

2016

State of Utah Plaintiff and Appellee v. Michael John Edgar Defendant and Appellant

Utah Court of Appeals

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Case No. 20150605-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

MICHAEL JOHN EDGAR,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for six counts of possession with intent to distribute, a first degree felony; three counts of possession with intent to distribute, a second degree felony; one count of theft by receiving stolen property, a third degree felony; and one count of possession of drug paraphernalia, a class A misdemeanor, in the Fourth Judicial District, Utah County, the Honorable Lynn W. Davis presiding

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Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for six counts of possession with intent to distribute, a first degree felony; three counts of possession with intent to distribute, a second degree felony; one count of theft by receiving stolen property, a third degree felony; and one count of possession of drug paraphernalia, a class A misdemeanor. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West Supp. 2015).

INTRODUCTION

Defendant was convicted for receiving stolen property and committing various drug crimes including possession with intent to distribute myriad illicit drugs, but he challenges only the admissibility of evidence supporting his drug-related convictions. Defendant argues that

the trial court erred in overruling an alleged prejudice objection to evidence that he contacted the DEA and offered to help agents gain access to a high-level heroin trafficker in exchange for leniency in this case. Alternatively, Defendant argues that his counsel was ineffective for not raising a prejudice objection to the evidence. Defendant further argues that trial counsel was ineffective for not objecting to an amendment to the information that substituted a sports facility for a ballet school as the facility that triggered the drug-free-zone penalty enhancement. Defendant has not shown that his prejudice objection was preserved below; nor has he met his heavy burden to show deficient performance and prejudice with regard to either of his ineffectiveness claims.

STATEMENT OF THE ISSUES

1. Defendant was arrested for trying to sell a stolen trailer. At the time of his arrest, he was in sole possession of a briefcase filled with myriad, distributable amounts of illicit drugs including heroin, paraphernalia, two valid prescription bottles containing Oxycodone bearing his name, and identification documents belonging to people not involved in the case.

After he was charged, Defendant contacted the DEA and offered to help agents gain access to a high-level heroin dealer in exchange for

reduced charges. There is no evidence that Defendant ever discussed his request for leniency with the prosecuting attorney.

(a). Did the trial court err in overruling an alleged objection under rule 403, Utah Rules of Evidence, to a DEA agent's testimony that Defendant offered to help the DEA gain access to a high-level heroin trafficker in exchange for reduced charges?

Standard of Review. This issue is unpreserved; no standard of review applies.

(b). Alternatively, was trial counsel ineffective because he did not raise a rule 403 objection to evidence of Defendant's offer to help the DEA?

Standard of Review. An ineffective-assistance-of-counsel claim raised for the first time on appeal presents a question of law. *State v. Bedell*, 2014 UT 1, ¶20, 322 P.3d 697.

2. The morning of trial, the prosecutor filed an amended information that substituted a sports facility for a ballet school previously identified as the facility that triggered the drug-free-zone penalty enhancement. The trial court allowed the amendment on the ground that the prosecutor would call an owner of the sports facility to testify, as per trial counsel's request. Counsel investigated the sports facility online and both the prosecutor and counsel interviewed the owner during a break before the owner testified.

Was trial counsel ineffective for not objecting to the amendment?

Standard of Review. See 1.(b)., above.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A: U.S. CONST. amend. VI.

STATEMENT OF THE CASE

A. Summary of facts.¹

Following Defendant's arrest for trying to sell a stolen trailer, he was found in possession of myriad illicit pills and other drugs (including heroin), digital scales, packaging materials, paraphernalia, two valid prescription bottles containing Oxycodone bearing his name, and several identifications belonging to other people. See R444-R448; State's Exhibit (SE) 13,13A,19,19A (SE7-29 are attached in Addendum B).

* * *

Defendant was arrested near where he was trying to sell a stolen trailer on Geneva Road, in Lindon, Utah. See R384. Defendant told one of two officers from the Lindon City Police Department, Officer Boren, that he was selling the trailer for someone who owed him money, but whose name

¹ Defendant does not contest his conviction for receiving stolen property; the State thus limits its summary of facts to those relevant to Defendant's drug convictions.

he did not know. R378,R381-382,R478.² Defendant also denied knowing who owned the Cadillac he was driving at the time, claiming that he had borrowed it from a friend of a friend. R460-461. Boren was ultimately able to confirm that Defendant in fact had the owner's permission to drive the Cadillac. *Id.* Boren also obtained the bill of sale for the trailer from Defendant. R461;SE5. It listed two names, Joshua Haskill and Robin Smith. SE5. Boren tried unsuccessfully to follow up on both names. R462,R478. Defendant told Boren that he did not know Haskill. R478.

Officer Boren had already left for the jail with Defendant when, in the course of an inventory search, Detective Purvis found a briefcase in the trunk of the Cadillac. *See* R463. The briefcase contained myriad illicit pills and other drugs (including methamphetamine, heroin, and LSD), digital scales, paraphernalia (including spoons, pipes, syringes, wrapping papers), and packaging material. R383-387,R434-451;SE7-29. Although the illicit pills and other drugs in the briefcase were packaged in single-user amounts, in Purvis's twenty-one years of experience, the totality of the briefcase's contents supported that the drugs were intended for distribution: "[I]t's all packaged together and massive amounts of different kinds of pills. That's

² Before trial, Boren killed himself and several family members in a murder-suicide. *See* R462.

common with people distributing medications to other people.” R474; *see also* R386-R387 (“That’s typical of what dealers use to sell their product. They package it in smaller packages, use scales to weigh out the large quantities to put in the smaller packages.”); R455 (“[I]ts a large distributable amount of stuff.”).

The briefcase also contained two valid prescriptions for Oxycodone in Defendant’s name, *see* R438,R443-444;SE13-13A&SE19-19A, a wallet belonging to Joshua Haskill, and several identifications belonging to other people, *see* R466-67. Both Officer Boren and Detective Purvis tried unsuccessfully to make contact with Haskill and the other people whose identifications were found in the briefcase. *See* R466-67,R471,R478-479. According to Purvis, most of the individuals were “into drugs” and their families no longer had contact with them or knew where to locate them. R467; *see also* R479 (“[T]heir families lost touch with them. They said they were on drugs, they didn’t know what they were doing, they didn’t have any way to contact them themselves.”). Haskill, however, later contacted law enforcement about his missing driver’s license. *See* R480-481.

B. Summary of proceedings.

Defendant was charged with theft by receiving stolen property worth over \$5000, a second degree felony, Utah Code Ann. § 76-6-408 (West 2004);

six counts of possession of a controlled substance with intent to distribute in a drug-free zone, a first degree felony, Utah Code Ann. § 58-37-8(1)(a)(iii), (4) (West Supp. 2015-2016); three counts of possession of a controlled substance with intent to distribute in a drug-free zone, a second degree felony, Utah Code Ann. § 58-37-8(1)(a)(iii), (4) (West Supp. 2015-2016); and possession of drug paraphernalia in a drug-free zone, a class A misdemeanor, Utah Code Ann. § 58-37a-5(1) (West 2012) (R27-30).

- 1. Defendant contacts the DEA and offers to help agents gain access to a high-level heroin trafficker in exchange for leniency.**

After he was charged, Defendant contacted a DEA agent, Brandon Holmer, via the "duty phone." R412-413, R418. The "duty phone" is an "after hours," "publically available number" that anyone may use to report "drug trafficking activities." R412-413. Defendant told Agent Holmer that he would introduce him to a high-level-heroin trafficker in Salt Lake City in exchange for "consideration with his pending charges in Utah County." R419.

- 2. The trial court overrules a relevance objection to evidence of Defendant's offer.³**

At trial, Defendant objected on relevance grounds to Agent Holmer testifying about his offer to help the DEA. R414. Outside the presence of

³ Pertinent transcript pages (R414-432) are attached in Addendum C.

the jury, counsel elaborated that Holmer's testimony was not relevant because Defendant called the DEA several months after the charged crimes occurred. R415; *see also* R412-R413. Continuing outside the presence of the jury, the prosecutor elicited Holmer's proffer that Defendant said he contacted the DEA because "[h]e was seeking consideration with pending charges [at the state level] by cooperating with law enforcement on other cases." R415-R416. Defendant believed that Holmer "could supercede the authority of the state and compel them to help him out with his charges." R416. Defendant thus asked Holmer to contact the Utah County prosecutor, Craig Johnson, and ask about a "stay" or "reduction in his charges." *Id.* In exchange, Defendant said "he had access to a high level Mexican heroin trafficker that operated out of Salt Lake City." R417. Defendant said the heroin trafficker dealt in "[p]ound level quantities," which in Holmer's experience was "a fairly good sized trafficker." *Id.*

After hearing Holmer's proffer, the trial court overruled defense counsel's relevance objection: "the basis of the conversation and the projection as it relates to the usefulness of the information that could be provided and that it related specifically to this pending, these pending charges because there's a reference directly to Mr. Craig Johnson as Deputy Utah County Attorney and I will find by virtue of that and the admissions

involved that it is relevant.” R418. The trial court further noted that Defendant’s statement was “sort of an admission against interest. I would make the further observation that there’s been testimony already that some of the drugs involved were heroin; and secondarily, the independent contact by the defendant with a federal agent was initiated by him and that secondarily that it would be admissions against interest.” *Id.*

3. The trial court excludes evidence of Defendant’s similar offer in another case on prejudice grounds.

When Agent Holmer resumed testifying in front of the jury he reiterated his earlier proffer to the trial court—i.e., that Defendant contacted him and offered to help the DEA gain access to a high-level heroin trafficker “in exchange for consideration with his pending charges in Utah County.” R419. Holmer additionally testified that Defendant “identified Mr. Johnson as the prosecutor over his cases,” and that they discussed “what services” Defendant “could provide.” *Id.* Concerned that Holmer had referenced Defendant’s “other pending cases,” the trial court called another bench conference. *Id.*

Outside the presence of the jury, the trial court observed that referring to “multiple charges” could be “potentially approaching prejudicial if he (Agent Holmer) goes into each of the cases and the number of charges and the nature of the charges and everything else.” *Id.* The trial

court thus asked the prosecutor to “advise” Holmer “that beyond what he has testified to or he heard from him that he can’t open the door to all the other cases that are pending and everything else that way.” R420.

Following the bench conference, the prosecutor elicited more detail about Defendant’s offer to the DEA, including that Defendant said the high-level-heroin trafficker “was capable of dealing in pounds of heroin, which, for the record, was worth [Agent Holmer’s] time” because the street value of that amount of heroin was between \$10,000 and \$20,000. R423. The prosecutor also elicited that when working with a potential confidential informant, Holmer “[tried] to find out if they are currently or have previously worked with anyone else in law enforcement.” R424. This statement prompted defense counsel to request a bench conference. R424-R425.

At the bench, the trial court reiterated that Agent Holmer could not “talk about [Defendant’s] past at all[.] He can talk about this case but he can’t talk about the fact that he’s served as a confidential informant in the past in any form or fashion. That’s out totally, in my estimation.” R425. After the prosecutor said he had planned to call another DEA agent to testify about Defendant’s similar offer in another case, the trial court

excused the jury so that it could make a determination as to the “breadth of the direct examination” of Holmer. R425-R426; *see also* R428.

After the jury was excused, defense counsel argued that Agent Holmer’s testimony “could easily lead to mistrial,” where Holmer had already testified about Defendant’s “other cases,” and about Defendant’s “working with other state agents that won’t be involved in this case, . . . and other matters that happened well after November 7, 2013.” R427. The prosecutor responded that evidence Defendant had previously worked with another agent was admissible and he should thus be allowed to explore it. *See* R427-R429. Defense counsel objected that evidence of Defendant’s “other cases,” and that Defendant worked “with other officers . . . that don’t pertain necessarily to this case,” was “prejudicial.” R429.

