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1975
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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM HAROLD KENDRICK,
Defendant-Appellant,

vs.

THE STATE OF UTAH,
Plaintiff-Respondent.

Case No. 13888

DEFENDANT-APPELLANT'S BRIEF

**Appeal from the District Court of Salt Lake County,
State of Utah
Jay E. Banks, District Judge**

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FILED
MAR 2 0 1975
Clerk, Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM HAROLD KENDRICK, *Defendant-Appellant,* vs. THE STATE OF UTAH, *Plaintiff-Respondent.*	Case No. **13888**

DEFENDANT-APPELLANT'S BRIEF

NATURE OF THE CASE

This is a prosecution for robbery, a felony of the second degree, under the provisions of Section 76-6-301, Utah Code Annotated, 1953, as amended.

DISPOSITION IN THE LOWER COURT

After a trial before a jury which returned a verdict of "quilty of robbery as charged in the information", the trial court entered a judgment and commitment sentencing defendant-appellant to the Utah State Prison for the indeterminate term (1-15 years) as provided by law for the crime of robbery.

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RELIEF SOUGHT ON APPEAL

Defendant-appellant seeks reversal of the judgment and commitment based on said verdict and the discharge of said defendant-appellant or, that failing, reversal of said judgment and commitment and remand of the case back to the trial court for a new trial.

STATEMENT OF FACTS

On June 27, 1974, defendant-appellant and James E. Travis were charged by a Complaint filed in the City Court of Salt Lake City with aggravated robbery in violation of Sections 76-6-301(1) and 76-6-301(1) (a) a first degree felony ". . . as follows, to-wit: that said James E. Travis and William Harold Kendrick, . . . [on or about the 26th day of June, 1974 at the County of Salt Lake, State of Utah] . . . , robbed Blair C. Roberts and Robert C. Zancanella, and in so doing used a deadly weapon, to wit: a wooden club; . . ." (R. 10). On July 18, 1974, a preliminary hearing was held, after which the court dismissed the charge of aggravated robbery, ordered that the Complaint be amended to charge non-aggravated robbery and bound both defendants over to stand traial in the District Court on the Amended Complaint (R. 2).

On July 25, 1974, an Information was filed by the Salt Lake County Attorney charging James E. Travis and William Harold Kendrick with "robbery, a felony of the second degree, in violation of Section 76-6-301, Utah Code Annotated, 1953, as amended, as follows, to-wit: that on or about the 26th day of June,

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1974, in Salt Lake County, State of Utah, the said James E. Travis and William Harold Kendrick robbed Blair C. Roberts and Robert C. Zancanella; . . ." (R.11).

On July 26, 1974, both defendants entered pleas of "not guilty" to the crime of robbery as charged in the information (See Minute Entry, R. 13). Motions to Sever were filed in behalf of defendant Travis on July 29, 1974 (R. 16) and by defendant Kendrick on August 26, 1974 (R. 19).

On August 9, 1974, the undersigned was appointed as counsel for the defendant-appellant (Minute Entry of August 9, 1974, R. 17 and Order of August 16, 1974, R. 18).

On August 26, 1974, the date set for joint trial of defendant-appellant and his co-defendant, James E. Travis, the court heard argument and took testimony on the Motions to Sever of each of said defendants and thereafter granted the Motion to Sever and ordered that defendant-appellant's co-defendant, James E. Travis, be tried first, beginning on that date. (See Minute Entry of August 26, 1974, R. 23-24; Transcript of Proceedings of Monday, August 26, 1974, pps. 1-21).

The trial of defendant-appellant's co-defendant, James E. Travis commenced thereafter. In addition to the evidence presented by the state therein, James E.

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Travis took the stand and testified in his own defense. During his testimony he testified, in substance and effect, that the robbery was committed by defendant-appellant (See Minutes of August 27, 1974 and August 28, 1974, R. 25 and R. 26; See also Transcript pps. 195-252).

