

2005

Utah v. Terry Arnold Messer, Jr. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Respondent,

v.

TERRY ARNOLD MESSER, JR.,

Defendant/Appellant.

BRIEF OF APPELLANT

Case No. 20050309-CA

Appeal from a final order, the "Second Amended Judgment, Sentence, and Commitment" entered on or about March 18, 2005, in the Fifth Judicial District Court, in and for Iron County, State of Utah, after jury trial, the Honorable James L. Shumate, District Judge, presiding.

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The Defendant/Appellant is incarcerated.

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JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdiction of this matter because this case has been transferred from the Supreme Court pursuant to Utah Code Ann. §78-2-2-(4) (1953, as amended).

ISSUES FOR DETERMINATION

ISSUE I: Did the District Court fail to give proper jury, specifically by not presenting a lesser included offense?

(**Raised below:** *See* R. at 801, 803; Trial Transcript (Record pp. 1255-1258) (hereafter “Tr.”) at 917.)

ISSUE II: Did the District Court err in denying Defendant’s Motion for Mistrial because comments by trial judge were improper and denied the Defendant the right to a fair trial before an impartial jury?

(**Raised below:** *See* Tr. at 59-60.)

ISSUE III: Did the Court err in not suppressing the suppress evidence from trunk of an automobile in which the methamphetamine lab central to this case was discovered based on defective third-party consent?

(**Raised below:** *See* R. at 1259, p. 123-124 (defense counsel bringing out on cross-examination of searching officer, in hearing on motion to suppress, that third parties, to whom the evidence in the trunk did not belong, rather than the Defendant gave the consent to search box in trunk), and p. 162 (counsel pointing out,

inter alia, the box belonged to the Defendant and he had an expectation of privacy in it, in making his argument the the evidence found therein should be suppressed).

ISSUE IV: Did the District Court err in denying Defendant’s Motion to Suppress evidence seized from the Purgatory Correctional Facility and from the St. George impound lot?

(Raised below: R. at 72-73, 204, 1259)

ISSUE V: Did the District Court err in denying the Defendant’s Motion in Limine and allowing eye witness testimony which was tainted and unreliable?
(See Tr. at 635.)

(Raised below: R. at 635-637).

ISSUE VI: Did the District Court err in allowing a jail “kite” or letter (trial exhibit #28) into evidence, where there was insufficient foundation to allow the letter into evidence?

(Raised below: Transcript of Trial (R. 1257) at 491-493, 507.

ISSUE VII: Did the District Court err in disallowing certain testimony from defense witness Mr. Paul Halstead, on the basis of hearsay; and the testimony of defense witness Mr. Troy Thode, on the basis of hearsay and on the basis that it was too collateral to the issues at trial?

(Raised below: Tr. at 673-679; 752 to 753.)

Standards of Review

The standard of review for Issue I: Whether the trial court properly refused to give requested instructions to a jury is a matter reviewed for correctness. State v. Parra, 972 P.2d 924, 927 (Utah Ct. App. 1998).

In State v. Baker, 671 P.2d 152, 159 (Utah 1983), the Utah Supreme Court formulated a two-part analysis for determining whether to grant a defendant's request for jury instructions on a lesser included offense. *First*, the court must compare the statutory elements of the crimes and determine whether the elements overlap. *See id.* *Second*, it must determine whether a rational basis exists on which the jury could acquit the defendant of the offense charged while convicting him of the alternative offense. *See id.*

State v. Parra, 972 P.2d 924, 927 (Utah Ct. App. 1998) (emphasis added).

The standard of review for Issue II: Rulings on motions for mistrial are reviewed for abuse of discretion and this standard is met only if the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant. For purposes of determining whether a mistrial should have been granted, our overriding concern is that defendant receive a fair trial. *State v. Harmon*, 956 P.2d 262, 276 (Utah 1998).

The standard of review for Issue III and IV: “A trial court’s findings underlying its decision to grant or deny a Motion to Suppress are reviewed under a clearly erroneous standard, and it’s legal conclusions are reviewed for correctness.” *State v. Jarman*, 9987 P. 2d 1284.

The standard of review for Issue V, VI, and VII: Evidentiary rulings are reviewed for abuse of discretion, although the application of legal standards in those rulings is reviewed for correctness. *See, e.g., State v. Wetzel*, 868 F. 2d 64 (Utah 1983); State v. Thurman, 846 F. 2d

1256 (Utah 1993); Comcoa, Inc. v. Nec Tel's, Inc., 931 F. 2d 655 (10th Cir. 1991); Orth v. Emerson Elec. Co., 980 F. 2d 632, (10th Cir. 1992).

STATEMENT OF THE CASE

A. Nature of the Case

This is a criminal action against Defendant for one count of UNLAWFUL POSSESSION OF LABORATORY EQUIPMENT OR SUPPLIES, as enhanced to a first-degree felony under U.C.A 58-37d-4 (1953, as amended).

B. Course of the Proceedings

Trial of the above-referenced matter was conducted on October 22, 2001 to October 25, 2001 on the instant charges. *See* Record Transcripts of Jury Trial, with each transcript volume given record numbers, to wit: 1255, 1256, 1257, and 1258; the pagination of the Jury Trial transcripts runs consecutively throughout the several volumes (hereafter jury trial transcripts will be cited as “Tr.” with page numbering from the consecutive pagination indicated thereafter). At the Preliminary Hearing evidence was presented and the Defendant was bound over for trial. *See* R. at 55-57, 60, 71. Trial by jury was then held on the above-mentioned dates.

C. Disposition at Trial Court

The Defendant was convicted at trial, and originally Judgment, according to the jury verdict, was pronounced against Defendant and on December 3, 2001. R. at 854-55. Defendant was sentenced by the trial court to a five-to-life prison term in the Utah State Prison. On December 20, 2001, a signed Judgment, Commitment, and Sentence was entered. R. at 868-870. On February 8, 2002, an amended judgment was entered, which stated that Defendant had been

convicted of Unlawful Possession of Laboratory Equipment or Supplies and that the conviction had been enhanced to a first-degree felony. R. at 955-958. On March 18, 2005, a Second Amended Judgment, Sentence, and Commitment was entered by the Court, which also sentenced Defendant to a five-to-life term in the Utah State Prison. *See* Record at 1483-1486. A Notice of Appeal was filed on March 22, 2005. R. at 1489-1488.

D. Statement of Facts

Facts Regarding Issue I:

The Defendant in this case submitted to the Court at trial, but the District Court disallowed, the following proposed instruction (“Instruction No. A”), which set forth the instructions as to what elements were necessary to convict Defendant on the charge of Unlawful Possession of Laboratory Equipment and Supplies, also gave the jury the option of convicting Defendant of a lesser included offense, that of Possession of a Controlled Substance Precursor, a class A misdemeanor; the trial judge refused to include this jury instruction. The proposed instruction read as follows:

Before you may find Defendant TERRY ARNOLD MESSER guilty of the offense of Unlawful Possession of Laboratory Equipment or Supplies, a as charged in the Information, the State must prove and you must find, unanimously and beyond a reasonable doubt, each and every one of the following elements:

1. That the Defendant acted knowingly and intelligently;
2. That the Defendant did:
 - (a) possess laboratory equipment and supplies with the intent to engage in a clandestine methamphetamine laboratory operation; or
 - (b) possess a controlled substance precursor with the intent to engage in a clandestine methamphetamine laboratory operation; and
3. That such acts occurred on or about January 14, 1999, through January 21, 1999, in Iron County, State of

Utah.

If the State of Utah has failed to prove any one or more of the previously described elements, you must find the Defendant not guilty of the offense of Unlawful Possession of Laboratory Equipment or Supplies, as charged in the Information. If the State has proved, however, each and every one of the foregoing elements to your satisfaction and beyond a reasonable doubt, then it is your duty to find the Defendant guilty of Unlawful Possession of Laboratory Equipment or Supplies, as charged in the Information.

In the event that you find the Defendant not guilty of Unlawful Possession of Laboratory Equipment or Supplies, you should disregard the balance of this Instruction and proceed to the next numbered Jury Instruction which deals with Possession of a Controlled Substance Precursor, a class A misdemeanor.

If you find that the Defendant is guilty of Unlawful Possession of Laboratory Equipment or Supplies, as charged in the Information, then and only then should you consider whether or not said acts took place under the following conditions, to wit:

- (a) The Defendant illegally possessed, transported, or disposed of hazardous or dangerous material while transporting, or causing to be transported, materials in furtherance of a clandestine laboratory operation, that created a substantial risk to human health or safety or danger to the environment.
- (b) The intended methamphetamine laboratory operation took place within 500 feet of a residence.
- (c) Said clandestine laboratory operation was for the production of methamphetamine base.

If, [sic] you find the Defendant guilty, beyond a reasonable doubt, and you find unanimously and beyond a reasonable doubt that any of the special conditions exist, then you should so indicate on the special verdict form provided with these instructions.

R. at 803 (emphasis added).

Because the trial judge refused to include the lesser included offense language in the first

instruction, he likewise did not include the following instruction (“Instruction No. B”) on the elements of Unlawful Possession of a Controlled Substance Precursor, a class A misdemeanor:

Before you may find Defendant TERRY ARNOLD MESSER guilty of the offense of Unlawful Possession of a Controlled Substance Precursor, a class A misdemeanor, a lesser included charge of the one charged in the Information, the State must prove and you must find, unanimously and beyond a reasonable doubt, each and every one of the following elements:

1. That the Defendant acted knowingly and intelligently;
2. That the Defendant did:
 - (a) obtain or attempt to obtain or possess any controlled substance precursor, and
 - (b) the Defendant knew or had reasonable cause to believe that the controlled substance precursor was intended to be used in the unlawful manufacture of any controlled substance, and
3. That such acts occurred on or about January 14, 1999, through January 21, 1999, in Iron County, State of Utah.

