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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 950380-CA
v.	:	Priority No. 2
DAX BRANT HAMMER ,	:	
Defendant-Appellant.	:	Oral Argument Not Requested

BRIEF OF APPELLEE

- - - - - - - - -

DEFENDANT'S APPEAL OF SENTENCE, ENTERED UPON HIS CONVICTION FOR ATTEMPTED BURGLARY, A THIRD DEGREE FELONY, UTAH CODE ANN. §§ 76-4-101, 76-4-102, and 76-6-202 (1995), BY THE FIFTH JUDICIAL DISTRICT COURT, WASHINGTON COUNTY, UTAH, THE HONORABLE JAMES L. SHUMATE, PRESIDING

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COURT OF APPEALS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

JURISDICTION AND NATURE OF PROCEEDINGS. 1

ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW. 1

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES 2

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS. 4

SUMMARY OF THE ARGUMENT 5

ARGUMENT

POINT I — BY FAILING TO OBJECT TO THE SUSPICIONLESS SEARCH CONDITION OF HIS PROBATION, HAMMER HAS WAIVED THIS ISSUE ON APPEAL 6

POINT II — THE FOURTH AMENDMENT PERMITS RANDOM, SUSPICIONLESS SEARCHES AS A CONDITION OF PROBATION. 8

A. Utah Fourth Amendment Precedent: *Velasquez* 8

B. Knowing Waiver of *Velasquez* "Reasonable Suspicion" Requirement 9

C. *Velasquez* Overruled by Later U.S. Supreme Court Holdings 10

CONCLUSION. 21

APPENDICES

Appendix I

Appendix II

TABLE OF AUTHORITIES

FEDERAL CASES

Bell v. Wolfish, 441 U.S. 520 (1979) 12, 15, 16, 21

Brinegar v. United States, 380 U.S. 160 (1949) 20

Camara v. Municipal Court, 387 U.S. 523 (1967) 12

Delaware v. Prouse, 440 U.S. 648 (1979) 13

Griffin v. Wisconsin, 483 U.S. 868 (1987) 8, 11, 14, 18

Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990) 12

Morissey v. Brewer, 408 U.S. 471 (1972) 15

OConnor v. Ortega, 480 U.S. 709 (1987) 12

Payton v. New York, 445 U.S. 573 (1980) 15

Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989) 12

Tennessee v. Garner, 471 U.S. 1 (1985) 16

Treasury Employees v. Von Raab, 489 U.S. 656 (1989) 12

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 12

United States v. Salerno, 481 U.S. 739 (1987) 19

Vernonia School District 47J v. Acton, ___ U.S. ___,
115 S. Ct. 2386 (1995) . . . . passim

Wilson v. Arkansas, ___ U.S. ___, 115 S. Ct. 1914 (1995) 16

STATE CASES

People v. Wealer, 264 Ill. App. 3d 6, 201 Ill. Dec. 697, 636 N.E.2d 1129 (App. 2 Dist.), *review denied*, 157 Ill. 2d 519, 205 Ill. Dec. 182, 642 N.E.2d 1299 (1994) 19

State v. Amicone, 689 P.2d 1341 (Utah 1984) 7

State v. Archambeau, 820 P.2d 920 (Utah App. 1991) 2, 6

State v. Blackwell, 809 P.2d 135 (Utah App. 1991) 9

State v. Bywater, 748 P.2d 568 (Utah 1987) 6

State v. Dunn, 850 P.2d 1201 (Utah 1993) 7

State v. Gibbons, 740 P.2d 1309 (Utah 1987) 9

State v. Hammer, Pet. for Interlocutory Review, No. 950437-CA, (Utah Ct. App. 27 June 1995) 4

State v. Hunter, 831 P.2d 1033 (Utah App.), *cert. denied*, 843 P.2d 1042 (Utah 1992) 9

State v. Jameson, 800 P.2d 798 (Utah 1990) 2, 6, 15

State v. Johnson, 748 P.2d 1069 (Utah 1987) 9

State v. Josephson, 867 P.2d 993 (Idaho App. 1993) 21

State v. Lopez, 886 P.2d 1105 (Utah 1994) 2, 6

State v. Lopez, 873 P.2d 1127 (Utah 1994) 13

State v. Olivas, 122 Wash. 2d 73, 856 P.2d 1076 (1993) 19

State v. Parker, 872 P.2d 1041 (Utah App.), *cert. denied*, 883 P.2d 1359 (Utah 1994) 9

State v. Rhodes, 818 P.2d 1048 (Utah App. 1991) 2, 7

State v. Robbins, 733 P.2d 132 (Utah 1987) 6

State v. Smith, 812 P.2d 470 (Utah App. 1991), *cert. denied*, 836 P.2d 1383 (Utah 1992) 10

State v. Thurman, 846 P.2d 1256 (Utah 1993) 10

State v.Velasquez, 672 P.2d at 1254 (1983) . . . . passim

State v. Yates, 834 P.2d 599 (Utah App. 1992) 7

State v. Martinez, 811 P.2d 205 (Utah App. 1991) 8, 14

U.S. Xpress, Inc. v. State Tax Commission, 886 P.2d 1115 (Utah App. 1994) 6

FEDERAL STATUTES

U.S. Const. Amend. IV 2

U.S. Const. Amend. V 9

STATE STATUTES

Utah Code Ann. § 76-4-101(1995) 1

Utah Code Ann. § 76-4-102 (1995) 1

Utah Code Ann. § 76-6-202 (1995) 1

Utah Code Ann. § 78-2a-3 (Supp. 1995) 1

Utah Const. Art. I § 14 . . . . 2, 8

Utah R. Crim. P. 11 9

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BRIEF OF APPELLEE

- - - - - - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant-appellant Dax Brant Hammer appeals one of the conditions in his probation agreement, entered in lieu of a prison sentence upon his conviction for attempted burglary, a third degree felony under Utah Code Ann. §§ 76-4-101, 76-4-102, 76-6-202 (1995). This Court has appellate jurisdiction under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1995).

ISSUES PRESENTED ON APPEAL
and
STANDARDS OF APPELLATE REVIEW

Although framed differently by appellant Hammer, the State respectfully submits that this case presents two issues:

1. Did Hammer waive his appellate challenge to a probation condition calling for random, suspicionless searches of his person, property, and residence, by failing to object to the legality of that condition when his criminal sentence was imposed? The question of trial-level waiver is necessarily examined by the appellate court de novo upon the record, as is

the question whether the appellant has established any exception to the rule that issues not raised in the trial court are waived on appeal. *State v. Lopez*, 886 P.2d 1105, 1113 (Utah 1994); *State v. Archambeau*, 820 P.2d 920, 922-26 & nn. 2-10 (Utah App. 1991).

Only if Hammer prevails on the above issue may this Court reach the substantive issue on appeal:

2. Can a probation agreement, entered in lieu of incarceration for a felony conviction, include a term requiring the defendant to permit suspicionless searches of his or her person, residence, and property? Just as a trial court has wide discretion to grant or deny probation, *e.g.*, *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990), *State v. Rhodes*, 818 P.2d 1048, 1049 (Utah App. 1991), the crafting of a probation order to include certain conditions must similarly allow wide trial court discretion. The question whether that discretion includes authority to waive or restrict the defendant's Fourth Amendment protections is properly cast as a matter of law, upon which no deference is due to the trial court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Hammer has disclaimed any independent analysis under article I, section 14 of the Utah Constitution. His argument on appeal thus involves only the similarly-worded Fourth Amendment to the United States Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Hammer was originally charged with second degree felony burglary, and misdemeanor theft. By plea bargain, he pleaded guilty to a single count of attempted burglary (dwelling), a third degree felony (R. 2, 12-15). The ensuing presentence report recommended that Hammer be placed on probation, including a condition that he "submit to random urinalysis and other tests of breath and bodily fluids to insure compliance with the terms and conditions of Probation Agreement" (R. 51 at ___ (sealed presentence report, not released with record on appeal)).

Hammer's standard Probation Agreement included the usual provisions for breath and bodily fluid tests, and for "reasonable suspicion"-based searches of "PERSON, RESIDENCE, VEHICLE or any other property under my control, without a warrant, at any time, day or night . . ." (R. 38, para. 6, copied in appendix I of this brief). The trial court, however, added "SPECIAL CONDITIONS" to the Probation Agreement, which Hammer signed: "D. Submit to random tests of breath or bodily fluids, and random searches of person and property" (id.; see also R. 43, also copied in appendix I ("shall submit to a search of his person, possessions, and residence upon request . . .")). Those amendments omitted any "reasonable suspicion" requirement; the trial court so informed Hammer at sentencing: "You will submit to random urinalysis and other testing of your breath and bodily fluids. And you'll submit to a search of your person, your premises or any property under your control or any vehicle under your control to determine whether or not you are using or possessing controlled substances or alcohol" (R. 59-60, also copied in appendix I). On appeal, Hammer challenges the inclusion of suspicionless searches as a condition of his probation.

STATEMENT OF FACTS

A review of the facts, including events subsequent to the challenged sentence, lends support to the State's position in this case. It appears from the transcript of Hammer's 29 March 1995 sentencing hearing (R. 54-63, copied in appendix I of this brief) that the trial court and the parties agreed that Hammer has a substance abuse problem that had apparently precipitated his crime (R. 56-58). Evidently impressed by Hammer's intelligence and "heritage," the court expressed its desire to assure that Hammer would not again go astray (R. 58-59). Toward that end, the court imposed the special probation search condition, allowing suspicionless searches, of which Hammer now complains.

On 18 April 1995, just eight days after he signed the Probation Agreement, Hammer was a guest in a friend's home that was the subject of a warrant-supported search. The warrant directed officers to search all persons present at the subject residence, and the search of Hammer revealed a controlled substance and paraphernalia. In his ensuing prosecution for possession of that contraband, before the same judge who had entered Hammer's probation order in this case, Hammer moved to suppress, challenging the warrant's validity. *See State v. Hammer* ("*Hammer II*"), Pet. for Interlocutory Review, No. 950437-CA, filed in Utah Ct. App. 27 June 1995, at 1-3 (copied in appendix II of this brief). Although concerned about the warrant, the trial court denied Hammer's motion to suppress, relying upon the Probation Agreement to support the search of Hammer. However, the trial court characterized the Probation Agreement as only authorizing searches based upon "reasonable suspicion," and held that standard had been satisfied. *Id.* at 3 (and attachment,

interlocutory review of that suppression motion (Order copied in appendix II). Thus as far as the trial court is concerned, Hammer has been searched under the now-challenged Probation Agreement.

