

1992

## Utah v. James : Brief of Appellee

Utah Court of Appeals

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**BRIEF**

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DOCKET NO. 920264 IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff-Appellee, : Case No. 920264-CA  
v. :  
EDWARD H. JAMES, : Category No. 2  
Defendant-Appellant. :

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BRIEF OF APPELLEE

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APPEAL FROM A CONVICTION OF ATTEMPTED  
BURGLARY, A THIRD DEGREE FELONY, IN VIOLATION  
OF UTAH CODE ANN. §§ 76-4-101 AND 76-6-202  
(1990), IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE JOHN A. ROKICH, PRESIDING.

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**FILED**  
Utah Court of Appeals

JAN 29 1993

  
Mary T. Noonan  
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff-Appellee, : Case No. 920264-CA  
v. :  
EDWARD H. JAMES, : Category No. 2  
Defendant-Appellant. :

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of attempted burglary, a third degree felony, in violation of Utah Code Ann. §§ 76-4-101 and 76-6-202 (1990). This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (1992), as the appeal is from a district court in a criminal case not involving a conviction of a first degree felony.

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Did the trial court correctly adopt the findings and conclusions submitted by the prosecution?

"The discretion of adopting the findings as submitted to the trial court is exclusively in th[e district] court as long as the findings are not clearly contrary to the evidence." Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977).

2. Was the trial court's denial of defendant's motion to suppress correct under the federal constitution?

In considering the trial court's action in denying defendant's motion to suppress, we

will not disturb its factual evaluation unless its findings are clearly erroneous. . . . However, in assessing the trial court's legal conclusions based upon its factual findings, we afford it no deference but apply a "correction of error" standard.

State v. Johnson, 771 P.2d 326, 327 (Utah App. 1989) (citations omitted), rev'd on other grounds, 805 P.2d 761 (Utah 1991).

3. Has defendant waived the issue of a separate state constitutional analysis by failure to adequately preserve it; alternatively, should the Court conduct such analysis in this case?

"[T]he proper forum in which to commence thoughtful and probing analysis of state constitutional interpretation is before the trial court, not, as typically happens and as happened here, for the first time on appeal.

State v. Bobo, 803 P.2d 1268, 1273 (Utah App. 1990).

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The language of the provisions upon which the State relies is included in the body of this brief.

#### STATEMENT OF THE CASE

On March 28, 1991, defendant was arrested and, on April 1, 1991, charged with burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202; and theft, a class A misdemeanor, in violation of Utah Code Ann. § 76-6-404 (Record [hereafter R.] at 10, 7-8).

After the case was bound over, defendant filed a motion on April 30, 1991, to suppress any statements he had made to law enforcement, claiming they were taken in violation of "his Miranda [sic] rights and his fifth and sixth amendment rights"

(R. at 21). A hearing was held on the motion on May 8, 1991 at which only the two detectives who took defendant's statements testified (R. at 23, 140-64<sup>1</sup>). The court took the matter under advisement, indicating that his initial inclination was to suppress the confession but he would reserve his ruling until he had read the cases provided by the parties (R. at 23, 161). The State filed a memorandum regarding the admissibility issue on May 9, 1991 (R. at 24-33).

On May 13, 1991, the court entered its ruling, denying the motion to suppress (R. at 78, 184-87). On that same day, the State submitted proposed findings and conclusion, to which defendant filed objections on May 21, 1991. On May 24, 1991, the court signed the findings and conclusions as drafted by the prosecution (R. at 81-87).

On June 20, 1991, defendant filed a second motion to suppress his statements, claiming that they were taken "in violation of his rights to silence and to counsel under the Utah State Constitution" (R. at 89). He filed a supporting memorandum on July 3, 1991 (R. at 92-101). A hearing was conducted on that motion on July 8, 1991 and the court took the matter under advisement (R. at 91, 165-70).

The court denied the motion on July 15, 1991, stating that "[t]he court believed that confession made by the defendant

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<sup>1</sup>The two transcript volumes are numbered consecutively to the pleadings volume. Citation will be to the record pages stamped on the bottom of each page.

was done in a non accusatory [sic] environment" (R. at 108).<sup>2</sup> On November 12, 1991, defendant entered a guilty plea to a reduced charge of attempted burglary, conditioned on taking this appeal of the court's denial of his suppression motions (R. at 114-21, 171-80). On February 10, 1992, defendant was sentenced and placed on probation (R. at 123-24).

#### STATEMENT OF THE FACTS

The facts of the underlying crime are sketchy in the record and will not be recited here; the facts pertinent to this appeal surround the incriminating statements given by defendant to detectives.

Defendant was arrested March 28, 1991, at his apartment at 355 North 700 West #2, Salt Lake City, Utah, on suspicion of burglary and theft (R. at 10). The next day, at 10:14 a.m., two detectives, who had not been involved in his arrest or booking, went to the jail to interview him (R. at 141-42, 146, 151). At the request of the detectives, Newren and Cheever, defendant was called out of his cell and taken to an interview room where the detectives waited (R. at 142). The detectives told defendant that they were doing a "follow-up investigation" of the burglary and theft which had occurred at 355 North 700 West #3 (a neighboring apartment) (R. at 143, 152). Before advising him of any rights under Miranda,<sup>3</sup> the detectives first asked him

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<sup>2</sup>Pages 108-113 are out of order at the back of the pleadings file.

<sup>3</sup>Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

identifying questions, such as his name, date of birth, birth place, living arrangements, and employment (R. at 144). Defendant was cooperative and answered those questions (R. 144-45). One of the detectives, probably Cheever, asked "something about what [defendant] did for a living" and defendant said he was not working at that time (R. 145, 155). There was a slight pause, then defendant "said at that point that he got the idea in his head and that he did it, he went into a neighbor's house and took a coat and stereo, and they [sic] found it" (R. at 155-56). The statement was not in response to any question about the burglary; instead, it came "out of the blue" (R. at 155). The detectives then interrupted defendant and advised him of the Miranda warnings (R. at 147, 156). After defendant waived his rights under Miranda, the detectives began to question him about the burglary and theft (R. at 147, 156-57). Defendant gave further incriminating statements which were not recited at the hearings (R. at 147, 157).

The detectives testified that they did not use any physical force, deception, artifice or measure of intimidation to compel defendant to talk (R. at 149-50, 157-58). Defendant spoke English and appeared to have all of his faculties; there were no signs of impairment such as alcohol or drug use (R. at 158). Defendant offered no evidence contradicting the testimony of the detectives.

After the evidence was concluded, the court discussed the case with counsel, specifically asking the prosecution why

the detectives did not save all this bother and advise of Miranda before asking any questions (R. at 160). The court expressed its inclination to suppress the confession because "[i]t would have only taken them about a second to read [the warnings] when they brought him down to investigate; ask about the crime" (R. at 161). The prosecution presented its argument, relying on Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285 (1985), and the court reserved its ruling until it had had a chance to review the cases cited by defendant and the prosecution (R. at 159-64).

On May 13, 1991, the court found the prosecution's cases to be persuasive and denied the suppression motion. The court's personal feelings had not changed since the previous hearings, he felt that the confession should be suppressed; however, he felt that the law compelled him to deny the motion (R. at 184-85). The prosecutor, as offered, prepared findings of fact and conclusions of law (R. at 184, 84-87). Defendant filed objections thereto; however, the court signed them as prepared by the prosecution (R. at 81-83, 87).

Over a month later, defendant filed a second motion to suppress his statements, this time based on the state constitution (R. at 92-101). In this motion, defendant stated that the court should afford greater protections under the state constitution than those afforded under the federal constitution. However, defendant did not present any specific way in which that should be accomplished; he merely asked the court to suppress his statements under the state constitution (R. at 97-101).

Defendant did cite to Salt Lake City v. Carner, 664 P.2d 1168 (Utah 1983), for the proposition that Miranda warnings should be given when "the environment" becomes accusatory (R. at 86); however, defendant did not link this to the state constitution. The court denied the second motion, determining that defendant's statement had been made in a "non accusatory [sic] environment" (R. at 108).

#### SUMMARY OF ARGUMENT

The trial court's adoption of the findings and conclusions submitted by the prosecution was not "merely mechanical." The court had given the decision much thought and had the benefit of defendant's filed objections to the findings and conclusions. The record demonstrates that the court adequately deliberated and considered the merits of the case before adopting the proposed findings and conclusions. Neither were the findings contrary to any "oral finding" because the court entered few, if any, findings orally. Finally, the record supports the findings so they were not in conflict with the evidence.

The court correctly denied the suppression motion under the federal constitution because the biographical data questions asked of defendant were not "interrogation" in the Miranda sense. Defendant's volunteered statement that he had committed the burglary and theft did not come in response to a question which the officers reasonably should have known would have elicited an incriminating response. Even if the volunteered statement should

have been suppressed, the statements obtained after Miranda warnings were given were admissible under federal law. Finally, defendant's claim that the officers did not record the statements is not factually correct; they were recorded in the officers' reports.

Defendant has waived the issue of a separate state constitutional analysis of his claims because he failed to preserve them. The motion below failed to provide "thoughtful and probing analysis" of the state claim. Alternatively, the different Miranda-type requirements sought to be established by defendant would only cause confusion and unworkable direction to police officers. Since there is no current contradictory and confusing law under the federal standard, there is no need to adopt a separate state standard. A separate requirement for audio or videotaping of the statements before they are admissible is a change which "should be made only after a full hearing of all the policy and financial implications and with adequate advance notice to . . . law enforcement." Finally, federal law regarding admission of statements obtained after warning which followed previous unwarned but uncoerced statements is consistent with current state law and no reason was given for rejecting the federal case law.



## ARGUMENT

### POINT I

THE TRIAL COURT CORRECTLY ADOPTED THE FINDINGS AND CONCLUSIONS SUBMITTED BY THE PROSECUTION; ADDITIONALLY, THE FINDINGS AND CONCLUSIONS DID NOT CONFLICT WITH THE EVIDENCE OR ANY RULING BY THE COURT

Defendant contends that the trial court incorrectly adopted the findings of fact and conclusions of law submitted by the prosecution. Defendant also maintains that the court entered an oral ruling at the conclusion of the suppression hearing and that the findings of fact and conclusions of law later signed by the judge conflicted with that ruling and with the evidence.

Whether to adopt findings as submitted to the court is within the discretion of the court "as long as the findings are not clearly contrary to the evidence." Boyer Co. v. Lignell, 567 P.2d 1112, 1114 (Utah 1977). A court's findings of fact are upheld unless they are clearly erroneous; however, "in assessing the trial court's legal conclusions based upon its factual findings, we afford it no deference but apply a 'correction of error' standard." State v. Johnson, 771 P.2d 326, 327 (Utah App. 1989), rev'd on other grounds, 805 P.2d 761 (Utah 1991).

In Boyer Co. v. Lignell, the Utah Supreme Court stated:

The law is well settled that it is the duty of the trial judge in contested cases to find facts upon all material issues submitted for decision unless findings are waived. The court may ask counsel to submit findings to aid the court in making the necessary findings for the particular case. While we do not recommend that the trial judge "mechanically adopt" the findings as prepared by the prevailing party, we certainly do not

find such to be the fact in this case. After the proposed "findings" were submitted by defendants' counsel, the plaintiff filed objections and proposed amendments which were argued before the trial court who ultimately adopted the findings as submitted. The discretion of adopting the findings as submitted to the trial court is exclusively in that court as long as the findings are not clearly contrary to the evidence.

