

1950

State of Utah v. Joe Petralia : Brief of Appellant

Utah Supreme Court

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Recommended Citation

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IN THE
SUPREME COURT
OF THE
State of Utah

STATE OF UTAH,

Plaintiff,

vs.

JOE PETRALIA,

Defendant and Appellant,

No. 4703

APPELLANT'S BRIEF

FILED

ARTHUR WOOLLEY

JAN 21 1950

Attorney for Defendant and Appellant

Clerk, Supreme Court, Utah

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State of Utah

STATE OF UTAH,

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No. 4703

JOE PETRALIA,

Defendant and Appellant,

APPELLANT'S BRIEF

STATEMENT OF FACTS

The defendant was tried before the Honorable John A. Hendricks, one of the judges of the District Court, and a jury, in Weber County, Utah, upon an Information charging the crime of *robbery*, a felony, as follows:

“The said defendant did then and there wilfully, unlawfully and feloniously take, steal and carry away from the immediate presence of George Steve and Taiji Anazawa certain personal property, to-wit: approximately the sum of \$27,300.00 in United States currency, and said taking of said property being then and there accomplished by

means of force and fear used upon and against the persons of the said George Steve and Taiji Anazawa, and against their will, said personal property at the time of said taking being then and there in the possession of the said George Steve and Taiji Anazawa”.

(Tr. 005) The Information was supplemented by a Bill of Particulars, specifying “on or about June 25, 1948” as the time, and the premises known as The Club at the address 126 25th Street in Ogden, Utah, as the place of the alleged crime. (Tr. 007)

The defendant had waived preliminary hearing and entered a plea of “Not Guilty” to the Information and duly served notice of intention to offer evidence to establish an alibi in his defense. (Tr. 006).

The case was set for trial for June 1st, 1949 at 10:00 o'clock a.m., on Wednesday. The defendant resided at Bell, a suburb of Los Angeles, in California. Several days before the time set for the trial, information was received that the defendant was ill and might be unable to attend the trial at the time appointed. A telegram from his physician was received, and on the day before the date set, suggestion was made to Judge Hendricks by counsel for the defendant, for a continuance on account of the condition of the health of the defendant. Notwithstanding the effort in that respect, the defendant was advised to come to Ogden, and on the evening before the time set, the defendant notified counsel that he would come on by plane, leaving Los Angeles at 7:45 a.m. on the 1st of June.

At the time appointed on June 1st, 1949, at 10:00

o'clock the following proceedings were had. (Tr. 084-1)

“Be it remembered the above-entitled case came regularly before the Honorable John A. Hendricks, Judge, sitting with a Jury at Ogden, Weber County, Utah, for trial on the 1st day of June, A. D., 1949 and was continued from day to day thereafter until the said trial was concluded.

APPEARANCES:

Glenn Adams, Esq. District Attorney,
for the State of Utah

Arthur Woolley, Esq.,
for the defendant.

PROCEEDINGS

(Tuesday June 11, 1949 at ten o'clock a.m.)

The Court: This is the time set for the trial of the case No. 4703, the State of Utah vs. Joe Petralia.

You say your client won't get in until about three o'clock.

Mr. Woolley: Yes, Your Honor. I talked to him last night about nine. He was scheduled to leave in a plane at 7:45 a.m. and arrive in Salt Lake City at one and come from there then. I think he should be here by about three.

The Court: Then we will call the roll of the jury and adjourn until three p.m.”

(Tr. 084 2 & 3)

“(Tuesday June 1, 1949 at 4:15 p.m.)

The Court: State of Utah vs. Joe Petralia, 4703, call the roll of the jurors.

(The clerk called the roll of the jurors.)

Mr. Woolley: If the court please, the defendant has just arrived. Yesterday I made a suggestion to your honor that the case be continued on account of the condition of the health of the defendant, and the suggestion was made that the defendant be examined here and a local physician's findings be considered. I now move that an order be made to allow that and that a continuance be had until tomorrow morning at ten o'clock at which time a determination of that fact can be made.

The Court: Well, we might save further time and expense and inconvenience of some of the jurors if we select the jury tonight.

(Discussion)

The Court: Gentlemen of the jury: You will be excused until ten a.m. in the morning, so you may now leave the court room. You can close the door there, Mr. Bailiff.

Mr. Adams: I take it, Your Honor, there are no members of the prospective jurors now in the court room.

The Court: No, I don't think there is.

Mr. Adams: May the record so show that is a fact.

The Court: Now, Mr. Petralia, the court holds it inexcusable for you to arrive here late. This trial has been set for a long time. You knew you were to be here, and you knew you were to be here at ten o'clock this morning. Now, the court is going to find you in contempt of court, and its going to fine you. To purge yourself from that contempt, you are to pay the jury fees of today. That's \$176.00. How many witnesses did you have?

Mr. Adams: Just one second, Your Honor. Eight witnesses were called for today, Your Honor.

The Court: Four dollars a day, \$32.00. That's \$208.00 costs that you will have to pay to purge yourself from that contempt.

The court will make an order that you may be examined. The State may arrange to have one doctor examine you, and you may have your counsel arrange to have one doctor examine you, and if it should develop that we will have to postpone this case again, the court will expect you to pay the costs of tomorrow, jury and witnesses too.

It's going to take very good proof that you are not able to go to trial before any further continuance is had. The District Attorney may arrange for an examination to be made, and have that done prior to ten o'clock in the morning, because we don't want to have any further delay on that account.

It's embarrassing for all concerned to have 22 men laying around all day long.

I think you'd better have the physicians here so that they can testify at 9:30 in the morning so we can have them out before the jury comes in, and so you and Mr. Woolley can get together and arrange for the examination.

All witnesses appear here again tomorrow morning. The Court will be adjourned until ten o'clock.

Mr. Adams: About the order, Your Honor, concerning the payment of these costs. When must they be paid?

The Court: He is to pay those tomorrow morning.

(Whereupon at 4:30 p. m., court adjourned to Wednesday, June 2, 1949 at ten o'clock a.m.)"