SUMMARY OF ARGUMENT

1. Hammer has waived his challenge to the suspicionless search probation condition, because he failed to object to it in the trial court. Nor has Hammer proven "plain error" or "exceptional circumstances" to justify relief from that waiver by default. On this basis, the suspicionless search provision should be summarily affirmed, without addressing the merits.

2. If the merits can be reached, affirmance is appropriate. Hammer misrelies on the Utah Supreme Court's 1983 *Velasquez* decision under the Fourth Amendment, holding that probationer searches must be based upon reasonable suspicion, for two reasons. First, *Velasquez* does not address whether the "reasonable suspicion" requirement can be waived. By every indication, it can be waived, and it was voluntarily and knowingly waived by Hammer. Second, the *Velasquez* holding has been superseded by subsequent Fourth Amendment holdings from the United States Supreme Court. Under those decisions, and the "balancing" analysis articulated in the federal Supreme Court's 1995 *Acton* decision, suspicionless probationer searches are permissible.

ARGUMENT

POINT ONE

BY FAILING TO OBJECT TO THE SUSPICIONLESS SEARCH CONDITION OF HIS PROBATION, HAMMER HAS WAIVED THIS ISSUE ON APPEAL

Hammer cannot overcome the threshold problem of waiver by default. He argues on appeal that as a matter of Fourth Amendment law, the trial court could not impose the suspicionless search condition of his Probation Agreement. But in the trial court, Hammer never objected to the suspicionless search condition. Indeed, he verbally acquiesced to the condition when the court informed him of it (R. 59-60, copied in appendix I). In the written Probation Agreement, executed later outside of court, Hammer again acknowledged that condition by initialling it and signing the Agreement (R. 38, also copied in appendix I). He therefore waived the issue by default (indeed, as set forth in Point Two of this brief, he affirmatively waived his protection from suspicionless searches).

Now, on appeal, Hammer fails to demonstrate "plain error" or other "exceptional circumstances" that would justify excusing that waiver and reaching the merits of his Fourth Amendment argument. "It is well settled that, absent extraordinary circumstances or plain error, issues cannot be raised for the first time on appeal." *U.S. Xpress, Inc. v. State Tax Comm'n*, 886 P.2d 1115, 1119 (Utah App. 1994). *Accord State v. Lopez*, 886 P.2d 1105, 1113 (Utah 1994); *State v. Archambeau*, 820 P.2d 920, 922-26 & nn. 2-10 (Utah App. 1991). The waiver-by-default rule applies with equal force to issues overlooked in sentencing hearings. *See State v. Jameson*, 800 P.2d 798, 801-02 (Utah 1990); *State v. Bywater*, 748 P.2d 568, 569 (Utah 1987); *State v. Robbins*, 733 P.2d 132 (Utah 1987) (per curiam).

Hammer, who acknowledges the waiver-by-default rule and even cites *Archambeau* (Br. of Appellant at 16), makes no attempt to articulate either exception to this rule. Instead, he alludes to habeas corpus as "the precious safeguard of personal liberty," and suggests, without explanation, that his defaulted claim could be raised in a habeas corpus petition, and therefore, should be entertained on direct appeal (Br. of Appellant at 16-17).

That unsupported suggestion does not carry Hammer's appellate burden of proving an exception to the waiver rule. "This court has routinely declined to consider arguments which are not adequately briefed on appeal." *State v. Yates*, 834 P.2d 599, 602 (Utah App. 1992); *accord State v. Amicone*, 689 P.2d 1341, 1344 (Utah 1984). To address Hammer's defaulted argument now, without proof of plain error or extraordinary circumstances, would violate the policy that underlies the waiver-by-default rule: "[T]he trial court should have the first opportunity to address the claim of error." *State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993) (citing cases). Hammer never gave the trial court an opportunity to reconsider, and perhaps delete, the suspicionless search condition of his probation.

That default would make it particularly unfair to the trial court, were this Court to consider the merits of Hammer's claim on appeal absent a powerful showing of exceptional circumstances or plain error. Hammer's prayer for relief asks this Court to "vacate[] and set aside" the suspicionless search provision of his Probation Agreement (Br. of Appellant at 17). Such relief would amount, in effect, to appellate editing of the trial court's considered judgment. Such editing would inappropriately divest the trial court of its traditional, broad discretion to decide whether a guilty defendant can be successfully supervised on probation, or should instead be committed to prison. *See, e.g.*, *State v. Rhodes*, 818 P.2d 1048, 1049 (Utah

App. 1991). Therefore, this Court should not address the merits of the Fourth Amendment issue raised by Hammer, and should summarily affirm the trial court's judgment.

POINT TWO

THE FOURTH AMENDMENT PERMITS RANDOM, SUSPICIONLESS SEARCHES AS A CONDITION OF PROBATION

Were this Court to reach the merits of this appeal, Hammer could not prevail. Hammer argues that the Fourth Amendment to the United States Constitution bars the provision for random, suspicionless searches from his Probation Agreement. He disavows any separate analysis under Article I, section 14 of the Utah Constitution (Br. of Appellant at 2 n.1). Therefore, merits analysis proceeds solely under the Fourth Amendment.

A. Utah Fourth Amendment Precedent: *Velasquez*

Interpreting the Fourth Amendment in *State v. Velasquez*, 672 P.2d 1254 (1983), the Utah Supreme Court held that warrantless searches of parolees are permissible when State officials have "reasonable grounds"--a standard less than probable cause--to believe that the parolee has violated parole or committed a crime. *Id.* at 1260 (the State equates "reasonable grounds" with the "reasonable suspicion" standard of *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny). The court identified its holding as a "middle ground" position--between demanding probable cause and requiring no cause for a parolee search. Subsequently, in *State v. Martinez*, 811 P.2d 205, 209-10 (Utah App. 1991), this Court extended the *Velasquez* "reasonable grounds" requirement to searches of probationers, whose liberty interests are limited to the same degree as those of parolees. *Accord Griffin v. Wisconsin,* 483 U.S. 868, 874 (1987) (equating parolees' and probationers' limited liberty interests). *See also*

State v. Johnson, 748 P.2d 1069, 1072 (Utah 1987) (following *Velasquez*); *State v. Blackwell*, 809 P.2d 135, 136-39 (Utah App. 1991) (same). Thus *Velasquez* arguably supports Hammer's position on appeal.

B. Knowing Waiver of *Velasquez* "Reasonable Suspicion" Requirement.

However, in *Velasquez*, the Utah Supreme Court was not presented with, and hence did not reach, the question whether a convicted criminal, in order to receive probation in lieu of incarceration, may affirmatively waive his or her protection against any or all types of searches, whether or not supported by any level of suspicion. Perusal of other aspects of criminal law quickly reveals that such waiver is permissible. In entering guilty pleas, criminal defendants waive all their constitutional trial rights, along with virtually all right of appeal. *See* Utah R. Crim. P. 11(e)(3) through -(e)(8); *State v. Gibbons*, 740 P.2d 1309 (Utah 1987). That the decision to plead guilty may be difficult, or later regretted, in no way affects the validity of such waivers. Defendants who proceed to trial routinely cope with the dilemma whether to waive the right to remain silent, U.S. Const. Amend. V, and are required to live with the consequences of their decisions. Similarly, imposition of a probation condition that happens to be unpleasant or costly does not, *ipso facto*, operate to invalidate the condition. *Cf. State v. Parker*, 872 P.2d 1041, 1049 n.1 (Utah App.) (separate opinion of Davis, J.) ("While choosing probation over prison is nearly a Hobson's choice, it is nevertheless a choice offered at the discretion of the court"), *cert. denied*, 883 P.2d 1359 (Utah 1994).

Because *Velasquez* is silent about whether the "reasonable suspicion" requirement for probationer searches may be waived, this Court is free to hold that the requirement can be waived. Such holding would be consistent with *State v. Hunter*, 831 P.2d

1033 (Utah App.), *cert. denied*, 843 P.2d 1042 (Utah 1992), in which this Court upheld a university dormitory room search that was authorized by the housing contract between the student-defendant and the university. Just as the student in that case agreed to limit his Fourth Amendment rights by valid contract, so too did Hammer contractually waive the "reasonable suspicion" limit on probationer searches, in return for the opportunity to receive probation, rather than face a prison term, for attempted burglary.

This Court can then hold that Hammer knowingly and voluntarily agreed to that waiver, because the record readily supports such holding. Hammer signed the written Probation Agreement, initialling each of its conditions, including the special condition of random searches (R. 38, copied in appendix I). He was orally informed of that condition in open court, and stated his acceptance of it (R. 60, also copied in appendix I). Just as a written plea agreement and oral colloquy demonstrated a properly accepted, voluntary no-contest plea in *State v. Smith*, 812 P.2d 470, 476-81 (Utah App. 1991), *cert. denied*, 836 P.2d 1383 (Utah 1992), so too does the record in this case prove that Hammer knowingly and voluntarily waived his right, under *Velasquez*, to be searched only upon reasonable suspicion.

C. *Velasquez* Overruled by Later U.S. Supreme Court Holdings.

If this Court does not find a voluntary waiver of Hammer's rights under *Velasquez*, Hammer still cannot prevail. The "reasonable suspicion" limitation on probationer searches, established in *Velasquez*, is no longer valid. That limitation has been overruled *sub silentio* by subsequent United States Supreme Court cases interpreting the Fourth Amendment, which both this Court and the Utah Supreme Court are bound to follow. *See State v. Thurman*, 846 P.2d 1256, 1266 & n.9 (Utah 1993). Under the United States Supreme Court's

interpretation of the Fourth Amendment, Hammer's probation agreement properly requires him to submit to random, suspicionless searches of his person (including "bodily fluids"), residence, and property.

1. "Special Needs" Searches and Probationers.

