

1975

# Utah v. William Harold Kendrick : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Vernon B. Romney; Attorney General; Earl F. Dorius; Assistant Attorney General; Attorneys for Respondent.

James F. Housley; Attorney for Appellant.

---

## Recommended Citation

Brief of Respondent, *Utah v. Kendrick*, No. 13888.00 (Utah Supreme Court, 1975).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/121](https://digitalcommons.law.byu.edu/byu_sc1/121)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

RECEIVED  
LAW LIBRARY

DEC 17 1975

BRIGHAM YOUNG UNIVERSITY  
Reuben Clark Law School

STATE OF UTAH,

*Plaintiff-Respondent,*

vs.

WILLIAM HAROLD KENDRICK,

*Defendant-Appellant.*

Case No.

13888

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE  
THIRD JUDICIAL DISTRICT COURT, IN AND  
FOR SALT LAKE COUNTY, STATE OF UTAH, THE  
HONORABLE JAY E. BANKS, JUDGE, PRESIDING.

VERNON B. ROMNEY

Attorney General

EARL F. DORIUS

Assistant Attorney General

236 State Capitol

Salt Lake City, Utah 84114

*Attorneys for Respondent*

JAMES F. HOUSLEY

316 Kearns Building

Salt Lake City, Utah 84101

*Attorney for Appellant*

MAY 12 1975

Clerk, Supreme Court, Utah

## TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT .....	1
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF THE FACTS .....	2
ARGUMENT .....	4
POINT I. THE TRIAL COURT DID NOT VIOLATE APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BY RECEIVING INTO EVIDENCE A CODEFENDANT'S PRIOR TESTIMONY .....	4
CONCLUSION .....	19

### CASES CITED

California v. Green, 399 U. S. 156, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) .....	11, 15
Douglas v. Alabama, 380 U. S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965) .....	14, 15
Dutton v. Evans, 400 U. S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) .....	7, 11
Mancussi v. Stubbs, 408 U. S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972) .....	12
Mason v. United States, 407 F. 2d 903 (10th Cir. 1969) .....	9
Mattox v. United States, 156 U. S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895) .....	9, 13
Pointer v. Texas, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) .....	8

## TABLE OF CONTENTS—Continued

	Page
Schneble v. Florida, 405 U. S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972) .....	16
State v. Oniskor, 29 Utah 2d 395, 510 P. 2d 929 (1973) .....	16
United States v. Allen, 409 F. 2d 611 (10th Cir. 1969) .....	13
United States v. Elmore, 423 F. 2d 775 (4th Cir. 1970) .....	9
United States v. Gernie, 252 F. 2d 664, (2d Cir. 1958), cert. den., 356 U. S. 968, 78 S. Ct. 1006, 2 L. Ed. 2d 1073, rehearing denied, 357 U. S. 944, 78 S. Ct. 1383, 2 L. Ed. 2d 1558 .....	14
United States v. Mobley, 421 F. 2d 345 (5th Cir. 1970) .....	9

### STATUTES CITED

Utah Code Ann. § 76-6-301 (1953), as amended .....	4, 18
Utah Code Ann. § 77-42-1 (1953) .....	17
Utah Rules of Evidence, Rule 20 (1971) .....	6
Utah Rules of Evidence, Rule 25(a) (1971) .....	5
Utah Rules of Evidence, Rule 62(7)(a) (1971) .....	9
Utah Rules of Evidence, Rule 63(1) (1971) .....	6
Utah Rules of Evidence, Rule 63(3) (1971) .....	8

### OTHER AUTHORITIES CITED

McCormick, Evidence 606 (1972) .....	8
--------------------------------------	---

### CONSTITUTIONS CITED

V Amendment, U. S. Const. ....	5, 13, 15
VI Amendment, U. S. Const. ....	4, 11

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

STATE OF UTAH,

*Plaintiff-Respondent,*

vs.

WILLIAM HAROLD KENDRICK,

*Defendant-Appellant.*

Case No.

13888

---

BRIEF OF RESPONDENT

---

STATEMENT OF THE NATURE OF THE CASE

The appellant, William Harold Kendrick, appeals from a conviction of the crime of robbery entered against him in the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant was found guilty of robbery by a jury

and was sentenced to serve in the Utah State Prison for the indeterminate term of 1-15 years.

### RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the verdict and judgment rendered by the jury at the trial.

### STATEMENT OF THE FACTS

Respondent agrees with appellant's Statement of Facts with the following additions and corrections:

1. The evidence offered by the State proved that:  
(a) appellant and Mr. Travis entered the lounge together and pushed Mr. Zancanella and Mr. Roberts down on the floor (Tr. 32, 33, 80); (b) appellant and Mr. Travis forcibly took the victims' wallets, money, and other personal belongings, and then took money belonging to the business located in a money bag and cash register behind the bar counter (Tr. 33-36, 55-58); (c) Mr. Roberts was beaten and lost consciousness when he was hit over the head (Tr. 36, 55-56); (d) two persons left the lounge together carrying a money bag (Tr. 81); (e) Mr. Zancanella told the police he had been robbed (Tr. 84, 112); (f) appellant, Mr. Travis, and Miss Ruwe were later apprehended with various rolls of coins, sacks, and personal items belonging to Mr. Zancanella, Mr. Roberts, and the lounge (Tr. 108, 109); (g) at the place of apprehension, Mr. Zancanella identified appellant and Mr. Travis as the men who had robbed him (Tr. 126).

2. Mr. Zancanella denied ever putting his hand on Mr. Travis or making a pass at appellant or making a homosexual pass at the bartender (Tr. 41, 42, 48).

3. Mr. Roberts denied ever raising his fists or yelling at appellant (Tr. 75).

4. Mr. LaVoie, a bystander across the street from the scene of the crime, testified that two people got out of a blue 1962 Impala with green license plates and white lettering, went into the lounge, exited carrying a money bag, and drove quickly away (Tr. 79-83).

5. Appellant, Mr. Travis, and Miss Ruwe had used and were apprehended in a vehicle fitting the above description (Tr. 92, 114, 116).

6. The refusal of Mr. Travis to testify was not anticipated by the prosecution (Tr. 187, 188).

7. The four leading questions asked by the prosecution to Mr. Travis at the time Mr. Travis refused to testify did not incorporate the testimony given by Mr. Travis at his previous trial. Rather, the only questions that the prosecution asked involved whether Mr. Travis had previously met or traveled with the appellant and certainly did not incorporate the testimony within the fifty-six pages of transcript (Tr. 186).

NOTE: Page numbers refer to typed numbers of the transcript as determined by the reporter in the trial court below, in accordance with appellant's brief, and not according to transcript page numbers which include the documents' portion of the transcript on appeal.

## ARGUMENT

## POINT I.

THE TRIAL COURT DID NOT VIOLATE APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BY RECEIVING INTO EVIDENCE A CODEFENDANT'S PRIOR TESTIMONY.

Appellant was convicted of robbery under Utah Code Ann. § 76-6-301 (1953), as amended, which provides:

"(1) Robbery is the unlawful and intentional taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear.

(2) Robbery is a felony of the second degree."

The fact that the basic elements of the crime of robbery were committed is not disputed by appellant. Appellant's contention is that the trial court violated appellant's Sixth Amendment rights to confront the witnesses against him when the court allowed a codefendant's prior testimony to be received into evidence, which was given at the codefendant's own separate trial and which implicated the appellant. Respondent contends that (1) the admission of the prior testimony does not raise a constitutional issue with respect to appellant's Sixth Amendment rights; (2) any constitutional objec-



tion that is raised falls within the exceptions outlined by the United States Supreme Court; and (3) even if appellant's right to confront the witnesses against him was violated, the error was harmless beyond a reasonable doubt.