If the State of Utah has failed to prove any one or more of the previously described elements, you must find the Defendant not guilty of the offense of a Controlled Substance Precursor [sic].

If the State has proved, however, each and every one of the foregoing elements to your satisfaction and beyond a reasonable doubt, then it is your duty to find the Defendant guilty of Unlawful Possession of a Controlled Substance Precursor, a class A misdemeanor.

R. at 801.

The reasoning behind the judge’s refusal is preserved on the record. The trial judge, in justifying his refusal, gave the following explanation:

The court, in analyzing the evidence and testimony that came before

this jury, first of all, from the state's witnesses, the expert witnesses, the chemist who analyzed the material seized from the trunk of the blue corsica, did not elicit, in any form, any weight of controlled substance precursors. We had no weight of iodine crystals, no weight of phosphorous of any kind, and no weight of ephedrine. The only evidence of the presence of iodine crystals in an amount sufficient to meet the 12-ounce statutory threshold under the statute, as it exists now and as it existed back in 1999, was the evidence offered by Mr. Messer himself indicating that the witness, Karen Hardy, displayed to him a 1 gallon ziplock bag containing his, in his estimate, 2 pounds of what he described as iodine crystals. That testimony was independent and separate from any of the supporting testimony whatsoever. The only logical inference that the court can have regarding the source of iodine crystals for these parties is the reduction by evaporation of tincture of iodine purchased from Overson's Farm Supply and from Intermountain Farmers. The testimony was clear, a total of five gallons, one from Intermountain Farmers at maximum. And there was some conflict there, may be none, from Intermountain Farmers, and four or five from Overson's. Mr. Messer is the only person who testified that there was five. Mr. Overson testified that that was a 7 percent solution of tincture of iodine. A 1 gallon plastic bag containing only the iodine from that many gallons of 7 percent solution would not possibly have the volume described by Mr. Messer. And I have no idea as to the weight because my chemistry is way too old to remember the atomic weight of iodine or the potential weight of a gallon of this tincture, therefore, I'm not giving it.

Tr. at 914.

Immediately after the judge's statement, the following interchange between Mr. Scarth, counsel for Defendant, and the trial judge, took place:

MR. SCARTH: The only thing is regards to your findings, Your honor, is you stated that Mr. Messer's testimony was that Karen Hardy displayed the crystalline iodine to him. But his testimony was in fact that he handled it.

THE COURT: That's correct, counsel. He did testify that he handled it. And feeling, that wonderful

phrase that he did not use, but I will use, the heft thereof, estimated it at 2 pounds, but that's the only testimony that we have on the issue.

Tr. at 916.

Facts Regarding Issue II:

In his introductory comments to the jury, the Court stated:

Right now, our system of government, our way of life is under assault. And it's good people like you who stand up and support it.

Tr. at 54.

Trial Counsel moved for a mistrial, which motion was denied without explanation or justification. *See* Tr. at 59-60.

Facts Regarding Issue III:

During the investigation into Defendant's purported methamphetamine lab, Officer Kelly Edwards of the Cedar City Police Department went to the home of Tim Hasch because of suspected illegal activity on Mr. Hasch's property (Tr. at 430). Also present at Mr. Hasch's home with Officer Edwards were David Excell, Mark Gower, and J.R. Robinson, and Keith Millett, all of whom are peace officers (Tr. at 372). Officer Edwards testified that he asked Mr. Hasch if he could look at the contents inside a car on Mr. Hasch's property and Mr. Hasch gave consent to the search (Tr. at 431). According to Officer Edwards' Testimony, Mr. Hasch retrieved a key to the car and opened up the car trunk where Officer Edwards testified to seeing a bag that he suspected contained a methamphetamine lab (Tr. at 431). Officer Edwards testified that he believed that the bag and purported methamphetamine lab did not belong to Mr. Hasch because Mr. Hasch had in fact informed Officer Edwards that it was not his. Mr. Hasch also testified at

trial that the meth lab in the trunk of the car was not his, that he had never used it, and had never seen it before (Tr. at 438). Officer Millett testified that when the trunk of the car was opened he saw two suitcases, a duffel bag, and a backpack (Tr. at 374). Officer Millet also testified that he believed that Officer Excell photographed the “stuff” in the trunk and then “*opened it up briefly just to see what it contained*” (Tr. at 374, emphasis added).

Mr. Hasch was the one that gave the consent upon which the officers relied, for the search of the contents of the trunk, even though Mr. Hasch made clear those items did not belong to him and belonged instead to the Defendant. *See* R. at 1259, p. 123-124 There was no assertion that the Defendant gave consent to the search of his private bags. *See id.*, *passim*.

Facts Regarding Issue IV:

On January 21, 1999, Detective Mark Gower, Commander David Excell, and then-agent Keith Millett followed Defendant’s vehicle southbound on Interstate 15 from Cedar City to La Verkin, Utah (Tr. at 101). Detective Gower continued to follow Defendant’s vehicle southbound toward Hurricane, Utah and later observed Ms. Karen Hardy walking with Defendant’s car stopped a short distance away from Ms. Hardy’s location.

Defendant was identified as the driver of the car and arrested. Defendant’s vehicle was impounded and subsequently inventoried. In speaking with Ms. Hardy, Detective Gower learned that a “boxed” methamphetamine lab was being stored on the property of Tim Hasch (Tr. 104-105). Later in the evening Detective Gower responded to the Hasch residence and, with the assistance of Mr. Hasch, discovered the boxed lab in the trunk of a car parked on Mr. Hasch’s property. The key to open the trunk was provided by Mr.

Hasch, who informed Detective Gower that Defendant possessed another key to the same trunk (Tr. 105).

Detective Gower then returned to the Purgatory Correctional Facility in Washington County, Utah, to examine the items taken from Defendant when he was booked into jail (Tr. 106). Detective Gower located a key withing this property that later opened the trunk of the vehicle containing the boxed lab (Tr. 107).

Upon further examination of the trunk, Detective Gower located two suitcases, a duffle bag, and a backpack (Tr. 108). After conducting an inventory of the items located within the suitcases and bags, Detective Gower notice these were items consistent with clandestine manufacturing of methamphetamines (Tr. 111).

At a hearing held on August 23, 2001, the Court accepted the proffer of Defendant's testimony as follows: (1) That at the Washington County Jail on January 21, 1999, after Defendant's booking inventory of his personal belongings was complete, Defendant saw a man named Brett Rasmussen, who was an acquaintance of Defendant, and requested the booking deputy to release Defendant's personal property to Mr. Rasmussen. The deputy refused the request.(2) Thereafter, a detective examined Defendant's personal property at the jail and seized certain items for evidentiary purposes. (3) That on February 2, 1999, police officers went to the St. George Police impound lot and, without a warrant, seized a walkie-talkie/two-way radio box from Defendant's car. (Tr. 106-111)

Facts Regarding Issue V:

The district court failed to limit Larry J. Overson's identification testimony at trial (Tr. at 635).

At the preliminary hearing on this matter Mr. Overson identified Defendant as one of the two persons who purchased iodine in his store on January 14, 1999 (Tr. 8-10).

However, Mr. Overson's identification of Defendant was not only assisted by Defendant being seated at the defense counsel's table and attired in prison garb, but was also prompted to give his identification by a leading question by the state prosecutor. The prosecutor asked Mr. Overson the following question: "Is one of the individuals that you saw on January 14th in your store seated at the table on my left?"

Therefore, as a result of the prosecutor essentially pointing out Defendant to the witness for the purposes of identification, Mr. Overson's identification is forever tainted.

Mr. Overson could also not identify or recall seeing another person (Karen Hardy) who had earlier been in the court room for the preliminary hearing, and who, in fact, had been the person who actually purchased the iodine in question directly from Mr. Overson (Tr. 6, 11).

Facts Regarding Issue VI:

At trial the State introduced, with the Defense's objection being overruled, a jail "kite" or letter purported to have been written by the Defendant, which contained incriminating statements which the State utilized as evidence that Defendant was attempting to convey to a co-defendant his encouragement that they stick together and not cut a deal with the State, and suggesting to the

co-defendant that she get the key to the box holding the methamphetamine lab so, purportedly, evidence could be taken and/or destroyed. *See* Trial Exhibit #28; R. at 983 p. 18-19.

The Defense objected for lack of foundation, and the Court overruled the objection. The Court stated that the *only* foundation for the letter was the testimony of a co-defendant who indicated she could recognize the handwriting as the Defendant's handwriting. *See* R. 1257, p. 520 (Court states: “. . . It is the identity of this, lay identification of that handwriting as Mr. Messer's, which is the sole basis for the court's admission of it.”) .

Facts Regarding Issue VII:

The Defense sought at trial to have Mr. Paul Halstead, who had been a cell mate of State's witness, Mr. Ervin Hasch, testify that Ervin Hasch, was attempting to pin the methamphetamine lab on Mr. Messer rather than having to answer for it himself. *See* Tr. at 675-76. The Court did not allow this testimony based on the determination that it was hearsay and on the fact that the Defense did not reveal the Defense's intention to put on this hearsay testimony to the State until a point during the trial. The Court determined it could not come in, due to this lack of notice, and the Court cited Utah Rules of Evidence 803(24). *Id.*

The Defense also sought at trial to put on testimony from bail bondsman Troy Thode regarding a woman he'd previously bailed out of jail, State's witness Karen Hardy. *See* Tr. at 748-756. The testimony in question, which was not allowed by the Court, was that Ms. Hardy had been bailed out by him, and had secured the transaction with some jewelry and two vehicles; and that the vehicles, when the bondsman went to tow them to hold them, were gone; and that the jewelry turned out to be reportedly stolen from another State's witnesses' (Todd Farnsworth's) house; and that she had jumped bail. *See id.* The Court did not allow this testimony, on the basis

that it was “impeachment in a far too collateral issue.” *See id.* at 752.

