

1998

Joe W. Ruden, Jr. v. Betty Jo Ruden : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

JOE W. RUDEN, Jr.,

Plaintiff / APPELLANT,

vs.

BETTY JO RUDEN,

Defendant / APPELLEE.

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BOOKET NO 980379

BRIEF OF APPELLANT

[Utah R. App. P. Rule 29]
["Oral Argument" — Priority (15)]

Case No. 98-0379-CA

Trial Court # 89-071-5786 DA

BRIEF OF APPELLANT

APPEAL FROM THE SEVENTH DISTRICT COURT
CARBON COUNTY, STATE OF UTAH
JUDGE, DAVID K. HALLIDAY

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FILED

Utah Court of Appeals

MAR 26 1999

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

JOE W. RUDEN, Jr.,

Plaintiff / APPELLANT,

vs.

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Court Opinions of Central Importance to Appeal

PAGE	DESCRIPTION
1	Article I, Section 7 [Due Process of Law]
1	Article I, Section 26 [Provisions Mandatory and Prohibitory]
1	Article I, Section 27 [Fundamental Rights]
2-15	<u>Herring v New York 442 U.S 853, 95 Sup.Ct. 2550, 45 L.Ed. 2d 593 (1975)</u>
16-22	<u>Joseph v V.H. Groves Latter Day Saints Hospital 7 Utah 2d 39, 318 P2d 330 (Utah 1957)</u>

**** Parts of Record of Central Importance**

** Trial Court must sign an order of an agreed upon statement of facts by the parties which will be submitted hereafter acknowledging that no closing argument was permitted or allowed by the trial court. Court of Appeals has previously signed an order approving said submission.

Determinative Constitutional Provisions, Statutes, Rules [Reproduced verbatim in addendum]

TABLE OF AUTHORITIES

Cases

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Herring v New York

442 U.S 853, 95 Sup.Ct. 2550,
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7 Utah 2d 39, 318 P2d 330 (Utah 1957) iii, 3, 8

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<u>Article VIII Section 5 [Jurisdiction of District Court / Right of Appeal]</u> .	2

****JURISDICTIONAL STATEMENT**

Notice of appeal was filed within thirty days of date of judgment.

[Judgment ***filed*** June 10, 1998 (Wed.), Notice of Appeal ***filed*** July 7, 1998 (Tues.)) “Entry date” of original judgment was 6/10/98; appeal was filed 7/7/98.

Objections and Exceptions to the trial court’s Findings of Fact, Conclusions of Law, and Judgment were filed 7/7/98.

*****There exist question whether such Objections and Exceptions constitute “motion which requires the case be returned to the trial court to resolve prior to further appellate action” since the Finding of Fact and Conclusion of Law are not consistent with the court’s oral articulation of same from the bench.***

There exists no evidence in the trial record that the trial court has ever ruled upon the post-judgment motion, there exists no minute entry, no record of hearing, no signed order, or any other document evidencing court’s consideration of what appellant maintains is a post-judgment motion; therefore, **the jurisdiction of the appellate court is clouded by this omission.**

JURISDICTION OF THE COURT OF APPEALS

UTAH RULES OF APPELLATE PROCEDURE

Utah R. App. P. Rule 3 [Appeal as of right: how taken.]

[(a) Filing appeal from final orders and judgments.]

Utah R. App. P. Rule 4 [Appeal as of right: when taken.]

[(a) Appeal from final judgment and order.]

[(b) Time for appeal shall run from the entry of the order denying a new trial or granting or denying any other such motion]

UTAH CODE ANNOTATED

UCA 78-2a-3(2)(e) "Court of Appeals Jurisdiction"

[(2)(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity]

UTAH STATE CONSTITUTION

Article VIII Section 5 Constitution of Utah

[Jurisdiction of district court and other courts -- Right of appeal.]

[Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.]

STATEMENT OF ISSUE ON APPEAL

Issue on appeal is whether there exists an absolute right to have closing argument in a civil case, and if failure to grant same violates fundamental principles under **Article I, Section 27 of the Utah State Constitution.**

STANDARD OF REVIEW

There does not appear to be a standard of review established for this particular issue, as no case has ever arisen in the State of Utah where there was a denial of the right to make closing argument in a non-jury civil case, although there does exist Utah Supreme Court case law discussing the right to make a closing argument in a civil jury case. **See: Joseph v V.H. Groves Latter Day Saints Hospital 7 Utah 2d 39, 318 P2d 330 (Utah 1957)**

CONSTITUTIONAL PROVISIONS, STATUTES & RULES

Statutes, rules and other authorities which are determinative:

CONSTITUTION OF UTAH

Article I, Section 7 [Due Process of Law]

Article I, Section 26 [Provisions Mandatory and Prohibitory]

Article I, Section 27 [Fundamental Rights]

U.S. SUPREME COURT CASE LAW

Herring v New York

442 U.S 853, 95 Sup.Ct. 2550, 45 L.Ed. 2d 593 (1975)

UTAH CASE LAW

Joseph v V.H. Groves Latter Day Saints Hospital

7 Utah 2d 39, 318 P2d 330 (Utah 1957)

STATEMENT OF THE CASE

Plaintiff filed a petition for child, alimony provision of the Decree of Divorce [1989] based upon multiple grounds including but not limited to adultery, co-habitation, or in the alternative unlawful fornication contrary to public policy. Plaintiff was further seeking termination of alimony on further grounds that he had retired and thus there was a substantial change in circumstances. Defendant filed counter petition to increase alimony or in the alternative to continue it at the same level set in the Decree of Divorce based on stipulation and settlement agreement at the time of the divorce. Both parties are in agreement that original divorce decree had been entered by stipulation and that there was in fact a provision for review of the alimony provision in the decree.

STATEMENT OF FACTS

5/27/97 Plaintiff filed a petition to terminate or modify alimony provision of divorce decree dated 8/22/89 based upon the fact that he had retired for reason of "reduction in force" and that his source of income was retirement and payments from a pension benefit plan which defendant waived interest in at the time of divorce.

