sign your form indicating that you had
14 completed it?

15 A Yes.

16 Q And did you send that into the state?

17 A It was given a copy to the record driver.

18 Q Okay.

19 A And then we sent - have a copy of it.

20 Q Okay. What happened when -

21 A And then he gets a copy of it too.

22 Q Okay. The - he meaning the -

23 A The defendant -

24 Q - defendant?

25 A - yes.

1 Q Okay. And you complied with those requirements and
2 distributed those copies?

3 A Yes.

4 Q Okay. What happened next then?

5 A The tow came and took the car, and he was - the
6 defendant was transported to jail. I read him the
7 admonitions, and he refused to take - I asked him to take a
8 urine test, and he refused to take a urine test.

9 Q Where is it that you read him the chemical test
10 admonition?

11 A It's on the DUI form.

12 Q Where were you located?

13 A Oh. We were at the jail.

14 Q Okay. As you went through the form, did you fill
15 it in as you proceeded -

16 A Yes.

17 Q - to read it to him?

18 A Yes.

19 Q So if it's marked that you told him he was under
20 the arrest - under arrest, was that done there at the jail?

21 A Yes.

22 Q Okay. And the next - what was his response to
23 that?

24 A He said, Yes, sir. Know - understanding that he
25 was under arrest for that.

1 Q Okay. And then you told him that - oh, what did
2 you tell him next?

3 A Then I read him - I'd like him to submit to a urine
4 and blood test, and then I read him the first admonition.

5 Q Okay. And what was his statement to you during
6 that reading - after that reading of the admonition?

7 A "I'm going to hold off. I smoke marijuana."

8 Q Then did you read him the refusal admonition?

9 A Yes.

10 Q And once again, what is the time marked to the side
11 of the second -

12 A Twelve - 12:38 in the afternoon.

13 Q For the refusal admonition?

14 A Yes.

15 Q Prior to that, it's 12:36 for the first admonition?

16 A Yes.

17 Q Okay. And you read to him the entire refusal
18 admonition?

19 A Yes.

20 Q And what was his response to that?

21 A "I'm denying it. My rights are being violated."

22 Q So what did you do then at that point?

23 A And I also read him the counsel admonition.

24 Q At the same time?

25 A About a minute later.

1 Q A minute later? You read to him - that admonition
2 is recorded at 12:39?

3 A Yes.

4 Q And what is that one?

5 A That's the right to counsel. Just to inform him of
6 - he doesn't have the right to refuse and - or the right to
7 counsel and all that stuff.

8 Q Could you read that for the record? What it says
9 there?

10 A "Your right to remain silent, and your right to
11 counsel do not apply - do not apply to imply consent law
12 which is civil in nature and separate from the criminal
13 charges. Your right to remain silent does not give you the
14 right to refuse to take the test. You do not have the right
15 to counsel during a test procedure. Unless you submit to the
16 test, I'm requesting and I will consider that you have
17 refused to take the test. I warn you that if you refuse to
18 take the test, your driving privilege can be revoked with no
19 provisions for limited driving."

20 Q Okay. What did you do then at that point?

21 A I read him that, and he still didn't want to do it
22 - give the test. So I obtained - I advised him I was going
23 to go get a - obtain a warrant, and I did.

24 Q Okay. And you filled in a search warrant; is that
25 correct?

1 A Yes.

2 Q And that warrant was heard by which judge?

3 A Judge Eyre.

4 Q And what was the result of you applying for that
5 warrant?

6 A He signed it and gave it to me.

7 Q Okay. And then what happens next?

8 A I went back to the jail. I advised him I had a
9 warrant and gave him the thing he - the copy he needed, and
10 then I believe Trooper Housekeeper came and conducted a blood
11 draw.

12 MS. HOWARD: If I may have just a minute, Your
13 Honor?

14 THE COURT: You may.

15 MS. HOWARD: That's all I have for this hearing,
16 Your Honor.

17 THE COURT: Thank you.

18 Mr. Harmon, do you have questions?

19 MR. HARMON: Yes. We have some, Your Honor.

20 CROSS EXAMINATION

21 BY MR. HARMON:

22 Q Officer, after you stopped the defendant, did you
23 ever take him back to the back of his vehicle to show him the
24 license plate and the condition of the stickers?

25 A He was back there, yes, cause that's where we did

1 the field sobriety tests.