At 9:30 o'clock a.m. on Wednesday, June 2, 1949, the court convened and heard testimony from Doctors Conroy and Barker, physicians of Ogden, concerning the physical condition of the defendant, from which it appeared the defendant had a gastric ulcer or peptic ulcer of the stomach, and a small or moderate sized tumor at the base of the neck near the 7th cervical vertebrae, "probably benign", "probably a fibroma", "probably a sebaceous cyst". Both physicians were of the opinion that his condition was not sufficiently acute that attendance upon the trial would do him any irreparable harm, and the court denied the motion for continuance. (Tr. 084-7)

The trial of the cause resumed June 2nd. The jury was impanelled and testimony was taken on that and

the following day when the case was continued to June 6th and resumed for further testimony. The state having rested, the defendant called witnesses in person and offered to read the testimony of Lewis Green and other witnesses taken in a proceeding had in the state of California before a court there hearing a Writ of Habeas on petition of the defendant against an Order of Extradition to Utah upon the charge here, which had been made by the Governor of the State of California, there having been a stipulation orally made between the attorney for the defendant here and the District Attorney here for the use of the transcript of the witnesses called by the defendant in his behalf upon the Habeas Corpus proceedings. The District Attorney repudiated the stipulation, when it came to the point of reading the testimony at the trial.

On the coming in of court for further trial of the cause on June 7th, the defendant moved the court for a continuance of the trial to enable the defendant to serve subpoenas in the state of California, and for proceedings to compel the attendance at the trial of this cause in Utah of witnesses to be so subpoenaed on the part of the defendant, and that motion was by the court granted, and the cause continued to June 14, 1949. (Tr. 064) On June 14th, the trial was resumed and witnesses from California and others testified on behalf of the defendant. (Tr. 065) On June 15th, the trial was resumed and the case was submitted to the jury, and the jury returned a verdict of guilty, as follows.

“We the jury, empaneled in the above entitled action find the defendant guilty of the crime of *Grand Larceny*, a felony, a crime as included with-

in the information herein.”

(Tr. 066) The defendant was ordered to appear for sentence on June 27, 1949. The defendant filed notice of intention to move for new trial and motion for new trial. (Tr. 068-069) The matter was continued to June 28th, 1949.

In the meantime, the court had suggested to counsel for the defendant that he would consider placing the defendant on parole if application was made. On June 28th, the defendant moved for an order placing the defendant on probation to the State Adult Probation Officer and the court referred the matter to the officer for investigation and report and continued the motion for new trial to August 1, 1949. (Tr. 071) The defendant was placed in custody of the Sheriff and held in the County Jail.

On July 5, 1949, the court made an order to the clerk to hold and retain from the \$5000.00 deposited as appearance bond on behalf of the defendant, the sum of \$1,000.00 against a fine on the grand larceny conviction, and \$208.00 for payment of the fine for contempt levied by the court during the trial, and ordered that the balance be paid over to the defendant.

Without intimation of change of attitude, and abruptly on the coming in of the court on August 1, 1949, His Honor overruled defendant's motion for new trial and proceeded to pronounce sentence. (The minute entry of the proceedings recites that the defendant had been convicted of the crime of “robbery, a felony”, which is, of course, an error.) (Tr. 080). The sentence imposed was of imprisonment for a term not less than one year, nor

more than ten years, and that the defendant pay a fine of \$1,000.00 to the State of Utah, the penalty for grand larceny, "said funds to be taken from the bond on deposit with the clerk of the court". Defendant was remanded to the Sheriff of Weber County to be forthwith taken and delivered to the Warden of the State Prison in execution of judgment. Notice of appeal was then and there served and filed. (Tr. 076). An order fixing and admitting to bail in the sum of \$10,000.00 was made, and notice of application for certificate of probable cause was presented to the court and granted. (Tr. 077-79).

The defendant furnished the bail and is at liberty pending the appeal.

This Is The Strange Case of the "Robbery of the Club".

George Pappas and Harry Pappas, commonly known as "Bum", are brothers, and have been engaged in business together on lower 25th Street in Ogden for "nigh onto forty years". They have prospered, through all the vicissitudes of the prohibition era, post-prohibition, and many changes of administration. 25th Street and a street in Bagdad have been named together by a famous author as the two most wicked streets in the world. Ogden's reputation in this respect is, like the announcement of Mark Twain's death, "slightly exaggerated".

The premises known as The Club, 126 - 25th Street, are on the north side. It is called a tavern under present terminology. Facilities for eating and sleeping are not provided for the patrons, however. Over the years the Pappas brothers have come to own the premises, as well as a hotel in the upper stories of the building, which they

call "The Roosevelt". The Union Depot, where the railway employee population are paid twice monthly, and many other industries of substantial payrolls, are near by. As a result a large number of employees with pay checks have formed the habit of dropping in at The Club to cash their checks. To meet this demand the Pappas Brothers have had to keep on hand large sums of currency, bills and silver.

There was usually a room in back, at one place or another, where gambling was carried on during the permitted periods, and silver in large quantities was a necessary facility. The money for cashing checks was kept in a little box and a slide drawer back of the cigar counter at the front end of The Club, and near the main entrance to the premises. There was usually a line-up on payday, and the cue was often longer than at a teller's window in the bank. It was convenient to pass from the cash counter around the screen to the bar extending forty to fifty feet along the same wall. No safe held the money over night.

THE PLOT

The plot of the story, as the prosecution would have us believe it, was outlined by the District Attorney in his opening statement. (Tr. 16-21) The State's proof followed the brief:

"Mr. Adams: If the Court please, and Mr. Woolley, and Gentlemen:

"The proof presented by the State will show that George and Harry Pappas have, for quite a number of years, operated a beer tavern on 25th

Street. That it has been their practice, on railroad paydays, the 10th and 25th days of the month, to have large sums of money on hand with which they cashed checks of railroad employees, particularly some of the icehouse who are paid by check on those days.

“That this practice has resulted in them having sums of money as high as \$30,000.00 and sometimes large sums of money in cash on hand. That it was the practice to secure this money the day before the 10th or 25th and to keep it on the premises so that it would be available on the 10th and 25th.

“That this practice was known to one Tony Salerno, who had some years before been employed by the Pappas brothers and who was well acquainted with this practice.