6/27/97 Defendant filed counter-petition for modification alleging that alimony should continue at same amount, but did not dispute that there was a stipulation at the time of divorce, that defendant had retired, and that her condition had improved.

There was a two day trial to the court, non-jury. Day one of trial was held January 29, 1998 and day two April 24, 1998 for reason trial could not be concluded on consecutive days. Just prior to completion of evidence on day two, the court announced *sua sponte* to both parties that it would not allow summation or closing arguments, thus neither party was allowed to marshal evidence or to argue circumstances that were related to their case. Court then immediately entered its findings orally from the bench. From the court's written judgment appeal was taken; *however, court has never ruled upon post judgment motion framed as objection and exception.*

SUMMARY OF ARGUMENT

Denial of right to make a closing argument was not appropriate for the trial court and constituted error as a matter of law, since closing argument is so fundamental to American jurisprudence that its denial constitutes reversible error, at best, or in the alternative, requires that the case be returned to the trial court with instructions that the parties be granted an opportunity to conduct closing argument and thereby marshal the evidence and adequately develop the record before the trial court issues a decision.

DETAIL OF ARGUMENT

DENIAL OF RIGHT TO MAKE ANY CLOSING ARGUMENT
WHATSOEVER CONSTITUTES ERROR AS A MATTER OF
LAW REQUIRING JUDGMENT TO BE REVERSED OR CASE
REMANDED FOR PURPOSE OF ALLOWING THE PARTIES
TO MAKE CLOSING ARGUMENT AND MARTIAL THE
EVIDENCE BEFORE THE TRIAL COURT.

CLOSING ARGUMENT IS ESSENTIAL FUNCTION

Utah Supreme Court has recognized that one of the essential functions of trial counsel is that of arguing the case to the fact finder; Therefore, counsel should be permitted to closing argument to refer to and use all of the competent evidence that has been marshaled and presented in the trial, and to explain its meaning and argue its significance to counsel's theory of the case.

Joseph v V.H. Groves Latter Day Saints Hospital 7 Utah 2d 39, 318 P2d 330 (Utah 1957)

“ . . .@ pg. 333. . .This emphasizes the importance of *according plaintiff's counsel the opportunity of performing one of his essential functions: that of arguing his case to the jury. In doing so, he should be permitted to refer to and use all of the competent evidence he has marshaled and presented in the trial, and to explain its meaning and argue its significance to his client's cause....*”

DUTY OF TRIAL COUNSEL

The right to closing argument in Utah has been recognized as an essential function of trial counsel and furthermore has been framed as a duty of counsel.

State v Kazda 540 P2d 949 (Utah 1975)

“ . . . @pg. 951. . . It is our opinion that it is not only the prerogative, but the duty of either counsel, to analyze all aspects of the evidence; and this should include any pertinent statements or deductions reasonably to be drawn therefrom as to what the evidence is or is not, and what it does or does not show....”

BROAD LATITUDE ALLOWED

Given the essential function of closing argument and duty of counsel to conduct same, it has been recognized that trial counsel should be afforded broad latitude, considerable freedom, and wide discretion in expressing to the jury *or* fact finder his view of the evidence.

State v Bautista 30 Utah 2d 112, 514 P2d 530 (Utah 1973)

“ . . . @ pg. 116. . . The prosecutor in summing up his case before the jury as well as defense counsel has a wide discretion and is entitled to exercise considerable freedom in expressing to the jury his view of the evidence.”

CONSTITUTIONAL PRINCIPLE

The right to closing argument has been recognized in a criminal case to be a right granted by the Utah Constitution.

See: State v St. Clair 3 Utah 2d 230, 282 P2d 323 (Utah 1955)

Article I, Section 12 Utah Const. [Rights of Accused Persons]

Also See: URCrP Rule 17 “The Trial”

“ . . . (7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.”

CLOSING ARGUMENT IS FUNDAMENTAL PRINCIPLE

The right to be heard in closing argument in a civil case is an element of a “fair trial,” deeply rooted in American jurisprudence. The right is so deeply rooted that it can safely be said that it is a *“fundamental principle”* which is essential to a free government and therefore basis for such right can be found in the Utah Constitution.

Utah Const., Article I, Section 27 [Fundamental Rights]

“Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.”

Utah Const. Article I, Section 26 [Provisions Mandatory and Prohibitory]

“The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.”

United States Supreme Court has interpreted the right to closing argument in a non-jury criminal case as one which rises to the level of a constitutional right to assistance of counsel and which has been characterized as a “fundamental right” which even extends to defendants in state criminal prosecution through the 14th Amendment.

BASIC ELEMENT OF ADVERSARY PROCESS

In Herring v New York, 442 US 853, 95 SCt 2550, 45 LEd 2d 593 (1975)

the court recognized that closing argument is a basic element of the adversary fact finding process, and that right should be accorded to every party ***regardless of how simple, clear, unimpeached, or conclusive the evidence may seem.***

It is only after all of the evidence is in that counsel for parties are in a position to present their respective versions of the case as a whole, and only then could they argue the inferences to be drawn from all the testimony and point out weaknesses in the adversary's position.

MARSHALING OF EVIDENCE IN CLOSING ARGUMENT

The underlying premise of the adversary system is that partisan advocacy on both sides of the case will best promote the fact finding process, and that no aspect of such advocacy could be or is more important than the opportunity finally to marshal the evidence for each side for submission of the case for judgment.

The language of the court perhaps best states the reason and purpose of closing arguments as follows: **(Herring v New York, supra.)**

“ . . .@ pg. 601. . .Some cases may appear to the trial judge to be simple–open and shut–at the close of the evidence. And surely in many such cases a closing argument will, in the words of Mr. Justice Jackson, be ‘likely to leave [a] judge just where it found him.’ But just as surely, there will be cases where closing argument may correct a premature misjudgement and avoid an otherwise erroneous verdict....”

“ . . .@ pg 601 ... [8a] This present case is illustrative. This three-day trial was interrupted by an interval of more than two days–a period during which the judge’s memory may well have dimmed, however conscientious a note-taker he may have been....”