2 Q And did he - did you show him the stickers where
3 they were missing?

4 A To tell you the truth, I can't believe - I can't
5 remember if I did or not, but he was back there.

6 Q Okay.

7 A And we were back there.

8 Q But when you initially told him that the stickers
9 were missing, that was a puzzle to him, wasn't it?

10 A Yes. He said it must have fallen off or... Well,
11 first I told him about the month sticker, cause I didn't run
12 the plate. So I didn't know - or see the registration. So I
13 don't know if it was expired or not. So we were just talking
14 about the month sticker. And then when he handed me the
15 registration and I showed - and it showed that it should have
16 been 2011, I advised him - yeah, you're missing both of them.

17 Q You were able to confirm through the records that
18 he did - that the vehicle was validly registered to him?

19 A Yes. It expired on three of 2011, but he just had
20 the 2010 sticker on the plate.

21 Q Okay. And who did the vehicle belong to?

22 A Mr. Martinez-Castellanos.

23 Q Okay. And so you were able to confirm that he
24 would have been confused assuming that he had it properly
25 registered?

1 A I don't know if he was confused or not. It was
2 properly registered, yes.

3 Q And you also were able to confirm that he did have
4 a valid driver's license?

5 A Yes. He didn't have it with him, but he had a
6 valid one.

7 Q Okay. You indicated that you searched in the
8 vehicle and searched the center console. What was the reason
9 for conducting that search?

10 A He is a convicted felon and said he had knives in
11 the car.

12 Q Okay. And did you ask him to get them for you?

13 A No, not at that point. He's a convicted felon, and
14 I don't want him grabbing knives on me. That's an officer
15 safety thing.

16 Q Did your record check show what he was convicted -
17 the charge he was convicted of?

18 A Yes. But offhand, I couldn't tell you. I know he
19 had several drug charges.

20 Q Okay. None related to violence?

21 A I don't recall what they were.

22 Q Okay. Did you seize the weapon - the knife?

23 A I got both of them, yes.

24 Q Okay. And you say that they were medium-sized.
25 About how long would the blade be on the knife?

1 A Between two and four inches.

2 Q Between two and four?

3 A Yes. They were - like I said, they weren't the
4 small - the really small ones, and they weren't the big ones.
5 So they - I would say that they were the medium-sized ones.

6 Q Would they be like a pocket knife that a carpenter
7 would carry?

8 A I don't know.

9 Q Or that a handy person would carry around -

10 A They're just -

11 Q - the house?

12 A - typical knives people carry around with them.

13 Q Okay.

14 THE COURT: Mr. Harmon, let me ask you a question
15 that hasn't been - it may have been stated. I'm just not
16 clear on it. Are we talking about a folding type knife, or
17 are we talking about a fixed blade knife?

18 THE WITNESS: It's a folding one.

19 THE COURT: Okay. And when you say two to three
20 inches, you're referring to the -

21 THE WITNESS: The blade.

22 THE COURT: Thank you. Okay.

23 Q (BY MR. HARMON) Okay. And these weren't unusual in
24 appearance, I take it?

25 A No. They were just the kind you buy and people

1 carry around.

2 Q Okay. And like a father would give to his son as
3 the boy's growing up? Something like that?

4 A Anybody carries them.

5 Q Okay. And what do people usually use those type of
6 knives for?

7 A Just about anything that you cut with -

8 Q Okay.

9 A - and do handiwork with, whatever.

10 Q So it may be a utility tool, rather than a
11 dangerous weapon?

12 A Well, they're a dangerous weapon. If you got
13 stabbed with one of those, they could do damage.

14 Q But that would be - the same would be true of a
15 mini screwdrivers and things like that?

16 A Well, yeah. And these are knives. So they're a
17 little bit different than a screwdriver.

18 Q Was there ever any indication that the defendant
19 intended to use them for any criminal purpose?

20 A They were in the glove box. I don't - or in the
21 console. So I don't know what his ultimate intention were
22 with them.

23 Q Okay. Would these be the type of knife that a
24 person would be advised to carry apart of - as part of his
25 emergency equipment in his vehicle?

1 A I don't know. You can use them, you know, to cut
2 stuff with.

3 Q And you may use those as a part of your emergency
4 equipment?

5 A You can, yes.

6 Q Okay. You - was the basis for doing the field
7 sobriety tests what you felt was his jittery and his jittery
8 movements?