Following introduction of further evidence, instructions by the court and argument by counsel, the jury returned the verdict finding James E. Travis guilty of robbery as charged in the information (See Minutes of August 28, 1974; R. 27 and Verdict, R. 49).

On September 20, 1974, defendant-appellant's co-defendant, James E. Travis, was committed to the custody of Division of Corrections under Utah Code 76-3-404 for ninety-days evaluation period and ordered to be returned to court on December 27, 1974 for sentencing (See Minutes of September 20, 1974, R. 90 and Order, R. 96).

From that Order James E. Travis appealed to this court in a separate appeal No. 13834 entitled, "State of Utah, Plaintiff-respondent vs. James E. Travis, Defendant-appellant." As of the date of this Brief, said appeal is still pending.

On September 11, 1974, defendant-appellant's severed jury trial commenced before the Honorable Jay E. Banks, District Judge, sitting with a jury and continued to September 12. At the conclusion of the

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trial, the jury returned a verdict finding the defendant-appellant guilty of robbery as charged in the information (See Minute Entries of September 11, 1974, R. 58-59 and September 12, 1974, R. 54-57 and Verdirt, R. 86-2nd page).

During his case in chief, the prosecutor repeatedly referred to, and questioned witnesses concerning, Exhibit 7, a steel pinch bar with an electrical cord wrapped around it to form a handle. At the conclusion of the prosecution's case in chief, Exhibit 7 was received into evidence over defendant-appellant's objections (TR. 137, R. 60).

After the prosecution rested its case in chief, defendant-appellant, in his own defense, took the stand and testified, in substance and effect, that he and his co-defendant had been subjected to homosexual assault by Robert C. Zancanella while patronizing the Radio City Lounge; that after the lounge had closed, they, together with Lynn Ruwe, went to a party at the home of Duane Daniel, the day bartender at the Radio City Lounge; that while at the party, he was subjected to an homosexual assault by Duane Daniel whereupon defendant-appellant, his fiancee and his co-defendant left the party and returned to the Radio City Lounge to buy beer; that he entered the Radio City Lounge and was subjected to another homosexual assault by Robert C. Zancanella whereupon he hit Zancanella; that Blair Roberts then entered into the fight and defendant hit Blair Roberts (TR. 152-156). Defendant-

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appellant further testified that he then left the bar and that no robbery occurred. Defendant-appellant explained the presence of money and other property allegedly taken in the robbery in the car of Miss Ruwe at the time of their arrest by theorizing either that Duane Daniel left those objects in the car during the ride from the Radio City Lounge to Daniel's home or that Travis or Lynn Ruwe took the property from the home of Duane Daniel and left it in the car (TR. 160-163).

In its rebuttal, the prosecution called defendant-appellant's co-defendant, James E. Travis. When Travis refused to testify, the prosecution was permitted, over defense objections, to ask Travis leading questions which incorporated the testimony given in his own earlier severed trial. Travis declined to answer said questions on the ground that it might tend to incriminate him (TR. 185-187). In addition, the prosecution was permitted to introduce testimony of the court reporter who reported the proceedings at Travis' trial and who read, verbatim from her notes, the testimony of Travis given in his own defense at his trial (TR. 187-196).

The substance and effect of Travis' testimony was that defendant-appellant was the one who robbed Roberts and Zancanella at the Radio City Loung (TR. 196-252). Defendant-appellant made timely and continuous objections to the foregoing (TR. 188, 193, 195-196, 253-254, 260-261) and made timely Motion for

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Mistrial (TR. 253, 260-261) and Motion to Strike (TR. 254, 261). Counsel for defendant-appellant attempted to cross-examination Travis but Travis invoked his 5th Amendment privilege and refused to testify (TR. 256-260).

Following instructions by the court, the prosecutor argued, in his summation, over the objections of the defense, that because defendant refused to tell the police officers, during their interrogation of him on the morning of the alleged robbery, what happened at Daniel's party and at the Radio City Lounge, that defendant-appellant's testimony was unworthy of belief (TR. 262-264).