BENCH TRIAL NO DISTINCTION MADE

The court furthermore in a footnote rejected any assertion or contention that the right to make a closing argument should be recognized in a jury trial but not in a bench trial; that footnote and the language thereof is significant and set out as follows: (**Herring v New York, supra**)

“ . . . @ pg. 601. . . **Footnote 15** The contention has been made that, while a right to make closing argument should be recognized in a jury trial, there is insufficient justification for such a right in the context of a bench trial. This view rests on the premise that a judge, with legal training and experience, will be likely to see the cause clearly, rendering argument superfluous, or to recognize that further illumination of the issues would be helpful, in which case he would permit closing argument.

We find this contention unpersuasive. Judicial training and expertise, however it may enhance judgment, does not render memory or reasoning infallible. Moreover, in one important respect, closing argument may be even more important in a bench trial than in a trial by jury. As Mr. Justice Powell has observed, the ‘collective judgment’ of the jury ‘tends to compensate for individual shortcomings and furnishes some assurance of a reliable decision.’ Powell, Jury Trial of Crimes, 23 Wash & Lee L Rev 1, 4 (1966). In contrast, the judge who tries a case presumably will reach his verdict with deliberation and contemplation, but must reach it without the stimulation of opposing viewpoints inherent in the collegial decision making process of a jury....”

The conviction, even though non-jury, was reversed.

CONCLUSION

Both parties in the case filed petitions. The case was tried before the court on both petitions on January 29, 1998. There was then a ***two month interval*** before the trial was completed on April 24, 1998. The court ***sua sponte*** indicated that it would rely upon its notes, and therefore no summation or closing argument would be allowed, nor was allowed.


This action by the court deprived the parties of an essential function and duty to marshal the evidence and argue their theories of the case. The court immediately made oral findings from the bench. Plaintiff filed written objections, exceptions, and Memorandum of Authority; defendant filed reply memorandum. ***The court has never held a hearing on or settled the issues raised in the objections.*** This raises an issue on appeal as to whether or not the objection is a post-judgment motion, which can be treated either as a “motion to alter or amend judgment” or “motion for new trial;” however, the fact that no closing argument was allowed makes this question more significant in this particular case. Trial court may limit closing argument, but to deny it totally is error as a matter of law.

RELIEF REQUESTED

Relief requested is in the alternative as follows:

1. Judgment be vacated and case remanded to the trial court to allow the parties to conduct closing argument and thereby marshal the evidence presented before the trial court prior to the court's entry of judgment; *or in the alternative,*
2. Plaintiff's written objection to court's Findings of Fact, Conclusions of Law, and judgment be treated as a post trial ***"Motion to Alter or Amend Judgment"*** upon which the plaintiff should be allowed hearing and argument and the case therefore be remanded to the trial court to decide said post trial motion prior to appeal.

Dated this 26th day of MARCH, 1999.


Steven Lee Payton
Attorney for Plaintiff / APPELLANT

ADDENDUM CONTENTS

Court Opinions of Central Importance to Appeal

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**** Parts of Record of Central Importance**

** Trial Court must sign an order of an agreed upon statement of facts by the parties which will be submitted hereafter acknowledging that no closing argument was permitted or allowed by the trial court. Court of Appeals has previously signed an order approving said submission.

Determinative Constitutional Provisions, Statutes, Rules [Reproduced verbatim in addendum]

CONSTITUTION OF UTAH

Art. I, § 7

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Art. I, § 26

Sec. 26. [Provisions mandatory and prohibitory.]

The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

History: Const. 1896.

Art. I, § 27

Sec. 27. [Fundamental rights.]

Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

History: Const. 1896.

[422 US 853]
CLIFFORD HERRING, Appellant,

v

STATE OF NEW YORK

422 US 853, 45 L Ed 2d 593, 95 S Ct 2550

[No. 73-6587]

Argued February 26, 1975. Decided June 30, 1975.

SUMMARY

At the close of the defendant's nonjury criminal trial in the Supreme Court of Richmond County, New York, the defense counsel's request to make a summation of the evidence before the rendition of the judgment was denied by the trial judge in reliance upon a New York statute which conferred upon the court in such a trial discretion to permit the parties to deliver summations. The Appellate Division of the New York Supreme Court, Second Department, affirmed the conviction without opinion (43 App Div 2d 816, 351 NYS2d 368), and the New York Court of Appeals denied leave to appeal.

On appeal, the United States Supreme Court vacated the judgment of the Appellate Division and remanded the case. In an opinion by STEWART, J., expressing the view of six members of the court, it was held that the Sixth Amendment's guaranty of assistance of counsel, applicable to the states through the Fourteenth Amendment, was violated by the New York statute insofar as it conferred upon the trial judge in a nonjury criminal trial the power totally to deny counsel any opportunity to make a closing summation.

REHNQUIST, J., joined by BURGER, Ch. J., and BLACKMUN, J., dissented on the ground that (1) a prophylactic rule with regard to summations in nonjury trials is inappropriate; and (2) the court's decision, reversing a criminal conviction which was fairly obtained, derives no support either from logic or from the Sixth Amendment.

Briefs of Counsel, p 874, *infra*.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Criminal Law § 46.6 — right to counsel — denial of opportunity to closing summation

1a-1d. The Sixth Amendment's guaranty of assistance of counsel, applicable to the states through the Fourteenth Amendment, is violated by a state court's denial, under the authority of a statute of the state, of any opportunity for the defense to make a summation of the evidence before rendition of judgment, since (1) closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial; (2) there can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all; and (3) there is no certain way for a trial judge to iden-

tify accurately cases in which closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict until the judge has heard the closing summation of counsel.