SUMMARY OF ARGUMENT

ISSUE I: The District Court failed to give proper jury instructions by not giving the jury a choice of a lesser included offense. The jury should have been given the opportunity to convict on the lesser included offense.

ISSUE II: The District Court erred in denying Defendant’s Motion for Mistrial because comments by trial judge were improper and denied the Defendant the right to a fair trial before an impartial jury. The comments made by the Court at the outset of the trial were inappropriate and set a tone which was not impartial and in line with the presumption of innocence, but which rather set a tone that the juror’s duty was to convict.

ISSUE III: The Court erred in not suppressing evidence found in a trunk which was searched based on invalid third-party consent. The items found in the trunk were identified by the third party as *not* belonging to him, and yet law enforcement searched them based on the third party’s consent.

ISSUE IV: The District Court failed to suppress the illegally obtained evidence by the police seizure of Defendant’s personal property without consent or a search warrant at the Purgatory Jail after the booking inventory search was completed, violating the Defendant’s U.S. and Utah Constitutional protection against unreasonable search and seizure. The District Court also failed to suppress the illegally obtained evidence by the police seizure of personal property from the Defendant’s car at the police impound lot some twelve (12) days after the impound and inventory search again without consent or a search warrant, which violated the Defendant’s U.S.

and Utah Constitutional protected rights against unreasonable searches and seizures.

ISSUE V: The District Court failed to limit Larry J. Oversons' identification testimony at trial. During the preliminary hearing Mr. Oversons' identification of the Defendant was unduly influences, and the objectivity thereof corrupted, not only by the Defendant being seated at Defense Counsel's table and attired in prison garb, but further with the leading question of the Prosecutor. The Prosecutor asked Mr. Oversons the following question, "Is one of the individuals that you say on January 14th in your store seated at the table to my left?" Therefore, as a result to the Prosecutor practically pointing to the Defendant, Mr. Oversons' identification of the defendant is forever tainted. Therefore the admittance of the tainted witness testimony violated the Defendant's U.S. and Utah Constitutional right to a fair trial.

ISSUE VI: The District Court erred in admitting a letter/kite (Trial Exhibit #28) into evidence because there was insufficient foundation to allow the letter into evidence, which violated the Defendant's right to a fair trial.

ISSUE VII: The District Court erred in disallowing the testimony of defense witness Mr. Paul Haulstead on the basis of Hearsay, and the testimony of Mr. Troy Thode on the basis of it being too collateral to the issues at trial. Both rulings denied the defendant due process and violated his right to a fair trial.

ARGUMENT

ISSUE I

THE DISTRICT COURT FAILED TO GIVE PROPER JURY INSTRUCTIONS BY NOT GIVING THE JURY A CHOICE OF A LESSER INCLUDED OFFENSE.

Whether the trial court properly refused to give requested instructions to a jury is a matter reviewed for correctness. State v. Parra, 972 P.2d 924, 927 (Utah Ct. App. 1998).

In State v. Baker, 671 P.2d 152, 159 (Utah 1983), the Utah Supreme Court formulated a two-part analysis for determining whether to grant a defendant's request for jury instructions on a lesser included offense. *First*, the court must compare the statutory elements of the crimes and determine whether the elements overlap. *See id.* *Second*, it must determine whether a rational basis exists on which the jury could acquit the defendant of the offense charged while convicting him of the alternative offense. *See id.*

State v. Parra, 972 P.2d 924, 927 (Utah Ct. App. 1998) (emphasis added).¹

The Court disallowed a lesser included jury instruction in this case, as wet forth in the Statement of Facts above. Defendant's proposed instruction in this regard set forth the instructions as to what elements were necessary to convict Defendant on the charge of Unlawful Possession of Laboratory Equipment and Supplies, but also gave the jury the option of convicting Defendant of a lesser included offense, that of Possession of a Controlled Substance Precursor, a class A misdemeanor; the trial judge refused to include this jury instruction.

¹ *See also* U.S. v. Monger, 185 F.3d 574, 578 (6th Cir. 1999) (New trial granted because district court's refusal to instruct the jury on lesser offense of simple possession is intrinsically harmful constitutional error); State v. Payne, 964 P.2d 327, 332 (Utah Ct. App. 1998); Utah Rules of Judicial Administration 4-503; State v. Bluff, 52 P.3d 1210 (Utah 2002); State v. Haston, 811 P.2d 929, 931 (Utah App. 1991); State v. Smith, 706 P.2d 1052, 1058 (Utah 1985); State v. Potter, 627 P.2d 75, 78 (Utah 1981).

Because the trial judge refused to include the lesser included offense language in the first instruction, he likewise did not include the Defendant's proposed instruction ("Instruction No. B") on the elements of Unlawful Possession of a Controlled Substance Precursor, a class A misdemeanor. See Statement of Facts above.

Applying the Baker test cited above to the reasoning of the Court, as set forth above in the Statement of Facts, it is evident that the trial judge erred in refusing to give the jury the option of convicting Defendant on the lesser included offense. In analyzing the two statutes at issue, U.C.A. §58-37d-4 (1953, as amended) (Unlawful Possession of Laboratory Equipment or Supplies) and U.C.A. §58-37c-10(k) (1953, as amended) (Unlawful Possession of a Controlled Substance Precursor), it is clear that the elements of the two crimes overlap. One of the two elements necessary to convict a Defendant of Unlawful Possession of Laboratory Equipment or Supplies, and included in the jury instructions as presented to the jury, is that the Defendant "possess a controlled substance precursor with the intent to engage in a clandestine methamphetamine laboratory operation." R. at 826. The statute associated with the lesser included offense of Unlawful Possession of a Controlled Substance Precursor reads defines unlawful conducts as

obtaining or attempting to obtain or to possess any controlled substance precursor or any combination of controlled substance precursor or any combination of controlled substance precursors knowing or having a reasonable cause to believe that the controlled substance precursor is intended to be used in the unlawful manufacture of any controlled substance.

U.C.A. 58-37c-10(k) (1953, as amended). Both crimes require the element of possessing a controlled substance with the intent of using the controlled substance precursor to illegally produce a controlled substance. The second prong of the Baker test is the determination whether a rational

basis existed that would allow the jury to acquit the Defendant of the offense charged while finding him guilty of the lesser included offense. Such a rational scenario existed in the instant case, therefore, the lesser included offense instruction should have been given.

Addressing what constitutes a rational basis on which a jury may rely the Baker court further said:

One of the foundational principles in regard to the submission of issues to juries is that where the parties so request they are entitled to have instructions given upon their theory of the case; and this includes on lesser offenses *if any* reasonable view of the evidence would *support such a verdict*.

State v. Baker, 671 P.2d 152, 154 (Utah 1983). Utah statutory law also states that unless a rational basis for conviction of a lesser included offense exists a trial judge need not give a lesser included instruction to the jury. U.C. A. 76-1-402(4) (1953, as amended).

[T]he court is obligated to instruct on the lesser offense only if the evidence offered provides a “rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.” *This standard does not require the court to weigh the credibility of the evidence, a function reserved for the trier of fact. The court must only decide whether there is a sufficient quantum of evidence presented to justify sending the question to the jury, a decision which must be made concerning all jury instructions in any trial.* When the elements of two offenses overlap as discussed in the previous paragraph, if there is a sufficient quantum of evidence to raise a jury question regarding a lesser offense, then the court should instruct the jury regarding the lesser offense. *Similarly, when the evidence is ambiguous and therefore susceptible to alternative interpretations, and one alternative would permit acquittal of the greater offense and conviction of the lesser, a jury question exists and the court must give a lesser included offense instruction at the request of the defendant.* This situation will often arise when the critical question is either the credibility of certain evidence or the determination of what inferences may legitimately be made on the basis of the evidence. By assessing the evidence and deciding whether any interpretation of it would, if believed by the jury, permit conviction

of the lesser offense and acquittal of the greater, the court preserves the weighing of evidence for the jury but is still able to protect the weighing process from frivolous “red herrings.”

State v. Baker, 671 P.2d 152, 159 (Utah 1983). In the instant case the trial judge improperly refused to send the question of a lesser included offense to the jury because he did not believe there was a “quantum” of evidence to send the question to the jury. There are multiple reasons pointing to the judge’s error in this matter.

First, it is evident from the record that the trial judge relied on an erroneous understanding of the controlled substance precursor statute when making his initial determination. As noted above, the trial judge stated that the “only evidence of the presence of iodine crystals in an amount sufficient to meet the *12-ounce* statutory threshold under the statute” was the Defendant’s testimony that he had held a bag of crystalline iodine that weighed about 2 pounds (Tr. at 915). The trial judge further stated that “[a] 1 gallon plastic bag containing only the iodine from [five] gallons of 7 percent [iodine] solution” could not possibly have the volume claimed by the Defendant (Tr. at 915).

In actuality, the threshold for amount under the statute is *not* twelve ounces—it is only ***two ounces***. U.C.A. § 58-37c-19(2)(a) (1953, as amended). Therefore, the trial judge, in making his initial threshold determination as to the existence of a quantum of evidence on which to support a verdict, in fact relied on an erroneous interpretation of the statute as written. While the trial judge did not believe that the Defendant’s estimate of the weight of the crystal iodine could be as much as he claimed, and therefore not satisfy the statutory threshold requirement, the judge may have been able to believe that the bag did in fact contain at least two ounces of crystalline iodine—an

amount that would be sufficient to satisfy the statutory requirement. However, because of the judge's erroneous belief, we do not know how he would have ruled if he would have had the correct statutory figure in mind. Therefore, because of the Court's error, a new trial should be held in order to properly rule on the issue with the correct legal standards being applied.