Upon the verdict finding defendant-appellant guilty of robbery as charged in the information, the court entered a judgment and commitment directing the defendant-appellant be confined and imprisoned in the Utah State Prison for the indeterminate term (1 to 15 years) provided by law for the crime of robbery (R. 98-99) (TR. 272).

From that judgment and commitment, defendant-appellant brings this appeal.

Additional facts will be discussed and developed within the body of the Argument.

ARGUMENT

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ASK

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LEADING AND SUGGESTIVE QUESTIONS OF A PROSECUTION WITTNESS, APPELLANT'S CO-DEFENDANT, JAMES E. TRAVIS, AND IN PERMITTING THE COURT REPORTER WHO REPORTED TRAVIS' TRIAL TO TESTIFY AS TO TRAVIS' TESTIMONY AT HIS OWN TRIAL CONCERNING APPELLANT'S PARTICIPATION IN THE ALLEGED ROBBERY WHERE TRAVIS' TRIAL HAD BEEN SEVERED FROM THAT OF APPELLANT AND WHERE THE PROSECUTION HAD KNOWLEDGE THAT TRAVIS WOULD REFUSE TO ANSWER QUESTIONS PROPOUNDED BY THE PROSECUTION ON THE GROUND THAT HIS ANSWERS WOULD TEND TO INCRIMINATE HIM.

Article I, Section 12 of the Constitution of Utah provides in part, "In criminal prosecutions the accused shall have the right . . . to be confronted by the witnesses against him . . ." and the 6th Amendment to the Constitution of the United States provides in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

The undersigned has been unable to find any Utah cases which specifically holds whether the right of confrontation guaranteed by Article I, Section 12, of the Constitution of Utah does or does not include or imply

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the right of cross-examination, effective cross-examination or cross-examination by counsel.

The Utah State Legislature has enacted, in the Code of Criminal Procedure, Utah Code Annotated, 1953, two statutes which, though inapplicable to this case, seem to implement Article I, Section 12 of the Constitution of Utah or apparently purport to be controlled thereby:

> "77-1-8. *The Rights of Defendant.*—In criminal prosecutions, the defendant is entitled:
>
> (1) To appear and defend in person by counsel.
>
> * * *
>
> (4) To be confronted by the witnesses against him, except that, where the charge has been preliminary examined before a commiting magistrate and the testimony taken down by question or answer *in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness*, or where the testimony of a witness on the part of the state, who is unable to give security for his appearance, has been conditionally *in like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or has had an opportunity to cross-examine the witness*, the deposition of such witness may be read, *upon its being satisfactorily shown to the court that he is dead or insane or cannot with due deligence be found within the state . . ."* [Emphasis Added]

"77-44-3. *Reported testimony used at subse-*

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> *quent trial, when.*—Whenever in any court of record the testimony of any witness in any criminal case shall be stenographically reported by an official court reporter, *and thereafter such witness shall die or be beyond the jurisdiction of the court in which the case is pending,* either party to the action may read in evidence the testimony of such witness, when duly certified by the reporter to be correct, in any subsequent trial law, or proceeding had in, the same cause, subject only to the same objections that might be made, if such witness were upon the stand and testifying in open court." [Emphasis Added]

Clearly, Sections 77-1-8 and 77-44-3 cannot be invoked to justify the receipt into evidence of the court reporter's testimony in this case simply because neither of those provisions was invoked nor could they have application, by their own terms. 77-1-8(4) requires that the testimony at preliminary hearing be "in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness" and the state made no showing, indeed could not show, "that the witness is dead or insane or cannot with due diligence be found within the state." 77-44-3 impliedly requires that the earlier trial be the trial of the defendant against whom the testimony is offered and the state did not show and could no show that the witness was dead or beyond the jurisdiction of the court.