Id. at 1113-14 (footnotes omitted). In Automatic Control Products v. Tel-Tech, 780 P.2d 1258 (Utah 1989), the supreme court rejected a claim that the trial court had erred in mechanically adopting the findings and conclusions submitted by counsel. The court found that "[t]here is no indication from the record here that the trial judge failed to adequately deliberate and consider the merits of the case." Id. at 1260.

After the trial, the court took the case under advisement, allowing both parties to submit memoranda, and later requested both parties to submit proposed findings of fact and conclusions of law.

Id. Defendant cites to a concurring opinion, in which Justice Zimmerman states that he personally "'feel[s] freer in close cases to disregard a finding or remand for further findings if the trial court did not prepare them him [or her] self.'" Id. at 1264 (Zimmerman, J., concurring) (quoting 9 Wright & Miller, Federal Practice and Procedure § 2578, at 707 (1971)). Contrary to defendant's implication at page 11 of his brief, the supreme court did not cite that portion of the concurrence with approval in State v. Rio Vista Oil, Ltd., 786 P.2d 1343 (Utah 1990). Justice Zimmerman wrote for the unanimous court in Rio Vista.

The text of the opinion immediately preceding the citation to Automatic Control reads in pertinent part:

[T]here is an apparent inconsistency between the reasoning of the findings and conclusions and the district court's memorandum decision. The findings and conclusions state [that a specific defense was not available to defendant]. Yet in the cursory memorandum decision, the judge stated that he was not reaching this issue. The explanation for this inconsistency may be that the judge changed his mind. It may also be that counsel . . ., in drafting the findings and conclusions, thought that the issue . . . should be addressed to strengthen the ultimate conclusion that the statute violated the constitution . . . . Whatever reason for this inconsistency, the findings and conclusions were signed by the judge and are not attacked here as not representing his views. We must assume that he found them satisfactory in all particulars. See Automatic Control Prods. Corp. . . . (Zimmerman, J., concurring).

Rio Vista, 786 P.2d at 1347.

The cases cited by defendant do not support his contention that this Court should pay less deference to the findings and conclusions because they were drafted by counsel. In the present case, defendant filed objections and proposed amendments to the findings and conclusions submitted by the prosecution. (The proposed findings and conclusions are found at R. at 84-87, a copy is attached as Addendum A; the objections are at R. at 81-83, a copy is attached as Addendum B). There is no indication in the record that the trial judge "failed to adequately deliberate and consider the merits of the case." Automatic Control Prods. Corp., 780 P.2d at 1260. After hearing the evidence surrounding defendant's statements, the court heard

argument, expressed a preliminary opinion about admissibility, then took the matter under advisement in order to read the cases upon which the parties were relying (R. at 160-64). The next day, the prosecution filed a memorandum presenting the State's cases and argument (R. at 24-33, a copy is attached as Addendum C). Five days after the hearing, the court found that the cases presented by the State were persuasive and, "even though [the court's] feelings were to the contrary," he felt that the law supported admission of the statements (R. at 184). The court indicated that he had given the issue considerable thought and, despite how he felt personally, had come to the conclusion that the suppression motion had to be denied (R. at 185). The proposed findings and conclusions were submitted on May 13, defendant's objections were filed on May 21, and the court signed the findings and conclusions on May 24 (R. at 88, 83, 87). The record supports the conclusion that the trial court did not "mechanically adopt" the findings and conclusions. The court had the benefit of defendant's objections and the record indicates that the court "adequately deliberate[d] and consider[ed] the merits of the case." Id. Given the court's personal misgivings about what the law should be and defendant's filed objections, the fact that the court signed the findings and conclusions allows the assumption "that he found them satisfactory in all particulars." Rio Vista Oil, 786 P.2d at 1347.

Defendant next argues that the findings and conclusions conflict with the court's "oral ruling" and with the evidence;

consequently, defendant maintains that the findings and conclusions are erroneous and the court's denial of the motion should be reversed.

A. "Oral findings"

Defendant argues that the court abdicated its judicial responsibility by failing to adequately articulate his ruling and then signing the findings and conclusions submitted by the prosecution. He then argues that the findings and conclusions conflict with the court's "oral findings" (Brief of Appellant [hereafter Br. of App.] at 12). The appellate courts have required trial courts to enter findings and conclusions in order to facilitate review. See State v. Marshall, 791 P.2d 880, 882 (Utah App.) (factual "findings must be sufficiently detailed in order to allow us the opportunity to adequately review the decision below"), cert. denied, 800 P.2d 1105 (1990); State v. Vigil, 815 P.2d 1296, 1300-1301 (Utah App. 1991) (adequate findings "ease the burden of appellate review by communicating the steps by which the ultimate legal conclusions are reached" and "enable appellate counsel to properly frame the issues on appeal" and comply with marshaling requirements). However, there is no requirement that the findings and conclusions be given orally in addition to in written form. See Utah R. Civ. P. 52(a) ("It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum decision filed by the court"); State v. Hurst, 821 P.2d 467, 469

(Utah App. 1991) ("Rule 52(a) has been amended to . . . provide explicitly that the district judge may make the findings of fact and conclusions of law required in nonjury cases orally"). By adopting the proposed findings and conclusions, the court fulfilled its responsibility to enter them.

Defendant's claim that the written findings and conclusions conflict with the court's "oral findings" also fails because the court did not enter oral findings. The court's questions and discussion at the conclusion of the evidentiary hearing should not be considered its findings of fact. After the evidence was in, the court asked why the detectives could not have administered the warnings before asking any questions, and saved "all the bother" of the suppression motion. The prosecutor responded by citing a United States Supreme court case (evidently, Pennsylvania v. Muniz, 496 U.S. 582, 110 S. Ct. 2638 (1990)) for the proposition that certain preliminary questions are not covered by Miranda because they are not interrogation "designed to elicit a response" (R. at 160). The following colloquy occurred:

THE COURT: The purpose here, though, was to see if they couldn't get a confession. That's what the purpose was, was it not, when they brought him into the booking office: name, address, place of employment, nearest relative. But there is one further point.

MR. MORGAN: They did that, though, your honor. They had the Miranda [sic] ready. They were about to do that. They had not asked a single question. There is nothing that these people had done that is contrary--

THE COURT: I'll read that case, but, frankly, I'm inclined to suppress the confession. It would have only taken them

about a second to read that when they brought him down to investigate; ask about the crime. That's the first thing they ought to do, because they've already got that information.

Why do they need to ask that? All they need to do is look at the booking sheet.

. . .

THE COURT: Let me look at these cases. But that's where I'm coming from.

. . .

THE COURT: I don't think this falls in the category of booking. There is a category-- brought him down for the sole purpose of interrogating him about the crime. When they brought him there, the first thing they should have said is this is what we're here for. You read him Miranda, and then there would be no problem.

. . .

THE COURT: As I say, based upon my knowledge at this time, and I can be corrected, but I'm inclined to suppress it, suppress the confession.

(R. at 160-63). The court was merely discussing his perceptions of what he thought the officers should have done; however, he clearly had not reached any final conclusions about the motion. After he had read the cases provided by counsel, and the memorandum supplied by the State, he concluded that the statements would not be suppressed (R. at 184).

Defendant argues that the court's statement that the detectives' purpose "was to see if they couldn't get a confession" was a finding of fact (R. at 160). There is no dispute that the detectives interviewed defendant hoping to obtain a statement; otherwise, why interview him? That is the

meaning behind the court's statement that the detectives were seeking a confession. However, as will be noted in Point II, that general purpose did not convert the detectives' initial background questions into "interrogation" in the Miranda sense.

B. Evidence

Defendant also contends that the findings signed by the court conflict with the evidence presented. He points again to the court's statement that the detectives were hoping to obtain a confession and claims that that conflicts with the finding that the detectives were "merely requesting biographical data to assure the interviewing detectives that they were about to question the right suspect" (R. at 87). The fact that the court accepted this finding demonstrates that defendant's reading of the court's statement about the detectives wanting a confession is out of context. That questions such as name, date of birth, etc., were asked to verify that the detectives were interviewing the right person does not conflict with the court's statement that the ultimate goal of the detectives was to obtain a confession. The preliminary, identifying questions were not intended to elicit a confession; as the findings state, they merely served to assure that the correct person was being interviewed.

Although at the evidentiary hearing the detectives did not testify specifically that they were asking these questions



for identification purposes,<sup>4</sup> that is the only reasonable inference to be drawn from those questions being asked. The detectives had the booking sheet with the pertinent information before them; however, the detectives were not familiar with defendant and the questions had to be asked to ascertain whether the person before them was the person arrested and booked on this charge (R. at 146).

Defendant next contends that the record does not support the finding that "defendant responded that he was presently unemployed, and then, after a pause, volunteered that during times when he was unemployed was when he got into trouble, that this is when he gets things into his head and does them, and admitted to the burglary" (R. at 85). Portions of that information did not come out as testimony at the evidentiary hearing, probably because defendant objected to the detectives testifying as to what his statements were (R. at 154). After the court ruled that the detective could relay the substance of defendant's statement, Detective Cheever gave a cursory synopsis of the statement (R. at 155). As defendant notes (Br. of App. at 17), and the court stated (R. at 148), a portion of the preliminary hearing testimony was available to the court (R. at 69-75; a copy is attached as Addendum D). The preliminary hearing transcript contains the portion of defendant's statement

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<sup>4</sup>Defendant called the detectives as adverse witnesses and conducted the examination by means of leading questions; the officers were never asked specifically their purpose in asking the preliminary identification questions.

which defendant now argues was not in the record. While the complained of portion was not testified to in the evidentiary hearing on the suppression motion, it was contained in the preliminary hearing transcript. Defendant did not object to the court having read that preliminary hearing transcript (R. at 148). The full record demonstrates that there is no conflict between the finding and the evidence.

Finally, defendant takes exception with the finding (or conclusion) that "[n]o coercion or deception of any kind was exercised by the Detectives [sic] in order to induce the defendant to speak with the police" (R. at 86). The evidence fully supports this determination by the court. The uncontroverted testimony of the detectives was that no physical force, deception, or intimidation was exercised against defendant (R. at 149-50, 157-58). Defendant presented no evidence of coercion. He merely argues that an "incommunicado, unrecorded interrogation occurring in the small, old booking room at the jail, wherein two older and experienced Caucasian detectives questioned a young Native American" must have been coercive (Br. of App. at 17). While "custodial interrogation is inherently coercive," State v. Sampson, 808 P.2d 1100, 1103 n.6 (1990), cert. denied, 112 S. Ct. 1282 (1992), the questions asked of defendant before administration of the Miranda warnings were not interrogation (see Point II). Defendant has failed to demonstrate that the court's determination that there was no coercion was erroneous.

## POINT II

### THE TRIAL COURT'S DENIAL OF THE MOTION TO SUPPRESS IS CORRECT UNDER THE FEDERAL CONSTITUTION

Defendant asserts that suppression of his statements is mandated by federal constitutional law. The fifth amendment to the federal constitution states that no person "shall be compelled in any criminal case to be a witness against himself[.]" "Prior to Miranda, the admissibility of an accused's in-custody statements was judged solely by whether they were 'voluntary' within the meaning of the Due Process Clause." Oregon v. Elstad, 470 U.S. 298, 304, 105 S. Ct. 1285, 1290 (1985) (citations omitted). "'Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.'" Id. at 305, 105 S. Ct. at 1291 (quoting United States v. Washington, 431 U.S. 181, 187, 97 S. Ct. 1814, 1818 (1977)). Whether a confession is "voluntary" is a legal question which is reviewed in the totality of the circumstances. State v. Singer, 815 P.2d 1303, 1309 (Utah App. 1991) (quoting Arizona v. Fulminante, \_\_\_ U.S. \_\_\_, 111 S. Ct. 1246, 1252 (1991)).