Constitutional Law § 37; Criminal Law §§ 46, 46.5, 48, 50; Jury § 2; Witnesses § 4 — Sixth Amendment — applicability to states

2. The Sixth Amendment's fundamental rights of an accused—the rights to a “speedy and public trial,” to an “impartial jury,” to notice of the “nature and cause of the accusation,” to be “confronted” with opposing witnesses, to “compulsory process” for defense witnesses, and to the “assistance of counsel” are extended to a defendant in a state

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

21 AM JUR 2d, Criminal Law § 234; 75 AM JUR 2d, Trial §§ 191, 211
 6 AM JUR TRIALS 771, Nonjury Summations
 USCS, Constitution, 6th and 14th Amendments
 US L ED DIGEST, Criminal § 46.6; Trial § 31
 ALR DIGESTS, Criminal Law §§ 110 et seq.; Trial § 32
 L ED INDEX TO ANNOS, Criminal Law; Trial
 ALR QUICK INDEX, Argument of Counsel; Assistance of Counsel
 FEDERAL QUICK INDEX, Assistance of Counsel; Closing Argument of Counsel

ANNOTATION REFERENCES

What provisions of the Federal Constitution's Bill of Rights are applicable to the states. 18 L Ed 2d 1388, 23 L Ed 2d 985.

Accused's right to counsel under the Federal Constitution. 93 L Ed 137, 2 L Ed 2d 1644, 9 L Ed 2d 1260, 18 L Ed 2d 1420.

Prejudicial effect of trial court's denial, or equivalent, of counsel's rights to argue case. 38 ALR2d 1396.

Propriety of court's limitation of time allowed counsel for summation or argument in criminal trial. 6 ALR3d 604.

Right of defendant in criminal case to conduct defense in person, or to participate with counsel. 17 ALR 266, 77 ALR2d 1233.

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criminal prosecution through the Fourteenth Amendment.

Constitutional Law § 10 — Sixth Amendment — liberal construction

3. The Sixth Amendment rights of an accused are not given a narrowly literalistic construction by the Supreme Court.

Criminal Law § 46.4 — right to counsel — scope

4. The right to the assistance of counsel means that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments; this right has been given a meaning that ensures for the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process.

Trial § 31 — by jury — defense — right to closing summation

5. Counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge.

Criminal Law § 1 — adversary system

6. The very premise of the American adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.

Trial § 31 — closing arguments — discretion of presiding judge

7. The judge presiding at a criminal trial has broad discretion in controlling the duration and limiting the scope of closing summations; he may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant, and he may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial.

Trial § 31 — closing arguments — by defendant

8a, 8b. A defendant in a criminal case who has exercised the right to conduct his own defense has the same right, as counsel for a defendant, to make a closing argument in a nonjury as well as in a jury trial.

SYLLABUS BY REPORTER OF DECISIONS

A total denial of the opportunity for final summation in a nonjury criminal trial as well as in a jury trial deprives the accused of the basic right to make his defense, and a New York statute granting every judge in a nonjury criminal trial the power to deny such summation before rendition of judgment violates the Sixth Amendment of the Constitution as applied against the States by

the Fourteenth.

43 App Div 2d 816, 351 NYS2d 368, vacated and remanded.

Stewart, J., delivered the opinion of the Court, in which Douglas, Brennan, White, Marshall, and Powell, JJ., joined. Rehnquist, J., filed a dissenting opinion, in which Burger, C.J., and Blackmun, JJ., joined, post, p 865, 45 L Ed 2d p 602.

APPEARANCES OF COUNSEL

Diana A. Steele argued the cause for appellant.

Norman C. Morse and Gabriel I. Levy argued the cause for appellee.

Briefs of Counsel, p 874, *infra*.

OPINION OF THE COURT

Mr. Justice Stewart delivered the opinion of the Court.

[1a] A New York law confers upon every judge in a nonjury criminal

trial the power to deny counsel any opportunity to make a summation of the evidence before the rendition of judgment. NY Crim Proc Law § 320.20

[422 US 854]

(3)(c) (1971).¹ In the case before us we are called upon to assess the constitutional validity of that law.

I

The appellant was brought to trial in the Supreme Court of Richmond County, NY, upon charges of attempted robbery in the first and third degrees and possession of a dangerous instrument.² He waived a jury.

The trial began on a Thursday, and, after certain preliminaries, the balance of that day and most of Friday were spent on the case for the prosecution. The complaining witness, Allen Braxton, testified that the appellant had approached him

outside his home in a Staten Island housing project at about six o'clock on the evening of September 15, 1971, and asked for money. He said that when he refused this demand, the appellant had swung a knife at him. On cross-examination, the appellant's lawyer attempted to impeach the credibility of this evidence by demonstrating inconsistencies between Braxton's testimony and other sworn statements that Braxton had previously made.³ The only other

[422 US 855]

witness for the prosecution was the police officer who had arrested the appellant upon the complaint of Braxton. The officer testified that Braxton had reported the alleged incident to him, and that the appellant, when confronted by the officer later in the evening, had denied Braxton's story and said that he had been working for a Mr. Taylor at the time of the alleged offense. The officer testified that he had then arrested the appellant and found a small knife in his pocket.⁴

1. Section 320.20(3)(c) provides:

"The court may in its discretion permit the parties to deliver summations. If the court grants permission to one party, it must grant it to the other also. If both parties deliver summations, the defendant's summation must be delivered first."

By contrast, New York law explicitly grants a right to make a "closing statement" in every civil case. NY Civ Prac Rule 4016 (1963).

2. NY Penal Law §§ 110.00/160.15, 110.00/160.05, 265.05 (1975).

3. On cross-examination of Braxton, the appellant's lawyer demonstrated the following inconsistencies: First, Braxton testified at trial that, after running into his house to evade the appellant, he did not look back outside to see where the appellant had gone; but before the grand jury, Braxton had said that, after entering his house, he had looked outside and the appellant was gone. Second, Braxton testified at trial that the knifeblade was shiny; but in his grand jury testimony he had said that he could not remember if it was shiny or not. Third, Braxton testified at trial that the appellant had asked him for money

in a "soft" voice; but before the grand jury he had stated that the request for money was "kind of loud." Fourth, Braxton testified at trial that the appellant had swung a blade at him once; but in the felony complaint filed the day after the alleged crime, he had stated that the appellant had swung a knife at him "a couple of times."