The trial court reiterated that evidence Defendant contacted and made an offer to Agent Holmer was admissible. R430. But the trial court excluded evidence that Defendant contacted another DEA agent in another case: “[W]e have to be very cautionary in my estimation as it relates to the next case.” R430; *see also* R431. The trial court observed that the prosecutor “probably [had] enough before the jury already relative to that independent contact by this defendant relative to the resolution of this case with a designation that he is able to supply them with high level traffickers.” R430.

Given the trial court's observation, the prosecutor agreed to "wrap it up," and to not call the other DEA agent. R431. When Agent Holmer resumed testifying, the prosecutor elicited only that Holmer ultimately told Defendant he was not willing to work with him. R432.

4. The information is amended to substitute a sports facility for a ballet school as the facility that triggered the drug-free-zone penalty enhancement.

The morning of trial, the prosecutor moved to amend the information—i.e., to substitute "Ultimate Sports USA Baseball and Softball Training" for a ballet school previously identified as the facility that triggered a drug-free-zone penalty enhancement. *See* R169-172; *see also* R808-813 (attached in Addendum D). The prosecutor planned to call the "case officer to testify about the Ultimate Sports training facility, since he had measured its distance from the defendant's arrest, but the defense attorney objected, arguing that the officer's testimony lacked foundation." R810. Accordingly, the trial court ruled that the prosecutor could file the amended information only if he "called the owner or operator of the Ultimate Sports training facility to establish the foundation for the new drug-free zone." *Id.*

During trial, the prosecutor elicited uncontroverted testimony from Detective Purvis that the sports facility was within 400-420 feet from where Defendant was arrested. R455.

The prosecutor also "located one of the owners of one of the businesses located [within] the Ultimate Sports training facility . . . and she agreed to appear at trial later that day." R810. Defense counsel "did some Google research on the training facility briefly that morning." R810-R811. Both the prosecutor and counsel interviewed the owner "during a break in the trial proceedings" that same morning. R811. On direct examination, the prosecutor elicited the owner's testimony that during the peak months of November through May, there were roughly 200 to 300 people under age eighteen at the facility on a weekly basis. R394. On cross examination, trial counsel elicited that the owner's business required a membership to participate, that a security code was required to access the building if no one else was there, and that participating clients had to sign a waiver. R399-R402.

5. Defense theory: Defendant did not possess the drugs in the briefcase, but even if he did, they were intended for personal use, not distribution.

In closing argument, defense counsel argued, among other things, that the State had not proven that Defendant possessed the drugs in the

briefcase where (1) Defendant was driving someone else's car; (2) the briefcase was found in the trunk after Defendant was taken from the scene; (3) Defendant never admitted the briefcase was his; and, (4) although Defendant had property inside the briefcase, it also contained other peoples' property. R572-R574. Defense counsel further argued that even if Defendant did possess the drugs in the briefcase, they were packaged in individual user amounts, which was more consistent with personal use than with distribution. R574-R575. Turning to the drug-free-zone evidence, defense counsel argued that the Ultimate Sports building was not necessarily open to the public. R576-R578. Rather, it was more akin to a private gym that required a membership for admission. *Id.*

On rebuttal, the prosecutor argued that the Ultimate Sports facility hosted from fifty to two hundred children per week from November through May; moreover, the mere fact that it could not be accessed after hours without a membership did not mean it was not a sports facility. R584-585. As for the drug charges, the prosecutor pointed out that other than the two prescription bottles bearing Defendant's name found inside the briefcase, none of the other drugs in the briefcase had peoples' names on them. R591. Additionally, Defendant never told the officers the names of the alleged friends from whom he obtained either the stolen trailer or the

Cadillac. R591-592. Defendant had been the Cadillac's sole occupant and driver. *Id.* Added to that, the briefcase in the trunk contained myriad pills and other illicit drugs packaged for distribution, scales for weighing drugs, and additional baggies. R592. Although the briefcase also contained paraphernalia that could be used to ingest or inhale some of the drugs, that did not mean the multitude of drugs in the briefcase were intended only for Defendant's personal use. *Id.* To the contrary, the drugs were packaged for distribution: "[I]t's a mobile pharmacy. But he's not a pharmacist, ladies and gentleman, he's a drug dealer." R593. Finally, the prosecutor argued that Agent Holmer's testimony about Defendant's offer to help the DEA gain access to a high-level heroin trafficker in exchange for reduced charges in this case showed Defendant's "consciousness of guilt" for the charged crimes. *Id.*

The jury convicted Defendant as charged. R178-R188. The trial court imposed statutory prison terms of five-years-to-life for each of the six first degree felony convictions; one-to-fifteen year prison terms for each of the three second degree felony convictions; and a zero-to-five year term for the third degree felony conviction. R236-R239. The trial court ordered that the prison terms run concurrent with each other and with Defendant's sentences in other cases. R238;R732. The trial court sentenced Defendant to

257 days jail with credit for time served for the class A misdemeanor. R238. The court also "suspended all fines and fees," and recommended that Defendant participate in the Conquest Program in prison, and that he "serve the least amount of time possible after getting his treatment in terms of drug rehab." R732-33. Defendant filed a timely notice of appeal. R240.

SUMMARY OF ARGUMENT

I.(a). Defendant argues that the trial court abused its discretion in overruling an alleged rule 403 objection to evidence that he offered to help the DEA gain access to a high-level heroin trafficker in exchange for leniency. But Defendant did not preserve a rule 403 objection to this evidence; he raised only a relevance objection. The trial court overruled Defendant's relevance objection and Defendant has abandoned that claim on appeal. Because Defendant's argument regarding an alleged rule 403 objection is unpreserved, this Court will address it only if Defendant can establish plain error, ineffective assistance of counsel, or exceptional circumstances.

I.(b). Defendant alternatively argues that his counsel was ineffective for not raising a rule 403 objection to the offer evidence. But Defendant has not rebutted the strong presumption that his counsel reasonably chose to forgo a rule 403 objection because he reasonably concluded that rule 403

would not have excluded it. That rule creates a high bar to excluding relevant evidence. It applies only when the evidence's probative value is substantially outweighed by its danger of unfair prejudice.

Counsel could have reasonably concluded that evidence of Defendant's offer to help the DEA had high probative value because it went to the central issue of the case—i.e., whether Defendant knowingly possessed the drugs in the briefcase, and if so, whether he intended to distribute them. Counsel argued that the drugs in the briefcase did not belong to Defendant, but that even if they did, he did not intend to distribute them. Defendant's offer to help the DEA get access to a high-level heroin trafficker in exchange for reduced charges was therefore highly relevant and probative of Defendant's knowledge and intent.

Counsel also could have reasonably concluded that the trial court would view Defendant's offer to help the DEA as highly probative because the offer arguably constituted a tacit admission of Defendant's guilt. Defendant's request for leniency arguably showed that he believed that the drug charges against him were valid. The evidence also had a low potential for unfair prejudice because Defendant's offer to help the DEA was tied to his request for leniency in this case, therefore reducing the chance that the jury would consider the testimony only as evidence that Defendant knew

drug dealers. Given all this, counsel could have reasonably decided that a rule 403 objection would be futile.

Finally, Defendant cannot show prejudice because a rule 403 objection would have in fact been futile and the remaining evidence against him was overwhelming. Defendant was found in sole custody of a briefcase that contained multiple, distributable amounts of drugs, including heroin and two prescriptions for Oxycodone in Defendant's name. While the briefcase also contained several other people's identifications, none of those people's names were on any of the drugs in the briefcase.

II. Defendant next argues that his counsel was ineffective because he did not object to a last-minute amendment to the information that substituted a sports facility for a ballet school as the entity that triggered the drug-free-zone penalty enhancement. Given the timing of the amendment, Defendant argues that his counsel could not measure the distance between the sports facility and the location of Defendant's arrest, and also could not otherwise investigate the sports facility. These claims fail at the outset because they are unsupported in the record. The uncontroverted evidence established that the sports facility was well within the statutorily required distance from where Defendant was arrested in possession of the drugs. It is further uncontroverted that trial counsel researched the sports facility

online that morning, and that he also interviewed an owner before she testified. No record evidence proves—or even suggests—that any additional research could have established that the sports facility was more than 1000 feet from the location of Defendant's arrest, or that it did not otherwise qualify to trigger the drug-free-zone penalty enhancement. Moreover, Defendant has not sought a remand to develop any non-speculative evidence supporting his claim of ineffectiveness.

ARGUMENT

I.

DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING AN ALLEGED RULE 403 OBJECTION TO EVIDENCE THAT DEFENDANT OFFERED TO HELP THE DEA GAIN ACCESS TO A HIGH-LEVEL HEROIN TRAFFICKER IN EXCHANGE FOR LENIENCY; ALTERNATIVELY, DEFENDANT HAS NOT SHOWN THAT HIS COUNSEL WAS INEFFECTIVE BECAUSE HE DID NOT OBJECT UNDER RULE 403

In Point I of his brief, Defendant argues that the trial court erred when it overruled an alleged rule 403 objection to Agent Holmer's testimony that Defendant offered to help the DEA gain access to a high-level heroin trafficker in exchange for reduced charges. Appt.Br.9-15 (citing Utah R. Evid. 403). Alternatively, Defendant argues that his counsel was ineffective for not raising a rule 403 objection to the testimony. Appt.Br.16-18. Defendant's challenge fails first because he never raised a rule 403

objection to the evidence; rather, Defendant challenged Holmer's offer testimony on relevance grounds only, a claim he has now abandoned on appeal. *See* Aplt.Br.9-18. Defendant's alternative argument, that his counsel was ineffective because he did not raise a rule 403 objection to the offer testimony, fails because Defendant has not proven—and cannot prove—deficient performance or prejudice.

A. Defendant did not preserve a rule 403 objection to the offer testimony.

"To preserve an issue for appeal, the issue must be preserved to the trial court in such a way that the trial court has an opportunity to rule on that issue." *State v. Alzaga*, 2015 UT App 133, ¶21, 352 P.3d 107 (citation and quotation omitted). An objection on one ground "does not preserve for appeal any alternative grounds for objection." *Id.* (citation and quotation omitted).

Defendant argues that the trial court erred in overruling an alleged prejudice objection to Agent Holmer's testimony that Defendant offered to help the DEA gain access to a high-level heroin trafficker in Salt Lake City in exchange for reduced charges. Aplt.Br.9-16. Defendant's argument fails at the outset, however, because he did not preserve a rule 403 objection below; rather, as shown in the Statement of the Case, above, Defendant's only objection to this testimony was that it was irrelevant. *See* R414,R417-

418. Instead of reasserting his relevance objection on appeal, Defendant now asserts a rule 403 prejudice objection. Apl't.Br.9-15. But to the extent that counsel raised a prejudice objection below, it went solely to Holmer's testimony that obliquely referenced Defendant's other cases, not Holmer's testimony about Defendant's offer to help the DEA in this case. *Compare* R427-429 and R414,R418. Because an objection on one ground "does not preserve for appeal any alternative grounds for objection," Defendant's rule 403 objection is unpreserved. *Alzaga*, 2015 UT App 133, ¶21 (citation and quotation omitted). This Court will thus review Defendant's rule 403 challenge to Holmer's offer testimony "only if Defendant can establish plain error, ineffective assistance of counsel, or exceptional circumstances." *State v. Kozlov*, 2012 UT App 114, ¶34, 276 P.3d 1207.