The so-called Miranda rights are "'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" Elstad, 470 U.S. at 305, 105 S. Ct. at 1291 (quoting Michigan v. Tucker, 417 U.S. 433, 444, 94 S. Ct. 2357, 2364 (1974)). Whether a confession was obtained in violation of

the "prophylactic Miranda warnings" is separate from the issue of voluntariness under the fifth amendment. Elstad, 470 U.S. at 305, 105 S. Ct. at 1291. Whether a person was interrogated for purposes of determining whether Miranda applies is a factual determination, reviewed under a clearly erroneous standard. Layton City v. Aragon, 813 P.2d 1213, 1215 (Utah App. 1991).

A. Recording the statements

Defendant first insists that the detectives were required to "record" defendant's statements<sup>5</sup> and that failure to do so renders their testimony about the statements unreliable. Defendant does not argue that the recording had to be by audio or videotape. As in State v. Carter, 776 P.2d 886, 890 (Utah 1989), "there is no proof to support a determination that any significant item was omitted from the statement[ or] that defendant's rights were violated[.]" The means by which the detectives recorded James's statements is found in defendant's brief; defendant states that his statements were recorded in "Detective Newren's police report, which was not placed in evidence, but which was provided to defense counsel in discovery" (Br. of App. at 23). At least Detective Newren (and possibly

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<sup>5</sup>Defendant gave more than one statement to the officers; how many were given or the contents of any other than the first statement is not in the transcript of the evidentiary hearing. The detectives testified that defendant gave a spontaneous statement to the effect that "he did it, he went into a neighbor's house and took a coat and stereo" (R. at 155). The detectives then interrupted him and advised him under Miranda (R. at 156, 153). After he waived his Miranda rights, the detectives asked about the burglary and defendant made other statements (R. at 147, 70). The substance of the statements obtained after the Miranda waiver is contained in the preliminary hearing transcript (R. at 70).

also Detective Cheever) recorded the statements in the reports prepared of the investigation.

The fact that the exact words recorded by Detective Newren were not presented verbatim to the trial court is not a function of the method or reliability of recording. Instead, it is a function of defendant's objection to introduction of the statement at all. When the prosecution asked Detective Cheever what defendant said, defense counsel objected to the court hearing the statement (R. at 154). The objection overruled, Detective Cheever testified that defendant said he was not working at that time, then defendant "went into the spontaneous statement." Again, defense counsel objected on the basis of "lack of relevance." The court said, "Let's hear what he has to say." Detective Cheever then gave a cursory summary of defendant's statement, not claiming that it was verbatim or taken from his record of the statement (R. at 155). Neither detective was asked to recite defendant's statement verbatim.

Defendant's claim that the detectives did not "record" defendant's statements is factually incorrect; the statements were recorded by the detectives in their reports. The detectives were not asked to recite defendant's statements verbatim; in fact, defendant tried to preclude their recitation at all. The fact that a verbatim recitation was not given does not indicate that a verbatim record was not taken.

B. Defendant's first statement was not a response to "interrogation" in the *Miranda* sense

Defendant states that the detectives "owed" him a Miranda warning at the outset of their interview (Br. of App. at 25). There is no dispute that such warnings are required whenever a person is subjected to "custodial interrogation." Layton City v. Aragon, 813 P.2d 1213, 1214 (Utah App. 1991). The State does not contest that defendant was in custody on the charge of which he subsequently pled guilty; however, denial of the suppression motion was correct because defendant's first statement was not a response to "interrogation" in the context of Miranda.

Most cases since Miranda was decided in 1966 have dealt with the custody prong of "custodial interrogation." In Rhode Island v. Innis, 446 U.S. 291, 298, 100 S. Ct. 1682, 1688 (1980), the Court addressed the issue of when an accused was interrogated in violation of Miranda. Not "all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation." Id. at 299, 100 S. Ct. at 1689. Instead, the Court concluded

that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather

than the intent of the police. . . . But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Id. at 300-302, 100 S. Ct. at 1689-90 (emphasis added; italics in original) (citations omitted).

Innis was cited with approval in Layton City v. Aragon, 813 P.2d 1213 (Utah App. 1991), wherein this Court said:

Cases since Innis have clarified that an express question from police to a suspect does not amount to interrogation if, under the circumstances, the question was not reasonably likely to elicit an incriminating response. Murphy v. Holland, 845 F.2d 83, 85-86 (4th Cir.1988); United States v. Gonzalez-Mares, 752 F.2d 1485, 1489 (9th Cir.1985). The likelihood of incrimination must be determined from all of the circumstances; the same question may constitute interrogation in one situation but not in another. For example, in United States v. Poole, 794 F.2d 462, 466-67, amended in 806 F.2d 853 (9th Cir.1986)[,] the court noted that asking for name, date of birth, and similar routine biographical data is ordinarily not an interrogation, but it was interrogation when asked immediately after showing a bank robbery suspect surveillance photos of the robbery and mentioning his accomplice by name.

Aragon, 813 P.2d at 1215.

Innis is the foundation for Pennsylvania v. Muniz, 496 U.S. 582, 110 S. Ct. 2638 (1990), which the prosecution provided to the court at the evidentiary hearing (R. at 47-53). In that decision, four justices determined that there should be an exception to Miranda requirements for "routine booking questions"

"which exempt[] from Miranda's [sic] coverage questions to secure the "'biographical data necessary to complete booking or pretrial services.'" Id. at 601, 110 S. Ct. at 2650 (plurality opinion) (quoting Brief for United States as Amicus Curiae). Four other justices found it unnecessary to determine whether the biographical questions fell within a "routine booking questions" exception because Muniz's responses were not testimonial. Id. at 608, 110 S. Ct. at 2654 (Rehnquist, C.J., White, Blackmun and Stevens, JJ., concurring in part and dissenting in part). These justices appeared to accept the existence of a "routine booking questions" exception when they stated:

Indeed, had the question [of when Muniz's sixth birthday occurred] related only to the date of his birth, it presumably would have come under the "booking exception to Miranda [sic] . . . , to which the Court refers elsewhere in its opinion.

Id. at 607, 110 S. Ct. at 2654 (Rehnquist, C.J., White, Blackmun and Stevens, JJ., concurring in part and dissenting in part) (citation omitted). At least implicitly, eight of the justices accepted the concept of an exception to Miranda requirements for routine questions to obtain biographical data.

Muniz is tangentially related to the present case because the detectives never claimed that they were booking defendant when they asked for his biographical data (R. at 146). Muniz is only relevant in that it reaffirms the analysis in Innis that questions do not amount to interrogation for Miranda purposes unless the questions are reasonably likely to elicit an incriminating response.



The decision in Aragon is the most instructive in analyzing the present case. "[A]n express question from police to a suspect does not amount to interrogation if, under the circumstances, the question was not reasonably likely to elicit an incriminating response." Aragon, 813 P.2d at 1215 (citations omitted).<sup>6</sup> In the circumstances of the present case, defendant was brought into the interview room and told that the detectives were there to investigate the burglary for which defendant was arrested (R. at 143). The detectives had not been involved in the arrest and, presumably, did not know defendant by sight (R. at 141). In order to ascertain whether the person who had been brought to the interview room was the same person booked the night before on this charge, the detectives began to ask biographical data (R. at 144). Since they had a copy of the

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<sup>6</sup>Defendant claims that Aragon and the cases cited therein confuse the "express questioning" with the "functional equivalent" of interrogation (Br. of App. at 26 n.8). Defendant does not analyze why an express question which is not reasonably likely to elicit an incriminating response should be treated any differently than a functional equivalent of interrogation. As noted in Aragon, courts have recognized that Miranda interrogation requires some knowledge that a question, or its functional equivalent, must be reasonably likely to elicit an incriminating statement. Aragon, 813 P.2d at 1215. In Innis, the Supreme Court said:

The concern of the Court in Miranda was that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination.

Id. 446 U.S. at 299, 100 S. Ct. at 1688 (citation omitted). Questions which do not serve to undermine the privilege against self-incrimination do not raise a Miranda concern. See also Muniz, 496 U.S. at 601-602, 110 S. Ct. at 2650 (plurality opinion) (questions which appear to be "reasonably related to the police's administrative concerns . . . fall outside the protections of Miranda").

booking sheet with them, they could then compare the answers on the booking sheet with the answers then being given by defendant to verify his identity (R. at 146; Finding of Fact #4, R. at 85). When one of the detectives asked about employment, defendant said he was not working at the time, paused, then said that he got the idea in his head, went into a neighbor's house and took a coat and stereo (R. at 155-56). The detectives could not have reasonably known that a question about whether defendant was employed was likely to elicit an incriminating response. Since they could not reasonably have known that a question about employment would elicit an incriminating response, the question does not constitute interrogation for Miranda purposes. Innis, 446 U.S. at 302, 100 S. Ct. at 1690.

C. Post-Miranda statements.

In Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285 (1985), the Supreme Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." Id. at 318, 105 S. Ct. at 1298. This decision is based on the fact that the prophylactic warnings mandated by Miranda do not rise to the level of a constitutional mandate; thus, a violation of Miranda is not necessarily a violation of the fifth amendment. Id. at 305, 105 S. Ct. at 1291. Only if the statement sought to be introduced against defendant was obtained by compulsion must it be suppressed as a violation of the fifth amendment. Id. The Utah

Supreme Court adopted the Elstad reasoning in State v. Bishop, 753 P.2d 439, 465-66 (Utah 1988).

Even if the detectives had been required to advise defendant of the Miranda warnings before asking for biographical data, the failure to do so was corrected (barring actual coercion) by the subsequent advisement (R. at 156-57). After defendant blurted out a confession, the detectives interrupted him and gave him the warnings; he waived his right to remain silent and to have an attorney present (R. at 157). Apparently, he then gave additional incriminating statements (R. at 70). Elstad teaches that a failure to warn a suspect is cured by a subsequent warning; the statements given after the warning are admissible. "A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." Id. at 314, 105 S. Ct. at 1296. The fact that the statements obtained after a Miranda waiver are admissible makes admission of the earlier statement harmless, if error at all. Bishop, 753 P.2d at 466.<sup>7</sup>

The fifth amendment aspect of Elstad requires analysis of the voluntariness of defendant's statements because a Miranda warning would not cure a fifth amendment violation. Id. at 806-807, 105 S. Ct. at 1292. A review of the record demonstrates that the interview of defendant "had none of the earmarks of

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<sup>7</sup>There is nothing in the record regarding whether the post-Miranda statements contained items not found in the pre-Miranda statement.

coercion." Elstad, 470 U.S. at 316, 105 S. Ct. at 1296. In Bishop, the supreme court illustrated some of those earmarks:

The record discloses that defendant was not unlawfully detained by police and that the officers made no threats, promises, or inducements to obtain the confession. And although the officers' statements were direct and contained profanity, when viewed in light of defendant's age, education, and background, we are not in the least satisfied that [the confession was involuntary].

Bishop, 753 P.2d at 464. The court also noted that Bishop was not subjected to unduly long periods of questioning; the presence of a number of officers was not coercive; and Bishop's contention that he was particularly susceptible because he was tired was not supported by the record. Id. See also State v. Hegelman, 717 P.2d 1348, 1350 (Utah 1986) ("Evidence sufficient to support a finding that a confession is involuntary must reveal some physical or psychological force or manipulation that is designed to induce the accused to talk when he otherwise would not have done so.").