Second, the judge improperly discounted the importance of the Defendant's own testimony in conjunction with his possession of crystalline iodine. It appears from the record that the judge believed that the Defendant's own testimony was not sufficient to support the claim that he had in fact violated the Unlawful Possession of a Controlled Substance Precursor statute. The trial judge stated that Defendant's testimony as to possession of the crystalline iodine "was independent and separate from any of the supporting testimony whatsoever. The only logical inference that the court can have regarding the source of iodine crystals for these parties is the reduction by evaporation of tincture of iodine purchased from Overson's Farm Supply and from Intermountain Farmers." Tr. at 915.

While the Defendant may have been the only witness to testify as to the weight of the crystalline iodine in the plastic bag, his testimony is still relevant and just as competent as any other witness'. Further, it is irrelevant what the source of the crystalline iodine was; whether it originated from the iodine allegedly purchased from Overson's Farm Supply or Intermountain Farmers it not the issue. In order to find the Defendant guilty of the lesser included offense the Defendant would have to (1) obtain or attempt to obtain or possess any controlled substance precursor, and (2) know or have reasonable cause to believe that the controlled substance precursor was intended to be used in the unlawful manufacture of any controlled substance, and (3) the Defendant would had to have possessed the controlled substance precursor between the

dates of January 14, 1999 and January 21, 1999. The origin of the methamphetamine is of no consequence.

By his own testimony, the Defendant did, in fact, possess the bag of crystalline iodine; he also testified to its weight (two pounds), which satisfied the minimum weight of two ounces under the statute (Tr. at 792). This satisfies the first element of the offense.

The Defendant obviously had reason to believe that the crystal iodine was intended to be used in the unlawful manufacture of a controlled substance. The record is replete with references to both the Defendant's involvement in the production of methamphetamine (Tr. at 153, 179, 577). The record also reflects the fact that the individual from whom the Defendant got the bag of crystalline iodine (his then-girlfriend, Karen Hardy) also claimed to know how to produce methamphetamine (Tr. at 153, 191, 576, 800). Also, the practice of cooking down iodine in order to reduce is to its crystalline form, outside of some professional or educational setting, is probably suspicious enough in and of itself to give a person a reasonable belief that the precursor would be used in the unlawful production of a controlled substance; coupled with the intimate knowledge of methamphetamine production, there is only one reasonable belief as to what crystalline iodine was destined to be used for. Moreover, based on the record as a whole, the jury could believe that the Defendant himself was the individual who intended to use the crystalline iodine for the production of a controlled substance. The second element of the lesser included offense is satisfied.

The third element, important for the purposes of the trial, was that the offense took place sometime between the dates of January 14, 1999 and January 21, 1999. The Defendant in fact testified that he possessed the methamphetamine on January 15, 1999 (Tr. at 789).

Next, the jury's own verdict suggests that the jury actually believed that the Defendant possessed controlled substance precursors. The jury, in addressing the enhancements did in fact find the Defendant guilty of actually operating a clandestine laboratory for the production of methamphetamine base. The purpose of the law against the possession of controlled substance precursors is undoubtedly to stem the production of controlled substances. The threshold amounts indicated in the statutes for various precursors evidently indicate minimum levels for the production of methamphetamine. It is only logical that if the Defendant actually operated the lab in order to produce methamphetamine that he would have had to have possessed controlled substance precursors in at least the minimum threshold amount contemplated by statute. It is unlikely that the legislature contemplated that possession of a controlled substance precursor was okay so long as the person with the precursor was only going to make "a little" methamphetamine. By the jury's very own verdict it is clear that the evidence could have supported a conviction of Unlawful Possession of a Controlled Substance Precursor.

Further, at the time of Defendant's arrest, tincture iodine was not mentioned on the list of controlled substance precursors found in U.C.A. § 58-37c-3 (1953) (amended 2000). However, tincture iodine, in concentrations greater than 1.5%, was added to the list in 2000, one year after the Defendant was arrested. Crystalline iodine, ephedrine, and pseudoephedrine were only added to the list in 1998, one year prior to the Defendant's arrest. Nevertheless, nowhere in the state does it state that the list of controlled substance precursors is intended to be an *exclusive* list of controlled substance precursors and their various forms. Therefore, since tincture iodine is obviously a controlled substance precursor, having that status laid out in statutory language in Utah since 2000, the Defendant should have been able to be convicted on Unlawful Possession of

a Controlled Substance Precursor not only because of his possession of crystalline iodine, but also because of his alleged possession of a seven percent solution of tincture iodine.

The argument that the precursor list is necessarily exhaustive and exclusive because of due process and notice concerns falls when applied. Theoretically, an individual could break the law by possessing a controlled substance precursor not listed in the statute and claim a violation of due process because he or she did not know that the material was a controlled substance precursor. This argument of due process violation breaks down as soon as the necessary element to the crime—intent—is introduced. If it can be shown that the individual had the intent to produce a controlled substance and was, in fact, engaged in using the unlisted precursor substance to that end, then that person cannot rationally argue that he or she did not have notice that the material was a controlled substance precursor.

It is also seemingly incongruous with the evident legislative intent of the statute to control the rising tide of illegal methamphetamine production to say that crystalline iodine is illegal, but tincture iodine, purchased and possessed for the very purpose and intent of producing crystal iodine, is not illegal. Similarly, an individual with a clear design and intent to produce methamphetamine, and who needs phosphorous to do so, could stockpile matchboxes for the very purpose of extracting the phosphorous for the production of methamphetamine. In doing so he could conceivably remain within the boundaries of the law up until the time he engages in the process of extracting the phosphorous from the matchboxes, because matchboxes are not on the list of precursors. However, it is surely not the nature and purpose of the law to protect drug producers in their trade; a controlled substance precursor is illegal in whatever form it takes when the intent to use it to produce methamphetamine is present.

The record is abundant with references to Defendant's connection with and possession of tincture iodine (Tr. at 62, 529). The jury could easily have convicted the Defendant on the charge of Unlawful Possession of a Controlled Substance Precursor based on the Defendant's alleged possession of tincture iodine, had the jury been given the choice.

Based on the foregoing and reviewed for correctness, it is evident that the trial judge in this case erred by not including the jury instruction for a lesser included offense. Therefore, the Defendant's conviction should be reversed and the case remanded for a new trial.

ISSUE II

THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL BECAUSE COMMENTS BY TRIAL JUDGE WERE IMPROPER AND DENIED THE DEFENDANT THE RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY.

In his introductory comments to the jury, the Court stated:

Right now, our system of government, our way of life is under assault. And it's good people like you who stand up and support it.

Tr. at 54.

Trial Counsel moved for a mistrial, which motion was denied without explanation or justification. *See* Tr. at 59-60.

Rulings on motions for mistrial are reviewed for abuse of discretion and this standard is met only if the error is substantial and prejudicial such that there is a reasonable likelihood that in its absence, there would have been a more favorable result for the defendant. For purposes of determining whether a mistrial should have been granted, our overriding concern is that

defendant receive a fair trial. *State v. Harmon*, 956 P.2d 262, 276 (Utah 1998).² The Constitution of the United States and the Constitution of the State of Utah both guarantee the right of a person accused of a crime to a trial before an “impartial jury.” U.S. CONST., art. I, § 6; UTAH CONST., art. I, § 12.

In the instant case the trial judge made the following comment to the jurors after they had been empaneled: “Right now, our system of government, our way of life is under assault. And it’s good people like you who stand up and support it.” Trial Tr. at 54.

This comment from the trial judge to the jury was highly inappropriate and prejudicial inasmuch as it appeared that the judge was referencing criminal elements in society, like the Defendant, that are threatening our way of life and that it was the jury’s duty to do something about it by convicting the Defendant. No Defendant should have to face a trial where at the outset of the trial the jury is conditioned to convict by a judge’s comment. This is certainly not the type of impartial jury that our Constitution contemplates.

For this reason the conviction of the Defendant should be reversed and the case remanded for a new trial.

ISSUE III

THE PURPORTED METHAMPHETAMINE LAB CENTRAL TO THIS CASE WAS DISCOVERED IN CONTRAVENTION OF THE FOURTH AMENDMENT AS IT CAME ABOUT DUE TO INVALID THIRD-PARTY CONSENT.

As stated with more detail in the Statement of Facts above, Officer Edwards went to the home of Tim Hasch because of suspected illegal activity on Mr. Hasch’s property. Officer Edwards

²See also *State v. Thomas*, 830 P.2d 243 (Utah 1992); *Burton v. Zion’s Coop. Mercantile Inst.*, 249 P.2d 514, 517 (Utah 1952); *State v. Cram*, 46 P.3d 230 (Utah 2002).

testified that he asked Mr. Hasch if he could look at the contents inside a car on Mr. Hasch's property and Mr. Hasch gave consent to the search. According to Officer Edwards's testimony, Mr. Hasch retrieved a key to the car and opened up the car trunk where Officer Edwards testified to seeing a bag that he suspected contained a methamphetamine lab. Officer Edwards testified that he believed that the bag and purported methamphetamine lab did not belong to Mr. Hasch because Mr. Hasch had in fact informed Officer Edwards that it was not his. Mr. Hasch also testified at trial that the meth lab in the trunk of the car was not his, that he had never used it, and had never seen it before. Officer Millett testified that when the trunk of the car was opened he saw two suitcases, a duffel bag, and a backpack. Officer Millet also testified that he believed that Officer Excell photographed the "stuff" in the trunk and then "*opened it up briefly just to see what it contained*".

Mr. Hasch was the one that gave the consent upon which the officers relied, for the search of the contents of the trunk, even though Mr. Hasch made clear those items did not belong to him and belonged instead to the Defendant. *See R. at 1259, p. 123-124* There was no assertion that the Defendant gave consent to the search of his private bags. *See id., passim*.