“That on the 24th of June of last year (1948) that George Pappas had large sums of money on hand and went to the First Security Bank and there got, as I remember, \$12,000 additional cash to have available to cash checks with the next day.

“That Tony Salerno in April or May of 1948 went to Bell, California on a trip. That he had been acquainted with Joe Petralia, the defendant, for sometime, 20 or 25 years.

“That Joe Petralia, the defendant in this case, is now a resident of Bell, California. That some ten years or so ago he had lived in Ogden, Utah, and had many acquaintances here in this city.

“That on this trip to Bell, California, Tony Salerno, who was unemployed, ran out of money and called Joe Petralia on the telephone, and Joe Petralia came to see him and gave him \$50.00. That at that time Tony Salerno and Joe Petralia discussed between themselves means of raising money by robbery or theft or otherwise. That Tony Salerno discussed with Petralia at that time the manner in which these sums of moneys were handled by the Pappas brothers.

“That the next morning in Bell, California, in April or May, Petralia took Tony Salerno to the train and told him that he would come to Ogden, Utah, shortly and that they would further discuss and develop their plans for this robbery.

“That Salerno came on to Las Vegas and phoned or wired for money; that Petralia sent him additional money; that Salerno came to Ogden, Utah. That he met and talked with Tony Salerno concerning their plans for this robbery. That one of the conversations at least took place in the Ogden city jail where Tony Salerno was at that time confined because of an arrest growing out of a fight with his girl friend. That Tony Salerno was released from jail on June 15, and within a few days after that time Salerno and Petralia went to the home of one Russel Gardner and there procured from Gardner a pistol which Salerno had previously left with Gardner as a pledge for a ten-dollar loan.

“That this gun was given to Petralia around June 17 and was kept by him and used in the rob-

bery that I will tell you about shortly. That about June 17 Petralia left Ogden and informed Salerno that he would return shortly before the 25th of June and bring with him two men to assist in this job. That he did go and returned on June 23, that he called Salerno where he lived in the Earl Hotel and they met and further discussed their plans.

“That Petralia directed or suggested to Salerno that he on the 24th of June hang around The Club tavern and ascertain for sure that the money was handled in the usual manner. That Salerno was around The Club on the 24th of June, and in fact stayed there until he left with Harry Pappas, one of the brothers in that premises, at one-thirty in the morning.

“That he, Salerno, did ascertain that that money was kept at its usual place in that establishment. Shortly after that time, or about two or 2:30 a.m. by prearrangement Salerno met with Petralia and the two of them went in Petralia's car to the Mountain View Auto Courts which is on west 24th across the viaduct. That there Petralia knocked on the window of a cabin there and two men came from the cabin dressed in coveralls.

“That these men were not known to Salerno at the time and were introduced only by their first names. That Tony Salerno had been acquainted with two of the men who worked in The Club at night. These men were George Steve and Taiji Anazawa, a Japanese man.

“That Salerno himself had worked for the Pap-

pas brothers off and on over a quite a period of years. That Salerno in company with one of the other men, not Petralia, went to the front door of The Club and Salerno, by reason of his former employment and friendship with these employees, knocked on the front door and pretended to need the toilet facilities.

“That he obtained entrance to The Club for himself and this man accompanying him, about three a.m. on the 25th of June. That Petralia was not among the men who accompanied them in on this visit. That Salerno pretending to use the toilet facilities which are in the back of this Club, made several visits into the facilities and flushed the toilet and pretended to use those facilities.

“That he in fact, by reason of his acquaintances with those premises went to the back door and there that door was locked by a thumb or turn lock which can be unlocked by merely turning a thumb lock. That he, Salerno, unlocked the back door and drank a beer at the front bar with this man and pointed out to him where this money was kept and then Salerno and his companion went out the front door. Went down the street to Wall Avenue, a short distance north and there joined Petralia and the other man.

“That Petralia sat in the car at a place where he could look up the alley which runs to the back of these premises. That these two men, not Petralia, put on their coveralls or had them on and went up the alley with Salerno. He showed them the back door to these premises, and there they

loaded the guns and put on their masks and went into the premises and with guns stuck up the Japanese man and George Steve, the other man employed in those premises at night.

“That they then bound them, put tape over their mouth, proceeded to take the money from the drawers and cabinets where it had been kept. That they then went out the back door and down the alley and got in the car where Petralia and Salerno were.

“They then drove out on Wall Avenue, I think to some place near 28th Street and Grant, that Salerno, pardon me, that Patralia told Salerno that they could not divide the money at this time because things were too hot and that it wouldn't do for Salerno, a person unemployed to have large sums of money on him.

“Salerno informed him he was broke and they gave to Salerno \$93.00. That there was taken in currency and silver from these drawers approximately \$27,300.00.

“That the men employed there soon freed themselves and gave an alarm and Tony Salerno who had left the car with the other three men then walked north on Grant Avenue and was arrested about in front of the Continental Baking Company. That he had on him at that time the \$93.00 received from the moneys taken in this robbery.

“This proof will show that Tony Salerno is also charged with robbery and that his case has not yet been tried. After being incarcerated for some

days Tony Salerno told the police officers the identity of Petralia, and George Pappas, who also knew Petralia, endeavored to reach Petralia by phone in Bell, California, and was unable to do so and I believe left a message there and finally Petralia called George Pappas here in Ogden and they had a conversation on the telephone and George Pappas left Ogden, Utah, and went to Bell, California about July 14 or 15.

“That there he met with Petralia and they discussed the robbery which had taken place here. That Petralia claimed that Pappas was claiming a larger loss than he, Pappas, in fact had, and in that discussion Petralia told some of the facts connected with that offense. One of the incidents concerned a pistol which was taken from one of the drawers and Petralia told Pappas that that pistol was thrown out of the car as they passed over the new Riverdale viaduct south of this city.

“That in that discussion Petralia with Pappas, Petralia agreed that he would pay back to Pappas \$10,000.00 and they parted and had an appointment to meet the next morning in front of the Lankersham Hotel in Los Angeles.

“That Petralia was somewhat late and came shortly before train time and handed to Pappas a package wrapped in paper. That they hurried to the train and Pappas put it in his suitcase. When he arrived here in Ogden he opened it before his brother, Harry, and there was in the package \$6,000.00 in greenbacks.