Implicitly recognizing as much, Defendant alternatively argues that his counsel was ineffective for not raising a rule 403 objection to Holmer's offer testimony. *See* Apl't.Br.16-18.

B. Defendant cannot rebut the strong presumption that his counsel reasonably decided to forgo a rule 403 objection to the offer evidence; nor has he shown prejudice.⁴

Defendant argues that his trial counsel should have objected under rule 403 to Agent Holmer's testimony that he offered to help the DEA gain access to a high-level heroin trafficker in exchange for leniency. Aplt.Br.10,16-18. Defendant argues that the testimony was excludable under rule 403 because there was "no evidence that the drug trafficker was involved in the charged crime" – thus, Defendant argues, the evidence was unfairly prejudicial. Aplt.Br.17. He further argues that Holmer's testimony about Defendant's offer constituted *Strickland* prejudice because it appealed "to the jury's passions or prejudices," and associated Defendant "with a feared . . . group." Aplt.Br.17-18 (quotation and citation omitted). Defendant is mistaken on both counts.

To prevail on his ineffectiveness claim, Defendant "has the difficult burden of showing *actual unreasonable representation and actual prejudice.*" *State v. Tyler*, 850 P.2d 1250, 1259 (Utah 1993) (emphasis in original). A failure to prove either element defeats an ineffectiveness claim. *Strickland v.*

⁴ Defendant raises a similar claim of ineffectiveness in a related case, *State v. Edgar*, Case No. 20150594-CA. The State's Brief of Appellee in that case was filed on 20 April 2016.

Washington, 466 U.S. 668, 687, 697 (1984); accord *State v. Verde*, 770 P.2d 116, 119 (Utah 1989). Defendant has not proven either *Strickland* element.

1. Defendant cannot rebut the strong presumption that counsel reasonably decided to forgo a rule 403 objection because the offer testimony had strong probative value and posed little danger of unfair prejudice.

This Court's review of counsel's performance begins with a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997) (quoting *Strickland*, 466 U.S. at 689). The presumption exists because of the "variety of circumstances faced by defense counsel" and "the range of legitimate decisions regarding how to best represent a criminal defendant." *Tyler*, 850 P.2d at 1254; see also *Strickland*, 466 U.S. at 689. The presumption recognizes that, "[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Defendant can rebut this strong presumption only "by persuading the court that there was *no conceivable tactical basis* for counsel's actions." *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (emphasis in original) (quotations and citation omitted). The State is not required to articulate a reasonable explanation for counsel's acts or omissions. Nor does a defendant succeed

merely because this Court cannot conceive of a tactical explanation for counsel's performance. Rather, "'the defendant'" always bears the burden to "'overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Benevenuto v. State*, 2007 UT 53, ¶19, 165 P.3d 1195 (quoting *Strickland*, 466 U.S. at 689); see also *State v. Powell*, 2007 UT 9, ¶46, 154 P.3d 788. But when it is possible to conceive of a reasonable tactical basis for trial counsel's actions, then a defendant clearly has not rebutted the strong presumption that his counsel performed reasonably. See *Clark*, 2004 UT 25, ¶7; *State v. Holbert*, 2002 UT App 426, ¶58, 61 P.3d 291.

Reasonably concluding that an objection will be futile is a conceivable tactical basis for not raising that objection. Futile objections do not affect the evidence before the jury. They do, however, have the potential to annoy or even alienate the jury. Such objections can also annoy and alienate the trial court and the prosecutor, with whom counsel may have to interact in the future. Thus, failure "to raise futile objections or motions does not constitute ineffective assistance of counsel." *State v. Kennedy*, 2015 UT App 152, ¶50, 354 P.3d 775.

Defendant's counsel could have reasonably concluded that it would have been futile to object to evidence of Defendant's offer under rule 403.

That rule presumes that evidence is admissible and imposes a high hurdle for excluding evidence. Relevant evidence may be excluded under the rule only “if its probative value is *substantially* outweighed by a danger of . . . *unfair* prejudice.” Utah R. Evid. 403 (emphasis added); *see also State v. Burke*, 2011 UT App 168, ¶ 34, 256 P.3d 1102. The rule “imposes . . . the heavy burden not only to show that the risk of unfair prejudice is greater than the probative value, but that it ‘substantially outweigh[s]’ the probative value.” *State v. Jones*, 2015 UT 19, ¶29, 345 P.3d 1195 (quoting Utah R. Evid. 403) (alteration in original). “Given this bar, [courts] ‘indulge a presumption in favor of admissibility.’” *State v. Lucero*, 2014 UT 15, ¶32, 328 P.3d 841 (quoting *State v. Dunn*, 850 P.2d 1201, 1221-22 (Utah 1993)). Indeed, rule 403 “‘is an “inclusionary” rule.’” *State v. Kooyman*, 2005 UT App 222, ¶26, 112 P.3d 1252 (quoting *State v. Ramirez*, 924 P.2d 366, 269 (Utah App. 1996)).

Evidence is unfairly prejudicial only when it “has an ‘undue tendency to suggest decision upon an improper basis.’” *Lucero*, 2014 UT 15, ¶32 (quoting *State v. Bair*, 2012 UT App 106, ¶22, 275 P.3d 1050). Evidence “is not unfairly prejudicial simply because it is detrimental to a party’s case.” *Kooyman*, 2005 UT App 222, ¶26 (quoting *United States v. Magleby*, 241 F.3d 1306, 1315 (10th Cir. 2001)).

Counsel could have reasonably concluded that Agent Holmer's testimony about Defendant's offer to help the DEA had high probative value for two reasons. First, it was directly relevant to the disputed issues of whether Defendant knowingly possessed the drugs in the briefcase, and, if so, whether he intended to distribute them. Second, counsel could have reasonably concluded that the testimony arguably showed that Defendant had tacitly admitted his guilt. Holmer testified that Defendant offered to introduce him to a high-level heroin trafficker in exchange for reduced charges, and asked him to contact the Utah County prosecutor in this case. R419.

This evidence was highly probative of Defendant's knowledge and intent with regard to the drugs in the briefcase. Counsel argued to jurors that the drugs in the briefcase did not belong to Defendant because (1) Defendant was driving someone else's Cadillac; (2) the briefcase was found in the trunk after Defendant was taken from the scene; (3) Defendant never admitted that the briefcase was his; and, (4) although Defendant had property inside the briefcase, it also contained other peoples' property. R572-574. Even if jurors believed that Defendant possessed the drugs in the briefcase, however, counsel argued that the drugs were packaged in individual user amounts, which was more consistent with personal use than

with distribution. R574-575. Evidence that Defendant had direct access to a high-level heroin trafficker made it highly likely that Defendant knowingly possessed the myriad distributable drugs in the briefcase—including heroin—and that he intended to distribute the drugs. In other words, Defendant's admission that he had access to a heroin wholesaler made it highly likely that he was a drug retailer.

For example, in *United States v. Haynes*, 372 F.3d 1164, 1167 (10th Cir. 2004), the defendant's statement that he knew a woman who manufactured methamphetamine using a particular method was admissible under federal rule 403, even though it showed the defendant associated with drug dealers, because the admission was highly probative of a disputed issue. Haynes was charged with attempting to manufacture methamphetamine after investigators found in his home various chemicals and equipment associated with manufacturing meth. *Id.* at 1166. Haynes claimed that he possessed the incriminating items only for making beer, and he introduced testimony that some of the incriminating items had non-criminal uses. *Id.* at 1166-67. One of the substances found in his home contained a substantial amount of phenyl-2-propanone (P2P), and one method for making methamphetamine requires P2P. *Id.*

Haynes objected under federal rule 403 when the prosecution offered testimony that he told a DEA agent “that he knew a woman who manufactured methamphetamine using the P2P method.” *Id.* at 1167. He argued that the evidence “‘posed a danger that the jury would convict on the ground that [he] apparently associated with drug dealers.’” *Id.* (alteration in original). The trial court overruled the objection and “admitted the statement, saying that although it was prejudicial, it was also ‘highly probative’ of Defendant’s knowledge.” *Id.*

The Tenth Circuit affirmed. *Id.* at 1167-1168. It held that the statement was “relevant to show that Defendant was aware that P2P could be used to manufacture methamphetamine” and therefore “shed[] light on why Defendant possessed the various items seized from his home.” *Id.* at 1167. Its probative value therefore was not substantially outweighed by the danger of unfair prejudice. *Id.* (citing Fed. R. Evid. 403).

Likewise, counsel here could have reasonably concluded that Defendant’s offer to help the DEA gain access to a high-level heroin trafficker was highly probative of whether Defendant possessed and intended to distribute the heroin and myriad other illicit drugs in the briefcase.

Counsel could have also reasonably concluded that Defendant's offer was highly probative because it arguably amounted to a tacit admission of his guilt. Defendant arguably admitted that he had engaged in criminal behavior when, rather than disputing the allegations against him, he attempted to obtain leniency by offering to introduce Agent Holmer to a high-level heroin trafficker.

Additionally, the evidence's context reduced, or arguably eliminated, any danger for unfair prejudice. Agent Holmer's testimony was always tied to Defendant's request for reduced charges in this case. *See* R419. Thus, the jury did not hear only that Defendant knew a high-level heroin trafficker. Rather, it heard that Defendant was offering to reveal this trafficker in exchange for leniency in this case. The jury would have therefore understood the testimony to be important because it amounted to an implicit admission of guilt, not merely evidence that Defendant knew a high-level heroin trafficker.

Defendant cites several federal cases all holding that evidence that shows only guilt by association is inadmissible under rule 403. *Aplt.Br.17* (citing *United States v. Echavarria-Olarte*, 904 F.2d 1391, 1398 (9th Cir. 2006)); *see also* *Aplt.Br.11-14* (citing, e.g., *United States v. Lopez-Medina*, 461 F.3d 724, 741-742 (6th Cir. 2006); *United States v. Marshall*, 173 F.3d 1312, 1317 (11th

Cir. 1999)). But none of those cases involved a defendant's admission that he had access to a trafficker of large amounts of drugs, let alone an offer to reveal his source in exchange for leniency. As explained, the evidence here showed more than just that Defendant "knew a criminal." See *Lopez-Medina*, 461 F.3d at 742. Defendant's cases therefore do not establish that counsel unreasonably chose not to object under rule 403.

In short, the challenged evidence was highly probative of Defendant's guilt on the drug charges and possessed little, if any, danger of unfair prejudice. Defendant therefore has not rebutted the strong presumption that his counsel performed effectively by not objecting under rule 403.

2. Defendant cannot show prejudice because rule 403 would not have excluded the offer evidence and, even if it would have, the remaining evidence was overwhelming.

To establish prejudice, Defendant must show "'a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *State v. Hales*, 2007 UT 14, ¶86, 152 P.3d 321 (quoting *Strickland*, 466 U.S. at 695). A reasonable probability is one "sufficient to undermine confidence in the outcome." *Harrington*, 562 U.S. at 104 (quotations and citation omitted). Defendant must do more than show "that the errors had some conceivable effect on the outcome of the

proceeding.” *Id.* “Counsel’s errors must be ‘so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *Id.*

Defendant cannot show prejudice because a rule 403 objection would have in fact been futile. For the reasons explained above, the rule would not have excluded evidence of Defendant’s offer because its probative value was not substantially outweighed by a danger of unfair prejudice. Because the failure “to raise futile objections or motions does not constitute ineffective assistance of counsel,” Defendant cannot show prejudice. *See Kennedy*, 2015 UT App 152, ¶50.