State v. Dunn, 850 P.2d 1201 (Utah 1993) provides us with the following discussion of the relevant rules of law:

To address . . . [this] Fourth Amendment claim, we consider two lines of search and seizure jurisprudence, one dealing with execution of search warrants and the other dealing with consent to search. We first discuss the principles governing these interrelated areas of law, and then we apply these principles to the facts before us.

The principles governing the execution of a search warrant are grounded in the purpose for such warrants. *As a general rule, searches conducted without a warrant are per se unreasonable under the Fourth Amendment, subject only to a few specific and well-defined exceptions.* A valid warrant authorizes the police to search

when and where they otherwise would have no right, and consequently, the terms of the warrant dictate the scope of the officers' authority. *A central purpose of the requirement of a warrant, issued under the authority of a neutral magistrate, is to protect against "general, exploratory rummaging in a person's belongings."*

Dunn at 1217 (citations omitted) (emphasis added).

Since a warrant was not obtained for the search, the officers rely upon the consent of Mr. Hasch to obviate the need of a warrant.

The next issue to be addressed is whether the Defendant had a privacy interest in the bags in the trunk of the car. "Although a person has a lesser expectation of privacy in a car than in his or her home, one does not lose the protection of the Fourth Amendment while in an automobile." State v. Lopez, 873 P.2d 1127 (Utah 1994), quoting State v. Schlosser, 774 P.2d 1132, 1135 (Utah 1989); see State v. Humphries, 818 P.2d 1027 (Utah 1991); State v. Lopez, 886 P.2d 1105 (Utah 1994); U.S. Constitution, Amend. IV; State of Utah v. Davis, 965 P.2d 525 (Utah App. 1998); United States v. Salina - Cano, 959 P.2d 861 (10th Cir. 1992). Therefore, the Defendant's claim of a privacy interest is not, at the outset, negated by the fact that his bags were in the car. Moving on to the meat of the privacy analysis, the Utah Supreme court stated:

The core inquiry in a Fourth Amendment analysis is "whether a person has a reasonable expectation of privacy in the area searched." United States v. Bilanzich, 771 F.2d 292, 296 (7th Cir. 1985). "It is the right of possession rather than the right of ownership which ordinarily determines who may consent to a police search of a particular place." 3 Wayne R. LaFare, *Search and Seizure* § 8.5(b) (2d ed. 1987). *If a third party rather than the defendant consents to a search, the third party must be one who possesses "common authority" over the area or has some other "sufficient relationship to the premises or effects sought to be inspected."* *Id.* § 8.5(c) (citing United States v. Matlock, 415 U.S. 164, 171, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974)). *The State bears*

the burden of proving common authority, and it must do so by a preponderance of the evidence. Matlock, 415 U.S. at 177, 178 n.14.

State v. Brown, 853 P.2d 851, 855 (Utah 1992) (emphasis added).

Defendant's bags are obviously private places or personal effect as contemplated by this relevant language. This expectation of privacy triggers the warrant requirement. To argue that a man's luggage is a public place where he has no expectation of privacy in our society would be laughable and has been rejected by the Court. *See State v. Crabtree*, 618 P.2d 484; U.S. v. Chadwick, 433 U.S. 1 (1977). The Defendant obviously had a reasonable expectation of privacy in his own bags.

Because the Defendant did not give consent to the search of his bags, the State must rely upon the consent of a third party to substitute for his consent. However, in this case, such third-party consent was not valid. In any event, the State did not make a showing on the record that there was sufficient common authority to give rise to valid third-party consent.

The Officers knew that the bag or bags in the trunk did not belong to Mr. Hasch and in fact did not believe that they belonged to Mr. Hasch. There is no indication of joint-ownership or control.

At all times Mr. Hasch told investigating officers that the bags were not his. If the officers believed that the bags did not belong to Mr. Hasch, and at least one officer (Edwards) testified that he did not believe the bag to be Mr. Hasch's, then the officers could not in good faith assert that Mr. Hasch exercised common authority over the bags and thereby have the ability to consent to the search of Defendant's bags. Any consent by Mr. Hasch was ineffective to overcome the warrant requirement. Based on probable cause the officers could have obtained a warrant to search the bags, but the officers in this case failed to do so. Therefore, the opening of the bags without proper consent or a warrant constituted an illegal search and subsequent seizure of Defendant's bags.

As it happened, Defendant's personal property was opened by third parties who had *no* common authority over it. This is not acceptable under the law.

A "fair trial" is not one in which evidence, especially key evidence, is obtained in contravention of the Fourth Amendment and subsequently used to convict the Defendant. If the evidence were suppressed from a jury it is possible that the outcome of the trial may very well have been different, since the State would not have had arguably its most important evidence at trial.

Defendant asks that Defendant's conviction be reversed and remanded for a new trial with the evidence from the car suppressed.³

³If the Court rules that this specific issue was not raised below, then it was ineffective assistance of counsel to not raise it. In State v. Templin, 805 P.2d 182, the court followed the analysis and decision result in Strickland v. Washington, 466 U.S. 668 (1984) for the determination of ineffective assistance of counsel. In Strickland, the Court set out a two part test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing the counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

In order to meet the first part of the test a defendant must identify the acts or omissions which, under the circumstances show that counsel's performance fell below an objective standard of reasonableness. First, in the instant case, if trial counsel did not sufficiently raise the third-party consent based grounds for suppression, then he omitted a grounds to suppress the most potentially damning evidence in the State's possession, the methamphetamine lab materials. This omission cannot simply be attributed to a tactical decision and there is sufficient information on the record suggesting that an attempt to suppress was absolutely warranted. By not moving to suppress the evidence found in the car on Mr. Hasch's property, counsel for Defendant was deficient in his representation. Second, the Defendant was, in fact, prejudiced by the deficiency. A "fair trial" is not one in which evidence, especially key evidence, is obtained in contravention of the Fourth Amendment and subsequently used to convict the Defendant. If the evidence were suppressed from a jury it is possible that the outcome of the trial may very well have been

ISSUE IV

THE DISTRICT COURT FAILED TO SUPPRESS THE EVIDENCE ILLEGALLY OBTAINED BY THE POLICE SEIZURE OF DEFENDANT'S PERSONAL PROPERTY WITHOUT A SEARCH WARRANT AT THE PURGATORY JAIL AFTER THE BOOKING INVENTORY SEARCH WAS COMPLETED, VIOLATING DEFENDANT'S RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES. THE DISTRICT COURT ALSO FAILED TO SUPPRESS THE EVIDENCE THAT WAS ILLEGALLY OBTAINED PURSUANT TO A POLICE SEIZURE OF PERSONAL PROPERTY FROM DEFENDANT'S VEHICLE LOCATED AT THE POLICE IMPOUND LOT APPROXIMATELY TWELVE DAYS AFTER THE IMPOUND AND INVENTORY SEARCH.

As stated more fully in the Statement of Facts above, Detective Gower and other law enforcement officials followed Defendant's vehicle on Interstate 15 and later observed Ms. Karen Hardy walking with Defendant's car stopped a short distance away from Ms. Hardy's location. Defendant was identified as the driver of the car and arrested. Defendant's vehicle was impounded and subsequently inventoried.

In speaking with Ms. Hardy, Detective Gower learned that a "boxed" methamphetamine lab was being stored on the property of Tim Hasch. Later in the evening Detective Gower responded to the Hasch residence and, with the assistance of Mr. Hasch, discovered the boxed lab in the trunk of a car parked on Mr. Hasch's property. The key to open the trunk was provided by Mr. Hasch, who informed Detective Gower that Defendant possessed another key to the same trunk.

Detective Gower then returned to the Purgatory Correctional Facility in Washington County, Utah, to examine the items taken from Defendant when he was booked into jail. He located a key withing this property that later opened the trunk of the vehicle containing the boxed lab.

Upon further examination of the trunk, Detective Gower located two suitcases, a

different, since the State would not have had its most important evidence at trial, the lab itself for which Defendant was convicted.

duffle bag, and a backpack. After conducting an inventory of the items located within the suitcases and bags, Detective Gower notice these were items consistent with clandestine manufacturing of methamphetamines.

At a hearing held on August 23, 2001, the Court accepted the proffer of Defendant's testimony as follows: (1) That at the Washington County Jail on January 21, 1999, after Defendant's booking inventory of his personal belongings was complete, Defendant saw a man named Brett Rasmussen, who was an acquaintance of Defendant, and requested the booking deputy to release Defendant's personal property to Mr. Rasmussen. The deputy refused the request. (2) Thereafter, a detective examined Defendant's personal property at the jail and seized certain items for evidentiary purposes. (3) That on February 2, 1999, police officers went to the St. George Police impound lot and, without a warrant, seized a walkie-talkie/two-way radio box from Defendant's car. *See R. at 1260, pp. 5-7.*

Both the 4th Amendment to the United States Constitution and Article I, Section 14 of the Utah Constitution protect people from unreasonable search and seizure of their property.

The facts illustrate that the booking inventory at the jail of Defendant's property was complete before the task force officer returned to the jail and seized items of Defendant's personal property. The officer may have had right to seize the alleged "cook sheet" because the booking deputy recognized its potential evidentiary value when she was conducting the inventory. However, once that procedure was completed, the police would need a search warrant to seize any other items from defendant's personal property because the purposes of the inventory had been fulfilled.