“That thereafter Petralia did not pay the other \$4,000,00 that he had promised in his conversation with Pappas.

“On these facts and with others I may have omitted, the State relies on its charge to prove that this defendant was an accessory and a principal to this crime. That he participated in it and though he himself did not go into the premises and wield the stick-up guns, that he planned it, that he employed the stick-up men who did take the money, that he shared in the loot obtained in that robbery.”

The testimony of the defendant and his witnesses was that he had been in Ogden with his wife and child for the period of several days prior to June 1, 1948, that he left Ogden in his automobile on that day and went to his home in Bell, near Los Angeles where he lived, and that he was there in and about his business through the days of the 23rd, 24th and 25th, and for a long time thereafter, and to corroborate him and his wife in that circumstance, several people with whom he had business transactions, acquaintances and friends, came on and testified of their experiences meeting him there, seeing him and transacting business with him there in Bell during the very time when the state claimed that he was here in Ogden participating in this alleged robbery.

TONY SALERNO

During all of the years, except for a brief term in the military service, one Tony Salerno worked for the Pappas Brothers, tending bar, dealing the games, fronting at knock-overs, a loyal, faithful, trusted servant. He

had, as they well knew, been convicted of felony.

The Pappas brothers carried insurance against robbery, apparently \$10,000.00 for robbery on the premises. Their income put them in a high bracket, and they were concerned with the matter of Federal excise and income taxes.

On June 24, 1948, George Pappas went to the bank and drew \$12,000.00 in currency, twenties, tens and fives, and took the package down to The Club. It was claimed by him that there was there that night at about 1:00 o'clock at closing time, over \$27,000.00 in money, currency and silver.

Checks were produced by Pappas covering a considerable period of time, showing withdrawals of usually \$5,000.00 on the day prior to railroad paydays, the 10th and 25th, but this day it was \$12,000.00. What circumstance would require \$27,000.00 for that night, or the following day, is left to conjecture. The Pacific Fruit & Express Company was having a pay day, and the Republic National convention was nominating Dewey, and the Joe Louis-Walcott fight was finally being pulled off in Madison Square Gardens. The back-room gambling was closed down, however, on account of a "change in administration". Mr. Perry had just come into the mayoralty again, but things seemingly hadn't been normalized as yet.

Harry Pappas bore testimony of his confidence in Tony Salerno. He was asked by counsel for the defendant on cross examination :

Q. Well, you wouldn't any more believe Tony Salerno would rob you than I would, would you?

A. Well, I never was figured that, no.
In fairness, he added:

“But I got surprised”.

(Tr. 100).

Tony Salerno, according to his story, waited outside of The Club in the rear alley until the two strangers came out with the money and then got in an automobile in which Petralia, the defendant, was, with the two strangers and the money. They claimed over \$27,000.00. Of this they claimed about \$2,000.00 was silver, and that one of the robbers carried the silver out in his hands in an apron, and that some of it spilled on the way along the alley. (No policeman reported picking any up).

At the trial we had a bank cashier bring into the courtroom two money bags containing \$1,000.00 in silver in each bag. Each bag weighted about sixty pounds. \$2,000.00 in silver pieces would weigh approximately one hundred twenty pounds. (Tr. 379). But, anyhow, Tony Salerno, according to his story, sat in this automobile containing this \$27,000.00 of which he was presumably to have a part—I would imagine a third of the loot—and rode a few blocks along the street, and then got out of the automobile and walked back along Grant Avenue toward 25th Street into the arms of two policemen who were in a prowl car hunting for him, and he had \$93.00 in currency in his pocket, which he said in his testimony Joe Petralia gave him out of the \$27,000.00 of boodle money that was in the automobile.

The jury were bewildered, too. This man who had been a trusted employee of the Pappas brothers for over twenty years would not rob them unless they told him to, even though he had been convicted of felony, as the state

proved, by him, and he would not have dared to do so unless they told him to, and he is not such a big fool as to be in an automobile with \$27,000.00 of loot, fruits from a robbery which he arranged, and to get out with \$93.00 and walk back into the arms of the police. Tony Salerno was as well known to every man on the force as the Pappas brothers themselves. He sweated it out in jail about ten days before he told the story which is his testimony in this case. This "confession" took place at the private residence of his mother and in the presence of a couple of policemen, the remnants of some bottles of whiskey, Harry Pappas, and Tony Salerno's brother-in-law, "Curly", and his lady friend being in the next room and consulted from time to time. The testimony of this lady, Fae Shelby Rugg, (Tr. 241-249), reflects the phoniness of this case. Her appearance upon the witness stand was one of those scenes which to fully appreciate, one needs to experience in real life, or in the caricature thereof, depicted upon the colored movies upon the theme, "does crime pay?"

Tony Salerno mailed the blackmail letter to Joe Petralia which she composed.

Tony Salerno, by the state's testimony, cased the joint. He went back into the place through the front door, being let in by Steve, one of the janitors, and brought a stranger in, and went back into the rear end of the place. It was while in the rear end that Tony is said to have opened the rear door so that the two highwaymen could come in freely. It was nothing unusual that Tony should come in the place at 3:00 o'clock in the night, and nothing strange that he should bring strangers in at that time of the night. Steve, who worked there a

long time, testified that he did that quite often, whenever he comes he lets him in. (Tr. 125). In fact he testified that Tony had a key to the place. (Tr. 129)

“So he open the door and gamle. Everybody had keys.”

The police arrived three or four minutes after the robbers had left, (Tr. 154) and Mr. George Pappas came within a half hour. (Tr. 155). Nobody went to the police station then. (Tr. 155) The Japanese night man said when the robber put the ropes on his hands, he held them up so they won't be tight and then just as quick as they had left he pulled them right out, illustrating, and Steve did the same thing, and they were both up within a minute after the robbers had left. They didn't follow them, but went to the front door and although there was a telephone right there, Steve went upstairs where George Pappas' father-in-law was, in the hotel, to report the occurence. John Harames was the father-in-law. (Tr. 435).