The undersigned has been unable to find any Utah cases which hold whether the right of confrontation

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guaranteed by Article I, Section 12, of the Constitution of Utah does or does not include or imply the right to cross-examination, the right of effective cross-examination or the right to cross examination by counsel. Sections 77-1-8(1) and (4), though not apropos to this case, appear to guarantee by statute the right to cross-examination and cross-examination by counsel where the accused has counsel. The trial court did not indicate whether it was applying Section 77-44-3 in admitting the reporter's testimony of Travis' statement in his own defense at his own trial. It does not appear from reading the transcript that Section 77-44-3 was the basis for its admission.

The undersigned has been unable to find any Utah cases which test the constitutionality of Section 77-44-3 in light of the guarantees contained in Article I, Section 12 of the Constitution of Utah and in the 6th Amendment of the Constitution of the United States. Section 77-44-3 is, however, patently unconstitutional unless there is implied therein the requirement that the accused be accorded the right to confront the witness and to cross-examine said witness. Bruton vs. U.S., 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476; Pointer vs. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923; Douglas vs. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934; Barber vs. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 2d 255.

The foregoing not withstanding, however, the right of an accused to confront the witnesses against

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him guaranteed by the 6th Amendment of the Constitution of the United States (and presumably Article I, Section 12 of the Constituion of Uah by virtue of the supremacy clause, Article 6, Clause 2, Constitution of the United States) implies the right to effective cross-examination of those witnesses (See Douglas vs. Alabama, *supra*; Pointer vs. Texas, *supra;* Bruton vs. U.S., *supra*; Barber vs. Page, supra) by counsel (See Gideon vs. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799, 93 A.L.R. 2d 733; Pointer vs. Texas, supra;) and that right is not satisfied by the mere fact that the witnesses are present in court (See Bruton vs. U.S., *supra*; Douglas vs. Alabama, *supra*;) or take the stand to deny that they made the statements (See Douglas vs. Alabama, *supra*) or exercise their 5th Amendment privilege against self incrimination (See Douglas vs. Alabama, *supra*).

The aforesaid right of cross examination is deemed a right "fundamental and essential to a fair trial" and is made obligatory upon the states by the 14th Amendment to the Constitution of the United States. Pointer vs. Texas, *supra;* Douglas vs. Alabama, *supra*; Malloy vs. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 2d 653. Mr. Justice Harlan, in his opinions concurring in the results in *Pointer* and *Gideon* stated that the right is "implicit in the concept of ordered liberty" and thus secured to defendants in state prosecutions by the 14th Amendment under the rationale of Palko vs. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (13 L. Ed. 2d at page 929; 9 L.Ed. 2d at page 810).

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The case at bar and the procedure employed by the trial court and by the prosecution herein is unique. It would be unusual indeed to find a case precisely identical to the instant case where the following features were present:

1. Where the accused and his co-defendant were represented by separate and unassociated counsel;

2. Where there was a severance of the trials of joint defendants prior to trial, and where the co-defendant was convicted in his severed case tried first;

3. Where the co-defendant took the stand and testified in his own defense, which testimony inculpated the accused;

4. Where the co-defendant had not been sentenced at the time of trial of the accused and where the co-defendant genuinely contemplated appeal of his conviction;

5. Where the co-defendant was called by the prosecution as a witness against the accused and where the co-defendant refused to testify and based his refusal upon the co-defendant's 5th Amendment right against self-incrimination;

6. Where the prosecutor knew that the co-defendant would not testify;

7. Where the court permitted the prosecutor to ask leading questions of the co-defendant whereby the

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prosecutor read into the record the testimony which inculpated the accused;

8. Where the court admitted the testimony of the court reporter who reported the co-defendant's trial and permitted the court reporter to read, before the jury, verbatim, the co-defendant's statements inculpating the accused;

9. Where the co-defendant refused to answer the questions by counsel for the accused on cross-examination on the ground that the co-defendant's answers might tend to incriminate him; and

10. Where the refusal by the co-defendant to testify against the accused was not procured by the accused.

The writer of this brief has been unable, after extensive research, to find a case incorporating all of the foregoing features. The case of Douglas vs. Alabama, *supra*, decided by the Supreme Court of the United States in 1965, however, is almost identical and incorporates almost all of the salient features of this case. In *Douglas*, there were the following identical or parallel features:

1. Douglas and his co-defendant, Loyd, were represented by the same attorney.

2. There was a severance of the trials of Douglas and Loyd prior to trial and Loyd was convicted in his severed case tried first.