After the evidentiary hearing, the court determined that defendant "was subjected to neither coercion, physical or psychological, or induced to speak as a result of promises or deception of any kind" (R. at 86, Conclusion of Law #1). At the hearing, defendant presented no evidence to refute the detectives' testimony that they had offered no physical force, deception, intimidation, or promises to induce defendant's statements (R. at 149-50, 158). Defendant spoke English and

appeared to have all of his "faculties"; in addition, there were no indications of alcohol or drug use (R. at 158).

Defendant asks this Court to presume involuntariness by assuming certain facts and certain emotions on the part of defendant which are not in the record. (Br. of App. at 34-35). The room in which the interview occurred is 12 feet by 13 feet, but there was no evidence that it was "isolated." (Br. of App. at 34; R. at 143). The fact that there were two detectives is "a factor to consider"; however, "the presence of more than one officer during" the interview was not sufficient to cause the statements to be involuntary. Bishop, 753 P.2d at 464. There was no evidence that defendant was "isolated from his family and friends, and from attorneys." (Br. of App. at 34). There was no evidence presented at the hearing about defendant's age, although from the booking sheet it appears he claimed to be nearly twenty (R. at 10). There was no evidence that defendant was "undoubtedly aware that, in the isolated circumstances of the interrogation, with no recording device in use, whatever was to happen in the old booking area of the jail with the two detectives would occur without witnesses." (Br. of App. at 34-35). This melodramatic recitation has no basis in the record. The unrefuted testimony of the detectives was that defendant was cooperative and voluntarily answered their questions, spontaneously volunteering that he had committed the crime (R. at 147, 149, 155-56). The evidence does not support an assumption that defendant feared the officers. There is also no evidence

that the coercive factors delineated in Bishop existed in the present case.

In summary, defendant's statements were voluntary under federal constitutional analysis and thus were admissible under the fifth amendment. There was no requirement to give Miranda warnings because the preliminary biographical questions asked of defendant were not reasonably likely to elicit incriminating responses. Defendant's volunteered statement that he committed the crime was admissible and the statements obtained after the warnings and waiver was admissible under Elstad even if the first statement were suppressed.

### POINT III

DEFENDANT HAS FAILED TO PRESENT GROUNDS FOR ADDRESSING HIS STATE CONSTITUTIONAL ARGUMENT; ADDITIONALLY, THIS CASE DOES NOT DEMONSTRATE A NEED FOR SEPARATE STATE CONSTITUTIONAL ANALYSIS

Defendant asks this Court to conduct a separate state constitutional analysis and suppress his statements.

#### A. Waiver

After the court denied suppression under the federal constitution, defendant filed a motion to suppress under the state constitution (R. at 92-101; a copy is attached as Addendum E). Although the motion is ten pages long and cites several cases, a careful reading demonstrates that the motion asks for a separate state constitutional analysis but fails to provide such analysis. The cases cited in the motion all indicate that the appellate courts of this state will conduct a separate state

constitutional analysis in the proper circumstances; defendant then asked the trial court to afford him "broader individual protections" under the state constitution (R. at 100). On appeal, defendant specifically asks that the Court require under the state constitution that all statements be recorded, presumably by audio or videotape, and that Elstad, 470 U.S. 298, 105 S. Ct. 1285 (1985), be rejected (Br. of App. at 42-46). Defendant's motion to suppress under the state constitution neglected to specify what "broader" protections he was seeking and the reasons the federal protections were not adequate. Failure to provide "thoughtful and probing analysis of state constitutional interpretation" to the trial court, i.e., by specifying what additional protections the state constitution should afford and why federal analysis was inadequate, precludes considering this issue on appeal. State v. Bobo, 803 P.2d 1268, 1272-73 (Utah App. 1990). See also State v. Webb, 790 P.2d 65, 77-78 (Utah App. 1990), and authorities cited therein.

B. The federal test for admissibility of a confession has been accepted as workable by Utah courts; consequently, no separate state constitutional analysis is needed

As set forth above, this Court should not reach the merits of defendant's belated state constitutional argument for the suppression of his confession because he has failed to preserve the issue. However, if the Court does address the merits, defendant has failed to articulate any reason for finding a different protection under the state constitution.

Resort to state constitutional analysis is necessary only when changing federal law is confusing, contradictory to state appellate decisions, and erodes constitutional guarantees. These considerations were foremost in State v. Larocco, 794 P.2d 460 (Utah 1990), wherein two justices of the Utah Supreme Court eschewed federal law regarding automobile searches in favor of an analysis under Article I, section 14 of the Utah Constitution. See id. at 465 (citing State v. Jackson, 102 Wash.2d 432, 688 P.2d 136, 140-41 (1984)). The Larocco plurality was also seeking consistency. Id. at 466-69 (decrying federal search and seizure law as a contradictory "labyrinth"). See also State v. Vigil, 815 P.2d 1296, 1300 (Utah App. 1991) (appellate courts have duty to provide "unambiguous direction"). Defendant has not presented any confusion, contradiction or erosion of constitutional guarantees compelling adoption of a different state analysis of self-incrimination law.

C. Adoption of a different *Miranda* requirement under the state constitution is not necessary

As this Court noted in State v. Erickson, 802 P.2d 111 (Utah App. 1990):

The Utah Supreme Court has not expressly ruled upon the question of whether Miranda warnings are required under the Utah Constitution.

Id. at 113-14 n.2 (citing Sandy City v. Larson, 733 P.2d 137, 141 (Utah 1987) (Durham, J., concurring and dissenting)). Defendant asks this Court to adopt the Miranda requirements under the state constitution and to extend them beyond the boundaries established



by federal case law. Although the exact extension is not clear, defendant apparently argues for two extensions: 1) that Miranda warnings be required whenever a person is in custody, whether interrogation occurs or not (excluding use of a volunteered statement such as that given by defendant); and 2) that the warnings be required whenever a person is questioned, whether in custody or not. (Br. of App. at 41-42). That argument detaches Miranda warnings from their anchor, which is the intersection between custody and interrogation. As established by federal case law, the warnings are required only when the inherent compulsion of custody is impacted by interrogation intended to elicit incriminating statements.

Reviewing the history of the self-incrimination clauses of the federal and state constitutions, the Utah Supreme Court concluded that the "choice of one widely used expression of the privilege over another was [not] meant to broaden the privilege as it existed at [the time the Utah Constitution was adopted]." American Fork City v. Crosgrove, 701 P.2d 1069, 1072 (Utah 1985).

The fifth amendment says that no person can be compelled "to be a witness against himself," whereas article I, section 12 of the Utah Constitution says, "The accused shall not be compelled to give evidence against himself."

Id. (emphasis in original). The historical background of adoption of the state constitution demonstrates that the state constitutional privilege was intended to have the same scope as the federal privilege, "which was the scope it had at common law." Id. at 1073. See also Sandy City v. Larson, 733 P.2d 137,

138 (Utah 1987) (since the scope of article I, section 12 is no broader than its federal counterpart, although the case was decided under the state constitution, "cases decided by the United States Supreme Court and others offer guidance."); In the Matter of a Criminal Investigation, 7th District Court No. CS-1, 754 P.2d 633, 645 (Utah 1988) ("To the extent that the common law defines the privilege, the federal and state provisions have been interpreted similarly.").

Miranda warnings themselves are not required by the federal constitution. As the Supreme Court stated in Elstad:

"The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.' . . . Requiring *Miranda* warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right."

Elstad, 470 U.S. at 305, 105 S. Ct. at 1291 (quoting New York v. Quarles, 467 U.S. 649, 654, 104 S. Ct. 2626, 2630 (1984), in turn quoting Michigan v. Tucker, 417 U.S. 433, 444, 94 S. Ct. 2357, 2364 (1974)). If this Court chooses to adopt the requirement of Miranda warnings under the state constitution, it should not elevate those judicially created requirements to the level of constitutional requirements. The federal constitution does not require Miranda warnings; instead, the Supreme Court established the requirement in order to ensure that a person subjected to custodial interrogation who waives his privilege against self-incrimination and right to counsel does so knowingly and

intelligently. Miranda v. Arizona, 384 U.S. 436, 475, 86 S. Ct. 1602, 1628 (1966).

Relying on Salt Lake City v. Carner, 664 P.2d 1168 (Utah 1983), defendant asks this Court to require Miranda warnings whenever "the environment during the interrogation" is accusatorial; in other words, "the police owed Mr. James a Miranda warning at the outset of the interrogation" under the state constitution (Br. of App. at 41-42). If this Court adopts a Miranda-type requirement under the state constitution, it should also adopt the federal case law to this point which has developed the parameters of that requirement. See Larson, 733 P.2d at 138 (since the state and federal self-incrimination provisions have the same scope, "although we decide this case under the Constitution of Utah, cases decided by the United States Supreme Court and others offer guidance.").

The experience of the Oregon appellate courts demonstrates the difficulties inherent in deciding what, if any, to adopt of federal Miranda law. When the United States Supreme Court remanded Oregon v. Elstad, the court of appeals of Oregon addressed Elstad's claim that the Oregon constitution precluded use of his second confession even though the federal constitution did not. State v. Elstad, 78 Or.App. 362, 717 P.2d 174, 175, review denied, 302 Or. 36, 726 P.2d 935 (1986). The court stated that it had declined previously "to adopt a different standard under the Oregon constitution for Miranda-violative statements and their use for impeachment[.]" Id. The court quoted:

"Although we may interpret our own state constitution to provide greater protection to our citizens than United States Supreme court interpretations of the federal constitution provide, . . . steps to adopt a stricter standard should be taken cautiously and be supported by reasoned analysis and sound policy considerations."

Id. (quoting State v. Mills, 76 Or.App. 301, 305, 710 P.2d 148 (1985), review denied, 300 Or. 546, 715 P.2d 93 (1986); other citations omitted). The court did "not find, nor has defendant identified, principles, precedents or criteria that persuade[d them] to adopt a different rule." Id. at 176 (citations omitted).

Shortly thereafter, the Oregon Supreme Court split on the issue of whether Miranda-type warnings were required under the state constitution. In State v. Smith, 301 Or. 681, 725 P.2d 894 (1986), the defendant asked for a holding that the state constitution require Miranda warnings at a time earlier than required by federal case law. Id. at 903. Writing for a three-judge plurality, Justice Campbell concluded that adoption of Miranda warnings under the state constitution was not warranted. He noted that there was no mention in the state constitution of any required warnings. Id. at 904. He then gave the history of the warnings since Miranda, and noted the plethora of cases since 1966 which have explicated the permutations of Miranda. The plurality opinion said:

If we adopted a different Oregon Miranda rule or placed a different interpretation upon the present federal rule, then we have created confusion. We doubt that the "task of scrutinizing individual cases to try to

determine, whether particular confessions were voluntary" would have created a greater case load for the courts than the flood of cases in the last 20 years that have tried to determine the correct application of the federal Miranda warnings.

Oregon is in this situation: We have the federal Miranda warnings. By virtue of the Fifth Amendment and the Fourteenth Amendment we have no choice. . . . We think that it is important to keep the Oregon law on confessions and admissions intact.

To adopt an Oregon Miranda rule identical to the federal rule without any commitment to future interpretations would be unwise. We would be in the same position as we are today, except that the ranch would have been sold with no down payment. To adopt an Oregon Miranda rule identical to the federal rule and tie it to future interpretation by the federal caselaw would be foolish. We do not know what may be waiting in the alley. To adopt an Oregon Miranda rule identical to the federal rule and place our own future interpretation on it would only further confuse an already confused area of the law. To adopt an Oregon Miranda rule different from the federal rule is not warranted.