STATEMENT OF ERRORS

The defendant relies for the reversal of the judgment against him upon the following errors occurring at the trial:

1. The court erred in denying defendant's motion for new trial. (Tr. 069 and To. 080).

2. The court erred to the prejudice of the defendant and exceeded the jurisdiction of the court in the matter of the claimed contempt of court by the defendant for having arrived late at the trial and in the imposition of a fine, and the taking of the sum of \$208.00 from the

defendant. (See transcript of evidence, page 1-7 inclusive in Vol. 1 of the Judgment Roll Volume of the transcript.)

3. The court erred in the rulings of the court upon the examination by counsel for the defendant of the jurors touching their qualifications to sit in the case, and in arbitrarily and unduly limiting and restricting the examination of jurors and restricting the examination of jurors by defendant's counsel, to the prejudice of the defendant. (Tr. 5-15).

4. The court erred in admitting in evidence over the objections of the defendant that the same was incompetent, irrelevant and immaterial testimony offered by the state as follows :

(a) The court erred in receiving in evidence, State's Exhibit "B", being "an entire bundle of checks". (Tr. 68).

(b) The court erred in receiving in evidence, State's Exhibit "C", being an adding machine tape containing figures made up by the witness George Pappas. (Tr. 68).

(c) The court erred in receiving in evidence, State's Exhibit "E", a receipt from the Shupe Williams Candy Company. (Tr. 68).

(d) The court erred in receiving in evidence, State's Exhibit "F", a telephone bill and telephone company statement. (Tr. 69).

(e) The court erred in receiving in evidence, State's Exhibit "G", an envelope appearing to be a Union Pacific Railroad Company paper with notations

thereon.

(f) The count erred in receiving in evidence, Exhibits "H", "I" and "J", said to be tapes from the cash register. (Tr. 69).

(g) The court erred in receiving in evidence, State's Exhibit "K", a piece of newspaper stamped to a card bearing telephone numbers. (Tr. 69).

(h) The court erred in receiving in evidence, State's Exhibit "M", a card with writing. (Tr. 78).

(i) The court erred in admitting in evidence the testimony of the witness Wayne Smith (Tr. 438 et seq), and the reading by him into the record of statements of telephone calls said to have been made on certain numbers between Ogden, Utah and Bell, California.

5. The court erred in giving to the jury the instructions as given by the court, and the whole thereof, for the reason and on the ground that the same do not contain, and do not constitute a complete statement of the law and matters upon which the jury must of necessity have been instructed in the case, and in particular, that the court failed to instruct the jury that the instructions should be construed as a whole, and together as one instruction, and not any one to be singled out by itself.

6. The court erred in giving the court's instruction numbered 5, and the whole thereof, and particularly for that the court failed to include in said instruction the necessary elements of the offense which must be proved beyond a reasonable doubt before the defendant could be found guilty, viz: that the defendant committed the acts

stated to be necessary elements of the offense. That the instruction as given is in form a binding instruction to find the defendant guilty if the jury finds beyond a reasonable doubt the statements contained in paragraphs 1, 2, 3 and 4 of the instruction to be true. That is to say, that the money was taken from the immediate presence of the persons, that it was forcibly taken and against their will, that it was taken by violence through force and fear, and that it was taken from them in Weber County, Utah.

7. The court erred in the giving of instruction numbered 6. That the same is upon its face an inadequate, incomplete, improper and erroneous instruction and statement of the law, and the elements of the crime of grand larceny, and permitted the jury to find the defendant guilty of grand larceny if the money was taken from "the immediate presence" of another, and nowhere in the instructions is the crime of grand larceny correctly defined, and the court nowhere defined grand larceny as the taking of money in excess of \$50.00.

8. The court erred in the giving of instruction numbered 7. This instruction directs the jury that if they find the defendant took the money from "the immediate presence" of Steve and Anazawa, then the defendant would be guilty of the included offense of grand larceny, and further that this instruction states that if there is a reasonable doubt in the minds of the jury as to which of the public offenses the defendant is guilty, he may not be convicted of the included offense, and this instruction is therefore, confusing, misleading and prejudicial to the defendant.

9. The court erred in the giving of instruction num-

bered 8. This instruction informs the jury that the taking of money "from the immediate presence" of another is grand larceny, whereas the statute does not so define the crime, and is a binding instruction to the effect that if the jury finds that the money was taken from the immediate presence of the persons they must find the defendant guilty of grand larceny, contrary to law, and the instruction was greatly to the prejudice of the defendant.

10. The court erred in the giving of instruction numbered 9. That this instruction unduly comments upon the evidence and contains a binding statement by the court of the weight and effect of the evidence, and invades the providence of the jury, to the great prejudice of the defendant.

11. The court erred in the giving of instruction numbered 11. Here again grand larceny is included in the instruction and the elements thereof are not stated, and the instruction is prejudicial to the rights of the defendant. It was the duty of the court to determine as a matter of law whether or not there was sufficient evidence to corroborate the witness, Salerno. The instruction, as given, is unnecessary and is confusing and is calculated to confuse and confound the jury in its deliberations and was highly prejudicial to the defendant.

12. The court erred in refusing to give to the jury, defendant's requested instruction numbered 1, and in refusing to instruct the jury to return the verdict of "not guilty" in favor of the defendant. That the evidence in the case did not corroborate the testimony of the witness, Salerno, sufficiently to warrant the case being submitted to the jury.

13. The court erred in refusing to give to the jury defendant's requested instruction numbered 5.

POINTS

1. *The Motion for New Trial.*

The motion was not argued. It would have been argued upon the grounds, as far as one would, under the circumstance confronting counsel, have had the hardihood to mention, argued in this brief.

The suggestion that it is not error to deny a new trial which ought to be granted, because it is not "argued", presupposes a willingness to listen without bias and appearance of umbrage upon the suggestion of "error"; otherwise, it is a waste of time and talent, if any, and often leads to frictions that are embarrassing.

Accused persons ought not to be prejudiced before the reviewing court by such situations. (Statement of Errors No. 1, and Tr. 069 and Tr. 080).