9 A Yes. When I first walked up to the car, I saw it.
10 And then when I ran him, that kind of added to my suspicions.

11 Q Okay. You - had you ever seen the defendant
12 before?

13 A Not that I remember.

14 Q Did you know anything at all about him?

15 A Not - well, I - only what I found out on my
16 investigation when I ran him.

17 Q Okay. Was there any of that that would indicate
18 that you should do the field sobriety tests when you did your
19 background check on him?

20 A Well, he had drug charges, but that just added to
21 my suspicions. That wasn't the reason I did it.

22 Q And tell us again what the reason for doing it was.

23 A His jittery movements, his rapid speech, and it
24 appeared that he was, like I said, he was on - what I thought
25 he could have been under stimulants.

1 Q Okay.

2 A Cause based on all the people I arrest for
3 stimulants and dealt with, he was - it made me think so.

4 Q Now, you did the blood draw and had that examined;
5 is that right?

6 A Yes.

7 Q And did that show that he was negative for illicit
8 drugs in his system?

9 A No. He was positive for something. I don't have
10 it with me, but I don't recall what it was.

11 Q Okay. Did he produce for you a prescription from a
12 physician in California showing that he had medical
13 marijuana?

14 A He said he had a medical marijuana card, but
15 they're not valid in Utah.

16 Q Okay. Tell me what your policy is now as you - as
17 a law enforcement officer as you've discussed this question
18 of medical marijuana and people driving on the freeway from
19 California?

20 A It's not valid in Utah. So we're - we treat them
21 just like everybody else that possesses an illegal controlled
22 substance.

23 Q Okay. Did you have any conversation with him about
24 the fact that having a prescription for marijuana in
25 California doesn't allow him to bring it into Utah?

1 A I believe I told him that that's not valid in Utah.

2 Q Okay. And that still leads to a criminal charge
3 then?

4 A Yes.

5 Q Even though he may have legally obtained it in
6 California and have a legitimate, physical reason for the
7 marijuana?

8 A That's correct.

9 Q Was the defendant cooperative with you?

10 A Up until I requested him to do the urine test, and
11 then I had to get a warrant.

12 Q Okay. And the only thing he asked for was that you
13 do that with a warrant?

14 A Oh, he didn't say do a warrant. He just refused
15 saying - he kept saying his rights were being violated.

16 Q Okay.

17 A I told him I was going to get a warrant.

18 Q And you read the admonitions from the form?

19 A Yes. I read all three of them.

20 Q Okay, and you indicated that he did have a valid
21 driver's license. Which state issued that?

22 A Utah.

23 Q When you obtained the search warrant from Judge
24 Eyre, did you complete an affidavit to support the issuance
25 of the warrant?

1 A I did.

2 Q Was there ever a copy of that and the warrant left
3 with the defendant?

4 A Yes. I gave him the copy that he was suppose to
5 have.

6 Q Where was he when you gave that to him?

7 A The jail. Actually, we were sitting in the little
8 room there.

9 (Inaudible conversation with client)

10 Q (BY MR. HARMON) Officer, could I just go back over
11 one thing with you? Where was the defendant when you first
12 saw his vehicle?

13 A Driving down the road.

14 Q And what direction was he -

15 A Northbound.

16 Q And where were you?

17 A I believe I was sitting on the side of the road.

18 Q And which side?

19 A The right side on the shoulder, cause I had just
20 stopped another car and finished up with them.

21 Q Okay. Were you southbound at that time?

22 A No. I was northbound.

23 Q So - and were you stationary when the defendant
24 passed you?

25 A Yes. I was - like I said, I was sitting on the

1 shoulder. I believe I had just finished a stop.

2 Q Okay. And why was it that you stopped the
3 defendant?

4 A Why?

5 Q Yes.

6 A When he came by, like I said, California plates are
7 really visible. So when he come by, I could see that the
8 sticker wasn't there.

9 Q And that's why you were working on the other side?

10 A Well, I had already completed that. I was just
11 sitting there.

12 Q Okay.

13 A I believe I was getting ready to come back out on
14 the road.

15 Q Okay. Did the fact that the car was licensed in
16 California have anything to do with you stopping it?

17 A No. I stop cars from all the states. So it
18 doesn't matter.

19 Q How about the fact that the defendant was Hispanic?

20 A No. That doesn't have anything to do with it. I
21 look for violations. I don't look for what race people are
22 when they come by.