Id. at 905-906 (footnote omitted). A fourth justice concurred in the result but stated that he believed the court had already adopted Miranda-type warnings under the state constitution. Id. at 906-907. The remaining three justices, in dissent,

refrained from stating that Article I, section 12, itself requires warnings before questioning. . . . [T]here is no need for a court to freeze details into constitutional law when guidance can be found in laws like [Oregon statutes requiring Miranda-type warnings in specified circumstances] that can be further considered and refined by the ordinary lawmaking process.

Id. at 913-14.

The dissension in Smith was noted by the Oregon Supreme Court the next year in State v. Kell, 303 Or. 89, 734 P.2d 334,

337 n.2 (1987). Kell did not involve a question of whether Miranda warnings should be given; instead, it asked what police may do when a suspect in custody only partially waives his right against self-incrimination. Id. at 336-37. The Oregon court said:

[W]e must evaluate the issue of waiver in the light both of Oregon's sole responsibility for the meaning of the Oregon Constitution and of the benefits of adhering to rules which are widely followed outside Oregon and which we consider to be satisfactory.

Although no authority outside Oregon can control our decision, there is no value in being different merely for the sake of the difference. That other courts generally follow a particular rule and that it appears to us to work satisfactorily are reasons in favor of following it in Oregon. . . . [In a prior case, the court refused to require under the state constitution more detailed warnings than Miranda warnings.] We did so because we did not believe that the alternative warnings were a sufficient improvement to justify a variation from the federal rule[.] . . . A majority of this court has not been able to agree whether Miranda-type warnings are required under the Oregon Constitution.

Id. at 336-37 (footnote omitted).

A few months later, noting the split in Smith and without direct citation to the state constitution, the court decided that the defendant was in custody for Miranda purposes in State v. Magee, 304 Or. 261, 744 P.2d 250 (1987). The majority declared that it need not match the facts of this case to those in "the few cases decided by the United States Supreme Court." Id. at 253. Instead, the majority asserted that "Oregon law furnishes an independent basis of decision." The court then

cited two of its prior cases, including Kell; it did not specifically state that the independent state basis was the state constitution. Magee, 744 P.2d at 253. The three justices who formed the plurality in Smith concurred separately in order to reiterate their opinion that the state constitution did not require Miranda-type warnings. Magee, 744 P.2d at 253.

An en banc decision by the Oregon Court of Appeals in State v. Brown, 100 Or.App. 204, 785 P.2d 790, review denied, 309 Or. 698, 790 P.2d 1141 (1990), compounded the confusion. The lead opinion in Brown assumed that the "independent basis" mentioned in Magee was the state constitution. Id. at 793. The lead opinion then basically adopted the federal standard that a person must be in custody, or its equivalent, before Miranda warnings are required under the state constitution. Three judges concurred in the result but pointed out that the Magee case had not conclusively established that Miranda-type warnings were required under the state constitution. Brown, 785 P.2d at 795-96. Pointing to the dissent following in Brown, the concurring judges stated, "If Newman, J., and Riggs, J., are correct that 'compelling circumstances' is the key analysis, we are beginning as torturous a trek under state law [as that found in the judicial history of present federal law]." Id. at 796. Finally, two judges dissented in Brown, asserting that Magee required "warnings when the police question a suspect in circumstances that are 'compelling.'" Id. at 797. The issue of custody had no bearing on the requirement. Id.

This recitation of the route Oregon has taken points out the confusion that may follow if this Court decides in this case to pursue a state constitutional analysis. If the Court adopts the federal rule and ties it to future interpretation by federal courts, that interpretation may not conform to what the appellate courts of this State deem appropriate. If the Court adopts the federal rule and places its own future interpretation on it, the Court may find itself in a morass similar to the one in which Oregon finds itself. Adopting a standard which may only cause confusion serves no legitimate purpose.

Defendant apparently asks this Court to require Miranda-type warnings from the outset of an interview between an accused and police officers. Adopting this position would preclude use of volunteered statements or statements in response to questions not intended to elicit an incriminating response, if these statements happened to come out before the warnings were given. Alternatively, defendant seems to be asking that warnings be required for any interrogation, whether the suspect is in custody or not. Adopting this position would unnecessarily hamstring law enforcement efforts. "Because Miranda warnings may inhibit persons from giving information, this court has determined that they need be administered only after the person is taken into 'custody' or his freedom has otherwise been significantly restrained." Elstad, 470 U.S. at 309, 105 S. Ct. at 1293 (citing Miranda, 384 U.S. at 478, 86 S. Ct. at 1629).



Defendant has failed to articulate any legal or policy rationale behind adoption of either position. See State v. Elstad, 717 P.2d at 175. He has failed to demonstrate how adoption would broaden protection for the constitutional right against compelled self-incrimination. The facts of this case do not raise a question which cannot be adequately addressed by resort to federal Miranda analysis.

D. Recording the statements

Defendant next contends that under article I, section 7 of the Utah Constitution<sup>8</sup> police officers should be required to "provide a reliable record of the interrogations" (Br. of App. at 42). Defendant does not indicate what kind of record of the interrogation was provided in this case or why it was not reliable. By citation to a Texas case, Shiflet v. State, 732 S.W.2d 622 (Tex.Cr.App. 1985), he implies that this Court should mandate an audio or videotaped record of the confession under the state constitution. The Texas provision about the admissibility of oral confessions is found in that state's Code of Criminal Procedure; Shiflet was not decided under a constitutional provision. Id. at 623. That case is not helpful.

The state of Alaska has addressed the issue and adopted a requirement for audio or videotaping of statements, where feasible, under their state constitution. Stephan v. State, 711 P.2d 1156, 1159-63 (Alaska 1985). However, it did so only

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<sup>8</sup>No person shall be deprived of life, liberty or property, without due process of law.

because it had, five years before, informed state law enforcement officials that they must tape record, where feasible, any questioning of suspects. Id. at 1157. Nine other states have expressly declined to follow Alaska's lead. See State v. Rhoades, 119 Idaho 594, 809 P.2d 455 (1991); Gale v. State, 792 P.2d 570 (Wyo. 1990); Jimenez v. State, 105 Nev. 337, 775 P.2d 694 (1989); People v. Everette, 187 Ill.App.3d 1063, 135 Ill.Dec. 472, 543 N.E.2d 1040 (1989), rev'd on other grounds, 141 Ill.2d 147, 152 Ill.Dec. 377, 565 N.E.2d 1295 (1990); State v. Gorton, 149 Vt. 602, 548 A.2d 419 (1988); Williams v. State, 522 So.2d 201 (Miss.1988); Coleman v. State, 189 Ga.App. 366, 375 S.E.2d 663 (1988); State v. Spurgeon, 63 Wash.App. 503, 820 P.2d 960 (1991), rev. denied, 118 Wash.2d 1024, 827 P.2d 1393; People v. Raibon, \_\_\_ P.2d \_\_\_, 1992 WL 119794 (Colo.App. June 4, 1992) (not yet released for publication). The Nevada Supreme Court stated that, "the concern is with the reliability of the testimony of the detectives, not with some unconstitutional action." The evidence of a failure to tape record the interrogation and the point that this failure called into question the reliability of the officers' testimony were argued to the jury. "The jury's determination that the detectives' testimony was truthful is sufficient to quiet concerns of reliability." Jimenez, 775 P.2d at 696-97. The Illinois appellate court stated:

[T]he most appropriate means of augmenting the due process rights of citizens, especially in view of the ramifications of the rule urged by defendant, is through

legislation. . . . "In the absence of legislation, we do not believe it appropriate to require, by judicial fiat, that all statements taken of a person in custody" be recorded or transcribed.

Everette 543 N.E.2d at 1047 (citing and quoting Vermont v. Gorton, 548 A.2d 419, 422 (Vt. 1988)). The Washington appellate court explained:

[I]t is our view that such a sweeping change in long standing police practice should be made only after a full hearing of all the policy and financial implications and with adequate advance notice to a [sic] law enforcement in the form of the adoption of a rule of evidence or a statute mandating recording.

Spurgeon, 820 P.2d at 963 (footnotes omitted). A requirement to tape or video record all interrogations should be addressed to a legislative or rulemaking body so that a full hearing on the implications of such a requirement could be held. This court should follow the lead of the majority of the states and decline to adopt such a requirement under the state constitution.

E. The rule propounded in *Elstad* is appropriate under Utah law

Finally, defendant asks this Court to presume that an unwarned confession taints any subsequent statements made after Miranda warnings. This "cat-out-of-the-bag" analysis was specifically rejected by the United State Supreme Court in Elstad.<sup>9</sup> Elstad, 470 U.S. at 311-13, 105 S. Ct. at 1294-96.

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<sup>9</sup>Defendant's quotation from United States v. Bayer, 331 U.S. 532, 540-41, 67 S. Ct. 1394, 1398 (1947), is disingenuous because defendant left off the conclusion of the paragraph, which reads:

But this Court has never gone so far as to hold that making a confession under

Defendant's claim that Elstad is inconsistent with or blurred the "bright line" of Miranda was also rejected by the Supreme Court. Elstad, 470 U.S. at 317, 105 S. Ct. at 1297 ("The Court today in no way retreats from the bright-line rule of Miranda."). The holding of Elstad is based on, and consistent with, Miranda and its other progeny; defendant's bald assertion, without analysis, that this is "confusing precedent" (Br. of App. at 45) does not support a rejection of Elstad.

Defendant also states that Elstad is inconsistent with prior state law; however, he has failed to support this argument. He cited to State v. Crank, 105 Utah 332, 142 P.2d 178, 184 and 192 (1943) (plurality opinion), for the proposition that a confession "obtained by improper influences" may taint a subsequent statement (Br. of App. at 45-46). Elstad does not conflict with that proposition; a statement obtained by coercion, i.e., an improper influence, is inadmissible under the fifth amendment. Elstad allows admission of statements obtained after proper Miranda warnings, even though a prior statement was obtained in violation of Miranda. Elstad did not allow admission of subsequent statements if the original statements were obtained in violation of the fifth amendment.

The other cases cited by defendant, State v. Ruggeri, 19 Utah 2d 216, 429 P.2d 969 (1967), and In re Criminal

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circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

Investigation, 754 P.2d 633 (Utah 1988), involve the rights of a person being targeted by a grand jury (Ruggeri), and a person being questioned under subpoena powers (Criminal Investigation); neither of these cases is analogous to the present case. Whether a person should be warned that he is a target of a grand jury or warned of a right to an attorney and avoid self-incrimination, has no applicability to whether a person subjected to custodial interrogation can waive his right to remain silent after having given a prior, unwarned statement.

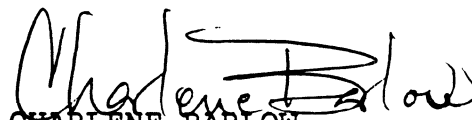
Defendant has failed to establish any contradiction or confusion to justify providing separate state constitutional analysis in this case. Neither has he provided any legal or policy justification for imposing the additional requirements he seeks under the state constitution. Consequently, this Court should decline to establish different state constitutional requirements in the realm of confessions.

#### CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm defendant's conviction and sentence.

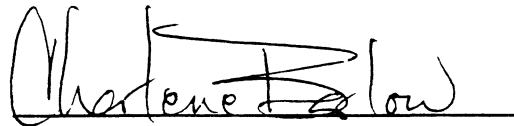
RESPECTFULLY submitted this 29<sup>th</sup> day of January, 1993.