4. There was a major inconsistency between the police officer's testimony and that of Braxton. Braxton testified that he was walking down the street with the officer at about 6:45 p.m. when they came across the appellant. But the officer testified that he had searched for the appellant with Braxton until only about 6:30 p.m., when they had separated, and that about an hour later he had seen the appellant and Braxton on opposite sides of Broadway. Thus Braxton testified that he and the officer were together when they found the appellant about 6:45 p.m., while the officer's testimony was that he had separated from Braxton about 6:30 p.m., and that he next saw Braxton and the appellant on opposite sides of a street at about 7:30 p.m.

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At the close of the case for the prosecution, the court granted a defense motion to dismiss the charge of possession of a dangerous instrument on the ground that the knife in evidence was too small to qualify as a dangerous instrument under state law. The trial was then adjourned for the two-day weekend.

Proceedings did not actually resume until the following Monday afternoon. The first witness for the defense

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was Donald Taylor, who was the appellant's employer. He testified that he recalled seeing the appellant on the job premises at about 5:30 p. m. on the day of the alleged offense. The appellant then took the stand and denied Braxton's story. He said that he had been working on a refrigerator at his place of employment during the time of the alleged offense, and further testified that Braxton, a former neighbor, had threatened on several occasions to "fix" him for refusing to give Braxton money for wine and drugs.

At the conclusion of the case for the defense, counsel made a motion to dismiss the robbery charges. This motion was denied. The appellant's lawyer then requested to "be heard somewhat on the facts." The trial

judge replied: "Under the new statute, summation is discretionary, and I choose not to hear summations." The judge thereupon found the appellant guilty of attempted robbery in the third degree, and subsequently sentenced him to serve an indeterminate term of imprisonment with a maximum of four years. The conviction was affirmed without opinion by an intermediate appellate court.⁵ Leave to appeal to the New York Court of Appeals was denied. An appeal was then brought here, and we noted probable jurisdiction. 419 US 893, 42 L Ed 2d 137, 95 S Ct 171.

II

[1b, 2] The Sixth Amendment guarantees to the accused in all criminal prosecutions the rights to a "speedy and

[422 US 857]

public trial." to an "impartial jury," to notice of the "nature and cause of the accusation," to be "confronted" with opposing witnesses, to "compulsory process" for defense witnesses, and to the "Assistance of Counsel."⁶ These fundamental rights are extended to a defendant in a state criminal prosecution through the Fourteenth Amendment.⁷

5. The court subsequently certified that in affirming the judgment, it had rejected the appellant's constitutional claims:

"Upon the appeal herein, there was presented and passed upon the following constitutional question, namely, whether relator's rights under the Fourth, Sixth and Fourteenth Amendments were denied by the trial court's application of paragraph (c) of subdivision 3 of CPL 320.20 to refuse appellant permission to deliver a summation. This court considered appellant's said conviction and determined that none of his constitutional rights were violated."

6. The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial, by an impartial jury . . . [.] to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

7. See *Klopfer v North Carolina*, 386 US 213, 18 L Ed 2d 1, 87 S Ct 988 (speedy trial); *In re Oliver*, 333 US 257, 92 L Ed 682, 68 S Ct 499 (public trial); *Duncan v Louisiana*, 391 US 145, 20 L Ed 2d 491, 88 S Ct 1444 (jury trial); *Cole v Arkansas*, 333 US 196, 92 L Ed 644, 68 S Ct 514 (notice of nature and cause of accusation); *Pointer v Texas*, 380 US 400, 13 L Ed 2d 923, 85 S Ct 1065 (confrontation); *Washington v Texas*, 388 US 14, 18 L Ed 2d 1019, 87 S

[3, 4] The decisions of this Court have not given to these constitutional provisions a narrowly literalistic construction. More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments. For example, in *Ferguson v Georgia*, 365 US 570, 5 L Ed 2d 783, 81 S Ct 756, the Court held constitutionally invalid a state statute that, while permitting the defendant to make an unsworn statement to the court and jury, prevented defense counsel from eliciting the defendant's testimony through direct examination. Similarly, in *Brooks v Tennessee*, 406 US 605, 32 L Ed 2d 358, 92 S Ct 1891, the Court found unconstitutional a state law

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that restricted the right of counsel to decide "whether, and when in the

course of presenting his defense, the accused should take the stand." *Id.*, at 613, 32 L Ed 2d 358, 92 S Ct 1891. The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process.

[1c, 5] There can be no doubt that closing argument for the defense is a basic element of the adversary fact-finding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge.⁸ The issue has been considered less often

[422 US 859]

in the context of a so-called bench trial. But the overwhelming weight of authority, in both federal and state courts, holds that a total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense.⁹

Ct 1920 (compulsory process); *Gideon v Wainwright*, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR2d 733, and *Argersinger v Hamlin*, 407 US 25, 32 L Ed 2d 530, 92 S Ct 2006 (assistance of counsel).

8. See, e.g., *Jackson v State*, 239 Ala 38, 193 So 417 (1940); *Yeldell v State*, 100 Ala 26, 14 So 570 (1894); *People v Green*, 99 Cal 564, 34 P 231 (1893); *State v Hoyt*, 47 Conn 518 (1880); *Hall v State*, 119 Fla 38, 160 So 511 (1935); *Williams v State*, 60 Ga 367 (1878); *Porter v State*, 6 Ga App 770, 65 SE 814 (1909); *State v Gilbert*, 65 Idaho 210, 142 P2d 584 (1943); *People v McMullen*, 300 Ill 383, 133 NE 328 (1921); *Lynch v State*, 9 Ind 541 (1857); *State v Verry*, 36 Kan 416, 13 P 838 (1887); *Sizemore v Commonwealth*, 240 Ky 279, 42 SW2d 328 (1931); *State v Cancienne*, 50 La Ann 1324, 24 So 321 (1898); *Wingo v State*, 62 Miss 311 (1884); *State v Page*, 21 Mo 257 (1855); *State v Tighe*, 27 Mont 327, 71 P 3 (1903); *State v Shedoudy*, 45 NM 516, 118 P2d 280 (1941); *People v Marcelin*, 23 App Div 2d 368, 260 NYS2d 560 (1965); *State v Hardy*, 189 NC 799, 128 SE 152 (1925); *Weaver v*

State, 24 Ohio St 584 (1874); *State v Rogoway*, 45 Ore 601, 78 P 987 (1904), rehearing, 45 Ore 611, 81 P 234 (1905); *Stewart v Commonwealth*, 117 Pa 378, 11 A 370 (1887); *State v Ballenger*, 202 SC 155, 24 SE2d 175 (1943); *Word v Commonwealth*, 30 Va 743 (1831); *State v Mayo*, 42 Wash 540, 85 P 251 (1906); *Seattle v Erickson*, 55 Wash 675, 104 P 1128 (1909).