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3. Loyd did not take the stand in his own trial but apparently had previously given an out of court statement to the police, which out of court statement inculpated Douglas.

4. Loyd had not been sentenced at the time of the trial of Douglas and Loyd genuinely contemplated appeal of his conviction.

5. Loyd was called by the prosecution as a witness against Douglas and Loyd refused to testify and based his refusal upon Loyd's 5th Amendment right against self-incrimination.

6. The prosecutor knew Loyd would not testify.

7. The court permitted the prosecutor to ask leadin gquestions of Loyd whereby the prosecutor read into the record the out of court statement of Loyd which inculpated Douglas.

8. Loyd's alleged out of court statement was marked as an Exhibit but was not offered or received into evidence.

9. The decision in *Douglas*, does not show whether or not there was any attempt to cross examine Loyd by counsel for Douglas.

10. There was no suggestion that Loyd's refusal to testify against Douglas was procured by Douglas.

The variations between the salient features in

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Douglas and those in the case at bar are minor and of little or no legal significance. If anything, the procedures employed by the prosecution and the trial court in the case at bar are more flagrant and prejudicial than in *Douglas.* The Supreme Court of the United States reversed Douglas' conviction on the ground that Douglas' inability to cross examine his co-defendant as to the alleged confession plainly denied him the right of cross examination secured by the confrontation clause of the 6th Amendment and made obligatory on the States by the Due Process provisions of the 14th Amendment to the Constitution of the United States.

In *Douglas*, the court stated:

> "Since the solicitor [prosecutor] was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examinaion. Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him. Nor was the opportunity to cross-examine the law enforcement officers adequate to redress this denial of the essential right secured by the Confrontation Clause. Indeed, their testimony enhanced the danger that the jury would treat the Solicitor's questioning of Loyd and Loyd's refusal to answer as providing the truth of Loyd's alleged confession. But since their evidence tended to show only that Loyd mad the confession, cross examination of them as to its genuineness could not substitute for cros-examination of Loyd to test the truth of the statement itself. Motes vs. United States, 178 U.S. 458, 44 L.Ed. 1150, 20 S.Ct. 993; cf. Kirby v. United States, 174 U.S. 47, 43 L.Ed. 890, 19 S.Ct. 574.

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"Hence, effective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer. We need not decide whether Loyd properly invoked the privilege in light of his conviction. It is sufficient for the purposes of deciding petitioner's claim undes the Confrontation Clause that no suggestion is made that Loyd's refusal to answer was procured by the petitioner, see Motes v. United States, supra, 178 U.S. at 471, 44 L.Ed. at 1154; on this record it appears that Loyd was acting entirely in his own interests in doing so . . ." 13 L. Ed. 2d at p. 938.

That the court permitted the prosecutor to read into the record Travis' testimony at his own trial and that the court admitted the verbatim record of that testimony is prejudicial to the rights of the defendant guaranteed by the 6th and 14th Amendments to the Constitution of the United States cannot be denied. Bruton vs. U.S., *supra*; Pointer vs. Texas, *supra*; Gideon vs. Wainwright, *supra*.

The extreme prejudice to appellant generated by the introduction by the prosecution and receipt by the court of Travis' testimony in his own severed trial without according appellant an opportunity to cross-examine Travis is made even more apparent when, after reading the entire record in this case, it is observed that there was no hint or suggestion to the jury that a weapon, more particularly the pinch bar received in evidence as Exhibit 7, had been used in the alleged

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robbery, apart from the very presence, and brandishment by the prosecution, of Exhibit 7 in the view of the jury.