2. *The proceedings by His Honor, Judge John A. Hendricks, at the commencement of the trial, arbitrarily and without charge, or hearing had, adjudging the defendant guilty of contempt of court and fining him in the sum of \$208.00.*

This may be considered a peccadillo in a trial about the taking of the sum of \$27,300.00. The amount is small, but right or wrong, and no matter how irate His Honor might be, or whatever else may be said about the thing, he judged this man and fined him \$208.00, without charge, evidence taken or opportunity for defense. We have been unable to find any amendment to 104-45-10, Utah Code Annotated, 1943, or any statute which author-

ized any court or judge in this state to fine any person for any contempt in excess of \$200.00, and we had thought it well understood that a judge may not summarily and without any papers, statement of charge, and without opportunity for defense, or explanation by the accused, be allowed to adjudge guilt of contempt and impose any sentence whatsoever. That at this late date, in this state, and in the light of recent cases from this Honorable Court that any judge would so exercise his office as in this instance is inexplicable. But this and similar happenings are so frequent here that nothing surprises us.

We suppose when a man comes late to court, his final act of appearing is in the presence of the court; but why he was late and what detained him on the way, what was the cause of the tardiness, is usually out of the presence of the judge. If the right of the court to punish here was under 104-45-3 for a contempt committed in the immediate view and presence of the court, and authorizing summary punishment, at least an order reciting the facts as occurring in such immediate view and presence must be made, and opportunity afforded the accused to defend.

And in any event, eight dollars are eight dollars, regardless of their purchasing power or metallic base; and in this the fine is manifestly excessive.

Do we just remit the excess or void the void?

The state of Utah has taken and holds the sum of \$208.00 as a fine for contempt, and the sum of \$1,000.00 as a fine imposed as part of the penalty for grand larceny. This money was paid over pursuant to the suggestion by the court to counsel for the defendant that parole would be granted the defendant, and thus avoid-

ing a determination of the motion for new trial and appeal. The attention of the court is invited to the Praecipe in the court file (Tr. 072).

Notwithstanding the payment of the contempt fine, defendant assigns its imposition and levying as prejudicial error. The transcript of the proceedings in the cause pertaining to this little play is found in the court file volume of the Bill of Exceptions and is not numbered in sequence in the Bill of Exceptions, but is numbered 1 to 7 and duly certified and assigned.

No findings were made and no judgment entered except as is reflected in the minutes in the file. (Tr. 060).

“The court being sufficiently advised, finds the defendant in contempt of court and to purge himself, he is required to pay into this court the sum of \$208.00, which amount represents the witness expense and jury expense incurred on account of defendant not being present pursuant to order of court”.

The stenographer's transcript of the proceedings is set forth in full in the statement of facts.

Does this reflect an arbitrariness warranting doing it over in form or giving back the \$208.00? Why this defendant was late might make an interesting hearing.

3. *The court unduly restricted the examination of the jurors upon voir dire.*

The transcript contains in full the proceedings upon the voir dire of the jurors and the examination of the jurors touching their qualifications to sit in the case. Judge Hendricks examined them briefly. (Tr. 3 and 4).

And it is respectfully submitted that the record reflects that His Honor unduly and arbitrarily and to the prejudice of the defendant, restricted examination of the jurors by defendant's counsel. (Tr. 5-15).

An example is the following, upon examination of the juror, Jensen. (Tr. 7).

Mr. Woolley: Did you, from what you read in the paper concerning this alleged happening, form an opinion, and do you now have an opinion as to whether or not a robbery occurred?"

Mr. Adams: I object to that as being repetition.

The Court: Well, I don't think that—if that is the end of your question.

Mr. Woolley: That is my question.

The Court: I don't think that has any bearing at all, it is repetition as to bearing on the guilt or innocence of the defendant.

Mr. Woolley: I submit that is an unfair statement and assign it as error.

The Court: That's all right.

Mr. Woolley: I take an exception to the Court's statement and ask the court to instruct the jury to disregard it and so move.

The Court: Proceed.

Mr. Woolley: May I have an exception to the refusal of the Court to so instruct?

The Court: I think the law gives you that exception without demanding it.

Mr. Woolley: Well, with deference to the Court, I think not. Because of its instruction, I have to take exception to it. That is why I make the record in that form, if I may, if the Court please. May I inquire whether or not Your Honor will permit me to ask that specific question of each of the jurors individually?

The Court: Oh, I don't think that question, if they believe there was robbery committed, is proper.

Mr. Woolley: Of course, it doesn't appear, might I suggest, Your Honor, any more than Roy Jensen has stated that he read about it.

The Court: No, I think that question, as far as it pertains to the defendant, may not be asked to the jury.

Mr. Woolley: I submit, if Your Honor please, that the fact claimed of robbery is an issue in this case and must be proved beyond a reasonable doubt before conviction could be had of this defendant or anyone.

The Court: The court has ruled. Proceed.

Mr. Woolley: I take exception to the statement and ruling of the court.

The Court: You may have that exception.

Whether or not a robbery occurred was an highly important element of this case. A trumped up, staged taking of this money in the manner reflected by the evidence, would not constitute a robbery if it was prearranged between the owners of the money and Salerno

and the two strangers, whoever they were. As reflecting this aspect, attention is invited to the statement of Mr. George Pappas, the first witness called by the state at the trial ((Tr. 45). He is relating a conversation he claimed occurred between him and Joe Petralia after the alleged robbery. Mr. Pappas over the telephone to Petralia states that he said:

“Tony Salerno, Joe, he confess and say everything in jail that I tell you”. He says, “if there’s any way, I want to give you the money back.” He asked me if I though Bum was mad, tell him hello.”

This same George Pappas, the Kingpin of 25th Street, told the jury that he went down to Los Angeles and got \$6,000.00 in money from Petralia and was to get an additional \$4,000.00 from him, and when the latter amount was not forthcoming, he joined the prosecution. On cross examination, this same witness, George Pappas, gave the following testimony: (Tr. 74-75).

“Q. You have had a very good business there and made money so that you pay a very large income tax, haven’t you, Mr. Pappas?

A. Yes.

Q. And you have given a good deal of thought as to how to keep out of the high brackets, haven’t you?

A. What do you mean?

Q. Well, work it so you don’t have to pay so much.

A. I don’t understand clear, what you said,

brackets. Explain to me a little easier.