The U.S. Supreme Court has "never held," outside the context of inventory search or administrative inspection...that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment [.] (emphasis added) Whren v. United States, 517 U.S. 806, 812

(1996). But the court has repeatedly indicated for discerning readers that improper ulterior motives will be invalidated police conduct in the context of inventory searches. Where Whren, *id.* At 811. The court acknowledged that in Florida v. Wells, 495 U.S. 1, 4 (1990), it stated that “an inventory search must not be used as a ruse for a general rummaging in order to discover incriminating evidence;” that in Colorado v. Bertine, there had been “no showing that the police, who were following standard procedure, acted in bad faith for the sole purpose of investigation”; and that in New York v. Burger, 482 U.S. 691, 716-717, n. 27 (1987) the court observed in upholding the Constitutionality of warrantless administrative inspection, that the search did not appear to be “a ‘pretext’ for obtaining evidence of...violation of...penal laws.” (Emphasis added) Significantly, the Supreme Court in South Dakota v. Opperman, 428 U.S. 364, 376 (1976), setting forth the high court’s first full articulation of the inventory exception, in approving an inventory after impoundment of a car left legally parked for an extended period, expressed the following caveat: “[T]here is no suggestions whatever that this standard procedure, essentially like that following throughout the county, was a pretext concealing an investigatory police motive.” (Emphasis added).

Further, the Utah Supreme Court has held “that the inventory exception to the warrant requirement ‘does not apply when the inventory is merely ‘a pretext concealing an investigatory police motive.’” State v. Lopez, 873 P.2d 1127, at 1138 (Utah 1994) (quoting State v. Hygh, 711 P.2d 264, at 268 (Utah 1985) (quoting South Dakota v. Opperman, 428 U.S. 364, 376 (1976))).

The facts illustrate that the booking inventory at the jail of Defendant’s property was complete before the task force officer returned to the jail and seized items of Defendant’s personal property. The officer may have had the right to seize the alleged “cook sheet” because the booking deputy recognized its potential evidentiary value when she was conducting the inventory. However, once that procedure was completed, a law

enforcement agent would need a search warrant to seize any other items from Defendant's personal property because the purposes of the inventory had been fulfilled.

In the instant case it is clear that Detective Gower was motivated to look through Defendant's personal property at the jail after the inventory was completed for the purpose of gathering (seizing) evidence to aid in the prosecution of Defendant. Because Detective Gower's actions were not for a permissible purpose related to an inventory search, the search and seizure of Defendant's property were unreasonable.

Further, prior to and/or at the conclusion of the booking inventory, Defendant should have been allowed to release his property (except for the "cook sheet") to anyone he wanted, including Brett Rasmussen. State v. Hygh, 711 P.2d 264, 268-269 (Utah 1985) (Zimmerman, J., concurring). If Defendant would have been permitted to release his personal property, as was his right, he would not have been subjected to the illegal, warrantless search of his belongings in the first place, a search which ultimately produced evidence that was used to convict Defendant.

In United States v. Cohen, 796 F.2d 20 (2d Cir. 1986), an Assistant U.S. Attorney initiated a search of inmate Barr's cell by prison personnel.

The Cohen court stated that

the record clearly reveals that the July 5th search of Barr's cell was initiated by the prosecution, not prison officials. The decision to search for contraband was not made by those officials in the best position to evaluate the security needs of the institution, nor was the search even colorably motivated by institutional security concerns. The Supreme court in Hudson did not contemplate a cell search intended solely to bolster the prosecution's case against a pre-trial detainee awaiting his day in court; it did not have before it the issue of whether such a search could lawfully be used by government prosecutors to uncover information that would aid them in laying additional indictments against a detainee. . . .

The Cohen court also made the following statement pertinent to the situation in Defendant's case:

The door on prisoner's rights against unreasonable searches has not been slammed shut and locked. We take seriously the Court's statement that no iron curtain separates prisoners from the Constitution, and that the loss of such rights is occasioned only by the legitimate needs of institutional security.

Id. at 23.

The emphasis on the need to accommodate individual rights to what is recognized as legitimate objectives is the dominate theme throughout the Supreme Court's writing on this subject. From this it is patent that since no wall of steel and stone separates prisoners from the Constitution, prisoner's rights continue to exist. It is the scope of these rights that it is necessarily limited by the Board authority prison official must have to ensure institutional security, obviously the creation of limitation or condition on the exercise of Constitutional rights is essential to orderly prison administration. Yet, because conditioning the exercise of such rights rests on the twin-rationale of objective administrators insuring prison security, a limitation imposed on prisoners' Constitutional rights cannot stand when the objectives the rationale serves are absent, nor any Federal Courts charged with the duty to protect the right of all citizens fulfill that obligation merely by paying lip-service to this concept.

In this case it is plain that no institutional need is being served were it a prison official that initiated the search would not be subject to Constitutional challenge ; regardless of whether security needs could justify it. But here the search was initiated by the prosecution solely to obtain information for a superseding indictment. In our view, this kind of warrantless search of a prisoner's cell fall well outside the rational of the decided cases. Barr retains a Fourth Amendment right-though much diminished in scope - tangible enough to mount the attack on this warrantless search.

Since it is clear from the record that the task force searched and seized the personal property of Defendant for purely investigatory purposes, in an unreasonable manner, all of the evidence seized at the jail from Defendant's personal property should have been suppressed by the trial court. Since it was not, the conviction of Defendant should be reversed and the case remanded for a new trial. And to further incorporate this unconstitutional administrative search see, *U.S. V. Bulcan*, 156 F. 3d 963, 968, 973-974 (9th Cir. 1998) (Plain View seizure of drug paraphernalia found inside Defendant's bag, as invalid, as items were discovered in course of unconstitutional administrative search).

Search of Vehicle / Impound Lot

Regarding the impound lot, it is clear from the record Defendant was arrested and booked into the Purgatory Jail while his car was lawfully impounded. It is also clear that the ready mobility of vehicles is the main factor justifying warrantless searches of vehicles. See *U.S. v. Chadwick*, 433 U.S. 1, 12 (1977) (automobile exception partially based on impracticality of obtaining a warrant given the "inherent mobility" of vehicles); see also *Carroll v. United States*, 267 U.S. 132 (1925) (warrantless search of automobile valid because securing a warrant is impractical when vehicle readily removable from jurisdiction); *Pinkney v. Keane*, 920 F.2d 1090 (2d Cir. 1990) (exigent circumstances justified warrantless search of vehicle when petitioner was likely to drive away after treatment in hospital emergency room); *U.S. v. Reed*, 26 F.3d 523 (5th Cir. 1994) (exigent circumstances justified warrantless search of vehicle when officers not certain how many sets of keys to a car existed and vehicle was vulnerable to efforts of others who might escape with evidence); *Smith v. Thornberg*, 136 F.3d 1070 (6th Cir. 1998) (exigent circumstances justified warrantless search of vehicle left unlocked and running in crowded area when vehicle could have slipped out of gear and injured someone); *U.S. v. Markling*, 7 F.3d 1309 (7th Cir. 1993) (exigent circumstances justified warrantless search of vehicle because defendant's friends or associates might move car at any time); *U.S. v. Martin*, 806 F.2d 204 (8th

Cir. 1986) (exigent circumstances justified warrantless search of vehicle because owners were aware of investigation and truck was readily accessible to public streets); U.S. v. Forker, 928 F.2d 365 (11th Cir. 1991) (exigent circumstances justified warrantless search of vehicle because officers were not certain how many sets of keys to the car existed or whether the car would remain in the parking lot if a warrant was sought and officers had not apprehended all suspects or other people involved in the conspiracy and the vehicle was vulnerable to efforts of defendant's cohorts to seize or destroy evidence).

In this case Defendant's vehicle was impounded and in the custody of the police at a police impound lot and secured. The vehicle was therefore immobilized and possessing no other threat that would justify a warrantless search some twelve days following the completion of the impound inventory search.

The impound inventory of Defendant's car was complete on January 21, 1999. On that day, the legitimate, recognized purpose of an inventory search was completed. No consent was given to the officers to perform a search of the vehicle. No other exception to the warrant requirement would apply to an automobile housed in a police impound lot. Therefore, the law enforcement officers, when they returned on February 2, 1999 to obtain an item from Defendant's vehicle, should have obtained a warrant to search Defendant's car and subsequently seize the box from the vehicle. They did not obtain such a warrant, but simply entered Defendant's vehicle and removed a potentially incriminating piece of evidence. In this case it is clear that the vehicle was impounded and in the custody of the police at a police impound, and therefor immobilized, and posing no threat to justify a warrantless search some (12) twelve days following the completion of the impound inventory search. See Lavicky v. Burnett, 758 F. 2d 48, 475 (10th Cir. 1985) (warrantless seizure and search of Defendant's truck invalid because vehicle immobile due to dismantled engine and on private property). The police would need a warrant to repeat a search already conducted for a

more extensive search, “Investigatory purposes.” see U.S. v. Jacobsen, 466 U.S. 109, 115-21 (police may repeat search already conducted by private party but must obtain warrant before conducting more extensive search of container or contents). It is clear the purpose of an inventory search is to satisfy (3) three purposes, 1) To protect the owner’s property while it is in police custody; 2) To protect the police against claims of lost or stolen property; and 3) To protect the police from potential danger. See Colorado v. Bertine, 479 U.S. 367, 372 (1987); Illinois v. Lafayette, 462 U.S. 640, 646 (1983); South Dakota v. Opperman, 428 U.S. 364, 369 (1976); see e.g., U.S. v. Ford, 986 F. 2d 57, 60 (4th Cir. 1993) (inventory search of car valid to protect against danger and false claims of loss); U.S. v. Lage, 183 F. 3d 374, 380 (5th Cir. 1999) (inventory search of truck extended to engine compartment invalid). The legitimate purpose of the inventory search was concluded on January 21, 1999. The record indicated that the second look/search conducted on February 2, 1999 was clearly for investigatory purposes, obtaining and seizing evidence to aid in the investigation, and prosecution of the Defendant’s which is not a legitimate purpose of an inventory search, see U.S. v. Marshall, 986 F. 2d 1171, 1175 (8th Cir. 1993) (invalid inventory search of vehicle when officers indicated purpose of search to find evidence of criminal activity); U.S. v. Johnson, 820 F. 2d 1065, 1072 (9th Cir. 1987) (Invalid inventory search of sealed envelope in which officers previously placed currency found on defendant at time of arrest because motivation for search to determine whether currency came from series of bank robberies); U.S. v. Blaze, 143 F. 3d 585, 592 (10th Cir. 1998) (invalid inventory search of vehicle because officers admitted to investigatory purpose in stumbled - upon drug deal, failed to follow set procedures, and failed to catalogue items found in trunk); U.S. v. Khoury, 901 F. 2d 948, 957-60 (11th Cir. 1990) (invalid search because inventory exception did not justify second look at inventoried diary when motivated by investigatory purpose). See Bertine, 479 U.S. at 272-73; U.S. v. Thompson, 29 F. 3d, 62, 66 (2nd Cir. 1994) (same); U.S. v. Castro, 129 F. 3d 752, 755 (5th Cir. 1997) (invalid inventory search of vehicle because search was immediately preceded by

