RESPONDING TO MOTIONS TO SUPPRESS

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I. Pre-hearing preparation:

A. Can I rely solely on the preliminary hearing transcript?

1. **This is not generally good practice.** *See State v. Gallegos*, 967 P.2d 973, 974-977 (Utah App. 1998) (preliminary hearing evidence differed from trial evidence, which did not ultimately support "plain view" justification for warrantless seizure).

2. **Factual dispute?** If after reviewing the preliminary hearing transcript there is any possibility of a factual dispute regarding any of the issues raised in the motion to suppress, a separate evidentiary hearing should be held to resolve those disputes.

   a. **Subpoena witnesses.** In light of the various theories of the case, subpoena all necessary witnesses.

   b. **Prepare witnesses.** Help your officers to clearly articulate *all* the factors they considered in making the stop or conducting the search. It is particularly important to have them explain the significance of the facts in light of their experience and training. *See United States v. Arvizu*, 534 U.S. 266, 273, 277 (2002); *State v. Markland*, 2005 UT 26, ¶ 11, 112 P.3d 507; *State v. Warren*, 2003 UT 36, ¶¶ 14, 20-21, 78 P.3d 590.

   c. **Decide whose burden to go forward.** Clarify for the trial court as to who has the burden of proof and burden to go forward. If it is a warrant-supported search or seizure, the defendant has the burden. If it is a warrantless search or seizure, the prosecution carries the burden.

3. **No factual dispute?** If there is no factual dispute to resolve, relying on the preliminary hearing transcript may be sufficient. But be sure to think about facts you will need to support any alternative theories against suppression because the appellate courts refuse to remand for further findings. *See State v. Topanotes*, 2003 UT 30, ¶¶ 9-11,76

P.3d 1159 (declining remand for additional findings in support of alternative inevitable discovery argument).

4. **Arguments preserved?** Even if no separate evidentiary hearing is necessary, it is still a good idea to hold a separate hearing to preserve your primary—and alternative—legal arguments against suppression.

B. Should I submit a written memorandum?

1. This is good practice. Include:

a. Statement of the facts. Bear in mind that if the trial court admits the evidence, your statement of facts can be turned into the trial court's formal findings.

b. Challenge expectation of privacy.

i. *Defendant's burden?* Generally, defendants have the burden to establish that "[their] own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois*, 439 U.S. 128, 131 n.1 (1978). But the court of appeals has held that prosecutors have the obligation to affirmatively challenge a defendant's expectation of privacy or the issue may be waived. *See State v. Marshall*, 791 P.2sd 880, 886-87 (Utah App. 1990). Just state that you dispute that the defendant has an expectation of privacy in the item or area searched, and this will shift the burden to defendant to put on evidence that she had an expectation of privacy. *State v. Atwood*, 831 P.2d 1056, 1058 (Utah App. 1992).

ii. *Never stipulate***.** Absent 100% certainty that defendant has an expectation of privacy in the item or area searched, do not stipulate to such. *State v. Beavers,* 859 P.2d 9, 12 n.3 (Utah App. 1993) (Beavers had no expectation of privacy, but because prosecutor stipulated to such, issue not considered on appeal).

Rather, you should consider whether *each* defendant has an expectation of privacy with regard to *each* item and place searched. *See State v. Earl,* 2004 UT App 163, ¶¶ 9-17, 92 P.3d 167; *State v. Webb,* 790 P.2d 65, 79-81 (Utah App. 1990).

iii. *Traffic stops***:** Driver-defendants with permissive possession of the vehicle generally have an expectation of privacy; whereas, passenger-defendants generally do not. *See State v. Scott*, 860 P.2d 1005, 1007 (Utah App. 1993) (passenger); *State v. Sepulveda*, 842 P.2d 913, 915 (Utah App. 1992) (driver).

iv. *Residences***:** Overnight and social guests have an expectation of privacy in another's home, but one who is merely present with the consent of the householder, or for merely business purposes, may not. *See Earl,* 2004 UT App 163, ¶¶12-15 (discussing *Minnesota v. Carter*, 525 U.S. 83 (1998)).

c. Primary *and* alternative arguments against suppression:

i. It is helpful to ask the trial court to make findings on alternative grounds for admitting the evidence. For example, if the appellate court disagrees that no prior illegality preceded the consent to search, it will not necessarily remand for findings on whether the consent was nonetheless sufficiently attenuated. *State v. Robinson*, 797 P.2d 431, 437 (Utah App. 1990) (refusing remand where facts "undisputed" below); *see also See State v. Topanotes*, 2003 UT 30, ¶¶ 9-11. Therefore, it is good practice to make any alternative arguments against suppression in the trial court, in the first instance. *See State ex rel M.V.*, 1999 UT 104, ¶¶ 11-13, 977 P.2d 494 (affirming suppression ruling based on prosecutor's alternative, inevitable discovery argument where ground relied upon by trial court was "close call").

ii) Another reason for making alternative arguments is that if the trial court suppresses the evidence, you will have preserved all possible grounds for appellate review. *See State v. Worwood*, 2007 UT 47, ¶ 16, 164 P.3d 397.