Q. Well, the income tax is in a bracket. That is, there is a line and then there is a higher rate for each amount, that is called brackets.

A. Yes.

Q. What we like to do is keep down in the low brackets.

A. Yes, sir, you are right.

Q. Because the percentage you have to pay on your income increases as the total amount of your income increases.

A. Yes.

Q. You understand me.

A. Yes.

Q. That's a fact, isn't it?

A. Yes.

Q. Then you thought you had, was it ten or 20 thousand dollars of insurance against robbery?

A. Ten thousand against robbery.

Q. Ten thousand against robbery?

A. Yes.

Q. You thought you had that.

A. Yes.

Q. Now, you were going to be entirely satisfied and see to it that the State of Utah didn't prosecute Tony or Joe either if you got ten thou-

sand dollars from down below.

A. You know why, Mr. Woolley?

Q. No, that is what you meant to tell the jury, isn't it?

A. Yes.

Q. I think that's all, Mr. Pappas.

And upon redirect examination, the same witness told the jury and the district attorney: (Tr. 79).

Q. Now, on cross examination, a question was asked you concerning why you were satisfied to take ten thousand dollars from Joe Petralia. Will you tell us why that was so, if it was so.

A. Because when Joe, he offered me six thousand dollars. Said that's all he had. He says: "When I get the other, I give you the rest". No, he tried to push me \$6,000.00. I told him "I don't do it for six thousand. It cost me that much, you know, monkeying around with it". Then I said, "Joe, if you give me ten thousand dollars up I won't say a word about it." The understanding was six in advance and the rest, four, to be sent to me in six to ten days afterwards." It isn't because Joe said he had no more money. The money was divided, and I thought myself to get all I can and that is why I was there to get all I can.

Q. I think that's all.

Mr. Woolley: Did you sign a complaint in this matter, Mr. Pappas?

A. No, I didn't, sir.

The same witness was called in rebuttal (Tr. 455) and was examined at length by the district attorney upon this phase, all of which reflects again and again that George Pappas did not want Petralia to go to jail. The jury did not find a robbery was committed. This, I think, does not cure the error of the court in refusing to permit the full facts concerning the matter to be developed, and certainly does not cure the prejudice created by the court against the defendant in refusing to permit the jury to consider whether or not a robbery in the true sense had really taken place.

Of course, Petralia denied any participation in the affair whatsoever, and specifically denied giving Pappas any money or returning any money to him, and produced a large array of witnesses to corroborate his testimony of alibi.*

The testimony of both Anazawa and Steve (Tr. 143 et seq, and 110 et seq) is interesting upon this phase. They both untied the string from their wrists and took the blind fold and gags off unassisted, and almost instantly after the robbers had gone out the back door.

4. *Errors in the Admission of Evidence.*

Exhibits:

State's Exhibit "B" was an "entire bundle of checks", all drawn by Pappas upon the bank at intervals prior to the time in question, and to bolster the testimony of Pappas that he drew \$12,000.00 from the same bank on the day in question. These checks were offered and received upon direct examination of George Pappas,

the first witness.

Exhibit "C" was an adding machine tape upon which Pappas claimed he had figured, the next day, what had been in the till at the time of the robbery.

Exhibit "E" was a statement from a candy firm. It had to do with Pappas mental process in arriving at the claimed total of his loss.

Exhibits "H", "I", and "J" were also tapes from the adding machine said to have been run off by Mr. Pappas to compute his loss.

These exhibits only cluttered the record. They were impressive of the importance of the Pappas business, but not competent proof of the contents of the till. (Statement of Errors 4—(a), (b), (c), and (f).)

Exhibit "F" was the Pappas telephone bill. (Statement of Errors 4 (d)).

Exhibits "G", "H", "I", "K" and "M" were memos made by Pappas of telephone numbers and addresses. (Statements of Errors 4 (e), (f), (g), and (h))

The whole testimony of the witness, Wayne Smith (Tr. 438) was a record of telephone calls between Bell and Ogden, and between certain numbers. (Statement of Errors 4 (i)).

None of this was ever brought home to Petralia, and all was mere "dressing", and attempts to prove in advance that which was not contradicted.

Manifestly irrelevant and incompetent.

5. *Errors in the Instructions.*

(a) *The Instructions pertaining to Grand Larceny, "the included offense" were incorrect and erroneous to the very great prejudice of the defendant.* (Statement of Errors 5, 6, 7, 8, 9, 11).

The information charged robbery. The court of his own motion, and without a request from the state or the defendant, instructed and submitted to the jury, the question of the guilt of the defendant of the crime of grand larceny, which the court informed the jury "is necessarily included in robbery".

In the court's instruction No. 2, the court instructed the jury as follows:

"It is not necessary for the state to prove the exact amount of money alleged in the information was taken; it is sufficient if it is proven beyond a reasonable doubt that any money was taken".

The court defined robbery and stated the material facts necessary to be proven to establish that offense in instructions. Nos. 4 and 5. Instructions upon the offense of grand larceny are instructions Nos. 6, 7 and 8:

"No. 6. If the proof on the part of the prosecution in this case leaves a reasonable doubt in the minds of the jury as to whether the taking of the money from the immediate possession of Taiji Ansawa and George Steve was accomplished by means of force or fear, then you are instructed that robbery includes grand larceny, because grand larceny is necessarily included in robbery, and that a case of robbery cannot be proved without also proving a case of grand larceny.

“The statutes of Utah define Grand Larceny as follows:

“ ‘When the property taken is from the immediate presence of another.’ ”

“No. 6. If it should appear to the jury from the evidence beyond a reasonable doubt that the defendant did not take the money from the immediate presence from the said George Steve and Taiji Ansawa by violence, and through force and fear, but took the money from the immediate presence of said George Steve and Taiji Ansawa, then the defendant would be guilty of the included offense of grand larceny as defined in these instructions, and if there is in your minds a reasonable doubt of which of the public offenses the defendant is guilty, you can convict the defendant of the included offenses.”