obvious attempt to obtain incrimination evidence of drug dealing); U.S. v. Rodriguez-Morales, 929 F. 2d 780, 787 (1st Cir. 1991) (inventory search valid when caretaking motive not mere subterfuge for coexisting desire to investigate); U.S. v. Decker, 19 F. 3d 287, 289 (6th Cir. 1994) (valid inventory search of vehicle when at time vehicle seized officers in possession of valid search warrant authorizing vehicle search); U.S. v. Franks, 864 F. 2d 992, 1001 (3rd Cir. 1998) (inventory search valid when non-investigatory motive present in addition to motive to investigate known fugitive).

Further, the Courts' attention is called to Florida v. Wells, 495 U.S. 1, 110 S. Ct. 1632, (1990) wherein the court clearly sets forth the valid purpose of the automobile impound-inventory exception to the search warrant requirement. Evidence gathering is not one of those purposes.

For the reasons stated above, it is respectfully requested that this court rule that the district court should have suppressed the evidence seized by the police authorities under color of the "book inventory" and the evidence seized from Defendant's automobile on February 2, 1999, and reverse the Judgment, Sentence, and Commitment of the lower court and remand the case back for a new trial.

ISSUE V
**THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION
IN LIMINE BECAUSE THE TRIAL COURT IMPROPERLY ALLOWED
UNRELIABLE EYEWITNESS TESTIMONY.**

As described more completely in the Statement of Facts above, the district court failed to limit Larry J. Overson's identification testimony at trial. At the preliminary hearing on this matter Mr. Overson identified Defendant as one of the two persons who purchased iodine in his store on January 14, 1999. However, Mr. Overson's identification of Defendant was not only assisted by Defendant being seated at the defense counsel's table and attired in prison

garb, but was also prompted to give his identification by a leading question by the state prosecutor.

The prosecutor asked Mr. Overson the following question: “Is one of the individuals that you saw on January 14th in your store seated at the table on my left?” Therefore, as a result of the prosecutor essentially pointing out Defendant to the witness for the purposes of identification, Mr. Overson’s identification is forever tainted. (Mr. Overson could also not identify or recall seeing another person (Karen Hardy) who had earlier been in the court room for the preliminary hearing, and who, in fact, had been the person who actually purchased the iodine in question directly from Mr. Overson (Tr. 6, 11)).

Admitting the tainted eyewitness testimony violated Defendant’s right to a fair trial under the United States and Utah Constitutions. In State v. Long, 721 P.2d 483 (Utah 1986) Utah courts received guidance on how to evaluate the value of eyewitness identification with the following list of factors by which reliability of such identification must be determined:

(1) The opportunity of the witness to view the actor during the event; (2) the witness’s degree of attention to the actor at the time of the event; (3) the witness’s capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness’s identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer’s.

Long, 721 P.2d at 493. The District Court failed to issue an order directing the State's witness, Larry J. Overson not to identify the Defendant as one of the two (2) people that purchased tincture on Iodine at his store. At the Preliminary Hearing herein, Mr. Overson identified the Defendant as (1) of the two (2) persons that purchased said Iodine in his store on January 14, 1999 (Tr. 8-10). At that time the Defendant was seated at counsel table; next to defense counsel and was attired in prison garb.

For the reasons stated above it was respectfully requested that this Court reverse and remand with an order that the district court suppress the tainted eyewitness testimony by Mr. Larry Overson. Given the overly suggestive manner in which the initial identification occurred, the eye-witness testimony was thereafter inherently unreliable and it was unfairly prejudicial to the Defense to allow that testimony to be elicited at trial.

ISSUE VI

THE DISTRICT COURT ERRED IN ALLOWING INTO EVIDENCE A JAIL "KITE" OR LETTER (TRIAL EXHIBIT #28) WHERE THERE WAS INSUFFICIENT FOUNDATION TO ALLOW THE LETTER INTO EVIDENCE.

At trial the State introduced, with the Defense's objection being overruled, a jail "kite" or letter purported to have been written by the Defendant, which contained incriminating statements which the State utilized as evidence that Defendant was attempting to convey to a co-defendant his encouragement that they stick together and not cut a deal with the State, and suggesting to the co-defendant that she get the key to the box holding the methamphetamine lab so, purportedly, evidence could be taken and/or destroyed.

The Defense objected for lack of foundation, and the Court overruled the objection. The Court stated that the *only* foundation for the letter was the testimony of a co-defendant who indicated she could recognize the handwriting as the Defendant's handwriting. *See* R. 1257, p. 520 (Court states: ". . . It is the identity of this, lay identification of that handwriting as Mr.

Messer's, which is the sole basis for the court's admission of it.") .

There was insufficient foundation to allow the admittance of said letter/kite into evidence. *See* Utah Rules of Evidence 104; Utah Rules of Evidence 901. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Utah Rules of Evidence 901. The only foundation here was the general, non-scientific, lay identification of the handwriting. Although a lay person can generally identify handwriting with which the witness is familiar, *see State v. Freshwater*, 85 P.2d 447 (Utah 1906), here there is a dearth of other foundational evidence which, coupled with the lay testimony regarding handwriting identification, should have made the kite inadmissible for lack of foundation. The letter/kite was not seized from the Defendant or his cell, but in fact from another inmate's person. There was no testimony by the seizing jailer, or from the inmate from whom the letter/kite was seized, but **only** a co-defendant's lay testimony that the handwriting looked like the Defendant's handwriting. This testimony does not establish the time, place, or other background facts regarding the letter, and furthermore this handwriting analysis was from a lay witness and her identification testimony regarding the letter did not flow from her commenting on its comments, creation, sending or delivery, context, etc., and thus her ability to testimony is essentially that of a handwriting expert, which she was not (nor did the State purport that she was). Excluding a letter where there is inadequate foundation is appropriate. *See, e.g., Murdock v. Farrell*, 163 P. 1102 (Utah 1917). It could not be established as to where the letter had come from, where it had been, who had handled it, altered it, etc. Thus, this letter had insufficient foundation and should have been excluded.

ISSUE VII
**THE COURT ERRED IN DISALLOWING THE TESTIMONY OF A DEFENSE
WITNESS, MR. PAUL HALSTEAD, ON THE BASIS OF HEARSAY, AND THE
TESTIMONY OF MR. TROY THODE ON THE BASIS OF IT BEING TOO
COLLATERAL TO THE ISSUES AT TRIAL.**

The Defense sought at trial to have Mr. Paul Halstead, who had been a cell mate of State's witness, Mr. Ervin Hasch, testify that Ervin Hasch, was attempting to pin the methamphetamine lab on Mr. Messer rather than having to answer for it himself. The Court did not allow this testimony based on the determination that it was hearsay and on the fact that the Defense did not reveal the Defense's intention to put on this hearsay testimony to the State until a point during the trial. The Court determined it could not come in, due to this lack of notice, and the Court cited Utah Rules of Evidence 803(24). *Id.* This testimony, however, directly undermined evidence obtained from and through Mr. Hasch, which was central to the case, and if in fact he stated to a fellow inmate that he was trying to pin the methamphetamine charge on the Defendant rather than himself, is so crucial that the notice requirement should have been relaxed; the State did not indicate that it was particularly prejudiced in any specific way, but rather sought simply to rely on the notice requirement as a means to block the critical, defense-friendly testimony.

Furthermore, the testimony was inconsistent with other statements of Mr. Hasch as revealed at trial, and was an admission of a co-conspirator and thus not hearsay, pursuant to Rule 801(d)(1) (prior inconsistent statement) and (2) (admission of party-opponent). Certainly statements amounting to the fact that Mr. Hasch was trying to pin the crime on the Defendant so as to avoid liability himself, would count as statements inconsistent with his statements that the Defendant, in truth of fact, committed the acts which constituted the crime in this case. Prior inconsistent statements are not hearsay. *See, e.g., State v. Heaps*, 711 P.2d 257 (Utah 1985).

Further, while Mr. Hasch was not a defendant in this trial, he was a co-conspirator in the

commission of these methamphetamine crimes, and co-conspirator's admissions are admissible. *See State v. Johnson*, 774 P.2d 1141 (Utah 1989).