II. The Order:

A. Make a checklist. Compare your previously prepared factual statement with the trial court's oral ruling. If the trial court does not refer to all significant facts in making its findings, remind the trial court of the pertinent fact and ask for a determination. The same applies to the court's legal conclusions. If the court does not rule on all the legal theories advanced by the parties, ask it to do so.

B. Draft factual findings and legal conclusions. Assuming you prevail and are asked to draft the court's ruling, make sure that the facts and law of the case are fully articulated. Make certain that all conflicts or contentions and the court's resolution thereof are included. If in drafting the findings and conclusions you determine that the trial court has failed to rule on all issues, ask the court for a supplemental ruling and incorporate it into the findings and conclusions. *See State v. Lovegren,* 798 P.2d 767, 770-71 (Utah App. 1990) (remanding where trial court findings inadequate for review).

C. Include credibility findings. Ask the trial court to make a credibility finding for all witnesses, *particularly the officer-witness*, and include these findings in the written ruling. Getting the trial court to make credibility findings is important for two reasons. First, it is not at all unusual for an important fact to be omitted from the ruling and the appellate court may not be willing to consider it on appeal. *See, e.g., Brigham City v. Stuart*, 2005 UT 13, ¶ 1 n.1, ¶¶ 1-6, 122 P.3d 506 (recognizing appellate courts review "the trial court's factual findings" and "relevant, objective facts gleaned from testimony given during the evidentiary hearing," but nonetheless refusing to "expend [its] review of the facts" to include testimony at evidentiary hearing). A credibility finding may advert that risk. Second, because credibility is a factual finding subject to review for clear error, it is most difficult to challenge. Therefore, a finding that your officer is credible may well bullet-proof your case from attack on appeal.

III. The Appeal:

A. **Should you appeal?** Assuming that the trial court rules against you, you will doubtless consider an appeal. There are several things you need to think about when considering a potential State's appeal, including the possibility of spreading your unfortunate result state-wide. *See additional handouts* "Considerations Governing Whether to Appeal" and "State's Appeal Request Form." *See also* Utah R. App. 5(e) (grounds for discretionary interlocutory appeals).

B. **Contact the Criminal Appeals Division.** If you think you have a potential State's appeal, contact Fred Voros (fvoros@utah.gov), or Marian Decker (mdecker@utah.gov). You can also call (801) 366-0180, or fax (801) 366-0167, or send materials to: 160 East 300 South, 6th Floor, PO BOX 140854, Salt Lake City, Utah 84114-0854.

C. **Time to appeal.** The State has only twenty days to file an interlocutory appeal, *see* Utah R. App. 5(a), and thirty days to file a direct appeal, Utah R. App. 4(a). Therefore, it is extremely helpful to the Criminal Appeals Division to be notified of the case as soon as possible.

D. **Motion to reconsider.** Notwithstanding your best efforts to preserve all your arguments against suppression, if you think of something after the trial court has ruled against you, try filing a motion to reconsider:

1. **Interlocutory appeal.** Beware that a motion to reconsider does not extend the 20-day deadline for filing an interlocutory appeal. Thus, if the trial court waits 21 days to rule on the motion, you may only appeal from the ruling on the motion to reconsider; you may no longer appeal from the initial interlocutory order.

2. **Direct appeal.** You should also beware that a motion to reconsider must be filed *before* any dismissal is entered—a motion to reconsider does not extend the 30-day deadline for filing a notice of appeal. *See Gillett v. Price*, 2006 UT 24, ¶¶7-10, 135 P.3d 861.

E. Motion to dismiss. The State can file a direct appeal for review of suppression orders *only* when they substantially impair the prosecution's case. *See* UTAH CODE ANN. § 77-18a-1(3)(b) (West Supp. 2008); *see also State v. Troyer*, 866 P.2d 528, 531 (Utah 1993). This requirement prevents the State from refiling charges if the suppression order is affirmed on appeal. *Id.*

In preparing a motion to dismiss and order, we suggest using language that conforms to the statute:

MOTION TO DISMISS WITH PREJUDICE

_____, Deputy _____ County Attorney, moves to dismiss with prejudice on the ground that the court's suppression of evidence has substantially impaired the prosecution's case. UTAH CODE ANN. § 77-18a-1(3)(b) (West Supp. 2008).

ORDER OF DISMISSAL WITH PREJUDICE

The Court certifies that its suppression order has substantially impaired the prosecution's case. UTAH CODE ANN. § 77-18a-1(3)(b) (West Supp. 2008).

IT IS HEREBY ORDERED that the above entitled matter is dismissed with prejudice.