A. The admission of the prior testimony in the present case did not violate appellant's constitutional rights, but rather was designed to attack the credibility of the codefendant. The prosecution was aware that the codefendant had implicated the appellant in the robbery during the codefendant's earlier severed testimony. In order to present this additional implicating evidence before the jury, the codefendant was called by the prosecution to testify against the appellant (Tr. 183). The codefendant's refusal to testify was not anticipated by the prosecution (Tr. 187, 188). Because the codefendant refused to testify, the trial court held the codefendant in contempt of court on the grounds that the codefendant was not an accused in the case, he waived his Fifth Amendment rights at the time of his trial and based on his testimony at that time, he claimed innocence of this particular robbery, and if he testified the same way, it would not incriminate him (Tr. 185, 187). The trial court had the authority to require the codefendant to testify under Rule 25(a), U. R. E. (1971), which requires a witness to testify and not invoke the privilege against self-incrimination if the judge finds that the matter will not incriminate the witness. Nevertheless, the prosecution was faced with two difficult alternatives. The prose-

cution could either allow the jury to infer from the codefendant's refusal to testify that the codefendant had committed the crime, and not the appellant, or the prosecution could impeach the codefendant as a hostile witness by introducing his prior inconsistent testimony. The prosecution of course chose to impeach the codefendant under Rule 20, U. R. E. (1971), which allowed any party, including the party calling the witness, to introduce any statement or conduct relevant upon the issues of credibility, and under Rule 63(1), U. R. E. (1971), which provides:

"A prior statement of a witness, if the judge finds that the witness had an adequate opportunity to perceive the event or condition which his statement narrates, describes, or explains, provided that (a) it is inconsistent with his present testimony, or (b) it contains otherwise admissible facts which the witness denies having stated or has forgotten since making the statement, or (c) it will support testimony made by the witness in the present case when such testimony has been challenged."

Rule 63(1) "also makes such statement, when admitted, substantive evidence in the case." Under the Rules of Evidence, therefore, the prior testimony of the codefendant was admissible for impeachment purposes and could be considered as substantive evidence.

Appellant's argument, that such evidence should not be admissible, is also invalid because of its sheer impracticality. If the court were to adopt the position of

the appellant no severed trial of any codefendants would be free from the defense tactic of each defendant blaming his codefendant, and then refusing to testify in the codefendant's separate trial, assured that the prior inconsistent testimony would never be allowed to be introduced in either of the trials. By denying the prosecution the opportunity to call as a witness a codefendant whose testimony has implicated the defendant on trial and to impeach his refusal to testify by prior inconsistent testimony, the court would be burdening the prosecution with requirements beyond their control simply on the basis that the codefendants had been granted a severed trial. Clearly, such a blanket opportunity for collusion with no similar opportunity afforded the prosecution to present prior inconsistent testimony is not warranted.

B. The decisions of the United States Supreme Court make it clear that the purpose of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of the prior statement. *Dutton v. Evans*, 400 U. S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970). The common law has always recognized exceptions to the confrontation clause where the defendant was given an opportunity to cross-examine the witness and the witness was subsequently unavailable to testify. Existence of these exceptions to the confrontation clause indicates that the confrontation clause does not confer an absolute right to cross-examine.

Indeed, *Pointer v. Texas*, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 933 (1965), the landmark decision which held that the right of cross-examination was included in the right of an accused in a criminal case to confront the witnesses against him, referred to many decisions that have approved the admission of hearsay evidence. Professor McCormick, in explaining that the emphasis of the confrontation clause is concerned with personal presence of the witness at the trial and affording defense counsel an opportunity for cross-examination, also agrees that the confrontation clause is not absolute and that in some instances both requirements may be dispensed with. McCormick, *Evidence* 606 (1972).

Most of the decisions involving a defendant's right to confront the witnesses against him concern prior testimony by the appellant offered in a preliminary hearing or prior statements by the appellant made out of the courtroom. Thus, the present case is rather unique in that the prior testimony was offered by the appellant's codefendant in a previous severed trial.

The Utah Rules of Evidence allow the introduction of prior testimony under Rule 63(3), as an exception to the hearsay rule, if:

“ . . . the judge finds that the declarant is unavailable as a witness . . . in another action . . . , when . . . the issue is such that the adverse party on the former occasion has the right and opportunity for cross-examination with an interest and motive similar to that which the adverse

party has in the action in which the testimony is offered.”

Concerning the requirement of unavailability, the United States Supreme Court held long ago that admitting the prior testimony of an unavailable witness did not violate the confrontation clause of the Sixth Amendment. *Mattox v. United States*, 156 U. S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895). In addition, the Utah Rules of Evidence recognize that a witness is unavailable when he is exempted from testifying on the ground of privilege. Rule 62(7)(a), U. R. E. (1971). Because of the practical necessities, the great weight of authority still holds that the exercise of a privilege not to testify renders a witness unavailable. *Mason v. United States*, 407 F. 2d 903 (10th Cir. 1969); *United States v. Mobley*, 421 F. 2d 345 (5th Cir. 1970); *United States v. Elmore*, 423 F. 2d 775 (4th Cir. 1970).