23 (Inaudible conversation with client)

24 Q (BY MR. HARMON) Was there a kind of recording made
25 of this stop - an audio or a visual -

1 A I believe so.

2 Q Okay. Do you know where that is now?

3 A It would be in the locker with all the other ones
4 if it's there.

5 Q Has that been provided for the county attorneys
6 office?

7 A Not yet.

8 MR. HARMON: I think that's all the questions we
9 have, Your Honor.

10 THE COURT: Thank you, Mr. Harmon.

11 Anything further?

12 MS. HOWARD: Nothing further.

13 THE COURT: Ms. Howard?

14 MS. HOWARD: The State rests.

15 THE COURT: Thank you. You may step down. Is there
16 any other evidence we're going to be seeking today?

17 MR. HARMON: The defendant will submit, Your Honor.

18 THE COURT: Thank you. Does -

19 MR. HARMON: We do have some requests, however,
20 though. We - there is the recording that was made of this,
21 and we'd like to get a copy of that.

22 THE COURT: I was just going to address a couple of
23 questions that came to my mind. Many times in these types of
24 motions, we have an evidentiary hearing, and then the
25 parties, based on the evidence, sometimes like to submit a

1 brief. In this case, it sounds like you have certain amounts
2 of evidence, but there may be additional evidence that may be
3 requested, if it's available. I was wondering if you wanted
4 me to simply make rulings based on what I've heard, or if you
5 intended to brief this before I make a decision.

6 MR. HARMON: I'd like to brief it, Your Honor, and
7 these are the things I'd like to go through in doing that so
8 that the defendant will be satisfied that we've done an
9 adequate job. I would like to have my secretary make a
10 transcript of this hearing so we have that testimony. I
11 would like to get the video recording so that we can review
12 that. And then once I have those items, then we would like
13 to be able to submit a brief on the matter, Your Honor. And
14 considering what I think of the time it will take us to get
15 that accomplished, we'd like to have it so that we would
16 submit our brief in 30 days.

17 THE COURT: Okay. Let me ask this. Because based
18 on the information I heard during the testimony, I wasn't
19 clear if we're looking for a video recording, or an audio
20 recording, or both?

21 DEFENDANT MARTINEZ-CASTELLANOS: Both.

22 THE COURT: I'm waiting for the officer to indicate
23 to me how it was recorded.

24 MR. SHEETS: On the camera.

25 THE COURT: So it's a video/audio recording?

1 MR. SHEETS: Yes.

2 THE COURT: On a single tape?

3 MR. SHEETS: Well, I'll have to -

4 THE COURT: It's a single recording?

5 MR. SHEETS: Yes.

6 THE COURT: You didn't have a mic on your shoulder
7 that was recording?

8 MR. SHEETS: No. We have one of these little mics
9 on our belt.

10 THE COURT: So you have - is that in conjunction
11 with the video camera of the car?

12 MR. SHEETS: Yes. Everything's on it.

13 THE COURT: Okay. So everything is on one tape?

14 MR. SHEETS: Yes.

15 THE COURT: Okay. So the request is, if that tape
16 can be located -

17 MR. HARMON: Yes.

18 THE COURT: - can it be provided? And I need to
19 know from counsel how long it would take to do that?

20 MS. HOWARD: I'm sure they could have it to Mr.
21 Harmon by Monday.

22 THE COURT: Okay. Then I think within 30 days is a
23 reasonable time for Mr. Harmon to provide us with a copy - or
24 of his brief on this matter, his memorandum, and Ms. Howard,
25 how long would you need after you receive his to reply?

1 MS. HOWARD: I wouldn't need very long, Your Honor.
2 If we can have two weeks?

3 THE COURT: That would be fine.

4 Mr. Harmon, if you could have yours prepared and
5 submitted by November 30th?

6 Then, Ms. Howard, if we could have yours by
7 December 15th, then I can consider the matter after that.

8 Is there anything further that we can accomplish on
9 this case today, counsel?

10 MS. HOWARD: I don't have anything further.

11 MR. HARMON: Yeah. I think that's -

12 THE COURT: Then let me do this. I'm going to ask
13 my clerk to pull the file and notify me after November 30th
14 just so that I can see if we have documents. I don't want
15 the case to linger or to be forgotten. And unfortunately, in
16 our criminal processes, we go from motion filing to
17 evidentiary hearing and then sometimes we don't have a bump
18 date by which to make sure that it comes back up on my
19 calendar. If we don't have the memorandum by November 30th,
20 I'm going to call for an oral argument type presentation by
21 counsel some time in December. I would prefer to give you an
22 opportunity to present things in writing. But if we don't
23 have it by the deadlines established, then I'll simply set a
24 hearing date so that we can have an oral argument and a
25 decision.