One treatise states the general rule as follows: "The presentation of his defense by argument to the jury, by himself or his counsel, is a constitutional right of the defendant which may not be denied him, however clear the evidence may seem to the trial court." 5 R. Anderson, *Wharton's Criminal Law and Procedure* § 2077 (1957).

9. See *United States v Walls*, 443 F2d 1220 (CA6 1971); *Thomas v District of Columbia*, 67 App DC 179, 90 F2d 424 (1937); *United States ex rel. Spears v Johnson*, 327 F Supp 1021 (ED Pa 1971), revd on other grounds, 463 F2d 1024 (CA3 1972); *United States ex rel. Wilcox v Pennsylvania*, 273 F Supp 923 (ED Pa 1967); *Floyd v State*, 90 So 2d 105 (Fla 1956); *Olds v*

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One of many cases so holding was *Yopps v State*, 228 Md 204, 178 A2d 879 (1962). The defendant in that case, indicted for burglary, was tried by the court without a jury. The defendant in his testimony admitted being in the vicinity of the offense, but denied any involvement in the crime. At the conclusion of the testimony, the trial judge announced a judgment of guilty. Defense counsel objected, stating that he wished to present argument on the facts. But the trial judge refused to hear any argument on the ground that only a question of credibility

[422 US 860]

was involved, and that therefore counsel's argument would not change his mind. The Maryland Court of Appeals held that the trial court's refusal to permit defense counsel to make a final summation violated the defendant's right to the assistance of counsel under the State and Federal Constitutions:

"The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unim-

peached, and conclusive the evidence may seem, unless he has waived his right to such argument, or unless the argument is not within the issues in the case, and the trial court has no discretion to deny the accused such right." *Id.*, at 207, 178 A2d, at 881.

The widespread recognition of the right of the defense to make a closing summary of the evidence to the trier of the facts, whether judge or jury, finds solid support in history. In the 16th and 17th centuries, when notions of compulsory process, confrontation, and counsel were in their infancy, the essence of the English criminal trial was argument between the defendant and counsel for the Crown. Whatever other procedural protections may have been lacking, there was no absence of debate on the factual and legal issues raised in a criminal case.¹⁰ As the rights to compulsory process, to confrontation, and to counsel developed,¹¹ the adversary system's commitment

[422 US 861]

to argument was neither discarded nor diluted. Rather, the reform in procedure had the effect of shifting the primary function of argument to summation of the evi-

Commonwealth, 10 Ky 465 (1821); *Yopps v State*, 228 Md 204, 178 A2d 879 (1962); *People v Thomas*, 390 Mich 93, 210 NW2d 776 (1973); *Decker v State*, 113 Ohio St 512, 150 NE 74 (1925); *Commonwealth v McNair*, 208 Pa Super 369, 222 A2d 599 (1966); *Commonwealth v Gambrell*, 450 Pa 290, 301 A2d 596 (1973); *Anselin v State*, 72 Tex Cr 17, 160 SW 713 (1913); *Walker v State*, 133 Tex Cr 300, 110 SW2d 578 (1937); *Ferguson v State*, 133 Tex Cr 250, 110 SW2d 61 (1937). Cf. *Collingsworth v Mayo*, 173 F2d 695, 697 (CA5 1949); *State v Hollingsworth*, 160 La 26, 106 So 662 (1925). But see *People v Manske*, 399 Ill 176, 77 NE2d 164 (1948). Cf. *People v Berger*, 288 Ill 47, 119 NE 975 (1918); *Casterlow v State*, 256

Ind 214, 267 NE2d 552 (1971); *Reed v State*, 232 Ind 68, 111 NE2d 661 (1953); *Lewis v State*, 11 Ga App 14, 74 SE 442 (1912).

10. Stephen has described the trial procedure in this period as a "long argument between the prisoner and the counsel for the Crown." 1 J. Stephen, *History of the Criminal Law of England*, 326 (1883). For a fuller description of the trial process in that period, see *id.*, at 325-326, 350.

11. See 7 Will 3, c 3, § 1 (1695); 1 Anne, Stat 2, c 9, § 3 (1701); 6 and 7 Will 4, c 114, § 1 (1836).

dence at the close of trial, in contrast to the "fragmented" factual argument that had been typical of the earlier common law.¹²

[422 US 862]

It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. See *In re Winship*, 397 US 358, 25 L Ed 2d 368, 90 S Ct 1068.

[6] The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ulti-

mate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

[7] This is not to say that closing arguments in a criminal case must be uncontrolled or even untrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion. See generally 5 R. Anderson, *Wharton's Criminal Law and Procedure* § 2077 (1957). Cf. American Bar Association Project on Standards for Criminal Justice,

12. Cf. Stephen, *supra*, n 10, at 349.

In the Colonies, where a similar reform in criminal defendants' rights occurred, common practice, if not right, apparently gave to the accused the opportunity to sum up his case in closing argument. For example, Zephaniah Swift, in an early colonial treatise on the law in Connecticut, wrote:

"When the exhibition of evidence is closed, the attorney for the state opens the argument, the counsel for the prisoner follow[s], the attorney for the state then closes the argument, and the chief justice then sums up the evidence in his charge delivered to the jury, in which he states in the most candid and impartial manner, the evidence and the law, and the arguments of the counsel for the state, as well as the prisoner. . . ." 2 Z. Swift, *A System of the Laws of the State of Connecticut* 401 (1796).