The Supreme Court addressed probationer searches in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), and upheld a warrantless search of a probationer's home that was carried out pursuant to a Wisconsin regulation that permitted such searches upon "reasonable grounds." 483 U.S. at 870-71. The Wisconsin regulation was deemed constitutionally reasonable because of the "special need" to closely supervise probationers, and because probationers' privacy interests are less than those of the public at large. *Id.* at 873-75. "Special needs" exist when the governmental interest at stake is "beyond normal law enforcement," and therefore justifies departure from the warrant requirment. *Id.* The Court also found the challenged search reasonable "because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well-established principles." *Id.* at 873. Significantly, however, the Court in *Griffin* did *not* hold that the "reasonable grounds" requirement, contained within the Wisconsin regulation, was itself constitutionally required. *See id.* at 872 (declining to decide whether federal "reasonable grounds" standard must be met); *id.* at 875-76 (deferring definition of "reasonable grounds" to the Wisconsin state courts). Thus *Griffin* reserved the question whether a probationer search might be permissible without any level of individualized suspicion.

That question is now answered affirmatively, if tacitly, by other Supreme Court decisions. Most recently and compellingly, in *Vernonia School District 47J v. Acton*, ___

U.S. ___, 115 S. Ct. 2386 (1995), the Court approved a public school district's policy of random urinalysis drug testing for student-athletes. Like probationer searches, the Supreme Court observed that public school searches serve "special needs." *Acton*, 115 S. Ct. at 2391 (citing *Griffin*). Canvassing its precedent, the Court further stated that "special needs" searches can be justified without any individualized suspicion: "[T]he Fourth Amendment imposes no irreducible requirement of such suspicion." *Id.* (quoting authority). The Court acknowledged other instances wherein suspicionless searches and seizures were held to be reasonable. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (roadblock sobriety checkpoints); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (random drug testing of customs officers who are armed or involved in drug interdiction); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug testing of railroad personnel involved in train accidents); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (border checkpoints for illegal immigrants and contraband). *See also Bell v. Wolfish*, 441 U.S. 520, 555-60 (1979) (unnanounced cell searches, and post-jail visit body searches of pretrial detainees were reasonable under the Fourth Amendment). *Cf. O'Connor v. Ortega*, 480 U.S. 709 (1987) (government employers may search employees' desks without probable cause); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (administrative searches without probable cause).

2. The "Reasonableness" Test for Special Needs Searches.

In *Acton*, the Court also articulated the test for determining the reasonableness of "special needs" searches. Broadly described, such a search "is judged by balancing its intrusion on the individual's Fourth Amendment interests against the promotion of legitimate

governmental interests." *Acton*, 115 S. Ct. at 2390 (quoting *Skinner*, 489 U.S. at 619 (in turn quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). More specifically, this balancing analysis examines three factors: (1) the "nature of the privacy interest" upon which the search intrudes, *Acton*, 115 S. Ct. at 2391; (2) the "character of the intrusion" upon that interest, *id.* at 2393; and (3) "the nature and immediacy of the governmental concern" raised to justify the search, and "the efficacy of this means for meeting it," *id.* at 2394.

Notably absent from the foregoing balancing analysis is any reference to governmental regulations as benchmarks for Fourth Amendment protection. Thus while the content of a regulation can help a reviewing court to determine whether a "special needs" search is constitutional, as happened in *Griffin*, the existence *vel non* of regulations does not determine the scope of Fourth Amendment protection: after all, a policy or regulation could violate the Constitution. *State v. Lopez*, 873 P.2d 1127, 1138 (Utah 1994). Therefore, by invoking the probationer search regulations of the Utah Department of Corrections, which contain a "reasonable suspicion" requirement, Hammer gets the cart before the horse (Br. of Appellant at 10-14). While those regulations must obey Fourth Amendment law, they do not define that law. The Department's requirement of "reasonable suspicion" for probationer searches merely reflects its acceptance of the Utah Supreme Court's *Velasquez* decision as Fourth Amendment authority. That authority, however, is no longer good law. Instead, the balancing analysis set forth in *Acton* supports random, suspicionless probationer searches.

3. Reasonableness of Random Probationer Searches.

Application of the federal Supreme Court's balancing analysis, with comparison to the Court's pertinent precedent, demonstrates that the Fourth Amendment permits suspicionless searches as a term of probation:

Nature of the Privacy Interest

It is clear that probationers have limited privacy interests. On this point, Utah courts are in accord with the United States Supreme Court:

> Probation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging for solitary confinement in a maximum-security facility to a few hours of mandatory community service. . . . To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.

Griffin, 483 U.S. at 874 (citation and quotation omitted). *Accord Velasquez*, 672 P.2d at 1258 (parolees have "diminished expection of privacy"); *Martinez*, 811 P.2d at 209-10 (same for probationers).

And a criminal probationer, by definition guilty of a criminal offense, surely has no greater privacy interest than a public school student who desires to participate in sports, or a railroad employee unfortunate enough to be involved in an accident. Yet in *Acton,* the Supreme Court upheld suspicionless, random searches of student-athletes; in *Skinner*, drug screening of railroaders involved in accidents was approved. And if law enforcement officers may be subjected to random drug screening, as the Court held in *Von Raab*, surely adjudicated lawbreakers can expect no greater privacy. The privacy interests of pretrial detainees, not yet

convicted of any crime, yield to suspicionless searches under *Bell v. Wolfish*. Nor does a convicted criminal's interest in the privacy of his or her residence approach the "sanctity" level, *Payton v. New York*, 445 U.S. 573, 601 (1980), accorded to the ordinary citizen: *Griffin*, after all, upheld the search of a probationer's home.

It also appears proper to compare the privacy loss that would be inflicted upon a criminal who is imprisoned, rather than granted probation. Under Utah law, such a decision is left to the virtually unfettered discretion of sentencing courts. *See, e.g.*, *State v. Jameson*, 800 P.2d 798, 804 (Utah 1990). A prison setting, like a student-athlete's locker room, is surely "not for the bashful," *Acton*, 115 S. Ct. at 2392, in terms of privacy loss: a prison typically is designed to allow inmate surveillance at all times--including sleeping, showering, and toileting. If a sentencing court can impose such a dramatic, chronic privacy deprivation upon a convicted criminal, it must have the discretion to impose a lesser deprivation--such as probation that includes random, suspicionless searches. Indeed, it seems a safe bet that most criminals, given the choice, would readily choose the latter situation over the former. As a matter of both precedent and logic, then, probationers such as Hammer have very limited "legitimate expectations of privacy."

Character of the Intrusion

The character of the intrusion caused by random probationer searches also supports their permissibility under the Fourth Amendment. For one thing, as just explained, the intrusion caused by an occasional random search is far less onerous than day-to-day life in prison. *Cf. Morissey v. Brewer*, 408 U.S. 471, 482 (1972) (a parolee's "condition is very different from that of confinement in a prison"); *Velasquez*, 672 P.2d at 1258 n.1 (parolee

enjoys privacy rights not granted to prisoners). And as Hammer admits, probationers routinely live under a panoply of special expectations and restrictions: "The probationer's physical mobility and personal associations are restricted. He is required to provide a regular accounting which may include the status of his employment, schooling, mental health or substance abuse counselling or therapy, payment of fines and restitution, etc." (Br. of Appellant at 11). Hammer's Probation Agreement includes such requirements, plus a ban on firearms possession (waiving Second Amendment rights), a ban on alcohol consumption (normally legal for someone of Hammer's age, R. 3), and a requirement that he "pay a supervision fee" of $30 per month unless granted a waiver . . ." (R. 38, appendix I of this brief). Hammer does not contest the legitimacy of these restrictions. Compared to them, the occasional intrusion of a random, suspicionless search cannot amount, per se, to a constitutional violation.

Yet this is not to say that the character of a *particular* probationer search might not be so harsh as to justify Fourth Amendment disapproval. It is now settled that even a warrant-supported search might be unconstitutional under the Fourth Amendment's "reasonableness" clause. *See Wilson v. Arkansas*, ___ U.S. ___, 115 S. Ct. 1914 (1995) ("knock-and-announce" rule is part of reasonableness inquiry for warrant-supported search); *Bell v. Wolfish*, 441 U.S. at 560 ("The [pretrial detainee] searches must be conducted in a reasonable manner"); *Velasquez*, 672 P.2d at 1263 (searches may not be used to harass or intimidate). *Cf. Tennessee v. Garner*, 471 U.S. 1 (1985) (police may not use deadly force to seize suspect absent indication of immediate danger (due process analysis)). Thus there are inherent constitutional limitations on the manner in which state officials may conduct their

warrantless, suspicionless searches of probationer Hammer. To illustrate by extreme example, officials cannot hang Hammer by his heels, strip him naked in public, or tear down his home to conduct the searches authorized in his Probation Agreement: the manner in which they search him must be constitutionally reasonable. And by analogy to "scope-of-consent" analysis, a probationer search ought not exceed the scope of the probation agreement. But until and unless Hammer is subjected to such an unreasonable search (and no such situation is either alleged or apparent in this case), he has no Fourth Amendment complaint.[1]

In fact, with respect to the "bodily fluids" searches, state officials have committed themselves to conducting such searches in a minimally intrusive manner. Under Corrections Department policy FEr21 (copied in Br. of Appellant addendum E), primarily designed for incarcerated inmates but adaptable to "Field Testing," FEr21/04.04, same-sex testers collect urine samples, taking measures to make the process as private as realistically possible. In *Acton*, 115 S. Ct. at 2393-94, the Supreme Court noted similar privacy-protecting measures in holding that student-athlete drug screening was not unduly intrusive.

It also bears note that Hammer has not been permanently deprived of his protection against warrantless, suspicionless searches. Like any probation agreement, Hammer's is of limited term--set by the trial court at thirty-six months (R. 42). Once that term has been successfully completed, all restrictions, including the searches, will end. In

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[1]Hammer includes an incompletely developed argument that his Probation Agreement does not consent to searches by persons other than his probation officers (Br. of Appellant at 10). That argument is best deferred by this Court pending development on a more complete argument and trial court record--probably in *Hammer II* (described in the fact statement of this brief), if that case results in a conviction and appeal.

sum, the character of the intrusion is sufficiently limited to allow suspicionless probationer searches--both in general and in this case.