The Defense also sought at trial to put on testimony from bail bondsman Troy Thode regarding a woman he'd previously bailed out of jail, State's witness Karen Hardy. The testimony in question, which was not allowed by the Court, was that Ms. Hardy had been bailed out by him, and had secured the transaction with some jewelry and two vehicles; and that the vehicles, when the bondsman went to tow them to hold them, were gone; and that the jewelry turned out to be reportedly stolen from another State's witnesses' (Todd Farnsworth's) house; and that she had jumped bail. The Court did not allow this testimony, on the basis that it was "impeachment in a far too collateral issue." While it is true that the evidence which could have been elicited from Troy Thode did not deal with the exact issues of this trial, it was credible evidence of dishonesty of an important State witness, and should have been revealed to the jury so that the jury could evaluate the credibility of that witness. Generally, impeachment testimony is admissible if it goes to credibility, even though it introduces evidence which would be otherwise inadmissible. *See, e.g., State v. Reed*, 820 P.2d 479 (Utah App. 1991). While specific acts of misconduct that do not result in criminal convictions are sometimes, or generally, inadmissible to impeach a witness, *see, e.g., State v. Starks*, 581 P.2d 1015 (Utah 1978), in this instant the testimony was so compelling and so important because it directly undermined the credibility of the State's witness, and had to do with specific acts of dishonestly in dealing with the criminal justice system (treatment of a bondsman and bond-jumping) that it should have been allowed so that the truth could be known about this witness, and the Defendant allowed a fair trial.

The denial of the Defendant's opportunity to put on relevant evidence which would potentially vindicate him by damaging the State's case and raising reasonable doubt strips him of his constitutional right to a fair trial in which he is able to put on evidence which calls into

question the State's case and allows him to defend himself. See Utah Rules of Evidence 608; Utah Rules of Evidence 804; U.S. Constitution Amend., VI and XIV, as well as the Utah Constitution Article I, Section 7, and 12. Evidentiary rules should be relaxed to allow evidence vital to a criminal defendant's defense. See *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

The Court's Evidentiary Errors were Not Harmless

Regarding the evidentiary arguments and issues discussed above, the Defendant is required to show not only error, but that any errors were not harmless. See, e.g., *Hall v. NACM Intermountain, Inc.*, 1999 UT 97, ¶¶ 21, 988 P.2d 942. As for issues II, IV and V, these items go to the discovery of the methamphetamine lab which is the heart of this case. Certainly if error occurred with respect to these issues, then they cannot be said to have been harmless, for they allowed the methamphetamine lab itself to come into evidence. As for issues V, the eye witness testimony was crucial and cannot be said to have been harmless. The lab in question was not found in the possession of the Defendant, or in Defendant's house or car. Thus eye-witness testimony linking him to the lab was critical for the success of the prosecution. And, as for issue VI, the impeachment of crucial State witnesses, particularly the disallowed impeachment of one witness as to that witness's statement to a fellow inmate that he was trying to pin the charge on the Defendant, is absolutely critical and cannot be said to be harmless either, since it could have convinced the jury that the lab belonged to that State's witness (it was found in the trunk of his car) rather than the Defendant.

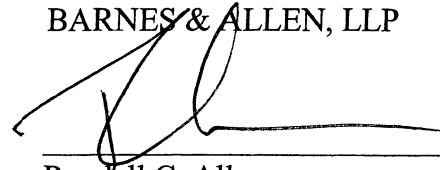
CONCLUSION

Based upon the above discussion, this Court should reverse the conviction and remand for

new trial.

Dated this 4th day of Nov, 2005,

BARNES & ALLEN, LLP

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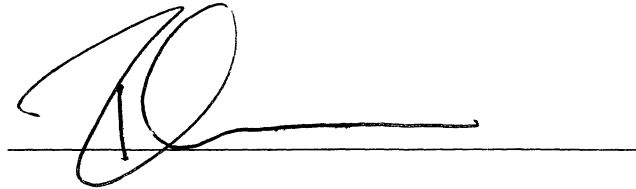
Randall C. Allen

CERTIFICATE OF SERVICE

I hereby certify that on this the 14th day of Nov, 2005, I

did cause two copies of this brief to be sent by US mail to:

J. Frederic Voros, Jr.
160 E. 300 S. 6th Floor
Salt Lake City, UT 84114


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ADDENDUM

Second Amended Judgment, Sentence, and Commitment

FILED

SCOTT F GARRETT (#8687)
Iron County Attorney
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P.O. Box 428
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5th DISTRICT COURT
IRON COUNTY
DEPUTY CLERK 

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR IRON COUNTY,
STATE OF UTAH

STATE OF UTAH,)	SECOND AMENDED JUDGMENT,
)	SENTENCE, AND COMMITMENT
Plaintiff,)	
vs)	
TERRY ARNOLD MESSER JR ,)	Criminal No 991500647
d o b 03/20/73.)	Judge James L Shumate
Defendant.)	

The Defendant, TERRY ARNOLD MESSER, JR., having been convicted by a duly empaneled jury of his peers of UNLAWFUL POSSESSION OF LABORATORY EQUIPMENT OR SUPPLIES, as enhanced to a First-Degree Felony, and the jury having also found the following enhancements beyond a reasonable doubt, to wit: (1) that the Defendant did possess said laboratory equipment or supplies within 500 feet of a residence; (2) that the Defendant did possess said laboratory equipment or supplies for the production of methamphetamine or methamphetamine base, and (3) that the Defendant did illegally possess, transport, or dispose of hazardous or dangerous materials in furtherance of a clandestine methamphetamine laboratory operation, and said materials caused a substantial risk to human health or safety, and the jury having found the Defendant guilty,

as well as found the enhancements, beyond a reasonable doubt on October 25, 2001, and the Court accepted said guilty verdict and thereafter ordered the preparation of a presentence investigation report and scheduled the matter for sentencing; and on or about November 5, 2001, the Defendant, by and through his then attorney, Jim Scarth, filed a request to re-schedule the sentencing in the above-entitled matter, and the Defendant having asserted that he waived his right to a presentence investigation report, and after having received the Defendant's motion, the Court having called the matter on for sentencing on December 3, 2001, in Cedar City, Utah, and the above-named Defendant, TERRY ARNOLD MESSER JR., having appeared before the Court in person, together with his then attorney of record, James R. Scarth, and the State of Utah having appeared by and through then Deputy Iron County Attorney Scott F. Garrett, and the Court having reviewed the file in detail and thereafter having heard statements from the Defendant, his attorney, and the Deputy Iron County Attorney, and the Court being fully advised in the premises now makes and enters the following Second Amended Judgment, Sentence, and Commitment, to wit:

SECOND AMENDED JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, TERRY ARNOLD MESSER, JR., has been found guilty, beyond a reasonable doubt, by a duly empaneled jury, of the offense of UNLAWFUL POSSESSION OF LABORATORY EQUIPMENT OR SUPPLIES, as enhanced to a First-Degree Felony. Further, the jury found, beyond a reasonable doubt, the following enhancements, to wit: (1) that the Defendant did possess said laboratory equipment or supplies within 500 feet of a residence; (2) that the Defendant did possess said laboratory equipment or supplies for the production of methamphetamine or methamphetamine base; and (3) that the Defendant did illegally possess, transport, or dispose of hazardous or dangerous materials in furtherance of a clandestine methamphetamine laboratory operation, and said materials

caused a substantial risk to human health or safety. The Court having asked whether the Defendant had anything to say in regard to why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, it is adjudged that the Defendant is guilty as charged and convicted.

SENTENCE

IT IS HEREBY ORDERED that the Defendant, TERRY ARNOLD MESSER, JR., and pursuant to his conviction of UNLAWFUL POSSESSION OF LABORATORY EQUIPMENT OR SUPPLIES, as enhanced to a First-Degree Felony, is hereby sentenced to a term of imprisonment in the Utah State Prison for a period of not less than five (5) years and not more than the term of his natural life.

IT IS FURTHER ORDERED that the Defendant be given credit for time served to date. Specifically, the Defendant shall be given credit for time served from January 21, 1999, to October 21, 2004, for a total of 2,100 days.

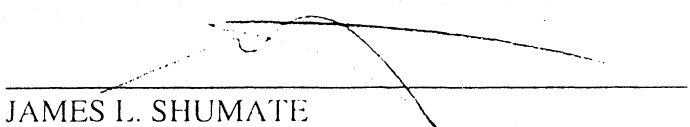
COMMITMENT

TO THE SHERIFF OF IRON COUNTY, STATE OF UTAH:

YOU ARE HEREBY COMMANDED to take the Defendant, TERRY ARNOLD MESSER JR., and deliver him to the Utah State Prison in Draper, Utah, there to be held under the provisions of the foregoing Second Amended Judgment, Sentence, and Commitment.

DATED this 7 day of March, 2005.

BY THE COURT:


JAMES L. SHUMATE
District Court Judge

CERTIFICATE

STATE OF UTAH)
 ss.
COUNTY OF IRON)

I, CAROLYN BULLOCH, Clerk of the Fifth Judicial District Court in and for Iron County, State of Utah, hereby certify that the foregoing is a full, true and exact copy of the original Second Amended Judgment, Sentence, and Commitment in the case entitled State of Utah vs. Terry Arnold Messer Jr., Criminal No. 991500647, now on file and of record in my office.

WITNESS my hand and the seal of said office in Cedar City, County of Iron, State of Utah, this 17 day of March, 2005.

CAROLYN BULLOCH
CAROLYN BULLOCH
District Court Clerk

(S E A L)

By: [Signature]
Deputy District Court Clerk

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a full, true, and correct copy of the within and foregoing SECOND AMENDED JUDGMENT, SENTENCE, AND COMMITMENT, by first-class mail, postage fully prepaid, on this 2nd day of March, 2005, to the following, to wit:

Mr. Glenn C. Halterman
Attorney for Defendant
P.O. Box 1472
Cedar City, Utah 84721-1472

[Signature: Calleen Thason]
Assistant

STATE OF UTAH)
COUNTY OF IRON) ss

I, the undersigned Clerk of the FIFTH DISTRICT COURT, certify that this document is a true copy of the original document on file in the clerk's office.

(WITNESS) my hand and seal of the court
on this date: 1-3-05