With a lesser degree of certainty, a modern scholar concludes that in the trial of capital offenses in colonial Virginia, it was likely, but not certain, that the accused would be given

an opportunity to make a closing argument in summation at the end of the trial. See H. Rankin, *Criminal Trial Proceedings in the General Court of Colonial Virginia* 101 (1965).

In England, in 1865, the right of the defendant in a criminal trial to make a closing argument, either by himself or by counsel if he was represented, was given express statutory recognition: "[U]pon every Trial . . . whether the Prisoners . . . or any of them, shall be defended by Counsel or not . . . such Prisoner . . . shall be entitled . . . when all the Evidence is concluded to sum up the Evidence respectively." Criminal Procedure Act of 1865, 28 Vict, c 18, § 2. This remains the rule in England. 10 Halsbury's Laws of England, § 777, pp 422-423 (3d ed 1955). See also T. Butler & M. Garsia, *Archibold's, Pleading, Evidence and Practice in Criminal Cases*, § 558 (37th ed 1969). Cf. *R. v Wainright*, 13 Cox Cr Cases 171 (1875); *R. v Wickham* 55 Cr App R 199 (1971) (noted at 1971 Crim L Rev 233).

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The Prosecution Function § 5.8, pp 126-129, and the Defense Function, § 7.8, pp 277-282 (App Draft 1971).

[422 US 863]

[1d] But there can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all. The only conceivable interest served by such a statute is expediency. Yet the difference in any case between total denial of final argument and a concise but persuasive summation could spell the difference, for the defendant, between liberty and unjust imprisonment.¹³

Some cases may appear to the trial judge to be simple—open and shut—at the close of the evidence. And surely in many such cases a closing argument will, in the words of Mr. Justice Jackson, be “likely to leave [a] judge just where it found him.”¹⁴ But just as surely, there will be cases where closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict. And there is no cer-

tain way for a trial judge to identify accurately which cases these will be, until the judge has heard the closing summation of counsel.¹⁵

[422 US 864]

[8a] The present case is illustrative. This three-day trial was interrupted by an interval of more than two days—a period during which the judge’s memory may well have dimmed, however conscientious a notetaker he may have been. At the conclusion of the evidence on the trial’s final day, the appellant’s lawyer might usefully have pointed to the direct conflict in the trial testimony of the only two prosecution witnesses concerning how and when the appellant was found on the evening of the alleged offense.¹⁶ He might also have stressed the many inconsistencies, elicited on cross-examination, between the trial testimony of the complaining witness and his earlier sworn statements.¹⁷ He might reasonably have argued that the testimony of the appellant’s employer was entitled to greater credibility than that of the complaining witness, who, according to

13. We deal in this case only with final argument or summation at the conclusion of the evidence in a criminal trial. Nothing said in this opinion is to be understood as implying the existence of a constitutional right to oral argument at any other stage of the trial or appellate process.

14. R. Jackson, *The Struggle for Judicial Supremacy*, 301 (1941).

15. The contention has been made that, while a right to make closing argument should be recognized in a jury trial, there is insufficient justification for such a right in the context of a bench trial. This view rests on the premise that a judge, with legal training and experience, will be likely to see the case clearly, rendering argument superfluous, or to recognize that further illumination of the issues would be helpful, in which case he would permit closing argument.

We find this contention unpersuasive. Judicial training and expertise, however it may enhance judgment, does not render memory or reasoning infallible. Moreover, in one important respect, closing argument may be even more important in a bench trial than in a trial by jury. As Mr. Justice Powell has observed, the “collective judgment” of the jury “tends to compensate for individual shortcomings and furnishes some assurance of a reliable decision.” Powell, *Jury Trial of Crimes*, 23 Wash & Lee L Rev 1, 4 (1966). In contrast, the judge who tries a case presumably will reach his verdict with deliberation and contemplation, but must reach it without the stimulation of opposing viewpoints inherent in the collegial decisionmaking process of a jury.

16. See n 4, *supra*.

17. See n 3, *supra*.

the appellant, had threatened to "fix" him because of personal differences in the past. There is no way to know whether these or any other appropriate arguments in summation might have affected the ultimate judgment in this case. The credibility assessment was solely for the trier of fact. But before that determination was made, the appellant, through counsel, had a right to be heard in summation of the evidence from the point of view most favorable to him.¹⁸

[422 US 865]

[1c] In denying the appellant this right under the authority of its statute, New York denied him the assistance of counsel that the Constitution guarantees. Accordingly, the judgment before us is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SEPARATE OPINION

Mr. Justice Rehnquist, with whom The Chief Justice and Mr. Justice Blackmun join, dissenting.

cause the accused has a prior right to the assistance of a third party in the preparation and presentation of his defense.

I

The Court has made of this a very curious case. What began as a constitutional challenge to a statute which gives trial courts discretion as to whether "parties" may deliver summations, has been transformed into an exploration of the right to counsel—although no one doubts that appellant was competently represented throughout the proceedings which resulted in his conviction. Today's opinion, in deriving from the right to counsel further rights relating to the conduct of a trial, expands the earlier holdings in *Ferguson v Georgia*, 365 US 570, 5 L Ed 2d 783, 81 S Ct 756 (1961), and *Brooks v Tennessee*, 406 US 605, 32 L Ed 2d 358, 92 S Ct 1891 (1972). In each of these three instances one must presume, in view of the Court's analytical approach, that regardless of the intrinsic importance of the rights involved, they are enforced only be-

I think that in each instance a statement from Mr. Justice Frankfurter's separate opinion in *Ferguson* is apropos: "This is not a right-to-counsel case." 365 US, at 599, 5 L Ed 2d 783, 81 S Ct 756. In the present case, the crucial fact is not that *counsel* wishes to present a summation of the evidence, but that the *defendant*—whether through counsel or otherwise—wishes to make such a summation. Of course

[422 US 866]

I do not suggest that the rights enforced in these cases are without basis, at least in particular cases, in the Due Process Clause of the Fourteenth Amendment. Cf. *id.*, at 598-601, 5 L Ed 2d 783, 81 S Ct 756 (opinion of Frankfurter, J.); *Brooks v Tennessee*, *supra*, at 618, 32 L Ed 2d 358, 92 S Ct 1891 (Rehnquist, J., dissenting). But I do suggest that the Court's analytical framework, and its result-

18. [8b] A defendant who has exercised the right to conduct his own defense has, of course, the same right to make a closing

argument. See *Faretta v California*, *ante*, p 806, 45 L Ed 2d 562, 95 S Ct 2525.