JAN GRAHAM  
Attorney General

  
CHARLENE BARLOW  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Elizabeth A. Bowman and Elizabeth Holbrook, SALT LAKE LEGAL DEFENDER ASSOC., Attorneys for defendant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 29<sup>th</sup> day of January, 1993.

  
Charlene B. Low

ADDENDA

## ADDENDUM A



DAVID E. YOCOM  
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Deputy County Attorney  
Courtside Office Building  
231 East 400 South, 3rd Floor  
Salt Lake City, Utah 84111  
Phone: (801) 363-7900

Third Judicial District

MAY 24 1991

By SAULT LAKE COUNTY  
Deputy Clerk

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

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|                    |   |                            |
|--------------------|---|----------------------------|
| THE STATE OF UTAH, | ) |                            |
| Plaintiff,         | ) | FINDINGS OF FACT,          |
|                    | ) | CONCLUSIONS OF LAW         |
|                    | ) | AND ORDER DENYING          |
|                    | ) | DEFENDANT'S MOTION         |
|                    | ) | TO SUPPRESS                |
| v.                 | ) |                            |
|                    | ) |                            |
| EDWARD H. JAMES,   | ) | Case No. 911900562FS       |
| Defendant          | ) | Before Hon. John A. Rokich |

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A hearing on Defendant's Motion to Suppress came before this Court on May 8, 1991, the State being represented by its counsel, B. Kent Morgan, Deputy County Attorney, and the defendant being present and represented by his counsel, Elizabeth A. Bowman, Esq., and the Court having taken testimony in the matter, having heard arguments of counsel, reviewed the authorities submitted and being otherwise fully advised in the premises, now enters its:

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FINDINGS OF FACT

1. Defendant was arrested and booked into the Salt Lake County Jail on the evening of March 28, 1991 for the offense of Burglary, a Second Degree Felony in violation of §76-6-202 U.C.A. and Theft, a Class A Misdemeanor alleged to have been committed at 355 North 700 West, Salt Lake County, Utah on the same day as his arrest.

2. From the time of his arrest until the interview conducted the following morning at 10:14 O'Clock A. M., the defendant was not questioned by the police about any matter. At no time did the defendant invoke his right to remain silent or request counsel.

3. On March 29, 1991, the defendant was called out from the general population into the booking area of the jail and confronted by Salt Lake City Police Detectives Gary Newren and Steve Cheever who immediately announced they were police officers whose purpose was to discuss the burglary committed the previous day.

4. The detectives then asked the defendant general questions about his identity for the purpose of ascertaining whether the correct person was being interviewed.

5. Detective Cheever questioned the defendant about his present employment to which the defendant responded that he was presently unemployed, and then, after a pause, volunteered that during times when he was unemployed was when he got into trouble, that this is when he gets things into his head and does them, and admitted to the burglary.

6. Detectives Newren and Cheever interrupted the defendant and read him his rights pursuant to *Miranda v. Arizona*, to which the defendant responded that he understood each of those rights and agreed to speak to the Detectives about the burglary. The defendant thereupon gave a detailed confession about the burglary.

7. No coercion or deception of any kind was exercised by the Detectives in order to induce the defendant to speak with the police.

Having entered its Findings of Fact, the Court now enters its:

CONCLUSIONS OF LAW

1. The mere fact that the defendant was in jail and called into the booking area does not render any statement made in response to police questioning involuntary under the totality of the circumstances, but rather is only a factor to be considered among the other circumstances of the interview. Based on the uncontradicted testimony of the Detectives who conducted the interview that the defendant freely volunteered the information requested and was subjected to neither coercion, physical or psychological, or induced to speak as a result of promises or deception of any kind, the Court concludes the defendant's statements were voluntarily given under the totality of the circumstances.

2. The police are not required to give *Miranda* admonitions to a defendant who is in custody prior to asking routine booking

questions which the police have no reason to know are reasonably likely to elicit an incriminating response. The questions elicited prior to giving *Miranda* admonitions in this case were merely requesting biographical data to assure the interviewing detectives that they were about to question the right suspect.

3. Notwithstanding any unwarned but nonetheless voluntary statement made prior to the *Miranda* warnings in this case, even if the unwarned statements resulted from interrogation within the meaning of *Miranda*, there is no constitutional requirement that this Court suppress the defendant's post-*Miranda* statements.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, Defendants Motion to Suppress is denied.

DATED this 24 day of May, 1991.

  
JOHN A. ROKICH  
District Court Judge

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## ADDENDUM B

FILED  
DISTRICT COURT

ELIZABETH A. BOWMAN, #4276  
Attorney for Defendant  
SALT LAKE LEGAL DEFENDERS ASSOC.  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-5444

MAY 21 12 01 PM '91

BY  CLERK

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

|                    |   |                              |
|--------------------|---|------------------------------|
| THE STATE OF UTAH, | : | OBJECTIONS OF FINDINGS OF    |
|                    | : | FACTS AND CONCLUSIONS OF LAW |
| Plaintiff,         | : |                              |
| vs.                | : |                              |
| EDWARD JAMES,      | : | Case No. 911900562FS         |
| Defendant.         | : | JUDGE JOHN A. ROKICH         |

FACTS

State's Fact No. 1 should have the following sentence  
added: The booking process on Mr. James was completed at that time.

State's Fact No. 3 should read as follows:

On March 29, 1991, the defendant was escorted by a jailer  
to the old booking area (now an interview area no longer used as  
booking) of the jail where two Salt Lake City Police Officers had  
requested he be brought.

The two officers, Newren and Cheever announced they were  
police officers and that they wanted to interview the defendant on  
the burglary charge. They were not obtaining any information for  
the purpose of booking.

Prior to interviewing Mr. James the officers did not

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Mirandize Mr. James nor did they inform him of his right to silence.

State's Fact No. 4 should read as follows:

No testimony regarding the purpose of the interview other than the stated purpose of investigation of the burglary was solicited at the Motion to Suppress.

State's Fact No. 6 should include:

6. After the statements were made by Mr. James the detectives read him his Miranda warnings.

State's Fact No. 7 should read as follows:

The defendant is a young Native American. Both officers were considerably older and white. The white officers were in a position of power compared to the inmate.

#### CONCLUSIONS

The defendant was escorted by a guard, while he was in custody, to an interview area (the old booking area). Two white, experienced police officers introduced themselves and proceeded to interview Mr. James about the burglary without first Mirandizing him, Mr. James was never told he did not have to accede to the interview. Several questions into the interview and in response to questions from the second officer, Mr. James made statments about the offense. The officer then Mirandized Mr. James who made more statements.

The State's reliance on the "booking questions" exception is misplaced for several reasons. Mr. James was booked the evening before. The booking process was complete. The old booking area is now used for interviews and that is where the interview took place.

The new booking area is in a different area of the jail. The booking procedure at the Salt Lake County Jail is done by Sheriff's Office employees. The two officers involved in questioning Mr. James were employed by the Salt Lake City Police Department. The stated purpose of the interview was to investigate the burglary.

The Court cannot conclude the information was freely volunteered because that entails a knowing waiver of one's rights unless the information is not elicited by the officers. Here, the officer elicited the information by directing Mr. James be brought to them and by asking him questions.

DATED this \_\_\_\_ day of May, 1991.

BY THE COURT:

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JUDGE JOHN A. ROKICH  
Third District Court

MAILED/DELIVERED a copy of the foregoing to the Office of the County Attorney, 231 East 400 South, Salt Lake City, Utah 84111, this \_\_\_\_ day of May, 1991.

DELIVERED BY

MAY 21 1991

PAT ADAMSON

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00083



## ADDENDUM C

DAVID E. YOCOM  
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Phone: (801) 363-7900

FILED 1991  
Third Judicial District

MAY 31 1991

SALT LAKE CITY  
By [Signature]  
Deputy Clerk

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

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|                    |   |                            |
|--------------------|---|----------------------------|
| THE STATE OF UTAH, | ) |                            |
| Plaintiff,         | ) |                            |
|                    | ) | MEMORANDUM RE:             |
|                    | ) | ADMISSIBILITY OF           |
| v.                 | ) | POST-MIRANDA STATEMENTS    |
|                    | ) | FOLLOWING UNWARNED         |
|                    | ) | STATEMENTS                 |
| EDWARD H. JAMES,   | ) | Case No. 911900562FS       |
| Defendant          | ) | Before Hon. John A. Rokich |

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ISSUE

Defendant claims that impermissibly coercive methods were used by police to extract his confession, thereby making it involuntary. Defendant further contends that his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) were violated because the police delayed in advising him of his *Miranda* rights.

STATEMENT OF THE CASE

The defendant is charged with the offenses of Burglary, a Second Degree Felony in violation of §76-6-202 U.C.A., and Theft, a Class A Misdemeanor in violation of §76-6-404 U.C.A. alleged to have been committed at 355 North 700 West #3, Salt Lake County, Utah on March 28, 1991.

Defendant was arrested on March 28, 1991 and booked into the Salt Lake County Jail that evening. An Information was filed on April 1, 1991, and the defendant was informed of the formal charges and appointed counsel the following day by Third Circuit Court Judge Eleanor Van Sciver. A preliminary hearing conference held before Third Circuit Court Judge Jones on April 9, 1991 failed to provide any resolution on the case. The preliminary hearing was held on April 16, 1991. After considering the evidence presented by the State, Judge Jones bound the defendant over as charged to enter a plea in this Court.

The defendant pled not guilty to the charges on April 29, 1991, obtained a reduction in bail and orally notified the Court the defendant intended to file a Motion to Suppress. Without disclosing the nature of the Motion, a hearing was scheduled for May 8, 1991. The written Motion was received by the State on May 1, 1991 disclosing in general terms that statements were sought to be suppressed because of a violation of *Miranda* rights.

FACTS

A hearing was held on March 8, 1991 wherein through the uncontradicted testimony of Salt Lake City Police Detectives Gary Newren and Detective Steve Cheever, the following facts surrounding the interview of the defendant on March 29, 1991 were adduced. Defendant was arrested and booked into the Salt Lake County Jail on the evening of March 28, 1991. There is no evidence of any intervening events before the police questioned the defendant. Nor is there any indication that the defendant refused to speak with the police or requested the advice of counsel prior to the interview the following morning on March 29, 1991 at 10:14 O'clock, A.M.

It is uncontested that defendant was in custody at the time of the interview. He was called out from the general population of the jail and removed to the booking area of the jail.

The interview began with a complete and honest disclosure by Detectives Newren and Cheever announcing they were police officers who were there to discuss the very burglary for which the defendant was being held in jail.

Following this disclosure, the defendant was asked general questions relating to his identity. The defendant was asked his name, his date of birth, his current living arrangements and about his employment. In regard to Detective Cheever asking the defendant about his employment, the defendant stated he was not working at the time, then paused, and added, "that this is when he got into trouble,"... "at such times, he gets things into his head and does them" and admitted to the burglary.

At this point, defendant was interrupted by the police detectives and informed of his right to remain silent, his right to counsel and the right to appointment of counsel if he could not afford them pursuant to Miranda v. Arizona. The defendant stated that he understood each of these rights, and agreed to talk to the detectives about the burglary. A detailed confession was thereupon obtained.

Each of the Detectives stated that they believed the defendant's statements during the entire interview were given voluntarily, and that neither coercion nor improper inducements were used to prompt the defendant to speak with them. They further specifically testified that no use of physical force, intimidation or representations of deception were used to elicit any statement from the defendant.