Nature and Immediacy of State Concern; Efficacy

Finally, the importance of the State's interest cannot be disputed. The Supreme Court described the interests served by rail worker searches and customs officer searches as "compelling." *Acton*, 115 S. Ct. at 2394 (quoting *Skinner*, 489 U.S. at 628, and *Von Raab*, 489 U.S. at 670). And in *Griffin*, the Court suggested, while reserving the question, that probationer searches might be justified simply on the basis that they serve "legitimate penological interests." 483 U.S. at 874 & n.2 (citing cases). In *Velasquez*, the Utah Supreme Court seemingly found powerful justifications for parolee searches:

> If the parole system is to be successful in achieving its objective of enabling a convict to leave a highly controlled prison environment and move to a point of less restraint and greater freedom in preparation for reentry into society, a parole officer needs to be able to act in a manner that could not be tolerated if done by a policeman or other agent of the state with respect to an ordinary citizen.

Velasquez, 672 P.2d at 1259. The foregoing language emphasizes rehabilitation, a special goal of both parole and probation, and indicates that the State's interest in searches as a means toward that goal is a powerful one. Thus Hammer properly concedes that the State's interest in probationer searches is "legitimate" (Br. of Appellant at 8).

Whatever level of governmental interest exists, or is required, to justify probationer searches, this much is clear: the interest advanced by suspicionless probationer searches is powerful. States, through their correctional authorities, are highly interested in utilizing probation as an effective rehabilitation and anti-recidivism tool. That interest is

surely as important as the goal of preventing student-athlete drug use. *See Acton*, slip op. at 15 ("the nature of the concern is important--indeed, perhaps compelling . . ."). *Cf. United States v. Salerno*, 481 U.S. 739, 749 (1987) (the "government's interest in preventing crime by arrestees is both legitimate and compelling"). This, too, supports suspicionless searches as a probation condition.[2]

And Utah citizens, like those throughout the nation, are highly concerned about crime, yet also concerned about the costs of incarceration. Crowded prisons and jails create pressures for alternative ways to effectively supervise convicted criminals, and therefore deter recidivism. In Utah, experiencing overall population growth, these pressures are increasing. Freedom from the "reasonable grounds" requirement for probationer and parolee searches will help to relieve those pressures. Probation and parole, as alternatives to incarceration, can be more readily ordered by sentencing courts upon assurance that the supervision of the criminals so sentenced will be intensive and liberally exercised.

Turning to the efficacy question, Hammer admits that "the greater the intensity of the [probation] supervision, the greater the compliance with the terms of probation will likely be" (Br. of Appellant at 15). The truth of that proposition seems self-evident: a probationer's knowledge that he or she can be searched at any moment should provide a

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[2]Appellate courts in Illinois and Washington have held that the law enforcement need to effectively investigate future sex offenses justifies saliva and blood sampling of convicted sex offenders, in order to create and maintain a DNA-type database. *People v. Wealer*, 264 Ill. App. 3d 6, 201 Ill. Dec. 697, 636 N.E.2d 1129 (App. 2 Dist.), *review denied*, 157 Ill. 2d 519, 205 Ill. Dec. 182, 642 N.E.2d 1299 (1994); *State v. Olivas*, 122 Wash. 2d 73, 856 P.2d 1076 (1993). These cases also discuss the "special needs" and "balancing" Fourth Amendment analysis utilized in this case.

powerful incentive to not just avoid the *appearance* of unlawful behavior, but to actually avoid such behavior altogether. Additionally, given the high cost of incarceration (state-provided shelter, food, supervision, medical care), the relative cost-effectiveness of intensive probation supervision, including random, suspicionless searches, has to be dramatic. Nor does it make good sense to render every probationer search subject to judicial review for "reasonable suspicion," as the Utah Supreme Court's *Velasquez* and *Johnson* holdings now require. That requirement forces probation officers to become versed in that elusive, often inconsistently-defined term, detracting them from their primary duties of supervision and rehabilitation. *See Acton*, 115 S. Ct. at 2396 (restricting student-athlete searches to individualized suspicion requirement distracts school personnel from their primary duties).

And Hammer is mistaken in suggesting, by quoting *Brinegar v. United States*, 380 U.S. 160, 180-81 (1949) (Jackson, J., dissenting) (Br. of Appellant at 15), that suspicionless probationer searches might be equated with the abuses of Nazi Germany. Intensive supervision of persons duly convicted of violating democratically-enacted laws simply does not compare to the executive fiat-based abuses of that era, directed against wholly innocent citizens. If a duly convicted criminal can be successfully supervised and rehabilitated by probation conditions that include random searches, that option cannot be regarded as "arbitrary," *Brinegar*, 380 U.S. at 180, and it should be available at sentencing. Limitation of supervisory ability, under the "reasonable grounds" requirement for probationer searches, will only chill trial court willingness to order probation rather than incarceration for offenders such as Hammer.

Finally, it bears remembering that Hammer, at sentencing, was recognized as a person with a drug abuse problem. Thus he had a history of surreptitious criminal behavior. The best way to monitor Hammer's success in ending that behavior, and arguably the best incentive for him to end it, was to subject him to random searches, just as the student-athletes in *Acton* were subjected to random testing. *See Bell v. Wolfish*, 441 U.S. at 559 (body cavity searches viewed as effective deterrent to contraband smuggling); *State v. Josephson*, 125 Idaho 119, 867 P.2d 993, 997 (Idaho App. 1993) (defendant's history of drug abuse supported Fourth Amendment waiver as condition of probation). On balance, then, and in line with federal Supreme Court authority, this Court should hold that suspicionless probationer searches are permissible under the Fourth Amendment.

CONCLUSION

By virtue of the waiver explained in Point One of this brief, this Court should affirm the trial court's judgment, without necessity of oral argument. If the Court reaches the merits of this appeal, its should affirm for the reasons set forth in Point Two. In light of the potentially broad ramifications of a merits ruling on Point Two, however, oral argument would be appropriate. Under either point, the judgment should be AFFIRMED.

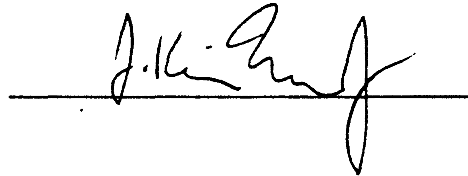
RESPECTFULLY SUBMITTED this 15 day of November, 1995.

JAN GRAHAM
Attorney General

J. KEVIN MURPHY
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed, postage prepaid, to GARY W. PENDLETON, attorney for defendant-appellant, 150 North 200 East, Suite 202, St. George, Utah 84770, this 15 day of November, 1995.



APPENDICES

APPENDIX I

STATE OF UTAH
DEPARTMENT OF CORRECTIONS
PROBATION AGREEMENT

Fifth District	Washington		951500040	00081991
Court	**County**		**Case #**	**OBSCIS #**

I, Dax Brant Hammer, agree to be directed and supervised by Agents of the Department of Corrections and to be accountable for my actions and conduct to the Department of Corrections and the Court.

I further agree to abide by all conditions of probation as ordered by the court and set forth in this Agreement, consistent with the laws of the state of Utah. I fully understand that violation of this agreement and/or any conditions thereof, or any new conviction for a crime, may result in action by the Court causing my probation to be revoked or my probation period to commence again.

1. VISITS: I will permit visits to my place of residence, my place of employment or elsewhere by Agents of Adult Probation and Parole for the purpose of ensuring compliance with the conditions of my Probation Agreement.

2. REPORTING REQUIREMENTS: I will not abscond from Probation Supervision.
   REPORTING: I will report as directed by the Department of Corrections.
   RESIDENCE: I will establish and reside at a residence of record and will not change my residence without first obtaining permission from my Probation Agent.
   LEAVING THE STATE: I will not leave the state of Utah, even briefly, or any other state to which I am released or transferred without prior written permission from my Probation Agent.
   Reporting Instructions:
   DH I will report with in the first five working days of each month and meet with my supervising agent in person as well as providing a written report.

3. CONDUCT: I will obey all State, Federal and Municipal laws. IF ARRESTED, CITED, or QUESTIONED by a peace officer, I will notify my Probation Agent within 48 hours.

4. WEAPONS: I will not possess, have under my control, in my custody or on the premises where I reside, any EXPLOSIVES, FIREARMS or DANGEROUS WEAPONS. (Dangerous weapon is defined as any item that in the manner of its use or intended use is capable of causing death or serious bodily injury.) Exceptions to this condition may be made by the supervising agent and must be in writing. This waiver will only apply to individuals on probation for a misdemeanor and who have never been convicted of a felony.

5. CHEMICAL ANALYSIS: I shall abstain from the illegal use, possession, control, delivery, production, manufacture or distribution of controlled substances (58-37-2 U.C.A.) and I will submit to tests of my BREATH or BODY FLUIDS to ensure compliance with my Probation Agreement.

6. SEARCHES: I will permit Agents of Adult Probation and Parole to search my PERSON, RESIDENCE, VEHICLE or any other property under my control, without a warrant, at any time, day or night, upon reasonable suspicion to ensure compliance with the conditions of my Probation Agreement.

7. ASSOCIATION: I will not knowingly associate with any person who is involved in CRIMINAL activity or who has been CONVICTED OF A FELONY without approval from my Probation Agent.

8. EMPLOYMENT: Unless otherwise authorized by my Probation Agent, I will SEEK, OBTAIN and MAINTAIN verifiable, lawful, full-time employment (32 hours per week minimum) as approved by my Probation Agent. I will notify my Probation Agent of any change in my employment within 48 hours of the change.

9. TRUTHFULNESS: I will be cooperative, compliant and truthful in all my dealings with Adult Probation & Parole.

10. SUPERVISION FEE: I agree to pay a supervision fee of $30 per month unless granted a waiver by the Department under the provisions of Utah Statute 64-13-21.

11. SPECIAL CONDITIONS:
A. Serve 66 days in jail with credit for time served. B. Maintain Full-Time Employment or Edu.
C. Complete a Substance Abuse Evaluation with SWUMH A/D and follow all recommendations.
D. Submit to random tests of breath or bodily fluids, and random searches of person and property.
E. Not use or possess any alcohol or illegal drugs. F. Report all perscriptions to AP&P with in 24 hours is issue. G. Pay a fine in the amount of 1,157.00 directly to the 5th District Court.

I have read, understand and agree to be bound by this agreement. If I violate any of the conditions of this agreement, the Court may revoke my Probation or the Department of Corrections may take other appropriate action against me, and I hereby acknowledge receipt of a copy of this agreement.