But even if such a motion would have succeeded, Defendant still cannot demonstrate prejudice because the remaining evidence against him was overwhelming. There was no real dispute that the drugs belonged to anyone other than Defendant, where he was found in sole possession of the briefcase filled with drugs, including two prescription bottles of Oxycodone that had labels bearing his name. *See* R435-446. Moreover, Defendant did not introduce any evidence to dispute Detective Purvis’s testimony that the briefcase contained distributable amounts of myriad illicit drugs. *See* R474; *see also* R455 (“[I]ts a large distributable amount”). In Purvis’s twenty-one years of experience, this type of packaging was a “common” practice among “people distributing medications to other people.” R474. Dealers typically

use scales like those found in the briefcase to “weigh out the large quantities to put in the smaller packages.” R386-387. Given these uncontested facts, there was no likelihood the jury would have reached a different result absent evidence of Defendant’s offer to help the DEA gain access to a high-level heroin trafficker in exchange for leniency. Defendant therefore cannot show that he was prejudiced by any deficient performance arising from a lack of a rule 403 objection to the evidence. Consequently, he has not shown that his counsel was ineffective for not making a rule 403 objection.

II.

DEFENDANT HAS NOT SHOWN THAT HIS COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE AMENDED INFORMATION OR REQUESTING A CONTINUANCE

The morning of trial, the prosecutor moved to amend the information to substitute a sports facility as the facility that triggered a drug-free-zone penalty enhancement. *See* R171; *see also* R808-813. Defendant argues that his counsel was ineffective because he did not object to the amendment. *Aplt.Br.*18-19. Specifically, Defendant argues that the timing of the amendment prevented his counsel “from fully developing his defense” — i.e., counsel (1) “could not measure the distance between the new location and the place where [Defendant] was arrested,” and (2) he could not

"investigate the type of business done at the new location." Apl't.Br.19-21. Defendant cursorily concludes that he was therefore prejudiced. Apl't.Br.21.

Defendant's ineffectiveness claim fails at the outset because it is unsupported in the record. Moreover, Defendant has not sought remand under rule 23B, Utah Rules of Appellate Procedure, to develop any non-speculative evidence in support of his ineffectiveness claim.

This Court presumes that "any argument of ineffectiveness presented to it is supported by all the relevant evidence of which defendant is aware." *State v. Litherland*, 2000 UT 76, ¶16, 12 P.3d 92. If "the record appears inadequate in any fashion, ambiguities or deficiency resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." *Id.* at ¶17. Defendant thus has the burden to provide evidence of his counsel's alleged deficient performance and resulting prejudice. The instant record is inadequate to support Defendant's claims of ineffective assistance.

First, at the time of Defendant's 2013 arrest, the drug-free-zone statute, Utah Code Ann. § 58-37-8(4)(a)(viii)-(ix) (West 2012), authorized enhanced penalties for specified crimes committed "in a . . . sports facility" or "within any area that is within 1,000 feet" of a sports facility. The uncontroverted evidence at Defendant's trial established that the sports

facility identified in the amended information was well within 1000 feet of where Defendant was arrested with the briefcase full of drugs. *See* R455. Absent any record evidence that the sports facility was, in fact, outside this 1000 foot zone, Defendant has not proven—and cannot prove—that his counsel was ineffective for not objecting to the amendment or requesting a continuance. On this record, objectively reasonable counsel could have concluded that any objection to the amendment, or request for a continuance, would have been futile. *See Kennedy*, 2015 UT App 152, ¶50. Defendant thus fails to prove deficient performance with regard to the 1000-foot zone.

For essentially the same reason, Defendant fails to prove prejudice. As shown, on this record, an objection would not have excluded the drug-free-zone evidence because the sports facility was well within the required 1000-foot zone. *See* R455. Because the failure “to raise futile objections or motions does not constitute ineffective assistance of counsel,” Defendant has not shown—and cannot show—prejudice. *See Kennedy*, 2015 UT App 152, ¶50.

Finally, Defendant’s claim that trial counsel was ineffective for not objecting or requesting a continuance to research “the type of business done” at the sports facility, is similarly unsupported. *Aplt.Br.21*. Indeed,

the record reflects that trial counsel in fact researched the sports facility online and also interviewed an owner before she testified. *See* R808-813. Defendant makes no attempt to show that these efforts fell outside the “wide range of reasonable professional assistance.” *Tyler*, 850 P.2d at 1254; *see* Aplt.Br.18-21. He thus fails to rebut the strong presumption of effective assistance. *See Tyler*, 850 P.2d at 1254.


For essentially the same reason, Defendant fails to establish any prejudice. The record does not support that any additional investigation would have allowed counsel to successfully challenge the drug-free-zone evidence on any basis.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on May 18, 2016.


SEAN D. REYES
Utah Attorney General



MARIAN DECKER
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 7166 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.


MARIAN DECKER
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on May 18, 2016, two copies of the Brief of Appellee were

☒ mailed ☐ hand-delivered to:

Emily Adams
ADAMS LEGAL LLC
PO Box 1564
Bountiful, UT 84011

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.

Lee Nakamura

Addenda

Addendum A

United States Code Annotated Constitution of the United States Annotated Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury trials

Amendment VI. Jury trials for crimes, and procedural rights

Currentness

<Notes of Decisions for this amendment are displayed in three separate documents. Notes of Decisions for subdivisions I through XX are contained in this document. For Notes of Decisions for subdivisions XXI through XXIX, see the second document for Amend. VI. For Notes of Decisions for subdivisions XXX through XXXIII, see the third document for Amend. VI.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

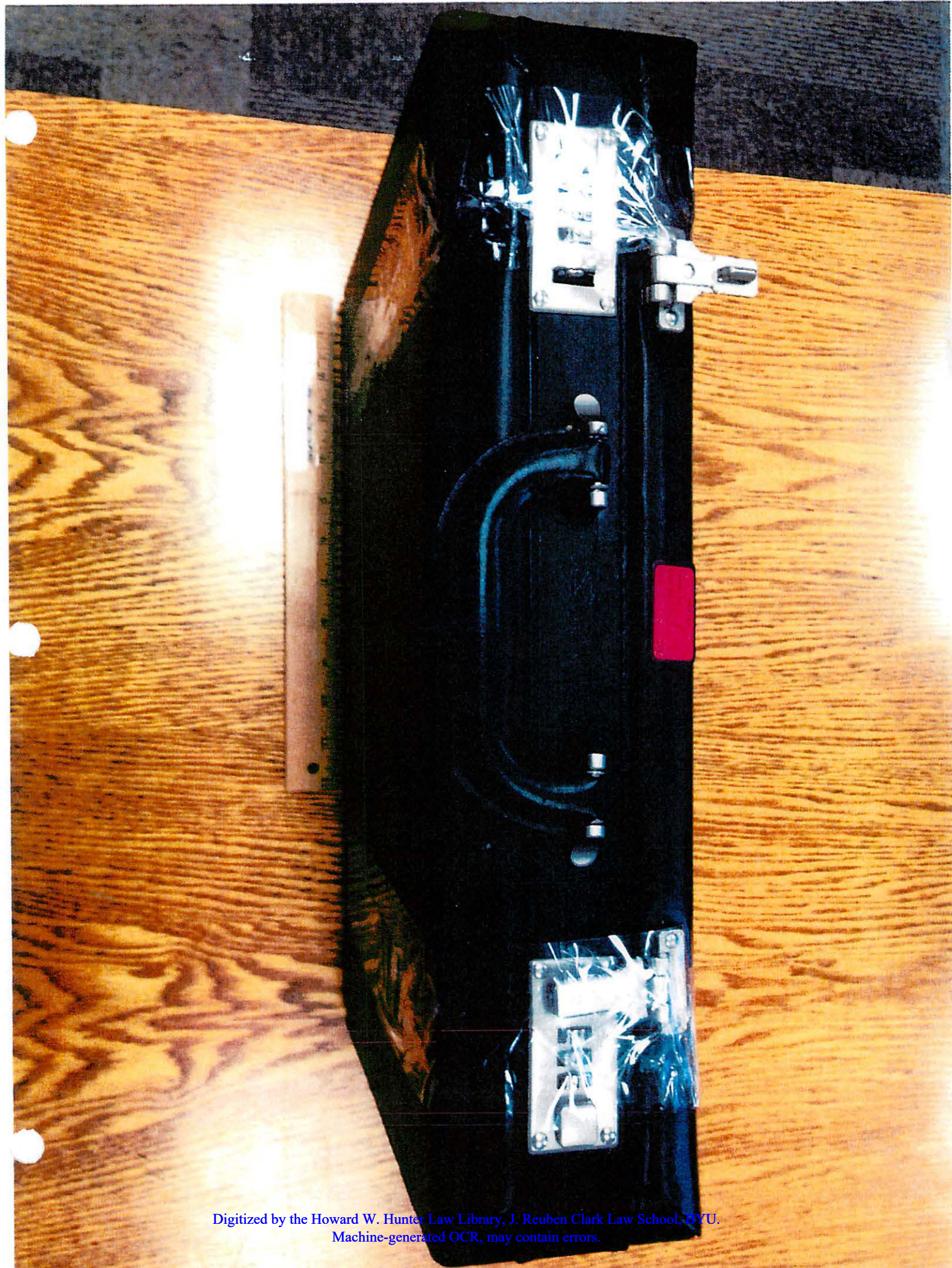
Notes of Decisions (5274)

U.S.C.A. Const. Amend. VI-Jury trials, USCA CONST Amend. VI-Jury trials
Current through P.L. 114-143. Also includes P.L. 114-145 and 114-146.

End of Document

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Addendum B





STATES	
EXHIBIT NO.	8
CASE NO.	
DATE:	CLK

STATES

EXHIBIT NO.

CASE NO.

DATE

CLK

Lindon City P.D.

100 North State Street
Lindon, UT 84042
(801) 769-8600

Suspect Name DOB

1 Michael Edgar

2

3

4

OFFENSE: Drugs 13:20

DATE & TIME SEIZED: 11-7-13

LOCATION: 410 N. 880 W.



WC20130177201001W

C201301772 - 1

LCP

Init

LA

Date

11/3/13

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MADE IN U.S.A.

C20131772-2
2/24/15 RB

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Case # 13LIE04181
Property # 6725
Officer Purris

Item Number and Description

1- Amphetamine Pill **#2**

LINDON POLICE
DEPARTMENT
INC#: 13LI04181
LOC: LIS26
DESC: CS-Prescribed Pill

13LIE0489

STATES
EXHIBIT NO. 10
CASE NO: _____
DATE: _____ CLK



Lindon City P.D.

100 North State Street
Lindon, UT 84042
(801) 769-8600

Suspect Name DOB

1 Michael Edgar

2

3

4

OFFENSE: Drugs

DATE & TIME SEIZED: 11/7/13

LOCATION: 410 W. 880 W.

FISKARS

941

MADE IN U.S.A.



Case # 13LI04181
Property # 6730
Officer Purvis

Item Number and Description

Unknown Pill

#3

LINDON POLICE
DEPARTMENT

INC#: 13LI04181

LOC: LIS26

DESC: CS-Prescribed Unknown



13LIE0481

STATES

EXHIBIT NO. 11

CASE NO. _____

DATE: _____

CLK

FISKARS

941

Lindon City P.D.

100 North State Street
Lindon, UT 84042
(801) 769-8600

Suspect Name DOB

1	<u>Michael L Edgar</u>	_____
2	_____	_____
3	_____	_____
4	_____	_____

OFFENSE: Drugs

DATE & TIME SEIZED: 11/7/13

LOCATION: 410 N. 880 W.