ARGUMENT

Defendant's claims under "involuntariness" and "the denial of due process pursuant to *Miranda*" are two separate and distinct questions that require an entirely different analysis. With respect to the claim that his statements were involuntary, and therefore are inadmissible in contravention of his right to be free from compelled self-incrimination, both the Utah and United States Supreme Court have adopted the "totality of the circumstances standard". *State v. Bishop*, 753 P.2d 439, 463 (Utah 1988); *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973).

Factors to be considered in the determination of whether a confession is voluntarily given include assessing the degree to which the police may have used physical or psychological force designed to induce the accused to talk when he otherwise would not have done so. Clearly, the use of violence or threats of violence will render a confession involuntary. Psychological coercion may exist where the police use improper influences or promises. Further, the defendant's age, education and background are relevant to determine his understanding of the questioning and his will to resist questionable police conduct. *State v. Watts*, 639 P.2d 158, 160 (Utah 1981).

As applied to this case, defendant alleges only that he was in jail, called to an interview room and confronted by two police officers as factors to consider in rendering his statements involuntary. Under the totality of the circumstances, especially taken with the uncontroverted testimony of the interviewing

detectives, no shred of evidence of coercion has been introduced. See *State v. Bishop*, 753 P.2d 439, 464 (Utah 1988) (confession voluntary despite lengthy questioning and numerous police officers present during questioning).

A fair characterization of the evidence is that the detectives had to interject *Miranda* warnings in between the defendant's outburst of unburdening his guilt. To consider removal of the accused from the general jail population to an interview area as a *per se* involuntary environment would virtually preclude questioning of any individual after he had been booked. Clearly defendant's entire statement was voluntary under the totality of the circumstances.

The next issue to be resolved is the legal effect of a delay in communicating to the defendant his rights under *Miranda*. The now famous *Miranda* admonitions arose from the United States Supreme Court's determination that interrogation in certain custodial circumstances may be inherently coercive. The requirement that the accused be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed was designed to even the scale between the police and the accused. "The prophylactic *Miranda* warnings therefore are not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory self-incrimination is protected. *New York v. Quarles*, 467 U.S. 649, 654 (1984).

The requirements of *Miranda* become relevant only when an individual is (1) in custody, and (2) subjected to interrogation. *Arizona v. Mauro*, 481 U.S. 520 (1987); *Rhode Island v. Innis*, 446 U.S. 291 (1980). The State necessarily concedes a defendant in jail is in custody.

However, the United States Supreme Court has recently affirmed the "routine booking question" exception which exempts from *Miranda's* coverage questions to secure the biographical data necessary to complete booking or pretrial services. *Pennsylvania v. Muniz*, 110 L.Ed.2d 528, 552 (1990). Prior to defendant's blurting out his misdeeds, all of the questions presented by the detectives can be appropriately characterized as routine booking questions designed merely to properly identify the person they were about to question about criminal activity. The determination of when interrogation has begun for the purpose of triggering Miranda has been defined as "words or action on the part of police that they should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, *supra* at page 301. The preliminary questions asked by the detectives do not rise to the level of interrogation within the meaning of *Miranda* in this case.

Notwithstanding an argument of interrogation to the contrary, the law remains clear that only the statements prior to *Miranda* need be suppressed. Both the Utah and United States Supreme Courts have held on cases factually on point that the Self-Incrimination Clause of the Fifth Amendment does not require the suppression of a confession, made after proper *Miranda*



warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the suspect. *Oregon v. Elstad*, 470 U.S. 298 (1985); *State v. Bishop*, *supra*. These cases reasoned:

If errors are made by law enforcement officers in administering the prophylactic *Miranda* Procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of *Miranda* to hold that simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made. *Elstad* at page 309.

Under the most gracious weight afforded to the evidence as viewed from the perspective of the defendant, only the unwarned statement could be suppressed under the law.

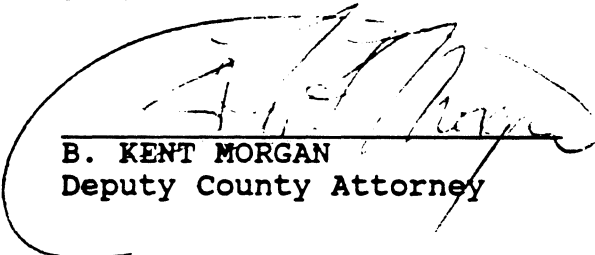
Defendant's reliance upon *State v. Sampson* is misplaced. That case turned on the issue of invoking the right to counsel after *Miranda* admonitions were given. No request for counsel, equivocal or otherwise was made in this case. *Sampson* has no persuasive value in the matter before this Court. Clearly, the defendants claim of a violation of *Miranda* is without merit.

CONCLUSION

Defendant's claims of involuntariness and deprivation of his rights pursuant to *Miranda* are not supported by the evidence before this Court. For these reasons, it is respectfully requested that defendant's motion to suppress his statements be denied.

RESPECTFULLY submitted this 9<sup>th</sup> day of May, 1991.

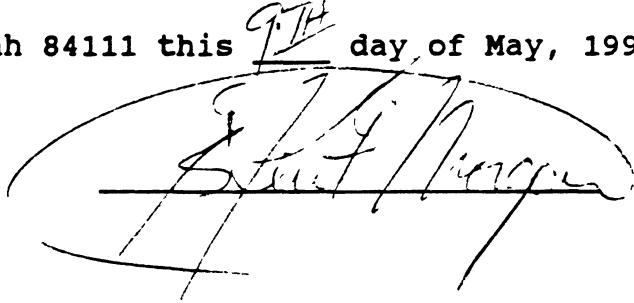
DAVID YOCOM



B. KENT MORGAN  
Deputy County Attorney

MAILING/DELIVERY CERTIFICATE

MAILED/DELIVERED a copy of the foregoing to the Office of  
the Salt Lake Legal Defender Association, 424 East 500 South,  
Suite 300, Salt Lake City, Utah 84111 this 9<sup>TH</sup> day of May, 1991.

A handwritten signature, "Stuart Berger", is written in cursive over a horizontal line. The signature is enclosed within a large, loopy oval flourish.

ADDENDUM D

PRELIMINARY HEARING  
EDWARD H. JAMES  
CASE #911003552FS  
TESTIMONY OF OFFICER NEWREN

DIRECT EXAMINATION

STATE: State your name and occupation for the record, please?

A: Gary Newren, I'm employed with Salt Lake City Corp. as a police officer.

Q: Are you presently in Detective division?

A: Yes I am.

Q: Are you acquainted with the Defendant?

A: Yes, I am.

Q: Do you know him as Edward James?

A: Yes, I do.

Q: Did you conduct an interview with him shortly after his arrest on March 28th 1991?

A: I did.

Q: What date was it actually, that you interviewed?

A: I am not sure, I'd have to look at my note there to see the exact date.

Q: Was it on or about March 28th?

A: Yes it was.

Q: Uh, and who was present during the course of the interview?

A: Another police officer by the name of Steve Chever, myself, and Mr. James.

Q: Was it recorded?

A: No, it was not.

Q: And, uh, prior to the interview did you advise the defendant of his rights pursuant to Miranda .....?

A: It was not, uh, immediately before hand, uh, there was some things that we were asking that did not need Miranda and then we asked Miranda ... when it became apparent.

Q: ..... and you're referring to identification information?

A: That is correct.

Q: How did he respond to your Miranda advise?

A: He indicated to both questions, ya.

Q: Allright, did you ask him about the burglary that occurred at 355 North 700 West Apartment #3 on that day?

A: We did

Q: How did he respond?

A: He responded that, uh, sometimes he gets things in his head and that he had done the burglary and gone through the window.

Q: Did he indicate what he had taken?

A: He did.

Q: What did he say he had taken?

A: He took the stereo and a leather jacket.

Q: And did you assist Ms. Kilsnak in recovering that property?

A: I did on the jacket and the stereo was already into evidence from the patrol officers that had, uh, placed Mr. James into custody.

Q: Did you return the stereos .....

A: Yes I did.

Q: And how about the leather jacket, where was that located?

A: That was located at the Rothchild's pawn shop and that was also returned.

Q: No further questions.

CROSS EXAMINATION

Q: It's Newren?

A: It is.

Q: .....

A: .....

Q: Uh, you did transport Mr. James to jail?

A: I did not.

Q: Detective Ch... did?

A: No, the patrol officers did the night before.

Q: Oh, he had been booked the night before?

A: That's correct.

Q: And you had him pulled out of the jail?

A: Pardon?

Q: Did you have him pulled out of the jail?

A: We never left the jail, the interview was conducted in the jail?

Q: Okay, was he, had he already been up on the floor in the jail?

A: That is correct.

Q: So he'd been pulled down to, and then,

A: Uh huh (affirmative).

Q: And that was at your request?

A: Yes it was.

Q: Was he told why he was being pulled out?

A: After we got there I explained to him why, what we were doing there, and our purpose.

Q: And you indicated that you wanted to do a follow up investigation of the burglary?

A: That is correct.

Q: And you didn't operate .... before that?

A: No I did not.

Q: And after you indicated you wanted to do a follow up investigation of the burglary you proceeded to ask ....

A: Clarifying his name and different things like that, because of the unusualness of the Edward and the James and date of birth, and,

Q: Okay, but after indicating that you wanted a follow up on the burglary, you proceeded to question him.

A: I believe I stated to him that myself and Officer Chever, Detective Chever were doing the follow up investigation of a burglary that occurred at 355 North on 700 West.

Q: Uh, and then you proceeded to ask him some questions.

A: That is correct.

Q: Okay. And that would still be before Miranda?

A: That is also correct.

Q: Now, some of the questions that you consider benign had to do with his name?

A: Uh huh (affirmative).

Q: His middle initial?



A: Yes.

Q: His date of birth?

A: Yes.

Q: His birth place?

A: Yes.

Q: His current living arrangements?

A: Yes

Q: His job?

A: Yes.

Q: His employment?

A: Yes.

Q: And he remained cooperative throughout that?

A: Very cooperative.

Q: And then Detective Chevers then asked him what he did for a living?

A: That's correct.

Q: And, uh, is it in response to that that there was an admission made, you believe?

A: Yes.

Q: And still no Miranda?

A: Yes.

Q: ....uh, at that point would makes the response he's still not been mirandized?

A: That is correct.

Q: Now that the, uh, stereo, where did that come from, I'm sorry?

A: The patrol officers had placed that into evidence, uh, and it was located at the time that, uh, they had responded to the investigation of the burglary at that location at the request of May Kilsnik.

Q: Was it, it's found at the scene?

A: It was found in the apartment next to.

Q: And this was in apartment that Cindy, was Cindy's home?

A: Yes.

Q: Do we know Cindy's last name?

A: Cindy Lee.

STATE: Just Lee.

Q: And her apartment was next to the, uh, Kilsacks?

A: Yes.

Q: Or her home?

A: Uh huh (affirmative).

Q: And that was, that would be immediately adjacent to it?

A: Yes it is.

Q: And who pawned the jacket?

A: It would been a Mary Ann Jaussi.

Q: Not Edward James?

A: Yes, that's correct.

Q: Was Mr. James told anything prior to the interview regarding if he would work with the officers things might go easier, anything to that effect?

A: No.

Q: Did you, you indicated to him you were trying to solve the ...?

A: I indicated to him that we were doing the follow up investigation on that burglary.

Q: Did you explain what that meant?

A: No, I did not.

Q: Thank you nothing further.