Dated this 10th day of April, 1995

Witnessed By: Dennis Banks

Probationer: [signature]

35

Eric A. Ludlow #5104
Washington County Attorney
W. Brent Langston #4614
Deputy Washington County Attorney
178 North 200 East
St. George, Utah 84770
(801) 634-5723

FIFTH JUDICIAL DISTRICT COURT

WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH	)	
Plaintiff,	)	JUDGMENT, SENTENCE, STAY OF EXECUTION OF SENTENCE, ORDER OF PROBATION, AND COMMITMENT
vs.	)	
DAX BRANT HAMMER,	)	Criminal No. 951500040 Judge: James L. Shumate
Defendant.	)	

The above-entitled matter having come on before the Court for Sentencing on the 29th day of March, 1995, and the Plaintiff being represented by W. Brent Langston, Deputy Washington County Attorney, and the Defendant, DAX BRANT HAMMER, being present and represented by Alan D. Boyack, and said Defendant having previously entered a guilty plea to the charge of ATTEMPTED BURGLARY, a 3rd Degree Felony, as charged in the Amended Information, and both counsel having stated that there was no reason why judgment should not be entered herein, the Defendant's Attorney having made recommendations to the Court regarding sentencing, and the Plaintiff's Attorney having made his recommendation, and the Court having received a Pre-sentence Investigation Report and the matter having been submitted; the Court being fully advised in the premises, now makes and enters the following:

JUDGMENT

IT IS HEREBY FOUND, ADJUDGED, AND DECREED that the

Defendant, DAX BRANT HAMMER, is guilty of ATTEMPTED BURGLARY, a 3rd Degree Felony, as charged in the Amended Information.

SENTENCE

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendant, DAX BRANT HAMMER, is sentenced to serve a term not exceeding five (5) years in the Utah State Prison.

STAY OF EXECUTION OF SENTENCE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the execution of the prison term imposed above, is stayed.

ORDER OF PROBATION

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant, DAX BRANT HAMMER, is placed on supervised probation for a period of thirty six (36) months, strictly within the following terms, provisions and conditions:

1. That the Defendant shall forthwith make and execute a form of an agreement of probation as provided by the Utah State Department of Adult Probation and Parole, and shall strictly conform with all of the terms, provisions, and conditions thereof during the period of probation, and the same are hereby made a part of this Order by means of incorporation.

2. That the Defendant shall report as ordered and required by this Court and by the Utah State Department of Adult Probation and Parole.

3. That the Defendant shall commit no law violations.

4. That the Defendant shall serve sixty six (66) days in the Washington County Jail, and shall receive credit for time previously served.

5. That the Defendant shall pay a fine in the amount of

one thousand one hundred fifty seven dollars ($1,157.00), which includes an eight-five percent (85%) surcharge for victim reparation, pursuant to monthly payment schedule with Adult Probation and Parole.

6. That the Defendant shall maintain full-time employment or school.

7. That the Defendant shall obtain a substance abuse evaluation with Southwest Utah Mental Health, and if recommended, enter into, successfully complete, and pay for counseling.

8. That the Defendant shall use no drugs.

9. That the Defendant shall use no alcohol.

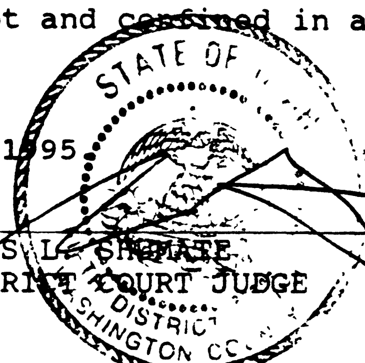
10. That the Defendant shall report this conviction to any attending physician before receiving a prescription and if so, shall report the receipt of said prescription to Adult Probation and Parole within 48 hours.

11. That the Defendant shall submit to a search of his person, possessions, and residence upon the request of his supervising agent of Adult Probation and Parole, peace officer, or any official of any program enrolled in, including submitting to a urinalysis or other tests for controlled substances and/or alcohol.

COMMITMENT

THE SHERIFF OF WASHINGTON COUNTY, State of Utah, is hereby commanded to commit the Defendant, DAX BRANT HAMMER, to the Washington County Jail, there to be kept and confined in accordance with the above Order.

DATED this 16 day of May, 1995.



JAMES L. SHUMATE
DISTRICT COURT JUDGE

43

ORIGINAL

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

HON. JAMES L. SHUMATE, judge

STATE OF UTAH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Criminal No. 951500040
	)	
DAX BRANT HAMMER,	)	
	)	
Defendant.	)	(Tape-Recorded Proceedings)

REPORTER'S HEARING TRANSCRIPT
Wednesday, March 29, 1995

APPEARANCES OF COUNSEL:

For the State: W. BRENT LANGSTON, ESQ.
DEPUTY WASHINGTON COUNTY ATTORNEY
178 North 200 East
St. George, Utah 84770

For the Defendant: ALAN D. BOYACK, ESQ.
205 East Tabernacle Street
St. George, Utah 84770

FILED
Utah Court of Appeals
OCT 24 1995
Marilyn M. Branch
Clerk of the Court
950380-CA

PAUL G. MCMULLIN
OFFICIAL COURT REPORTER

P.O. BOX 1534
ST. GEORGE, UTAH 84770
(801) 673-5315

1 ST. GEORGE, UTAH; WEDNESDAY, MARCH 29, 1995
2 -oOo-
3
4 THE COURT: Mr. Boyack, is this a good time to
5 do the Hammer matter? To call it a little early?
6 MR. BOYACK: I believe so.
7 THE COURT: All right. Is the defendant here,
8 or do you want to go get him?
9 MR. LANGSTON: He's here. He's incarcerated.
10 MR. BOYACK: I just -- that's where I was. I
11 was speaking to the defendant's mother.
12 THE COURT: All right.
13 MR. BOYACK: And we can proceed now.
14 THE COURT: Do you want her to be here? She's
15 not here.
16 MR. BOYACK: I don't think it's necessary. I
17 think we can proceed.
18 THE COURT: All right. I intend to follow the
19 recommendations. But if Mrs. Hammer wants to be here, I
20 will certainly hold off.
21 Let me call that matter, then. 951500040, State
22 of Utah versus Dax Brant Hammer.
23 Mr. Hammer, will you come down with your
24 attorney, Mr. Boyack.
25 This is the time and place set for sentencing in

1 this case. I have received the presentence report and find
2 that it's a favorable recommendation. I intend to follow
3 it.
4 Anything else you want to say, Mr. Boyack?
5 MR. BOYACK: No, Your Honor.
6 THE COURT: Mr. Hammer, is there anything you
7 want to tell the Court before I impose sentence?
8 MR. HAMMER: No. There's nothing.
9 THE COURT: Mr. Langston, is there anything you
10 want to add?
11 MR. LANGSTON: Your Honor, in the plea
12 agreement, we agreed to recommend that the defendant be
13 granted a stay of imposition of sentence, and also that he
14 receive counseling. We believe that he -- it's a fact that
15 he does need counseling for substance abuse problems and
16 other problems that have happened in his life, and we
17 believe that that should be ordered. That is part of
18 the -- it talks about an evaluation and -- in paragraph
19 number five of the recommendation. We certainly think that
20 should be done. And then any counseling followed up on
21 that.
22 And we'll submit it on that basis.
23 THE COURT: All right. Thank you, Counsel.
24 Anything else, Mr. Boyack?
25 MR. BOYACK: Yes, Your Honor. I just want the

1 Court to know that I've had an opportunity to get to know
2 Dax. When Dax didn't show, he voluntarily -- he rushed
3 himself back. And Dax and I have had some long talks about
4 the substance abuse, and we keep talking about that -- he
5 seems to think it's a problem, and the State and perhaps
6 the Court thinks that it's a problem. Dax may or may not
7 be in denial. And I want to give him some benefit of the
8 doubt in that if it was a problem, he's had a
9 detoxification forcibly imposed upon him, and I think that
10 from our talks in the jail facility that he knows and
11 understand that he's subject to periodic testing. And --
12 and so in a sense, he may have had the very best of a
13 rehabilitation period during his incarceration period, and
14 I hope that that might be enough.
15 On the other hand, we don't want to forestall
16 the counseling that's recommended. We think that's a good
17 idea. I would simply state that if the Court has any
18 reservations about Dax, at least he has detoxified, and I
19 think has an excellent attitude now to proceed and go on
20 with his life.
21 THE COURT: All right. Mr. Hammer, it's the
22 sentence of the Court that you be incarcerated in the Utah
23 State Prison for a period of time not to exceed five
24 years.
25 I'm going to stay the imposition of any fine.

1 I'm going to stay the execution of the sentence. I'm
2 afraid your days as a ski bum are over.
3 MR. HAMMER: I think so.
4 THE COURT: I think so too. Besides, the ski
5 season is about over now anyway.
6 Let me tell you the way it looks to those of us
7 who have been involved in the system as long as Mr. Boyack
8 and Mr. Langston and I have been involved. It looks like
9 you were wandering around, didn't have much to do and
10 suddenly saw a way to convert somebody else's property into
11 cash for drugs. That's ordinarily the way it looks like.
12 It may not be precisely that, but I want you to think about
13 what it looks like to those of us who see a lot of these
14 things. And that's the basis for the Court's order.
15 First term of your probation. I'm going to
16 place you on probation for 36 months and to serve 66 days
17 in the Washington County Jail, with credit for time
18 served. And you're getting out of the jail today.
19 Next term of your probation -- and I'm putting
20 them in the order of importance to the Court -- is that you
21 maintain full-time, gainful, legitimate employment or
22 education.
23 Mr. Hammer, there's no reason in the world for
24 you not to achieve a great deal in your life. You've got
25 the brains; you've got the drive. Frankly, you've got the