Lindon City P.D.

100 North State Street
Lindon, UT 84042
(801) 769-8600

Suspect Name DOB

1 Michael Edgatz

2 _____

3 _____

4 _____

OFFENSE: Drugs

DATE & TIME SEIZED: 11-7-13

LOCATION: 410 N. 880 W.

Case # 13LIE04181

Property # 6728

Officer S. Gray

Item Number and Description

Meth 1 Gram

LINDON POLICE
DEPARTMENT

INC#: 13LIE04181

LOC: LIS26

DESC: CS-Methamphetamine Crystal



13LIE0476

STATES

EXHIBIT NO. 12

CASE NO: _____

DATE: _____ CLK

1 MADE IN U.S.A. 2

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STATES	CLK
EXHIBIT NO. 13	
CASE NO:	
DATE:	

#5

LINDON POLICE DEPARTMENT	
INC#: 13LI04181	LOC: LIS26
DESC: CS-Prescribed Oxycodone Pill	
	
13LIE0474	



FISKARS®



941

STATES
EXHIBIT NO. 13a
CASE NO: _____
DATE: _____ CLK

Case # 13LI04181
Property # 6736
Officer Furris

Item Number and Description

Oxycodone 4 pills

LINDON POLICE DEPARTMENT
INC#: 13LI04181 LOC: LIS26
DESC: CS-Prescribed Oxycodone Pill



13LIE0474

STATES
EXHIBIT NO. 14
CASE NO.
DATE: CLK

R.O. 2/18/15

C20131722

6
2/24/15
PB

LINDON POLICE
DEPARTMENT
INC#: 13LI04181
LOC: LIS26
DESC: CS-Prescribed zolpidem

#6



13LIE0484



5118115

K.C.

11-25-53

STATES
EXHIBIT NO. 149
CASE NO: _____
DATE: _____ CLK



STATES
EXHIBIT NO. 15
CASE NO:
DATE: CLK

REC-118115

C2013.1772
8



2/11/15
EB

LINDON POLICE DEPARTMENT
INC#: 13LI04181 LOC: LIS26
DESC: CS-Prescribed xanax alprazola

13LIE0483

118





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STATES
EXHIBIT NO. 151
CASE NO: _____



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STATES
EXHIBIT NO. 16
CASE NO:
DATE: CLK

R.L. 3/15/88

LINDON POLICE DEPARTMENT
INC#: 13LI04181 LOC: LIS26
DESC: CS-Prescribed Clonazepam

13LIE0486

49

51815

588411



STATES
EXHIBIT NO. 16a
CASE NO: _____
DATE: _____ CLK



STATES
EXHIBIT NO. 17
CASE NO:
DATE: CLK

R.C. 2200/15

02081772 15

LINDON POLICE
DEPARTMENT
INC#: 13LI04181
LOC: LIS26
DESC: CS-Prescribed Pills
#10
13LIE0482



Case # 13LB04181
Property # 6732
Officer Purvis

Item Number and Description

Oxycodone

6

LINDON POLICE
DEPARTMENT

INC#: 13LI04181

LOC: LIS26

DESC: CS-Prescribed Pills



13LIE0482

STATES
EXHIBIT NO. 17a
CASE NO:
DATE:
CLK



1981/15

London City

100 North State Street
London, UT 84042
(435) 769-8600

Suspect Name DOB

1 Michael Edgar

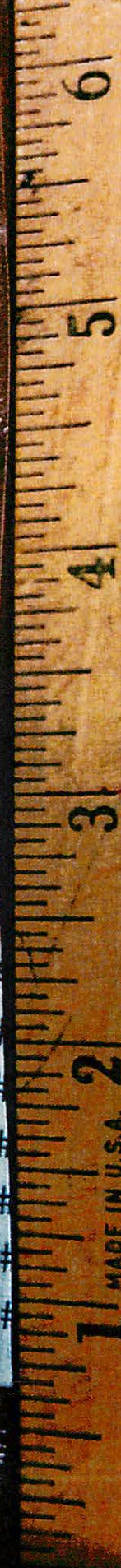
2 _____
3 _____
4 _____

OFFENSE: 11/2/81

DATE & TIME SEIZED: 11/2/81

LOCATION: 40

STATES
EXHIBIT NO. 17b
CASE NO:
DATE:
CLK



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STATES
EXHIBIT NO. 18
CASE NO:
DATE: CLK

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LINDON POLICE DEPARTMENT
INC#: 13LI04181 LOC: LIS26
DESC: CS-Prescribed Oxycontin

13LIE0475



STATES
EXHIBIT NO. 19
CASE NO:
DATE: CLK

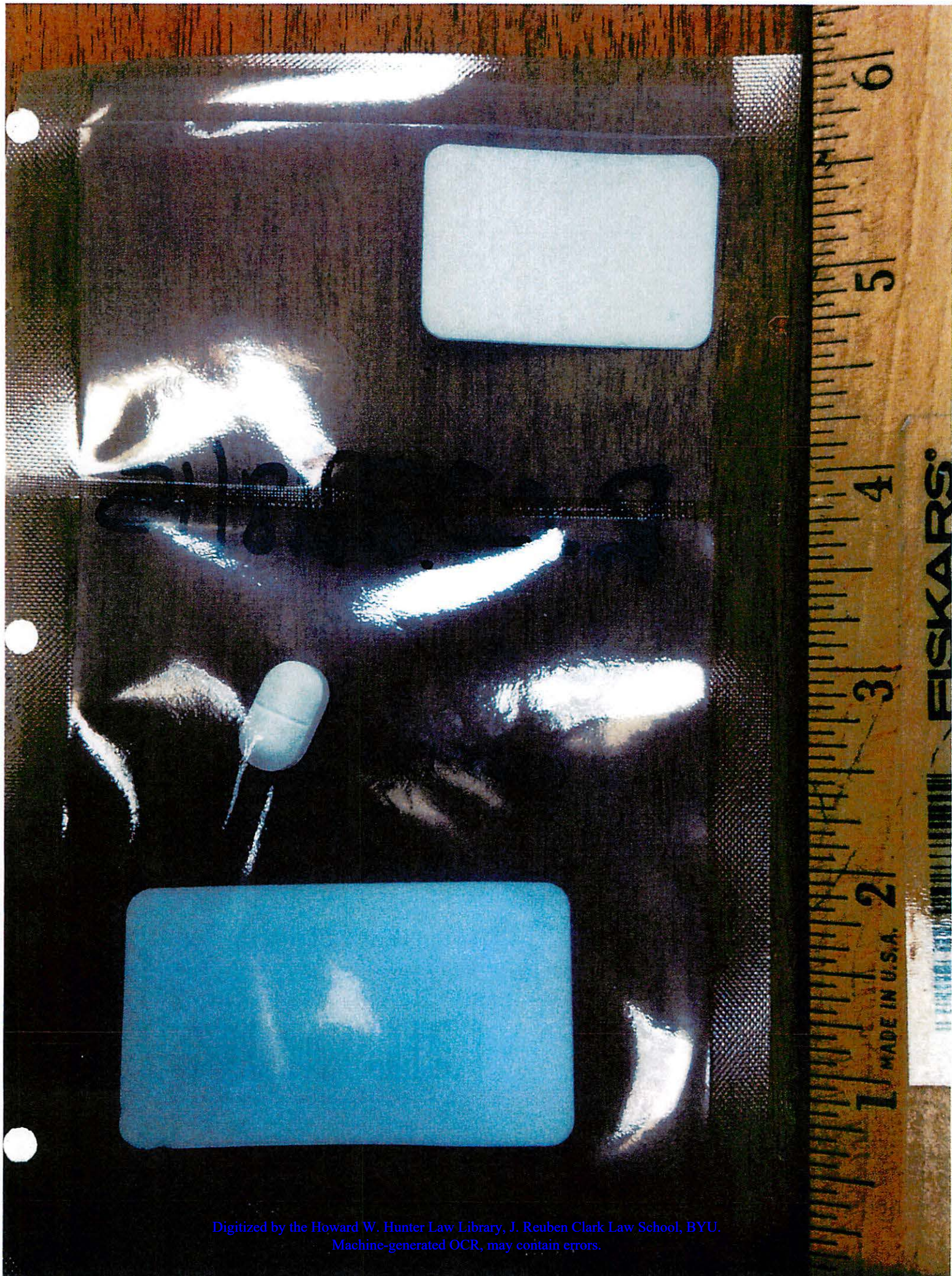
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LINDON POLICE DEPARTMENT
INC#: 13LI04181 LOC: LIS26
DESC: CS-Prescribed Oxycodone Pill

13LIE0490





Case # 13LI04181
Property # 6737
Officer Purvis
r and Description
tion bottle / 3
odone pills inside

STATES
EXHIBIT NO. 199
CASE NO.:
DATE:
CLK

LINDON POLICE DEPARTMENT
INC#: 13LI04181 LOC: LIS26
DESC: CS-Prescribed Oxycodone Pill



13LIE0490

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STATES
EXHIBIT NO. 20
CASE NO. 20
DATE: _____ CLK

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STATES
 EXHIBIT NO. 22
 CASE NO:
 DATE: CLK

LCP Init Date
 11/19/11

FISKARS®

MADE IN U.S.A.

943

Case # 13LI04181
Property # 6734
Officer Purvis

Item Number and Description

pill bottle used to
store the misc pills.

LINDON POLICE DEPARTMENT
INC#: 13LI04181 LOC: LIS26
DESC: CS-Paraphernalia Amphetamine Pill



13LIE0485

STATES
EXHIBIT NO. 23
CASE NO. _____
DATE _____ CLK

1 2 3 4 5 6
MADE IN U.S.A.
FISKARS



Lindon City P.D.

100 North State Street
Lindon, UT 84042
(801) 769-8600

Case # 13404181
Property # 6731
Officer S. Gray

Suspect Name DOB

1 Michael Edser

2 _____

3 _____

4 _____

OFFENSE: Drugs

DATE & TIME SEIZED: 11-7-13

LOCATION: 410N. 880W.

Item Number and Description

Scale

Pill bottle with residue

LINDON POLICE DEPARTMENT

INC#: 13LI04181 LOC: LIS26

DESC: CS-Paraphernalia Scales My Weight



13LIE0478



STATES
EXHIBIT NO
CASE NO
DATE

Handwritten: 1A 1004181

Case # 13LDO4181
 Property # 6718
 Officer S. Gray

Item Number and Description
 # plastic baggies
 # two spoons
 # 215 2A25

LINDON POLICE
DEPARTMENT
INC#: 13L104181
 LOC: LIS26
 DESC: CS-Paraphernalia spoons
 131E0479

Lindon City P.D.
 100 North State Street
 Lindon, UT 84042
 (801) 769-8600

Suspect Name Michael Edger DOB 9-6-80

1 pos of paraphernalia
 2
 3
 4

OFFENSE: pos of paraphernalia
 DATE & TIME SEIZED: 11-7-13
 LOCATION: 88062

STERILE FO

100 GUMMED
SQUARETTA PAP
170-51000



STATES
EXHIBIT NO. 26
CASE NO.
DATE
CLK

8/12/11

1 2 3 4 5 6 7 8
FISKARS

02/27/2015

Utah Bureau of Forensic Services
4501 South Constitution Blvd, Salt Lake City, UT 84129 (801) 965-4487

Page 1 of 2

CL Case #:	C20131772	Agency Case #:	13LI04181
Agency:	LCP - LINDON CITY POLICE DEPT.	Report #:	602794
ORI:			

Criminalistic Analysis Report - CONTROLLED SUBSTANCE ANALYSIS

Evidence Submission Information

Evidence Submitted:	02/18/2015
How Received:	IN PERSON
Haz. Materials:	NONE
Submitted By:	ALAN PURVIS ph. (801)769-8600
Delivered By:	ROBYN CLARK ph. (801)769-8600
Received By:	ALEXIS NELSON ph. (801)965-4560

Victims and Suspects

<u>Vic/Susp</u>	<u>Name</u>	<u>DOB</u>	<u>Sex</u>	<u>Race</u>
Suspect	EDGAR, MICHAEL JOHN	09/16/1980	M	W

Crimes

<u>NCIC Code</u>	<u>Description</u>
3599	DRUGS / CONT.SUB. / PARAPHERNALIA

CHAIN OF CUSTODY STATEMENT Re: Chain of Custody

The item(s) submitted under the police agency case numbers referenced in this report were in a sealed condition at the time any examination, testing, or analysis was commenced by the undersigned, and that said examination or handling, if any, of the actual items within any such sealed containers was accomplished in a manner to preserve the integrity of the item to assure that any chance of misidentification, or environmental cross-contamination would be avoided by adherence to standardized procedures within the Utah State Crime Laboratory appropriate to any processes applicable to the examination, analysis, or testing of said items. Any deviation from said procedures, and reasons therefore is noted below. The breaking of any seal or part of the container in which the item was submitted, has been followed by a reinsertion of the item into its original container, followed by any examination, testing or analysis and resealing of that container with the undersigned's initials placed over such new seal.