The requirement that the adverse party had an opportunity for cross-examination during the previous testimony, with an interest and motive similar to the present action was satisfied by the prosecution's cross-examination of the codefendant.

This is clear from observing the two effects of the codefendant's prior testimony. First, the appellant was implicated as a perpetrator of the robbery. The effect of this testimony presented nothing to the jury which had not already been testified to by the two victims of the crime, and was already an issue before the jury. Second, by implicating the appellant as the sole pepe-

trator of the robbery, the codefendant was exculpating his own participation in the crime. This testimony was adequately cross-examined by the prosecution in the previous trial since the conviction of the codefendant depended entirely upon a showing by the prosecution that appellant was not the sole perpetrator of the crime. Thus, the prosecution was of necessity forced into challenging the codefendant's testimony in the same way as appellant would have done had he been the party to do so.

For example, during the cross-examination the prosecution:

(a) challenged the codefendant's statement of appellant's reasons for returning to the bar until the codefendant admitted that the reasons did not make any sense to him (Tr. 226);

(b) challenged the codefendant's statement that appellant was the sole perpetrator of the robbery until the codefendant finally admitted that he did not know that appellant took the wallets and money of the victims (Tr. 231);

(c) challenged the codefendant's assessment of the time in which appellant accomplished the entire robbery until the court had to stop the prosecution for improper questioning (Tr. 232-233);

(d) challenged the codefendant's statement that the appellant was using a weapon until several objections were raised by defense counsel (Tr. 233-234);

(e) challenged the codefendant's reason for not mentioning the truth to the police at the time he was apprehended until defense counsel objected (Tr. 239);

(f) challenged the defendant's perception and reliability concerning his not seeing the money bag which was used during the robbery (Tr. 235).

Therefore, the role of the appellant in the robbery, according to the codefendant's prior testimony, could be weighed by the jury in light of the prosecution's cross-examination, the codefendant's prior conviction, his reliability, and his motive in offering such testimony.

Respondent also contends that the reliability of the prior testimony satisfied appellant's Sixth Amendment rights. In *Dutton v. Evans*, 400 U. S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970), where an inmate related at trial a statement of respondent's codefendant who did not testify at the defendant's trial, the court held there was no violation of Sixth Amendment rights where the testimony was sufficiently clothed with certain "indicia of reliability." These indicia of reliability have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

In *California v. Green*, 399 U. S. 156, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970), where a minor's statement at respondent's preliminary hearing was admitted to prove that respondent had furnished marijuana to the minor in violation of California law and where a claimed lapse

of memory by the minor affected respondent's right to cross-examination, the Court held that even in the absence of an opportunity for full cross-examination at trial, the admission into evidence of the preliminary hearing testimony did not violate the Constitution. The Court in *Green* echoed the "indicia of reliability" test and compared the purposes of the confrontation clause with the dangers of admitting an out-of-court statement. The majority stated that the purpose of confrontation was to insure that the witness is under oath; that he is subject to cross-examination; and that his demeanor is observed by the trier of fact. *Id.* at 158. The dangers most courts fear in admitting out-of-court statements are substantially lessened in the present case because the testimony was made during a prior trial where the witness was testifying under oath and his testimony was subject to cross-examination.

The "indicia of reliability" test, that affords the trier of fact a satisfactory basis for evaluating the truth of the prior statement, was also applied in *Mancussi v. Stubbs*, 408 U. S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972). The case involved prior testimony by a state's witness who had premanently removed himself to a foreign country and could not be compelled to return to the second trial by the state and held that the witness was considered unavailable at the second trial and therefore there was no constitutional error in permitting his prior recorded testimony to be read to the jury at the trial. In the present case, the prior statement was read into



the record when appellant's codefendant refused to testify on the grounds of the Fifth Amendment. Under the "indicia of reliability" standard in *Mancussi*, the prior testimony of appellant's codefendant was admissible on the grounds that the witness was unavailable at trial and his prior testimony was reliable since it was presented in the first trial.