1 heritage to do just about anything you want to do. So your
2 days as a ski bum are over. At least for the next three
3 years. If you want to go back to that life-style after
4 that, I guess you could. But I think you'll find out that
5 by the time you get to be my age, your body begins to give
6 out on you, and being a ski bum doesn't work much any
7 more. It's not as much fun as it might be right now. And
8 if you don't have some training, some background, some
9 profession, your life can be really empty. And there's no
10 reason for you to have an empty life.
11 Next term of your probation is that I want you
12 to submit to a substance abuse evaluation through Southwest
13 Mental Health and comply with all recommendations made as a
14 result of that evaluation.
15 If they evaluate you and determine that you are
16 not chemically dependent, then they won't make any further
17 recommendations. But if they do make that determination --
18 and I suspect they may find -- then I want you to deal with
19 the problem now. Don't deal with it two and a half years
20 from now after you have been found in violation of your
21 probation for using drugs that you couldn't get away from
22 and have to go off to the prison.
23 Any question about that term?
24 MR. HAMMER: No. Not really.
25 THE COURT: Okay. You will submit to random

1 urinalysis and other testing of your breath and bodily
2 fluids. And you'll submit to a search of your person, your
3 premises or any property under your control or any vehicle
4 under your control to determine whether or not you are
5 using or possessing controlled substances or alcohol. You
6 will not use alcohol or controlled substances during the
7 term of your probation. You will report this offense to
8 any doctor with whom you consult, and you will report any
9 prescription that you get to Adult Probation and Parole
10 within 24 hours. If you're at work and drop a brick on
11 your foot, and you need a prescription, that's up to the
12 doctor to make that decision. But I just don't want a drug
13 test to come up positive, and everybody be surprised,
14 because you forgot to report a prescription. So tell them
15 of any drugs that you're taking under prescription.
16 Any question about that one?
17 MR. HAMMER: No, sir.
18 THE COURT: All right. Now, you will pay a fine
19 in the amount of $1,150 -- 57. There's a $625 fine plus
20 the 85 percent surcharge.
21 You will be released from the jail. And I don't
22 expect to see you back except to have this matter
23 successfully completed at the end of your probation or such
24 sooner time as you have satisfied Adult Probation and
25 Parole that you're going to no longer involve yourself in

1 controlled substances or criminal conduct.

2 Any questions?

3 MR. HAMMER: No, Your Honor.

4 THE COURT: All right. Good luck to you.

5 You have the right to appeal any error of the

6 Court in this proceeding. You have to file a notice of

7 appeal within 30 days of today's date. If you wait any

8 longer than that, you lose your chance. And you do that by

9 filing a written notice of appeal with the clerk of the

10 Court.

11 Any questions about that, sir?

12 MR. HAMMER: No.

13 THE COURT: Good luck to you, sir.

14 MR. HAMMER: I would like to know one thing.

15 THE COURT: Yes, sir.

16 MR. HAMMER: I did contact Gary Webb of

17 Southwest Mental Health -- whatever it is.

18 THE COURT: Uh-huh.

19 MR. HAMMER: And he did come and see me, and I

20 did get money into the jail so I could get the evaluation.

21 And he told me he'd show up the next morning, and he did

22 not show up.

23 THE COURT: Well, you'll be able to get at him

24 yourself now. You can wait on his desk rather than wait on

25 him to come to you.

1 Good luck to you.

2 MR. HAMMER: All right.

3 MR. BOYACK: Thank you, Your Honor.

4 (Whereupon, the proceedings in the

5 above-entitled matter were concluded.)

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1 CERTIFICATE

2 STATE OF UTAH)
) ss.
3 COUNTY OF WASHINGTON)

4

5 I, PAUL G. MCMULLIN, CSR, RPR, an Official Court
6 Reporter in and for the Fifth Judicial District, State of
7 Utah, do hereby certify:
8 That the foregoing matter, to wit, **STATE OF UTAH**
9 **VS. DAX BRANT HAMMER, CRIMINAL NO. 951500040**, was
10 tape-recorded at the time and place therein named and
11 thereafter, to the best of my listening and understanding,
12 reduced to computerized transcription.
13 I further testify that I am not interested in
14 the event of the action.
15 WITNESS my hand and seal this 6th day of July,
16 1995.

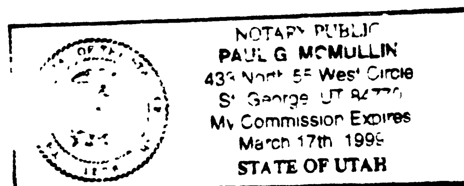
17

18

19 PAUL G. MCMULLIN, CSR, RPR

20

21 RESIDING AT: St. George, Utah
22 MY COMMISSION EXPIRES: 3-17-99



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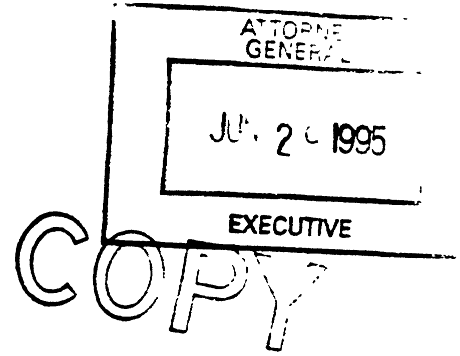
APPENDIX II



GARY W. PENDLETON (2564)
Attorney for Defendant and Petitioner
150 North 200 East, Suite 202
St. George, Utah 84770
Ph: (801) 628-4411

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
Plaintiff and Respondent,	)	PETITION FOR PERMISSION TO APPEAL INTERLOCUTORY ORDER
vs.	)	
DAX BRANT HAMMER,	)	Washington County Case No. 951500444 FS Case No. ________
Defendant and Petitioner.	)	

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1. Dax Brant Hammer (hereinafter "defendant"), through counsel, Gary W. Pendleton, petitions the Utah Court of Appeals to permit an appeal from an interlocutory order of the Honorable James L. Shumate, Fifth District Court, entered in this matter on June 26, 1995. Specifically, defendant seeks permission to appeal the district court's order denying the defendant's motion to suppress physical evidence which the state intends to use in defendant's pending prosecution on a charge of POSSESSION OF A CONTROLLED SUBSTANCE, a second degree felony.

2. A photocopy of the order for which review is sought is attached hereto as Exhibit "A". The supporting findings and conclusions are included as part of the order.

3. STATEMENT OF FACTS. In the early afternoon of April 18, 1995, St. George City police officers and Washington County Sheriff's deputies executed a search warrant at the residence of one Ray Adams in Santa Clara, Utah. The warrant ordered

peace officers to search the residence "as well as all persons present during execution of the search warrant." Because defendant was visiting the Adams residence when police officers arrived, his person was also searched.

Defendant was charged with POSSESSION OF A CONTROLLED SUBSTANCE (methamphetamine within 1000 feet of a public park), a second degree felony, and POSSESSION OF DRUG PARAPHERNALIA (within 1000 feet of a public park), a class A misdemeanor. Following preliminary hearing, the paraphernalia charge was dismissed and defendant was ordered to answer the controlled substance charge.

Following arraignment, defendant moved the district court to quash the search warrant and suppress the state's physical evidence. Defendant claimed standing to attack the search warrant because the warrant was directed at him as someone who was "present during the execution of the search warrant."

Defendant contended that the police officer affiant who applied for the search warrant had, in an attempt to establish an undisclosed informant's reliability, falsely described the informant as "a citizen with no motive to fabricate and nothing to gain from providing this information." This undisclosed informant was one Kelly Moore. Moore was in fact presently facing criminal charges in three separate proceedings, one of which was a felony charge which was pending preliminary hearing.

Defendant subpoenaed Moore to testify at the suppression hearing. Moore failed to comply with the subpoena. Defendant proceeded with the hearing as far as he could without Moore's testimony. The district court issued a bench warrant for Moore's arrest and continued the hearing. Although the hearing was ultimately continued three times, defendant was never able to compel Moore's attendance as a witness.

Because defendant had not been able to secure pretrial release, defense

counsel finally asked the court to rule on defendant's motion to suppress based upon the testimony which the court had already heard. Counsel asked that in the event the court upheld the search warrant, defendant be allowed to revisit the issue when and if Moore's attendance as a witness could be compelled.

The district court then, after expressing concern about the application for the search warrant but without deciding whether or not the warrant had been properly issued, denied defendant's motion to suppress for the following reasons: (1) Defendant had been recently convicted of Attempted Burglary, a third degree felony, and was on probation under the supervision of the office of Adult Probation and Parole; (2) Under the terms of the order of probation, defendant was obliged to submit to searches of <u>any</u> peace officer upon "reasonable suspicion";[1] and (3) Even if the affidavit supporting the issuance of the search warrant was insufficient to establish probable cause, the information set forth therein, was sufficient to establish "reasonable suspicion".

The district court had indicated that in the event defendant were able to secure Moore's attendance, the court would hear additional evidence on the question of whether or not the search warrant had been properly issued. However, that issue has become academic in light of the district court's ruling that the search was legal without the warrant.

Defendant has perfected a timely appeal from the judgment, sentence and order of probation entered upon his Attempted Burglary conviction. That appeal is presently pending before the court of appeals as Case No. 950380-CA. The only issue on that appeal is the validity of the term of probation which requires the defendant to "submit

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[1] Actually, the written order of probation contains no "reasonable suspicion" requirement.

to a search of his person, possessions, and residence upon the request of . . . peace officer . . . ."

4. QUESTIONS OF LAW:

(a) Was the defendant, by virtue of the order of probation entered as a result of his attempted burglary conviction, under a legal obligation to submit to a warrantless search by any peace officer?

(b) Was the defendant, under said probation order, properly required to submit to warrantless searches for controlled substances?

(c) Did the defendant, by accepting probation in the prior criminal proceeding, waive his Fourth Amendment rights?

5. ISSUES RAISED IN TRIAL COURT: The precise legal issues presented for review by this proposed interlocutory appeal were fully and fairly presented to the district court and the district court ruled on each question presented. This is apparent from a review of the minute entries which are attached hereto as Exhibit "B". See Minute Entry, May 18, 1995, at pp. 2-3; Minute Entry, May 26, 1995, at p.2; and Minute Entry, May 31, 1995, at pp. 1-2.

Specifically, in the proceedings before the district court, defense counsel advanced the following arguments and cited the following authorities:

(a) A probationer's Fourth Amendment rights may be curtailed by the court's probation order to the extent, but only to the extent, reasonably necessary to facilitate the administration of an effective system of probation. State v. Velasquez, 672 P.2d 1254 (1983)(parole case).

(b) A term of probation which modifies the probationer's Fourth Amendment rights must be reasonably related to the offense of which he was convicted. Sprague v.

State, 590 P.2d 410 (Alaska 1979)(burglary probationer not properly required to submit to warrantless searches for narcotics).