“No. 8. The material facts which the State of Utah, must prove to establish the offense of grand larceny, beyond a reasonable doubt, are as follows:

1. That the money was taken from the immediate presence of the said George Steve and Taiji Ansawa.

2. That the money was taken from the immediate of said George Steve and Taiji Ansawa with intent to steal it.

3. That the money was taken from the immediate presence of said persons in Weber County, Utah, on or about June 25, 1948.

If you should find the defendant guilty of taking possession of the money described in the information filed in this case, or that he aided and abetted in such taking from the immediate presence of George Steve and Taiji Ansawa, with intent to steal it, but that he did not take the said property from the immediate presence of said George Steve and Taiji Ansawa in fear, then he should be found guilty of grand larceny, in accordance with these instructions.”

It will be noted that the court informed the jury that the statutes of Utah defined Grand Larceny as follows:

“When the property taken is from the *immediate presence of another*”. The Statute of the State of Utah as published in the Utah Code Annotated, 1943, defining Grand Larceny, reads as follows:

“103-36-4. Grand Larceny Defined.

Grand Larceny is committed in either of the following cases:

(1) When the property taken is of value exceeding \$50.

(2) When the property taken is *from the person of another*.

(3) When the property taken is a horse, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack or jenny.”

Under subdivision (2) of this section, to constitute grand larceny, the property taken must be taken *from the person*.

In every instance in Instructions No. 6, 7, and 8, the court used the phrase "from the immediate presence", and nowhere did the court use the phrase "from the person".

Nowhere in the instructions did the court correctly define grand larceny under paragraph 103-36-4, or either subdivision thereof.

The evidence in the case was that the money taken belonged to George Pappas and Harry Pappas and was in a box in the wall of The Club. George Steve and Taiji Ansawa were janitors engaged in cleaning the premises when the robbers came in and took the money out of the box. It was taken from the immediate presence of George Steve and Taiji Ansawa, but not from the person of either of them, or any other person.

The jury did not find the defendant guilty of robbery. The jury found the defendant guilty of grand larceny, as defined in the instructions. The instructions did not define grand larceny as it is defined in the Statute.

The court having taken upon himself the duty of instructing upon grand larceny, was bound in duty to correctly quote the statute and state the law.

There was not a scintilla of evidence that any money was taken from the person of Steve or Ansawa. There was evidence that property was taken from the immediate presence of these persons. This glaring difference and error in the instructions was duly expected to by the defendant and constitutes a reversible error.

The court, in stating that a charge of grand larceny is necessarily included in a charge of robbery, probably

had in mind the case of

State v. Donovan
77 U. 343
294 P. 1108

The old case of

State v. Davis
28 U. 10
76 P. 705

also considers the point of "immediate presence" and
"from the person".

So also does

State v. O'Day
93 U. 387
73 P. (2) 965

None of the cases justifies a mis-statement of the
definition of grand larceny, as was done in this case.

(b) Instruction No. 9 invades the province of the
jury. (Statement of Errors No. 100).

Instruction numbered 9 assumes as a fact that Steve
and Anazawa were robbed, and the court informs the
jury that the evidence in the case would warrant the jury
in finding that Joe Petralia "and others" were acting
by prearrangement, or with a common purpose in the
robbery. The testimony of Tony Salerno stands alone
in this respect, and this by itself and uncorroborated
would not warrant the jury in finding that Petralia par-
ticipated in the affair. There is a strong inference in
this introduction by the court to the thought that they
need not determine the exact time and place where the

common purpose was formed. The court might properly have informed the jury that if they find from the evidence (assuming there was sufficient corroboration of Salerno's testimony) that Petralia participated in the prearrangement, that the exact time and place of the forming of the purpose, or prearrangement was not a necessary element to be found. The instruction, as given, was calculated to carry the thought to the jury that the judge in the case thought the defendant guilty. It is sometimes difficult to avoid this inference. The form of this instruction ought not to be approved, although it may not be sufficient standing alone to justify a new trial.

(c) Instruction No. 11 is calculated to confuse. (Statement of Errors No. 11).

The instruction numbered 11 is confusing. As prepared originally it seems to have been the thought of the court to cover only the charge of robbery. By interlineation in the hand of the court (Tr. 048), grand larceny is mentioned. This element is not mentioned in the first paragraph of the instruction, and it is not properly defined in the language added by the court, nor elsewhere in the whole body of the instructions as herein elsewhere pointed out.

6. *Corroboration...* (Statement of Errors No. 12 and No. 13).

The defendant moved the court and requested the court to instruct the jury by defendant's requested instruction numbered 1, to return a verdict of not guilty in favor of the defendant. This was based upon the whole record from which there arises the question of

whether or not the evidence of Salerno was sufficiently corroborated to warrant the case being submitted to the jury.

There are some words in the testimony of the witness George Pappas, who speaks rapidly and in a broken, foreign accent, only half articulating his words at times so that it is difficult to catch and hold his thought, at one place, he seems to say that Petralia in his conversation with Pappas admitted what Pappas told him, Salerno had told. There is some testimony that Petralia was seen in and about Ogden within a day or so of the alleged occurrence. It is a difficult task to comb a record as long as this, to analyze each bit of evidence, to see how much of it is in no way connected up with the defendant, and when all is said and done, it is largely a matter of impression with the reviewing court, whether or not the case should have been taken from the jury.

7. *The jury were entitled to consider the question of the realities.* (Statement of Errors No. 11).

By defendant's requested instruction numbered 5, we sought to have the court permit the jury to consider whether or not the robbery was a phony. The charge is that George Steve, an employee of Greek nationality, and Taiji Anazawa, an employee of Japanese nationality, both swamplers of The Club, were in possession of this \$27,300.00 U. S. currency, alleged to have been taken, and that it was they who were robbed. By requested instruction numbered 5, we sought to point the truth of the matter, that the money taken, if any, was the money of George Pappas and Harry Pappas, and if they framed this thing with Tony Salerno, or connived with him, or anyone else, there was not a robbery in truth. The court

did not permit this element to be submitted, and as elsewhere pointed out, the court declined to permit the voir dire of the jurors upon this phase and refused the requested instruction numbered 5, which, we submit, was error in the cause.

It is respectfully submitted that this conviction ought to be set aside.

Arthur Woolley
Attorney for Defendant and Appellant
617 Eccles Building
Ogden, Utah