In *United States v. Allen*, 409 F. 2d 611 (10th Cir. 1969), the court discussed the factors of unavailability, prior testimony, and demeanor which have been considered in connection with confrontation issues.. The case involved testimony of several witnesses at the preliminary hearing which was later read into the record after defendant invoked his privilege under the Fifth Amendment, and held that the prior testimony was admissible and did not violate appellant's right to confrontation. In the opinion the court considered three arguments which it felt were untenable. First, the court found that the requirement of unavailability was satisfied not when the witness was physically present but when his testimony was unavailable because of invocation of the Fifth Amendment privilege. Second, the court found that the preliminary hearing testimony and actual trial testimony were substantially similar. Third, on the basis of *Mattox, supra*, the court held that evidence of the witness's demeanor while testifying at the preliminary hearing was not an essential ingredient of the confrontation privilege. Following these considerations, the testimony of the codefendant in the present case was

admissible because the codefendant was unavailable, the trial testimony was taken under substantial safeguards and the fact that the witness's demeanor was not presented for the jury was not controlling.

Appellant also contends that knowledge by the prosecution that appellant would invoke his privilege against self-incrimination was a controlling factor. Respondent has previously shown that the refusal of the codefendant to testify was not anticipated by the prosecution (Tr. 187, 188). Nevertheless, "the mere calling of a witness to the stand to make him invoke the privilege against self-incrimination does not constitute a denial of the right to confrontation." *United States v. Gernie*, 252 F. 2d 664 (2d Cir. 1958), *cert. den.*, 356 U. S. 968, 78 S. Ct. 1006, 2 L. Ed. 2d 1073, *rehearing denied*, 357 U. S. 944, 78 S. Ct. 1383, 2 L. Ed. 2d 1558. In *Gernie*, a witness who was implicated in the same crime for which the defendant was being tried and who had plead guilty prior to trial was called to the stand and invoked the privilege. The Second Circuit was of the opinion that it made no difference whether the government had reason to believe that the witness would refuse to testify. The government had a right "to produce the witness and thus show the jury that it was bringing forward such witness as may have knowledge bearing on the case." 252 F. 2d at 669.

Appellant bases his contention that his constitutional right to confrontation was violated primarily upon *Douglas v. Alabama*, 380 U. S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965), which held that it was

error to admit an out-of-court statement by a co-defendant, when the codefendant refused to testify and the statement was brought before the jury by the prosecution's leading questions. Respondent contends that *Douglas* is distinguishable from the present case and that the more appropriate rule is the rule under *Mancussi* and *Green, supra*. The most obvious distraction is that in *Douglas* the confession was made to police officers out of court, whereas the codefendant's statement in the present case was made during a previous trial, under oath, and subject to cross-examination. Not only was the prior testimony in the present case subject to cross-examination, but it was subject to cross-examination at the time the statement was made, a relevant factor considered in *Green, supra*. Second, *Douglas* was decided on the basis of no adequate opportunity for cross-examination whereas the quality of the cross-examination of the codefendant is the only issue in the present case. Third, in *Douglas*, the confession "formed a crucial link in the proof both of Douglas' act and of the requisite intent to murder." 380 U. S. at 419. In the present case there was sufficient evidence without the admission of the codefendant's testimony to show that a robbery had been committed and that appellant committed the crime. Fourth, the flagrant impropriety by the prosecution in *Douglas*, is absent in the present case, for in *Douglas*, after the witness had claimed the Fifth Amendment, the prosecution persisted in reading the confession bit by bit pausing to ask the witness after each part, "Did you make that statement?" In the present case the court

permitted the prosecution to ask four leading questions to which the co-defendant invoked his privilege against self-incrimination. None of the questions referred to the substantive material of the transcript (Tr. 186).