It should be noted that the very exhibition of the pinch bar to the jury, let alone the receipt of it into evidence by the court, was error and prejudicial error, for two fundamental reasons:

1. The pinch bar (Exhibit 7) was irrelevant and incompetent because:

a. The charge was non-aggravated robbery.

b. The original Complaint charging aggravated robbery, which the court at preliminary hearing ordered dismissed and amended to charge non-aggravated robbery, did not allege that a pinch bar or a steel instrument of any kind was used, but merely alleged the use of a wooden club.

c. There was absolutely no evidence [except whatever was shown by Travis' prior testimony in his own case (TR. 207-209, 228, 230, 232-233, 241 and 246)] before the jury which tended to show that a club of any kind, let alone the steel pinch bar (Exhibit 7), was used in the alleged robbery and there was absolutely no evidence which could, in any way, connect the pinch bar to the alleged robbery.

2. Exhibit 7, the steel pinch bar approximately 12

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to 16 inches in length with an electrical corp wrapped around one end to form a handle, had a shocking and gruesome appearance, particularly when the concept of its use as a weapon was suggested by the prosecution, and its introduction and receipt into evidence could only serve to inflame the jury against the appellant.

It seems incongruous that the prosecution would introduce, *and vouch for*, testimony given by Travis at his earlier, severed trial which testimony tended to exculpate Travis and inculpate the appellant and at the same time seek, obtain and attempt to sustain the conviction of Travis in spite of the fact Travis' testimony exculpates Travis.

It is also unfortunate that the trial court would, on one hand, grant a motion to sever the trials of Travis and appellant, which motion was grounded upon extreme prejudice to the defendants resulting from their asserting radically different versions as to what happened in connection with the alleged offense, and then, on the other hand, permit the introduction of Travis' version, radically different from that of appellant, in such a way that appellant could have no opportunity to cross-examine Travis on Travis' version. In so doing, the court compounded the prejudice which required severance in the first place.

SUMMARY AND CONCLUSION

Appellant was deprived of his constitutionally guaranteed right to confront the witnesses against him

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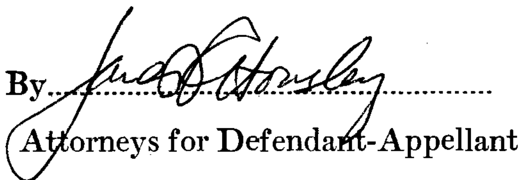
and to cross-examine those witnesses where the court permitted the prosecutor to ask leading and suggestive questions of appellant's co-defendant and where the court permitted the verbatim record of said co-defendant's testimony in his own behalf given at his own trial to be used in appellant's trial under the circumstances where appellant could not cross-examine his co-defendant. Under the circumstances of this case, appellant has been prejudiced in the extreme by the actions of the prosecutor in adducing Travis' testimony and the pinch bar and by the court in receiving said evidence. Appellant's conviction should be set aside and appellant discharged or, that failing, the case should be remanded for a new trial.

Respectfully submitted this 20 day of March, 1975.

HOUSLEY & BLACK
316 Kearns Building
Salt Lake City, Utah 84101



By..
Attorneys for Defendant-Appellant

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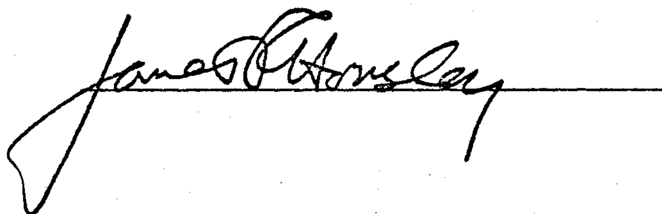
Filed 10 copies of the within Brief with the Supreme Court of the State of Utah and served 2 copies on the plaintiff-respondent by delivering copies thereof to his attorney The Attorney General for the State of Utah this 20 day of March, 1975.



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