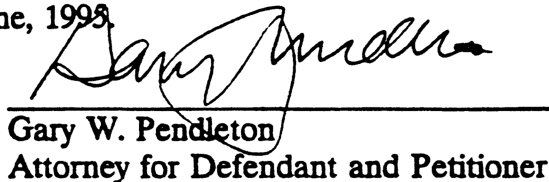
(c) While the administration of an effective system of probation may require submission to warrantless searches by probation officers based upon nothing more than reasonable suspicion, a probation order cannot properly require a probationer to submit to searches by any law enforcement officer. Elkins v. State, 388 So. 2d 1314 (Fla.App. D5 1980); State v. Fields, 686 P.2d 1379 (Hawaii 1984).

(d) A criminal defendant who, faced with a term of incarceration, accepts probation on condition that he waive his Fourth Amendment rights does not voluntarily waive his constitutional rights. Dearth v. State, 390 So.2d 108 (Fla.App. D4 1980).

6. IMMEDIATE APPEAL NECESSARY: Unless the issues presented by this proposed interlocutory appeal are resolved prior to trial, defendant is in jeopardy of being convicted and incarcerated on the basis of evidence which was obtained in violation of his fundamental rights. Furthermore, as long as the district court upholds the admissibility of the state's evidence based upon a theory that the defendant cannot assert any right under the Fourth Amendment, there is no need for the district court to seriously consider the issues of whether or not the search warrant was properly issued and whether or not it properly authorized the search of "all persons present during the execution of the search warrant." Finally, the consolidation of this case with defendant's pending appeal of the probation order entered in the Attempted Burglary case (Case No. 950380-CA) would advance the interests of judicial economy inasmuch as the proposed interlocutory appeal and Case No. 950380-CA present issues which are nearly identical. Moreover, the proposed interlocutory appeal presents facts and circumstances which give dimension to the bare legal issues presented by the appeal in Case No. 950380-CA.

7. ADVANCEMENT OF TERMINATION OF LITIGATION: Determination of the issues presented by the proposed interlocutory appeal will likely dispose of this litigation by dismissal or settlement.

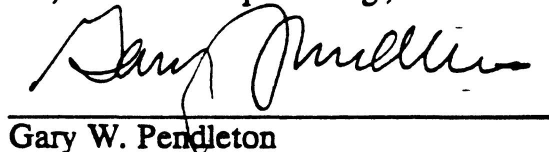
DATED this 27 day June, 1995.



Gary W. Pendleton
Attorney for Defendant and Petitioner

MAILING/DELIVERY CERTIFICATE

I do hereby certify that I did serve the above document this 27 day of June, 1995, by delivering a true copy thereof to Eric Ludlow, Washington County Attorney, 178 North 200 East, St. George, Utah, and by mailing a true copy thereof to Jan Graham, Utah Attorney General, Criminal Appeals Division, 236 State Capitol Bldg., Salt Lake City, Utah 84114.



Gary W. Pendleton

'95 JUN 28 PM COPY
... COURT
... COUNTY
BY ______

GARY W. PENDLETON (2564)
Attorney for Defendant
150 North 200 East, Suite 202
St. George, Utah 84770
Ph: (801) 628-4411

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR

WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH,	)	
Plaintiff,	)	FINDINGS, CONCLUSIONS, AND ORDER DENYING MOTION TO SUPPRESS
vs.	)	
DAX BRANT HAMMER,	)	Case No. 951500444
Defendant.	)	Judge James L. Shumate

This matter came on for further hearing following an evidentiary hearing which was conducted on defendant's motion to suppress evidence obtained during a search of the defendant's person which search was conducted on or about April 18, 1995. In the course of the proceedings on the motion to suppress, defendant has been unable to procure the compulsory attendance of one Kelly Moore who has now been identified by law enforcement officers as an undisclosed informant in the application for the search warrant under which the subject search was initiated. There are presently outstanding warrants for Mr. Moore's arrest not only in this proceeding but also in at least one criminal proceeding in which he is a defendant.

EXHIBIT "A"

The court specifically finds that given the information which has come to light regarding Mr. Moore's difficulties with law enforcement prior to the application for the search warrant, the court is disinclined to rely upon that portion of the search warrant which identifies Moore as "a citizen with no motive to fabricate and nothing to gain from providing this information." Accordingly, the court is without information by which the reliability of this undisclosed informant could be established other than by reference to other information in the affidavit.

However, if the search can be sustained on the basis of the defendant's probationary status, it is not necessary for the court to determine whether or not the search warrant was properly issued or whether or not it properly authorized the search of "all persons present during execution of the search warrant". The court, therefore, considers the issue of whether or not the defendant's probationary status rendered him subject to warrantless searches by peace officers based upon reasonable suspicion. In concluding that it does, the court specifically makes the following

FINDINGS OF FACT

1. Defendant was previously convicted of Attempted Burglary, a third degree felony, in Washington County Criminal No. 951500040 FS, and the court, sua sponte, takes judicial notice of those prior proceedings.

2. Defendant was sentenced on the Attempted Burglary conviction on March 29, 1995, during which proceeding, the district court specifically stated and included as a condition of probation that the defendant submit his person, possessions, and residence to

EXHIBIT "A" CONT.

search at the request of a probation officer at any time and to search by any peace officer upon reasonable suspicion.

3. The judgment, sentence, and order of probation in that case was not signed until May 16, 1995. It was entered as part of the court record on May 25, 1995.

4. Pursuant to that judgment, sentence, and order of probation the defendant signed a standard form Probation Agreement on April 10, 1995, which agreement includes the following language:

> 6. SEARCHES: I will permit Agents of Adult Probation and Parole to search my PERSON, RESIDENCE, VEHICLE or any other property under my control, without a warrant, at any time, day or night, upon reasonable suspicion to ensure compliance with the conditions of my Probation Agreement.
>
> That agreement also contains the following language which is typed in as part of paragraph 11 ("SPECIAL CONDITIONS"): "D. Submit to random tests of breath and bodily fluids, and random searches of person and property."

5. The subject search was conducted by peace officers on April 18, 1995.

6. Probation officers were not involved in conducting the search and did not request that the search be conducted.

7. Even if the circumstances involving Mr. Moore's difficulties with the law are factored into the equation, the affidavit for the search warrant, a copy of which is attached hereto, is sufficient to and does establish "reasonable suspicion" on the part of law enforcement officers to believe that Mr. Hammer, by virtue of his presence on the subject premises, was in possession of controlled substances, specifically methamphetamine.

Based on the foregoing Findings of Fact, the court makes upon the following:

EXHIBIT "A" CONT.

CONCLUSIONS OF LAW

1. The defendant was under the jurisdiction of the Fifth Judicial District Court, Washington County.

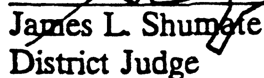
2. The condition of his probation requiring the defendant submit his person and residence to search by peace officers upon reasonable suspicion is a valid and enforceable term of the defendant's probation.

3. The defendant was required to submit to the subject search as there was reasonable suspicion to support the search.

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that defendant's motion to suppress physical evidence obtained in the search of the defendant's person is overruled and denied on the basis that the defendant was subject to warrantless search conducted by peace officers upon reasonable suspicion.

DATED this 23 day of June, 1995.



James L. Shumate
District Judge

Approved as to form and content:

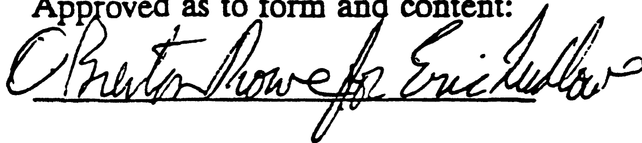


EXHIBIT "A" CONT.

IN THE FIFTH JUDICIAL DISTRICT COURT

WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH,	)	AFFIDAVIT IN SUPPORT OF SEARCH WARRANT
Plaintiff,	)	
vs.	)	
IN THE MATTER OF A CRIMINAL INVESTIGATION	)	Criminal No.

STATE OF UTAH) ss.
COUNTY OF WASHINGTON)

The Affiant undersigned, Mike Reynolds, appearing personally before me and having been sworn, states on oath:

(1) That I am employed by the St. George City Police Department as a law enforcement officer, and I am assigned to investigate narcotics violations in Washington County.

(2) The items for which a search warrant is sought are described as follows: One 10 inch radial arm saw and stand, and one 100 foot power cord bank. Also methamphetamine, and drug paraphernalia (see exhibit C).

(3) These items are believed to be located at or in: residence located at 1185 North Santa Clara Parkway, Santa Clara, Utah, including all outbuildings, all vehicles on the premises, as well as all persons present during execution of the search warrant.

(4) The grounds for issuing a search warrant are as follows:

a. On April 18, 1995, I received information from Santa Clara City Marshall Ken Campbell that on April 17, 1995, he

EXHIBIT "A" CONT

received information from a confidential informant that at about 5:00 that morning, Patrick Sparrow and Eric Fox had stolen a saw and power cord, and traded them to Ray Adams for an eight ball of methamphetamine. The informant stated that he received this information from one of the individuals involved in the theft. The informant is a citizen with no motive to fabricate and nothing to gain from providing this information.

b. Marshall Campbell was also advised on April 17, by Robert Loris, that a ten inch radial arm saw and stand, and a 100 foot power cord bank belonging to Mr. Loris had been stolen from a house Mr. Loris is building at 3520 Chalet Drive, in Santa Clara.

c. The informant also advised Marshall Campbell that he observed a white pickup truck at the job site early in the morning on April 17, 1995.

d. On April 18, 1995, I interviewed Patrick Sparrow, after first advising him of his Miranda rights. Mr. Sparrow stated that he was at 3520 Chalet Drive, in Santa Clara, picking up scrap lumber in the early morning hours of April 17, and he observed the above-described saw. Mr. Sparrow stated that he was driving a white pickup truck.

e. Mr. Sparrow further advised your affiant that the above-described saw is at the residence of Ray Adams, 1185 North Santa Clara Parkway, Santa Clara, Utah.

f. Mr. Sparrow also stated that he used methamphetamine at Ray Adams' residence in the early morning hours of April 17. Mr.

EXHIBIT "A" CONT.