STATE RESTS

ADVISING CLIENT

BINDS OVER

## ADDENDUM E

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Attorney for Defendant  
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FILED  
DISTRICT COURT

JUL 3 4 25 PM '91

BY M. J. [Signature]  
CLERK

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

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|                    |   |                               |
|--------------------|---|-------------------------------|
| THE STATE OF UTAH, | : | MOTION TO SUPPRESS UNDER BOTH |
|                    | : | THE UTAH AND UNITED STATES    |
| Plaintiff,         | : | CONSTITUTION                  |
| vs.                | : |                               |
| EDWARD JAMES,      | : | Case No. 911900562FS          |
|                    | : | JUDGE JOHN A. ROKICH          |
| Defendant.         | : |                               |

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STATEMENT OF THE FACTS

On March 28, 1991, Mr. James, an eighteen year old Native American, was arrested for the offense of Burglary, a Second Degree Felony in violation of section 76-6-202, and Theft, in violation of section 76-6-404 a class A Misdemeanor. Utah Code Ann. (1953 as amended). Mr. James was arrested and transported to the Salt Lake County jail where he was booked on the above charges.

During the morning of March 29, 1991, at the request of two Salt Lake City Police Department detectives, Mr. James was escorted by a jailer to the old booking area of the jail. At one time this area of the jail served as the location for the booking process. Currently, however, this area is used by the Police for

the purpose of conducting interviews.

When Mr. James arrived at this interview area the two Detectives, officers Newren and Cheevers both white males, announced they were Police Officers and stated they wanted to do a follow up investigation of the alleged burglary. Prior to this announcement Mr. James had not been told why he had been brought to this area of the jail. Before questioning Mr. James, the officers did not Mirandize him, nor did the officers advise him of his constitutional rights to remain silent, and to have counsel present.

Detective Newren began the questioning by asking Mr. James to state his name, middle initial, date of birth and birth place. Detective Newren continued this line of questioning by asking Mr. James about his current living arrangement, his current job, and his employment. Mr. James remained cooperative throughout detective Newren's questions. Then Detective Cheevers questioned Mr. James about his present employment. Mr. James responded that he was presently unemployed, and then, after a pause, stated that during times when he was unemployed he got into trouble. Mr. James then told the two Detectives that it was during these times of unemployment that he gets "things into his head" and does them. He then admitted to the burglary.

At the time Mr. James made his admissions he had still not received any Miranda warnings, nor had Mr. James in any way been advised of his constitutional rights. Only after Mr. James admitted to committing the crime he was accused of did he receive

the Miranda warnings which informed him of his constitutional rights.

POINT I

JAMES'S STATEMENT WAS TAKEN IN VIOLATION OF HIS STATE  
CONSTITUTIONAL RIGHTS TO REMAIN SILENT  
AND TO HAVE COUNSEL PRESENT

INTRODUCTION: The fifth amendment to the United States Constitution provides in part that no person "shall be compelled in any criminal case to be a witness against himself" U.S.C.A. Const.Amend. 5. (emphasis added). Article I Section 12 of the Utah State Constitution provides that "the accused shall not be compelled to give evidence against himself". Ut. Const. Art. 1, sec. 12. (emphasis added). Mr. James asks this court to construe Article I, Section 12 as providing greater protection to the individual than it's federal counterpart.

Mr. James recognizes the trial judge has ruled on the admissability of his statements under the federal constitution. See (Findings of Facts, Conclusions of Law and Order Denying Defendant's Motion to Suppress). However, he asks this Court to review and apply the federal standard, as well as the newly raised state standard, to the facts of his case to preserve all issues for appeal.

FEDERAL STANDARD: In Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), the U.S. Supreme Court held that a person in custody must be informed of certain constitutional rights before

being interrogated. Id. at 479.

The Miranda Court and subsequent decisions defined "custody" as when an individual has been deprived by a law enforcement officer of his freedom of action in any significant way. Id. Interrogation is the "express questioning or it's functional equivalent." Id. In Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682 (1980), the United States Supreme Court stated, "interrogation under Miranda refers not only to express questioning or it's functional equivalent, but also any words or actions on the part of the police (other than those normally attendant to arrest or custody) that the police should know are reasonable likely to elicit an incriminating response from the suspect." Id. at 300-02.

In this case both parties agree that Mr. James was in custody and had not received any Miranda warnings when he made the admissions. Relying on Oregon v. Elstad, 470 U.S. 298 (1985) this Court ruled, under the federal constitution, that the admissions were freely given and that the detective's questions were not likely to illicit an incriminating response. See (Findings of Facts, Conclusions of Law and Order Denying Defendants's Motion to Suppress). However, Elstad specifically applies to officers correcting errors made in the initial prophylactic Miranda procedures. This case is not about officers committing errors in the procedure of giving Miranda, but rather is about officers who have chosen to omit the Miranda warnings altogether. For purposes of appeal Mr. James will cite two cases



in support of his contention that the trial judge incorrectly ruled under the federal constitution, and respectfully asks this Court to reconsider it's ruling.

In Salt Lake City v. Carner, 664 P.2d 1168 (Utah 1983) the Court held that an accused must be apprised of his Miranda rights if the setting is custodial or accusatorial rather than investigatory. Id. at 1170 (emphasis added). The court further stated it is "at the point the environment" becomes accusatory that a police officer questions must be prefaced with a Miranda warning. Id.

The environment created by the two police officers who questioned Mr. James was accusatorial. The day prior to the questioning Mr. James was arrested and held on the burglary charge. Without any Miranda warnings the two officers began questioning Mr. James after requesting he be brought to them. The purpose of the questioning was to further investigate the burglary charge Mr. James was being held on.

In Layton City v. Aragon, No. 900247-CA, slip op. at 4 (Ut. Ct. App. filed June 13, 1991) (copy attached), the Court carefully indicated in construing the Innis holding, "The likelihood of incrimination must be determined from all of the circumstances; the same question may constitute interrogation in one situation but not in another." Id. Furthermore the Court elaborated "the main focus is on whether the suspect is likely to incriminate himself in response [to a question]." Id. at 5. (emphasis in original). The focus is not whether the two

detectives believed their questions would lead to incriminating responds, but whether Mr. James was likely to incriminate himself.

Mr. James had been accused of the crime and was the sole focus of the criminal investigation. He had received no warnings safeguarding his constitutional rights prior to the police beginning the questioning. Cultural and age differences also increased the likelihood of Mr. James making an un-mirandized admission in an already inherently coercive atmosphere of a police custodial interrogation. Mr. James is an eighteen year Native American man who was subjected to his first adult booking charge and who was being questioned by two white, experienced police officers.

#### STATE CONSTITUTIONAL ANALYSIS:

Based on an historical analysis as well as precedent from other cases, Mr. James asks this Court to suppress his statements under the state constitution should the Court choose not to do so under a review of the federal constitutional analysis.

Historically, the right to refuse to give evidence against oneself was of critical importance to the drafters of Utah's constitution. The framers of the constitution were well aware and suspicious of governmental interference into the lives of Utahn's. Mormon settlers were persecuted by various regional governments. The Mormons had been continually persecuted for their religious beliefs since their inception as a religion. See

L. Arrington and D. Bitton, The Mormon Experience pg. 67-69 (1980).

With a history so replete with government sanctioned persecution and intimidation, the drafters of the Utah State Constitution sought protection from governmental interference. The original drafters intended Article I Section 12 to protect them more than the Federal Constitution did.

The courts of Utah have at times interpreted the state constitution broader than the federal counterparts to insure greater protection for criminal defendants. For example, in In re Matter of Criminal Investigation, 7th District Court No. CS-1., 754 P.2d 633 (Utah 1988), the Utah Supreme Court considered the constitutionality of the Subpoena Powers Act which provided that upon application and approval of the District Court, for good cause shown, prosecuting attorneys could, among other things, subpoena witnesses and grant transactional immunity.

In considering the constitutional self incrimination challenge to the Act the Court stated, "Article I, section 12 of the Utah Constitution is arguably narrower [than it's federal counterpart] because it states only that 'the accused' has the privilege [against self incrimination]. Id. at 646. Rather than adopt a view that the privilege only attaches once charges have been brought, the Court embraced the common law approach that "all witness must be able to claim the privilege if the purpose of the privilege is to be satisfied." Id. The Court reasoned

otherwise the state would be allowed to "poke about in the speculation of finding something chargeable." Id. citing 8 Wigmore, Evidence sec. 2251, at 314 (McNaughton rev. 1961).

Under the rational of In re Criminal Investigation, 754 P.2d at 646, Mr. James could legitimately invoke the privilege under the state constitution once he became either a suspect or a witness. In addition, the Court also cautioned "the privilege is intended to protect against confessions secured by sheer force of psychological intimidation," (citations omitted) and compared the situation to the "psychological compulsion" inherent in a police custodial inquiry. Id. at 648.

In State v. Ramirez, 157 Utah Adv. Rep. 10 (Utah 1991) the Court set a stringent due process standard far more protective of individual rights under the State Constitution than it's federal counterpart. See also Foote v. Utah Board of Pardons, 156 Utah Adv. Rep. 3 (Utah 1991). Mr. James asks this Court to do the same.

In State v. Larocco, 794 P.2d 460 (Utah 1990), the Supreme Court relied on Article I, section 14 in deciding that "an officer's opening a car door to examine a VIN on a door jamb" id. at 465, constituted an unreasonable search under the state constitution. The Court recognized that federal fourth amendment-law, especially in the context of automobile searches, "has been a source of much confusion among judges, lawyers and police." Id. at 466. Although the Court indicated that if it were deciding the case under the federal law, it "would hold that

a search was conducted within the meaning of the forth amendment," it nevertheless reached its decision under the state constitution.

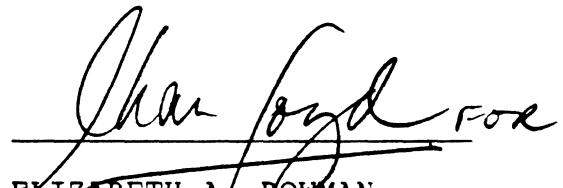
The Court in In re Matter of a Criminal Investigation, 7th District Court No. CS-1, 754 P.2d 633 (Utah 1988) announced that the use of "accused" in Article I, sec. 12, applies as soon as someone becomes a witness to a case in the context of invoking the privilege of self incrimination. Certainly the same rational would apply to the use of "accused" with regards to the right to counsel which is also set forth in the language of Article I, sec. 12. Additional support for this reasoning can be found in the recent Utah Supreme Court case of State v. Sampson, 143 Utah Adv. Rep 12 (1990). In Sampson the court stated, "Moreover, as an arm of the State, the police have a responsibility to protect the constitutional rights of the citizenry, and erring on the side of giving the Miranda warnings before they are strictly required advances that function".... Id. at 20 n.12.

#### CONCLUSION

As indicated above, the language of the Utah constitution provides broader individual protections than its federal counterpart. It has also been established that the framers of the Utah constitution intended to afford the individual great protection against government incursion. Based on this unique constitutional development and the precedent cited above, we move this Court to find greater protection for criminal defendant's

right to silence and to right to counsel under Article I, section 12 than the federal counterparts. We ask this Court to suppress any statements Mr. James made in violation of his state or federal constitutional rights.

DATED this 3<sup>rd</sup> day of July, 1991.

  
ELIZABETH A. BOWMAN  
ATTORNEY FOR DEFENDANT

MAILED/DELIVERED a copy of the foregoing to the Office of County Attorney, 231 East 400 South, Salt Lake City, Utah 84111, this 31<sup>st</sup> day of July, 1991.

DELIVERED BY  
JUL 02 1991  
PAT ADAMSON