Criminalistics Analysis Report and Conclusions



CL Case #:	C20131772	Agency Case #:	13LI04181
Agency:	LCP - LINDON CITY POLICE DEPT.	Report #:	602794
ORI:			

Criminalistic Analysis Report - CONTROLLED SUBSTANCE ANALYSIS

Pkg 1.

Item 2. The orange oval tablet marked "b 974 - - - 30" was physically identified as a preparation of amphetamine.

Item 3. Alprazolam was identified in the partial yellow tablet.

Item 4. Methamphetamine was identified in the plastic bag. The total weight of the white crystalline powder was 245 milligrams +/- 2 milligrams.

Item 5. The white round tablet marked "223" was physically identified as a preparation of oxycodone.

Item 6. The yellow round tablet marked "A1" was physically identified as a preparation of zolpidem.

Item 7. No controlled substances were identified in the partial orange tablet.

Item 8. The blue oval tablet marked "605" was physically identified as a preparation of alprazolam.

Item 9. The yellow round tablet marked "M - - - C 13" was physically identified as a preparation of clonazepam.

Item 10. The light green round tablet marked "M - - - 15" was physically identified as a preparation of oxycodone.

Item 11. The blue round tablet marked "A 215" was physically identified as a preparation of oxycodone.

Item 12. The white oblong tablet marked "WATSON 385" was physically identified as a preparation of hydrocodone.

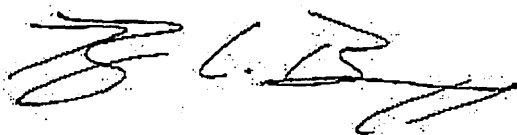
Item 13. The purple round tablet marked "M - - - 30" was physically identified as a preparation of morphine.

Item 14. Methamphetamine was identified in the seven plastic bags and two plastic containers. The total weight of the white crystalline powder was 9.572 grams +/- 0.006 grams.

Weight measurement uncertainty calculated at a coverage probability of 95.45%.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed On: 2/27/2015



Ryan Barney, M.S.
Senior Forensic Scientist
Central Crime Lab

CL Case #: C20131772
Agency: LCP - LINDON CITY POLICE DEPT.
ORI:

Agency Case #: 13LI04181
Report #: 607574

Criminalistic Analysis Report - CONTROLLED SUBSTANCE ANALYSIS

Evidence Submission Information

Evidence Submitted: 03/12/2015
How Received: IN PERSON
Haz. Materials: NONE
Submitted By: ALAN PURVIS ph. (801)769-8600
Delivered By: ROBYN COOPER ph. (801)769-8600
Received By: ALEXIS NELSON ph. (801)965-4560

Victims and Suspects

<u>Vic/Susp</u>	<u>Name</u>	<u>DOB</u>	<u>Sex</u>	<u>Race</u>
Suspect	EDGAR, MICHAEL JOHN	09/16/1980	M	W

Crimes

NCIC Code Description
3599 DRUGS / CONT.SUB. / PARAPHERNALIA

CHAIN OF CUSTODY STATEMENT Re: Chain of Custody

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Criminalistics Analysis Report and Conclusions



03/20/2015

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Page 2 of 2

CL Case #:	C20131772	Agency Case #:	13LI04181
Agency:	LCP - LINDON CITY POLICE DEPT.	Report #:	607574
ORI:			

Criminalistic Analysis Report - CONTROLLED SUBSTANCE ANALYSIS

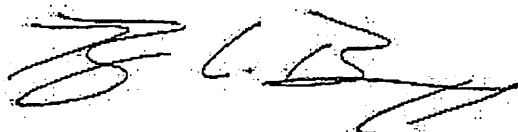
Item 1. 25I-NBOMe was identified on the piece of colored paper. The piece of foil was not analyzed.

Item 15. Heroin was identified in the prescription bottle. The total weight of the dark brown solid was less than 50 milligrams. Heroin was identified in the plastic bag. The total weight of the brown powder was 202 milligrams +/- 2 milligrams. Heroin was identified in the plastic bag. The total weight of the dark brown solid was 294 milligrams +/- 2 milligrams.

Weight measurement uncertainty calculated at a coverage probability of 95.45%.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed On: 3/20/2015



Ryan Barney, M.S.
Senior Forensic Scientist
Central Crime Lab

11/21/2013

Utah Bureau of Forensic Services
4501 South Constitution Blvd, Salt Lake City, UT 84129 (801) 965-4487

Page 1 of 2

CL Case #:	C20131772	Agency Case #:	13LI04181
Agency:	LCP - LINDON CITY POLICE DEPT.	Report #:	524415
ORI:			

Criminalistic Analysis Report - CONTROLLED SUBSTANCE ANALYSIS

Evidence Submission Information

Evidence Submitted:	11/13/2013
How Received:	IN PERSON
Haz. Materials:	NONE
Submitted By:	ALAN PURVIS ph. (801)769-8600
Delivered By:	ROBYN CLARK ph. (801)769-8600
Received By:	MICHELLE HARWARD ph. (801)965-4621

Victims and Suspects

<u>Vic/Susp</u>	<u>Name</u>	<u>DOB</u>	<u>Sex</u>	<u>Race</u>
Suspect	EDGAR, MICHAEL JOHN	09/16/1980	M	W

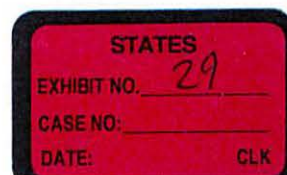
Crimes

<u>NCIC Code</u>	<u>Description</u>
3599	DRUGS / CONT.SUB. / PARAPHERNALIA

CHAIN OF CUSTODY STATEMENT Re: Chain of Custody

The item(s) submitted under the police agency case numbers referenced in this report were in a sealed condition at the time any examination, testing, or analysis was commenced by the undersigned, and that said examination or handling, if any, of the actual items within any such sealed containers was accomplished in a manner to preserve the integrity of the item to assure that any chance of misidentification, or environmental cross-contamination would be avoided by adherence to standardized procedures within the Utah State Crime Laboratory appropriate to any processes applicable to the examination, analysis, or testing of said items. Any deviation from said procedures, and reasons therefore is noted below. The breaking of any seal or part of the container in which the item was submitted, has been followed by a reinsertion of the item into its original container, followed by any examination, testing or analysis and resealing of that container with the undersigned's initials placed over such new seal.

Criminalistics Analysis Report and Conclusions



11/21/2013

Utah Bureau of Forensic Services
4501 South Constitution Blvd, Salt Lake City, UT 84129 (801) 965-4487

Page 2 of 2

CL Case #:	C20131772	Agency Case #:	13LI04181
Agency:	LCP - LINDON CITY POLICE DEPT.	Report #:	524415
ORI:			

Criminalistic Analysis Report - CONTROLLED SUBSTANCE ANALYSIS

Item 1) 25I-NBOMe was identified on the paper. The piece of foil was not analyzed.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed On: 11/21/2013



Mike Saunders, M.S.
Forensic Scientist II
Central Crime Lab

Addendum C

FOURTH DISTRICT COURT, PROVO DEPT.

UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 131403330
	:	
Plaintiff,	:	Appellate Court Case No. 20150605
	:	
v	:	Volume I of II
	:	
MICHAEL JOHN EDGAR,	:	
	:	
Defendant.	:	With Keyword Index

JURY TRIAL APRIL 9 & 10, 2015

BEFORE

THE HONORABLE LYNN W. DAVIS

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

APPEARANCES

For the Plaintiff: CRAIG R. JOHNSON
Deputy Utah County Attorney

For the Defendant: GREGORY V. STEWART
Attorney at Law

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1 Craig Johnson, was the guy handling his case and so that's
2 when I called you.

3 Q Okay. I didn't seek you out independently?

4 A No.

5 Q Your contact came from Mr. Edgar?

6 A That's correct.

7 Q And what did he say to you when he got ahold of you
8 on the phone?

9 MR. STEWART: Judge, just for the record, we would
10 object to this on the grounds of relevance to this case.

11 THE COURT: I don't know the relevance. We can
12 address it outside the presence of the jury if you wish to.

13 MR. JOHNSON: I think my proffer at the bench
14 should be sufficient for us to continue with the line of
15 questioning at this point.

16 THE COURT: But let's make a record outside the
17 presence of the jury then.

18 Ladies and gentlemen of the jury, in light of that
19 we will take up a legal discussion outside the presence of
20 the jury, excuse you at this point in time and caution you
21 not to discuss the case with anyone. If you've taken notes,
22 don't show those to anyone and don't attempt to learn
23 anything about this case outside this courtroom setting. Of
24 course avoid any radio, TV, newspaper, comments about the
25 trial. With that we'll excuse the jury, then we'll take up

1 these matters outside your presence and once I've ruled then
2 we will invite you back in. Thank you.

3 (Whereupon the jury left the courtroom)

4 THE COURT: The jury has been excused. There is an
5 objection. The basis hasn't been stated on the record and,
6 counsel, you may state that basis. You may then respond.

7 MR. STEWART: Judge, again, just to make this
8 perfectly clear for the record, I object on the basis of
9 relevance to this case. This case happened in November of
10 2013.

11 THE COURT: This contact was July 29, 2015.

12 MR. STEWART: '14.

13 THE COURT: '14, excuse me, all right. Okay.

14 MR. STEWART: Seven or eight months after this.

15 THE COURT: Now I don't know the facts involved
16 here and you can respond briefly to that and we may need to
17 take some testimony so that in fact I can -

18 MR. JOHNSON: Let's just do that. I'll just ask a
19 couple of questions and we'll see where that takes us.

20 THE COURT: Okay, very well.

21 Q (BY MR. JOHNSON) Agent Holmer, why did Mr. Edgar
22 indicate that he was contacting you?

23 A He was seeking consideration with pending charges
24 by cooperating with law enforcement on other cases.

25 Q State level or federal level?

1 A To my knowledge his charges were at state level.

2 MR. JOHNSON: And Judge, the Court can take
3 judicial notice that this case, among several others were
4 pending at the time of this conversation with Agent Holmer
5 and the defendant. I was the prosecutor on all of those
6 cases.