1 MS. HOWARD: Okay.

2 THE COURT: You need to talk to your attorney, and

3 I'll respond to him.

4 MS. HOWARD: I will leave the evidence - the

5 exhibits with you, Your Honor. If you'd like to have those

6 through the motions hearing?

7 THE COURT: Thank you. I would. Either party can

8 have access to the file if they have questions about what's

9 in the file, and a copy of the transcript should - I mean, a

10 copy of the recording of this hearing shouldn't be any

11 problem for either party to get a copy of if they feel they'd

12 like too.

13 Mr. Harmon, is there anything else we need to

14 address today?

15 MR. HARMON: No, Your Honor.

16 THE COURT: Thank you then. That'll be the order of

17 the court.

18 MS. HOWARD: Thank you, Your Honor.

19 (Whereupon the hearing was concluded)

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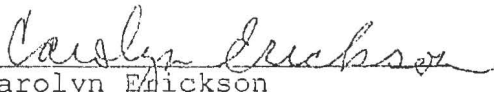
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CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge James Brady was transcribed by me from a audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 19th day of November, 2013 in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

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Addendum E

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
JUAB COUNTY

12 NOV -8 PM 4:38 *cg*

FOURTH DISTRICT COURT, STATE OF UTAH
JUAB COUNTY

<p>STATE OF UTAH,</p> <p style="text-align: right;">Plaintiff,</p> <p>vs</p> <p>ABISAI MARTINEZ-CASTELLANOS,</p> <p style="text-align: right;">Defendant.</p>	<p>NOTICE OF HEARING ON COURT'S SUA SPONTE CONSIDERATION OF GRANTING DEFENDANT A NEW TRIAL</p> <p>Civil No. 101600146 Judge James Brady</p>
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This matter came before the court for jury trial on November 1, 2012. The jury trial resulted in a conviction of the defendant on counts 1, 2, 4, and 5, and the dismissal of count 3 of the information. One week following the trial, the court met with counsel for both parties in chambers to notify the parties that the court is concerned with a question of whether any error or impropriety occurred in this case which may have had a substantial adverse effect on the rights of the defendant as is contemplated by Rule 24 of the Utah Rules of Criminal Procedure. Specifically, expressed concern whether defendant received effective assistance of counsel. This concern is based solely on the court's own considerations of two events in the history of this case. 1) Defense counsel's failure to file any memorandum following an evidentiary hearing on defendant's motion to suppress; and 2) Defense counsel's failure to challenge or remove a potentially biased juror from the jury on the day of trial.

Without coming to a conclusion on the final issue presented in the motion to suppress, the court notes that based on the testimony elicited at trial, there is at least an arguable basis to have pursued defendant's motion to suppress, which defense counsel failed to do.

The court is also concerned that a prospective juror who may have a bias was ultimately allowed to remain on the jury to hear and decide the case. The court's concern for potential bias is based on the juror's many years working as a highway patrolman, his prior involvement in numerous interdiction cases with facts similar to the case being tried, and/or his brief prior association with the State's only witness who is a current highway patrolman,

The court sets a hearing on December 20, 2012 at 11:30 A.m. at which time it will hear argument from counsel on the question of whether any error or impropriety occurred in this case which may have had a substantial adverse effect on the rights of the defendant, as contemplated by Rule 24 Utah Rules of Criminal Procedure.

Dated this 8th day of November, 2012.

BY THE COURT:

Jim Brady

Judge James Brady

By Cindy Jacquot
STAMP USED AT DIRECTION OF JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 101600146 by the method and on the date specified.

BY HAND: JARED W ELDRIDGE
BY HAND: MILTON T HARMON

11/08/2012
Date: _____

/s/ CINDY JACQUART

Deputy Court Clerk