C. If the court finds that the admission into evidence of the prior testimony of the codefendant presented a constitutional issue, then the question remains whether the error was harmless beyond a reasonable doubt. In *Schneble v. Florida*, 405 U. S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972), where three defendants tried jointly were convicted of murder following a trial in which police officers testified concerning a detailed confession by petitioner's codefendant, who did not testify, and which undermined petitioner's original version of the crime, the Court held that any violation of petitioner's constitutional rights that might have occurred was harmless beyond a reasonable doubt in view of the overwhelming evidence of petitioner's guilt as manifested by his confession, which completely comported with the objective evidence, and the comparatively insignificant effect of the codefendant's admission. The Utah Supreme Court, in *State v. Oniskor*, 29 Utah 2d 395, 510 P. 2d 929 (1973), where the defendant was convicted of murder following a trial in which the testimony of two witnesses at the preliminary hearing, who were outside of the State at the time of trial, was read to the jury, the Court held that although the State had made an insufficient effort to obtain the presence of the witnesses and the defendant was thereby denied his right to confrontation of the

witnesses against him, the error was not such that it was reasonably probable that there would have been a result more favorable to the defendant in the absence of the error. The Court reasoned that the error was to be evaluated in conformity with Utah Code Ann. § 77-42-1 (1953), which required the Court to render judgment without regard to errors or defects which did not affect the substantial rights of the parties. In the present case if the admission of the prior testimony was a denial of appellant's constitutional right to confrontation, then it was error harmless beyond a reasonable doubt and would not have made a difference in the outcome of the trial. At the trial the evidence presented by the prosecution showed that: (a) appellant and Mr. Travis entered the lounge together and pushed Mr. Zancanella and Mr. Roberts down on the floor (Tr. 32, 33, 80); (b) appellant and Mr. Travis forcibly took the victims' wallets, money, and other personal belongings, and then took money belonging to the business located in a money bag and cash register behind the bar counter (Tr. 33-36, 55-58); (c) Mr. Roberts was beaten and lost consciousness when he was hit over the head (Tr. 36, 55-56); (d) two persons left the lounge together carrying a money bag (Tr. 81); (e) Mr. Zancanella told the police he had been robbed (Tr. 84, 112); (f) appellant, Mr. Travis, and Miss Ruwe were later apprehended with various rolls of coins, sacks, and personal items belonging to Mr. Zancanella, Mr. Roberts, and the lounge (Tr. 108, 109); (g) at the place of apprehension, Mr. Zancanella identified appellant and Mr. Travis as the men who had robbed him (Tr. 126).

In addition, a witness who observed the events surrounding the crime testified that he saw two persons enter the lounge, return with what appeared to be a money bag and leave in a vehicle of the same description as was later apprehended by officers and which contained the appellant and his codefendant (Tr. 79-83). Furthermore, the evidence showed that the appellant was apprehended within minutes after the robbery had taken place while he was in the process of leaving the State of Utah (Tr. 158, 159). This evidence was clearly sufficient, without the testimony of appellant's codefendant, for the jury to find that a robbery had been committed and appellant was one of the persons who committed the crime. Therefore, if it appears that the introduction of the prior testimony raised a constitutional objection to the procedure of the trial court, the error was not of sufficient weight to preclude the jury from rendering a verdict that appellant was guilty beyond a reasonable doubt.

In addition to his constitutional objection to the procedure of the trial court, the appellant claims that the admission into evidence of a metal club was error since the charge of aggravated robbery had been dropped by the prosecution. Respondent contends that the admission of the weapon was not error since Utah Code Ann. § 76-6-301 (1953), as amended, under which appellant was charged, required that the taking of the victims' property be "against his will, accomplished by means of force or fear." Clearly, the possession of a metal club by appellant was evidence to be evaluated by

the jury in determining whether the requirements of the statute had been met.

### CONCLUSION

Because the prior testimony of appellant's codefendant was admitted into evidence for impeachment purposes, was clothed with certain indicia of reliability in that it was made in court, under oath, and subject to adequate cross-examination, and any error that could have been committed was harmless beyond a reasonable doubt, appellant's right to confront the witnesses against him was not denied by the procedure of the trial court. In addition, evidence of a metal club possessed by the appellant during the robbery was admissible to prove one of the elements of the crime. Therefore, respondent respectfully submits that appellant's request for reversal or a new trial be denied and that the verdict and judgment of the jury at the trial be affirmed.

Respectfully submitted,

VERNON B. ROMNEY  
Attorney General

EARL F. DORIUS  
Assistant Attorney General

*Attorneys for Respondent*

**RECEIVED  
LAW LIBRARY,**

**DEC 17 1975**

**BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School**