7 THE COURT: So he would cooperate with a federal
8 agent as it relates to -

9 Q (BY MR. JOHNSON) What did he want you to do if he
10 cooperated?

11 A He seemed to believe that I could supercede the
12 authority of the state and compel them to help him out with
13 his charges.

14 Q How did my name get brought up with respect to
15 that?

16 A He told me that you were the prosecutor.

17 Q Okay. And that by contacting me, what might
18 happen?

19 A That he might be given a stay on the current status
20 of these charges or a reduction in his charges because of my
21 involvement and his cooperation with us.

22 THE COURT: And did he promise anything in
23 connection with that as it relates to cooperation?

24 THE WITNESS: Obviously -

25 THE COURT: Your tie is running into the mike.

1 THE WITNESS: Sorry.

2 THE COURT: It's all right.

3 THE WITNESS: So, so whenever someone contacts me
4 I'm going to try and determine what their usefulness is to
5 the government. So I questioned him about what he would be
6 willing to provide, what level of trafficker he could give me
7 access to and what actions he could take specifically with
8 regard to that activity.

9 Q (BY MR. JOHNSON) How did he respond to that?

10 A He indicated that he had access to a high level
11 Mexican heroin trafficker that operated out of the Salt Lake
12 City area.

13 Q Okay, how much, how much quantity-wise of drugs
14 could he get access to?

15 A Pound level quantities. So significant
16 distribution quantities. Anytime there's going to be pound
17 loads of heroin, we're obviously interested. That's a fairly
18 good sized trafficker.

19 MR. JOHNSON: Judge, based on that I think the
20 relevance has been established.

21 THE COURT: Anything further, counsel?

22 MR. STEWART: Ummm - no, Judge, we'll stand on
23 what's been presented (inaudible) the objection.

24 THE COURT: Okay. Well, I'll overrule the
25 objection to outside the presence of the jury I make a

1 determination as it relates to the nature of the
2 conversations, the basis of the conversation and the
3 projection as it relates to the usefulness of the information
4 that could be provided and that it related specifically to
5 this pending, these pending charges because there's a
6 reference directly to Mr. Craig Johnson as Deputy Utah County
7 Attorney and I will find by virtue of that and the admissions
8 involved that it is relevant.

9 So we'll invite the jury back in.

10 And it's sort of an admission against interest. I
11 would make the further observation that there's been
12 testimony already that some of the drugs involved were
13 heroin; and secondarily, the independent contact by the
14 defendant with a federal agent was initiated by him and that
15 secondarily that it would be admissions against interest.

16 (Whereupon the jury entered the courtroom)

17 THE COURT: We are back on the record in the case
18 of state of Utah vs. Michael Edgar, Case No. 131403330.
19 Counsel and clients are present, the jury is now seated and
20 that we had some testimony elicited outside the presence of
21 the jury. The Court has made a ruling and you may proceed
22 counsel.

23 MR. JOHNSON: Thank you.

24 Q (BY MR. JOHNSON) You said Mr. Edgar contacted you
25 on the duty phone around July 28, 2014?

1 A Yes, sir.

2 Q And describe that conversation from the beginning.
3 I guess had you ever talked to him before this?

4 A No, never.

5 Q Okay, so describe the conversation please.

6 A So Mr. Edgar identified himself, told me that he
7 was seeking to cooperate with law enforcement in regard to
8 heroin trafficking or heroin trafficker that was operating
9 out of the Salt Lake City area and that he would do so in
10 exchange for consideration with his pending charges in Utah
11 County. He identified Mr. Johnson as the prosecutor over his
12 cases and we had a discussion about what his ability, what he
13 could provide, what services he could provide to me
14 specifically in the course of investigation.

15 THE COURT: Let me have counsel approach just
16 quickly and then -

17 (Whereupon a sidebar was held as follows:

18 THE COURT: He made a generic reference to his
19 cases. I don't want any plurality as it relates to this jury
20 knowing that there are other pending cases. Now the cases
21 could refer to multiple charges in this case certainly but if
22 you will instruct him that I've got to narrow that. It's
23 potentially approaching prejudicial if he goes into each of
24 the cases and the number of charges and the nature of the
25 charges and everything else.

1 (Inaudible conversation)

2 THE COURT: Okay, what are we doing to do? It's a
3 fine balance as it relates to that because I don't want all
4 four cases to be before this jury -

5 MR. JOHNSON: It would be those two, but
6 (inaudible).

7 THE COURT: I know. What do you do? How do you
8 protect your client?

9 MR. JOHNSON: (Inaudible).

10 THE COURT: I know. I know.

11 MR. JOHNSON: (Inaudible).

12 THE COURT: Okay, yeah, he probably did. Ummm, if
13 you will just advise this witness that beyond what he has
14 testified to or he heard from him that he can't open the door
15 to all the other cases that are pending and everything else
16 that way.

17 MR. JOHNSON: (Inaudible).

18 THE COURT: I know. If there's a specificity but -

19 MR. JOHNSON: (Inaudible).

20 THE COURT: Okay.

21 MR. STEWART: (Inaudible) irrelevant to this case.

22 (End of sidebar)

23 THE COURT: Approach again if you will, counsel.

24 (Whereupon a sidebar was held as follows:

25 THE COURT: Again, even though the discussion may

1 be, may involve other cases or other pending charges and it's
2 an admission on his part - I think opening that door before
3 this jury as it relates to exclusively here is a real
4 problem. So I don't know how to resolve that, you know, I
5 wasn't aware of it until two minutes ago.

6 MR. JOHNSON: (Inaudible) he created it.

7 THE COURT: I know he created it. What do you do?
8 Is it relevant? It is relevant. It's relevant as it relates
9 to the fact that he knows contacts and heroin traffickers and
10 everybody else and all that -

11 MR. JOHNSON: (Inaudible).

12 THE COURT: I know.

13 MR. JOHNSON: (Inaudible).

14 THE COURT: I don't know. Be cautious.

15 (End of sidebar)

16 Q (BY MR. JOHNSON) Okay, Agent Holmer, so to just
17 reorient ourselves where we were, Mr. Edgar talked to you,
18 called you to talk about working out some considerations,
19 some sort of deal on his Utah County charges, drug charges?

20 A Correct.

21 Q Okay. And as part of that, he was talking about
22 what he could offer in exchange for you trying to pull some
23 strings perhaps?

24 A Yes, sir, that's correct.

25 Q Specifically, I guess what - do you use

1 confidential sources as part of your job?

2 A Yes, it's a huge part of what we do.

3 Q Okay. And so in speaking with Mr. Edgar, I mean,
4 what factors play into whether you're going to actually use a
5 confidential source?

6 A First thing would be what they can actually
7 provide, their access and placement to drug traffickers.
8 Then there are a number of other factors that we take into
9 that which include their ability to be controlled and then
10 possibly most important, how truthful and whether or not we
11 can trust them which is a delicate matter because anytime
12 you're dealing with confidential source, obviously they've
13 probably doing something they shouldn't have been doing
14 previously.

15 Q Okay. And so in talking with Mr. Edgar,
16 specifically when you're talking about what he could do for
17 you, what was that conversation about?

18 A Had to do with specifically access to a heroin
19 trafficker who was capable of moving large quantities of
20 heroin.

21 Q Did you discuss that any further with him about
22 what large quantities mean?

23 A Well, we had to, as I recall we had to kind of
24 break it down because what one person considers a large
25 quantity may not necessarily be what I consider a large

1 quantity or something that's worth my time and efforts, just
2 quite simply because I get paid by the taxpayers to target
3 large trafficking organizations. So, as I recall, we had to
4 quantify what large quantities was and I believe it was
5 pounds specifically that we discussed, that he was capable of
6 dealing in pounds of heroin which, for the record, was worth
7 my time.

8 Q Okay. Do you happen to know the street value of
9 pounds of heroin?

10 A I believe it's over \$10,000. I think we're paying
11 20 for a kilo, something like that, \$20,000. I'd have to
12 confirm that.

13 Q So what else did Mr. Edgar - well, I guess at that
14 point were there some baseline rules that you talked to Mr.
15 Edgar about working with him?

16 A Well, I always try and kind of lay down
17 expectations. That's a big part of confidential source
18 management is them understanding exactly what we are willing
19 to do and not do, what they're allowed to do and not do and
20 one thing that I think has some bearing is that we
21 established that we do not make promises other than the fact
22 that we are going to make recommendations. So I do not
23 dictate the terms of their cooperation when they're working
24 as a defendant, confidential source, meaning they're giving
25 us cooperation in exchange for consideration with charges.

1 We make recommendations to prosecutors and we make
2 recommendations to judges but we have no bearing on what they
3 decide to do. So generally speaking, those are taken pretty
4 seriously.

5 Q And you explained that to Mr. Edgar?

6 A I explained that almost every time I speak to a
7 confidential source whose looking to work with us.

8 Q Okay. And was he willing to go along with that
9 or...

10 A I believe he understood that. I think I made
11 myself very clear.

12 Q Did he discuss with you working with any other
13 officers on a state level?

14 A Yes, he did. And that's another aspect of source
15 management, what's important is we, we always try and find
16 out if they are currently or have previously worked with
17 anyone else in law enforcement.

18 MR. STEWART: Judge, can we approach?

19 THE COURT: You may.

20 (Whereupon a sidebar was held as follows:

21 MR. STEWART: (Inaudible).

22 THE COURT: Can't go into any previous or anything
23 else that way. There's no - that's improper.

24 (Inaudible conversation)

25 MR. JOHNSON: Agent Holmer (inaudible).

1 THE COURT: Okay -
2 MR. JOHNSON: (Inaudible) his conversation
3 (inaudible) in connection with his client (inaudible).
4 THE COURT: Pardon me?
5 MR. STEWART: I (inaudible).
6 THE COURT: What we've got here is that you've got
7 the - he can't talk about his past at all. He can talk about
8 this case but he can't talk about the fact that he's served
9 as a confidential informant in the past in any form or
10 fashion. That's out totally, in my estimation. Okay? So
11 that's totally out.
12 MR. JOHNSON: (Inaudible) and because of this case
13 and the case (inaudible) he's trying to (inaudible).
14 MR. STEWART: (Inaudible).
15 THE COURT: Well, you can call Agent Palmer as it
16 relates to that if he independently goes to him and you can
17 call him as it relates to -
18 MR. JOHNSON: I've decleared him as a witness and
19 that's okay with Mr. Stewart (inaudible).
20 THE COURT: Okay. Well, I don't -
21 MR. STEWART: (Inaudible).
22 THE COURT: - I don't want, yeah, no you can't do
23 that. I don't want a mistrial in this case.
24 MR. JOHNSON: It's not a mistrial (inaudible).
25 THE COURT: And it's delicate as it relates to that

1 in my estimation. So...

2 MR. STEWART: Well, when he's done I'd like to break
3 (inaudible).

4 THE COURT: Pardon me?

5 MR. STEWART: When he's done I'd like to break for
6 a (inaudible).

7 THE COURT: Well, we can do it, we can do it right
8 now because we've got to make a determination as it relates
9 to the breadth of the direct examination from this point
10 forward.

11 MR. STEWART: (Inaudible).

12 THE COURT: We'll take another break.

13 (End of sidebar)

14 THE COURT: We'll take another break so that we can
15 discuss some legal matters outside the presence of the jury,
16 and I will caution you not to discuss the case with anyone.
17 If you've taken notes don't show those to anyone. Don't
18 attempt to learn anything about the case outside this
19 courtroom setting and avoid, of course, any radio, TV,
20 newspaper comments about the trial. We'll take matters up
21 outside the presence of the jury. Thank you.