Sparrow stated that he purchased one quarter gram of methamphetamine from an individual named "Rocky" at the residence.

g. Mr. Sparrow stated that "Rocky" is often at the residence, as well as a female named "Darcy," unknown last name, who Mr. Sparrow believes has been in trouble in the past for drug use. Your affiant is aware of individuals by the names of Rocky and Darcy who are involved in the drug culture in St. George.

h. In March, 1995, a confidential informant who has proved to be reliable previously, told your affiant that Ray Adams was distributing very large quantities of methamphetamine and marijuana in the Washington County area, and that the informant had seen methamphetamine in the residence during the month of March. The informant also observed individuals at the residence using methamphetamine. The informant knew of a large quantity of methamphetamine that was being delivered to Ray Adams during the first week of March.

i. During the last part of February, 1995, your affiant was contacted by a different confidential informant who advised that he/she could purchase drugs from Ray Adams, and had purchased drugs from Ray Adams in the past. This individual stated that Ray Adams would drive his vehicle to the Dutchman's Market in Santa Clara and sell the drugs from his vehicle.

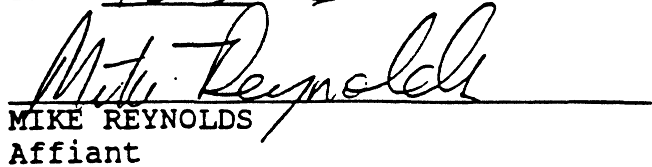
(5) Your affiant has probable cause to believe, and does believe, that the above-described evidence will be located at or in the above-described location, and that it could be easily

Exhibit "A" cont.

removed, concealed, damaged or destroyed, and asks for authority to search without notice.

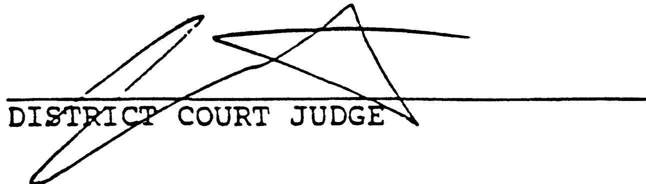
(6) Your affiant believes the foregoing information constitutes probable cause to support a search of the garage at the above residence, and seizure of the above-described evidence.

Dated 4-18-95 Time 1223 HRS



MIKE REYNOLDS
Affiant

SUBSCRIBED AND SWORN TO before me this 18 day of April, 1995.



DISTRICT COURT JUDGE

EXHIBIT "A" CONT.

ITEMS TO SEIZED
SEARCH WARRANT/AFFIDAVIT
CONTINUED

ATTACHMENT "C"

1. Methamphetamine, a crystalline white or yellowish powder solid or rock form, a controlled substance.

2. Packaging material, to include, but not limited to scales, plastic bags, tape, paper bindles cut into squares or tin foil sections.

3. Drug paraphernalia to include but not limited to syringes, bent spoon, cotton balls, mirrors, razor blades, straws, pipes, glassware used to produce "crank" a form of methamphetamine and of any cut material or precursor chemical.

4. Residency papers to include, but not limited to utility receipts and or bills, rental/lease agreements and articles showing occupancy of the premises on ownership of premises or automobiles.

5. U.S. Currency believed to be in close proximity to the narcotics or produced from the sale of narcotics being searched for.

6. Narcotic recordation, to include but not limited to price list, amounts sold, times, dates, amounts purchased, and especially drug indebtness.

7. Telephonic equipment to include but not limited to cordless phones, mobile phones, audio or digital pager devices used to communicate for the purpose of a related unlawful activity.

EXHIBIT "A" CONT.

In the Fifth Judicial District Court of Washington County
State of Utah

STATE OF UTAH, Plaintiff,	**Minute Entry** **Case No. 951500444 FS**
vs.	Judge/Comm'r: JAMES L. SHUMATE Reporter: Tape: 950271; 950272 Count: 364-3466; 2261-3384
HAMMER, DAX BRANT, Defendant,	Clerk: ghm Date: May 18, 1995

(364)

This matter is before District Judge James L. Shumate on May 18, 1995 at 9:00 a.m. for suppression hearing. Mr. Eric A Ludlow is the prosecutor for the State and Mr. Gary W. Pendleton is pro bono defense counsel.

Mr. Pendleton makes a statement in reference to motion to quash the warrant and evidence as well.

DW#1 Marshal Kenneth Campbell is called, sworn and examined regarding investigation of a theft, ExD-2 affidavit in support of search warrant, credibility of informant; informant's drug transaction with Rocky Sand at the Adam's residence.
(412-1572)

The signed and served subpoena for Kelly Moore is discussed as well as his telephone call to the clerk's office informing that he would not be present as he has separated ribs.

Judge Shumate makes a record in reference to affidavit #1 for the search warrant.
(1160)

Mr. Pendleton makes a statement in reference to calling Mr. Ludlow and reason for it. Mr. Ludlow proffers that he has had no discussions with Moore regarding leniency. Mr. Pendleton motions to recess and subpoena Mr. Paul Dame from county attorney's office.
(1581-1780)

EXHIBIT "B"

Criminal No. 951500444 FS

Judge Shumate makes statement in reference to judicial notice regarding Hammer's previous case and waiver of fourth amendment rights to search & seizure, warrant for search reference to paragraph #3.

DW#2 Mike Reynolds s called, sworn and examined regarding being the affiant in the search warrant, Moore's motive to be an informant.
(2194-2604)

(2605) Judge Shumate's statement for the record regarding motivation of informant's and defense counsel states case law.

DW#1 Kenneth Campbell is recalled for clarification of the record regarding whether Moore had discussion with county attorney on April 18, 1995 and if whether or not special consideration for being an informant. (negative) rests.

(3149) Mr. Pendleton further argues his position.

Recess is called and court will reconvene at 2:30 p.m. (3466)

EXHIBIT "B" CONT.

Criminal No. 951500444 FS
Tape: 950272 Count: 2261

Court is back in session all parties are present. (2280) DW#2 Mike Reynolds retakes the stand and is re-direct examined in reference to all three of the confidential informants, execution of the search warrant. Rests

(2750) The court makes a record in reference to Kelly Moore having been served with subpoena, there being no appearance for court today, telephone call to the court. Recess was called this a.m. and the court authorized issuance of order to show cause at 10:30 a.m. supported by a bench warrant with bail set in the amount of $1,000.00. Copy given to defense counsel and the problems with sheriff's department for service of the warrant.

(3133) Mr. Pendleton further argues theory in reference to waiver of fourth amendment applies to the probation office only and the validity of the warrant in this case.

The balance of the hearing to suppress is continued and notice setting shall be sent.

(3384) Recess

EXHIBIT "B" CONT.

IN THE FIFTH DISTRICT - St. George COURT

WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTE ENTRY - NOTICE
Plaintiff,	:	Date: MAY 26, 1995
vs.	:	Case No: 951500444 FS
DAX BRANT HAMMER,	:	Judge: JAMES L SHUMATE
Defendant.	:	Clerk: KLH
	:	Tape: 950300 Count: 300

HEARING

This case is before the court for SUPPRESSION HEARING on the charges of

(1) POSS OF A C/S (Second Degree Felony)

Appearing for the State is ERIC A LUDLOW. The defendant is present. Appearing as counsel for the defendant is GARY W PENDLETON. C-300 Court explained confidential informant is not available today for testimony. C-350 Mr. Pendleton put forth factual basis of confidential informant's credability. Mr. Pendleton stated that law enforcement was clearly in possession of evidence which magistrate should have had in issuing the warrant. Defense still bears burden of proof at this time and it does not shift back to the State. C-1000 Mr. Pendleton gave circumstances of theft of saw and involvement of participants. C-1585 Mr. Pendleton stated there was no probable cause to establish basis of issuance of search warrant. C-2603 Court

EXHIBIT "B" CONT.

responded with concern about defendant Hammer. Defendant was searched under two different assumptions. Warrant may not have been valid but was for purpose of searching location and also persons at location. Because defendant was on probation did police officer have right to search him independent of the warrant? C-3265 Court is not inclined to grant or deny motion to suppress at this time. Reluctance is due to difference between this defendant and case quoted by Mr. Pendleton. Mr. Hammer had a diminished right to privacy through 4th amendment because of his probationary status. Court needs to see more case law on probation restrictions. Confidential informant is definitely in gray area. Defendant is unique case to this court. Court defended officers as acting in good faith. Court needs to look at warrant as a whole and not as bifurcated document. C-3977 Court continued for review hearing on May 31, 1995 at 1:30 p.m.

IN THE FIFTH DISTRICT - St. George COURT

WASHINGTON COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTE ENTRY - NOTICE
Plaintiff,	:	Date: MAY 31, 1995
vs.	:	Case No: 951500444 FS
DAX BRANT HAMMER,	:	Judge: JAMES L SHUMATE
Defendant.	:	Clerk: VPF
(Jail)	:	Tape: 950302 Count: 2721

HEARING

This case is before the court for REVIEW HEARING on the charges of

(1) POSS OF A C/S (Second Degree Felony)

Appearing for the State is ERIC A LUDLOW. The defendant is present. Appearing as counsel for the defendant is GARY W PENDLETON. (2721) This case is before Judge James L. Shumate for a review hearing having been continued from 05-26-95. Mr. Pendleton submits furthe case rulings from other states regarding probation agreements and renews his argument that the search was illegal as the probation order was not signed by the Court until 05-16-95 and not entered into the Court record until 05-25-95.

The Court finds that at the time Defendant Hammer was under the verbal order of the probation agreement and was in the residence at the time of the search. The Court does not authorize the search warrant but is

EXHIBIT "B" CONT.

relying on the verbal probation order. The Court also finds that Officer Reynolds had reasonable suspicion that Defendant Hammer was using drugs and was under the search and seizure rule at the time. The Court denies the motion to suppress.

The court orders that the defendant be remanded to the custody of the County Sheriff.

EXHIBIT "B" CONT.

FILED

JUL 31 1995

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Respondent, v. Dax Brant Hammer, Defendant and Petitioner.	)	ORDER Case No. 950437-CA

Before Judges Bench, Billings, and Jackson (Law & Motion).

This matter is before the court on a petition for permission to appeal an interlocutory order.

IT IS HEREBY ORDERED that the petition is denied.

Dated this 31st day of July, 1995.

Judith M. Billings, Judge

Norman H. Jackson, Judge