22 (Whereupon the jury left the courtroom)

23 THE COURT: Mr. Holmer, you may be seated.

24 The record will reflect that the jury has been
25 excused and counsel wish to discuss some further legal

1 matters outside the presence of the jury and first of all in
2 connection with that, Mr. Stewart, you may be heard.

3 MR. STEWART: Judge, I think we're bordering on
4 testimony here that could easily lead to a mistrial. Agent
5 Holmer has mentioned other cases, he's mentioned in working
6 with other state agents that won't be involved in this case,
7 he's talked about matters that happened well after November
8 7, 2013 and I think the jurors have almost heard enough that,
9 to further implicate Mr. Edgar in other matters.

10 THE COURT: Okay.

11 MR. STEWART: Besides what we -

12 THE COURT: Mr. Johnson, you may be heard.

13 MR. JOHNSON: Thank you, Your Honor. Just a
14 second.

15 This testimony is 100 percent bourne out of a
16 contact that was initiated by the defendant. The defendant
17 took a great risk in doing this, doing it under the nose of
18 his attorney at the time who as far as I know had no
19 knowledge of this conversation. Anything he says to Agent
20 Holmer is an admission by a party opponent and is admissible.
21 It's relevant and frankly, under 403, it's not substantially
22 more prejudicial than probative. While it is prejudicial to
23 the defendant, it's certainly extremely probative of the
24 defendant's knowledge, intent in possessing the controlled
25 substances in the briefcase. Where the argument is going to

1 be that, oh, it just was in the car, that he was borrowing
2 from someone or whatever and he doesn't own what's in there.
3 Certainly conversations to a DEA agent about trying to
4 negotiate this case and another case that happened on
5 November 21st also in Lindon, the case officer in that case
6 was Detective Palmer, deputy with - actually he was an
7 officer with Provo Police Department who was with the Major
8 Crimes Task Force at the time and during that interaction,
9 two weeks after this case, the defendant tried to negotiate
10 this case and that case with Detective Palmer. When that
11 didn't work out, he then tried to negotiate this case with
12 Agent Holmer and gave Agent Holmer information about his
13 interactions with Detective Palmer.

14 At sidebar, when we spoke about this a couple of
15 sidebars ago, the Court said that we could go into what
16 Detective Palmer's interaction and involvement was with this
17 as long as I cautioned Agent Holmer to refer to his other
18 cases as pending state drugs charges or pending Utah County
19 drug charges or pending Lindon drug charges as opposed to
20 saying there were multiple cases and I did instruct Agent
21 Holmer about that and I've been trying to keep to that in
22 directing my questions and so far I think we've done that.
23 So then when we go and talk about Detective Palmer and then
24 the objection is raised again, after we just said that was
25 allowed, permissible, that's problematic for the State based

1 on the Court's prior ruling.

2 Again, this is information that came to my
3 attention because the defendant called Agent Holmer, gave
4 Agent Holmer my name, gave Agent Holmer Detective Palmer's
5 information and said this is what I can offer you, see what
6 you can do with them, contact them and try to work out my
7 case. This is nothing me seeking this out from the agent.
8 He said as much. Agent never talked to Mr. Edgar before this
9 happened, he wasn't seeking to set him up or something. This
10 is a mess that was created by the defendant and while it's
11 prejudicial and problematic and whatever you want to call it,
12 it's still lawful under the rules of evidence and ummm, and
13 so for that reason I think we should be allowed to continue
14 in this vein of questioning.

15 THE COURT: Mr. Stewart, anything further, sir?

16 MR. STEWART: The prejudicial nature of the
17 testimony, there's other cases, he's working with other
18 officers here in state of Utah, that don't pertain
19 necessarily to this case and we're looking at the facts for
20 November 7, 2013 and what he was doing at that time. I
21 think-

22 THE COURT: Okay. I will allow it as it relates to
23 the breadth - now, my understanding would, was when I made
24 the initial ruling that Officer Palmer would be a witness.
25 Now I'm advised at the next sidebar that he would not be a

1 witness.

2 MR. JOHNSON: His case is -

3 THE COURT: (inaudible).

4 MR. JOHNSON: - sorry. His case is Monday's case.

5 THE COURT: Yeah.

6 MR. JOHNSON: I noticed Agent Holmer up as a
7 witness for this hearing not Detective Palmer.

8 THE COURT: Okay. Well, then let's draw a line as
9 it relates to representations relative to the other case that
10 is going to be coming up on Monday and Tuesday in jury trial,
11 13th and 14th of April and draw the line there. I would have
12 drawn that line had I known that officer or Deputy Palmer was
13 not going to be called as a witness in this particular case.

14 Now, when he independently calls a federal officer
15 as it relates to potential for that officer to be involved in
16 this case and admitting that he may be useful in terms of
17 drug traffickers, then that is admissible, that's admissible.
18 He admits it. He made the contact. He independently did that
19 and he was - so I think it's probative and - but we have to
20 be very cautionary in my estimation as it relates to the next
21 case and you probably have enough before the jury already
22 relative to that independent contact by this defendant
23 relative to the resolution of this case with a designation
24 that he is able to supply them with high level traffickers.
25 So let's - so -

1 MR. JOHNSON: Okay, based on that ruling I'll wrap
2 it up and we'll -

3 THE COURT: Yeah, wrap it up because I -

4 MR. JOHNSON: - I'll just have to accept that.

5 THE COURT: - think we need to use a great deal of
6 caution in my estimation, even though that's independently
7 done on the part of the defendant probably which would have
8 been against any recommendation or approval of his attorney
9 at that point in time. Okay.

10 Let's get the jury back in here and wrap it up. So
11 I've sustained the objection, Mr. Stewart -

12 MR. JOHNSON: With respect to Detective Palmer's
13 involvement.

14 THE COURT: Yeah, I sustained the objection in part
15 as it relates to the breadth and as it relates to Deputy
16 Palmer. Okay.

17 (Whereupon the jury entered the courtroom)

18 THE COURT: You may be seated. We're back on the
19 record in the case of state of Utah vs. Michael Edgar, Case
20 No. 131403330. Counsel and clients are present, the jury is
21 seated and Mr. Johnson, you may continue with your
22 examination of Mr. Brandon Holmer.

23 MR. JOHNSON: Thank you, Your Honor.

24 Q (BY MR. JOHNSON) Agent Holmer, so after the
25 defendant talked to you about his ability to access pounds of

1 heroin and a potential Mexican drug trafficker, did you
2 indicate that you would contact me at his direction?

3 A Yes.

4 Q How were you suppose to get ahold of him after you
5 spoke to me?

6 A I was provided with a cell phone number.

7 Q By?

8 A By Mr. Edgar.

9 Q And after some time in talking with me did you call
10 that number back?

11 A Yes.

12 Q And who did you speak with?

13 A Spoke with who I identified as Mr. Edgars.

14 Q Okay, and during that conversation did you indicate
15 that you would not be working with him?

16 A That is correct, I told him I would not be willing
17 to work with him.

18 Q And is that the last you heard from him?

19 A Yes.

20 MR. JOHNSON: Okay, that's all I have. Thank you.

21 THE COURT: Cross examination?

22 CROSS EXAMINATION

23 BY MR. STEWART:

24 Q So, when you get calls like this do you make
25 records of those calls?

1 A Depends on the situation.

2 Q Did you in this case?

3 A No, I did not.

4 Q So there's no written record of this?

5 A That's correct.

6 Q And you keep referring to Mr. Edgars, do you know

7 his name?

8 A Michael Edgars, Michael John Edgars.

9 Q With an 's' at the end?

10 A He spoke his name over the phone. I had no reason

11 to run him, I didn't do any further background on him, so...

12 Q So you didn't get his birth date?

13 A No.

14 Q Get his address?

15 A No.

16 Q Okay. And you've always known him as Michael

17 Edgars with an 's' at the end?

18 A I believe so.

19 MR. STEWART: Okay, that's all I have.

20 THE COURT: You may step down. Thank you Mr.

21 Holmer for being here.

22 Any reason why he ought not to be excused?

23 MR. JOHNSON: If we could approach? Yeah if we can

24 approach real quick.

25 (Whereupon a sidebar was held as follows:

Addendum D



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Attorney for Defendant/Appellant

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

STATE OF UTAH,

Plaintiff / Appellee,

vs.

MICHAEL JOHN EDGAR,

Defendant / Appellant.

ORDER SUPPLEMENTING THE
RECORD

Dist. Ct. No. 131403330
App. No. 20150605-CA

Judge Lynn Davis

This matter came before the Court for a hearing on January 12, 2016, on request of the Court of Appeals to determine what happened at an unrecorded pre-trial bench conference. Craig Johnson appeared on behalf of the State, and Emily Adams appeared on behalf of Defendant Michael Edgar.

Based on the testimony received at the hearing, the Court makes the

following findings of fact:

1. Mr. Edgar was charged by Information with, among other things, possession of a controlled substance with intent to distribute.
2. The State amended the Information and charged Mr. Edgar with possession with intent to distribute within a drug-free zone. The State alleged in the Amended Information that Mr. Edgar committed the crime within 1,000 feet of a ballet school.
3. The ballet school, however, was over 1,000 feet from where Mr. Edgar was arrested.
4. The trial in this case occurred on April 9–10, 2015.
5. Around 8:30am on April 9, 2015, this Court, the prosecutor, and the defense attorney held an in-chambers conference. That conference was not recorded, although it was not the intent of the parties for the conference to be an on-the-record type of hearing; it was more of a conference where the attorneys touched base with the Court about the upcoming trial.
6. The prosecutor brought to that conference a Second Amended

Information, where, for the first time, Mr. Edgar was charged with committing a crime within 1,000 feet of the "Ultimate Sports USA Baseball and Softball Training Facility to the NW, making it a drug-free zone."

7. The prosecutor wanted the police case officer to testify about the Ultimate Sports training facility, since he had measured its distance from the defendant's arrest, but the defense attorney objected, arguing that the officer's testimony lacked foundation. The Court indicated that it would likely not allow the case officer's testimony about the Ultimate Sports training facility, but that the State could file the Second Amended Information if that State called the owner or operator of the Ultimate Sports training facility to establish the foundation for the new drug-free zone.
8. The prosecutor and case officer then located one of the owners of one of the businesses located at the Ultimate Sports training facility on the morning of April 9, 2015, and she agreed to appear at trial later that day. The defense attorney did some Google research on the

training facility briefly that morning.

9. As aforementioned, the prosecutor did ask permission from this Court to file the Second Amended Information. The prosecutor based the Second Amended Information on the information from the police officer, and had he not had the testimony from the police officer, he would not have asked for permission to file the Second Amended Information. The Court granted permission to file the Second Amended Information as long as the prosecutor could get one of the owners to testify and as long as the defense attorney could interview the owner during a break at trial.
10. The prosecutor and the defense attorney interviewed the owner for the first and only time during a break in the trial proceedings on the morning of April 8, 2015.
11. The owner did testify at trial and was cross-examined at trial.
12. As a result, the Court granted the State permission to file the Second Amended Information, which the defendant was convicted of, including the drug-free zone beyond a reasonable doubt.

Approved as to form:

/s/ Craig Johnson

Deputy Utah County Attorney

****ENTERED BY THE COURT ON THE DATE AS INDICATED BY THE COURT'S SEAL AT THE TOP OF THE**

FIRST PAGE**

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2016, I efiled and therefore served a true and correct copy of the foregoing on the following:

Jeffrey Buhman
Utah County Attorney

Gregory Stewart

/s/ Emily Adams