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ing prophylactic rule, are wrongly employed to decide this case.

I would have thought that in *Faretta v California*, ante, p 806, 45 L Ed 2d 562, 95 S Ct 2525, the Court had recanted its approach in *Ferguson and Brooks v Tennessee*. In *Faretta* the Court concluded that it is the Sixth Amendment, and not the Right-to-Counsel Clause of that Amendment, which "constitutionalizes the right in an adversary criminal trial to make a defense as we know it." Ante, at 818, 45 L Ed 2d 562, 95 S Ct 2525. Yet in the present case we are informed that it is the Right-to-Counsel Clause which constitutionalizes the right to present a defense "in accord with the traditions of the adversary factfinding process." Ante, at 857, 45 L Ed 2d 598. Not being content merely to contradict *Faretta* by holding that entitlement to the traditions of our judicial system depends upon the right to retain counsel, the Court also states that, "of course, the same right to make a closing argument" is available to those who choose not to exercise their right to counsel. Ante, at 864 n 18, 45 L Ed 2d 602. To complete the confusion, the Court does not explain the latter ipse dixit, but does cite one case—*Faretta*.

II

The Due Process Clause of the Fourteenth Amendment has long been recognized as assuring "fundamental fairness" in state criminal proceedings. See, e.g., *Lisenba v California*, 314 US 219, 236, 86 L Ed 166, 62 S Ct 280 (1941); *Moore v Dempsey*, 261 US 86, 90–91, 67 L Ed 543, 43 S Ct 265 (1923). Throughout the history of the Clause we have generally considered the question of
[422 US 867]
fairness on a case-by-case basis, re-

flecting the fact that the elements of fairness vary with the circumstances of particular proceedings. As the Court observed in *Snyder v Massachusetts*, 291 US 97, 116–117, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (1934):

"Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others."

See, e.g., *Sheppard v Maxwell*, 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507 (1966); *Spencer v Texas*, 385 US 554, 17 L Ed 2d 606, 87 S Ct 648 (1967); *Chambers v Mississippi*, 410 US 284, 35 L Ed 2d 297, 93 S Ct 1038 (1973); *Cupp v Naughten*, 414 US 141, 38 L Ed 2d 368, 94 S Ct 396 (1973).

However in some instances the Court has engaged in a process of "specific incorporation," whereby certain provisions of the Bill of Rights have been applied against the States. See the cases cited ante, at 857 n 7, 45 L Ed 2d 597. In making the decision whether or not a particular provision relating to the conduct of a trial should be incorporated, we have been guided by whether the right in question may be deemed essential to fundamental fairness—an analytical approach which is compelled if we are to remain true to the basic orientation of the Due Process Clause. See, e.g., *In re Oliver*, 333 US 257, 270–271, 92 L Ed 682, 68 S Ct 499 (1948) (public trial); *Duncan v Louisiana*, 391 US 145, 155–158, 20 L Ed 2d 491, 88 S Ct 1444 (1968) (jury trial); *Pointer v Texas*, 380 US 400, 403–404, 13 L Ed 2d 923, 85 S Ct 1065 (1965) (confrontation); *Washington v Texas*, 388 US 14, 17–19, 18 L Ed 2d 1019, 87 S Ct

1920 (1967) (compulsory process); *Gideon v Wainwright*, 372 US 335, 342, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR3d 733 (1963) (appointed counsel). But once we have determined that a particular right should be incorporated against the States, we have abandoned case-by-case considerations of fairness. Incorporation, in effect, results in the establishment of a strict prophylactic rule, one which is to be generally observed in every case regardless of its particular circumstances. It is a judgment on the part of

[422 US 868]

this Court that the probability of unfairness in the absence of a particular right is so great that denigration of the right will not be countenanced under any circumstances. These judgments by this Court reflect similar judgments made by the Constitution's Framers with regard to the Federal Government.

Beyond certain of the specified rights in the Bill of Rights, however, I do not understand the basis for abandoning the case-by-case approach to fundamental fairness. There are a myriad of rules and practices governing the conduct of criminal proceedings which may or may not in particular circumstances be necessary to assure fundamental fairness. Obvious examples are the rules governing the introduction and testing of evidence, as well as, I think, the New York rule governing summations in nonjury trials. Such matters are not specifically dealt with in the text of the Constitution, nor are they subject to the judgment that uniform application of a particular rule is necessary because the

likelihood of unfairness is too great when that rule is not observed. As to such matters it is appropriate, and frequently necessary, that trial judges be accorded considerable discretion, subject of course to both appellate review on an abuse-of-discretion standard and, ultimately, to the fundamental fairness inquiry under the Fourteenth Amendment.

The present case is a prime example of why a prophylactic rule with regard to summations in nonjury trials is thoroughly inappropriate. The case was tried before a judge who, unlike a jury, may take notes on testimony, and who is experienced in both judging the credibility of witnesses and testing the relevance of their testimony to the elements which must be proved to obtain a conviction. The case was conceptually and factually a simple one, involving no more than whether one was

[422 US 869]

to believe the victim, despite the inconsistencies in his testimony, or the defendant.¹ The judge had previously permitted appellant's counsel to summarize the evidence, on the occasion of the motion to dismiss at the close of the State's case. That appellant's counsel had considerable faith in the judge's familiarity with, and ability to organize, the evidence is shown by the transcript of that earlier summation:

"[MR. ADAMS:] Do you want to hear me extensively on that, Judge? Or I have a witness here, I can go on, or would you rather hear me on some lengthy argument subsequently, Judge?

"THE COURT: I will hear anything you have to say.

1. The employer's credibility was not at issue. Not only was he vague as to the times at which he had seen appellant at his garage,

but that garage was located only 3½ blocks from the scene of the crime. App 76, 86.

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"MR. ADAMS: All right. Judge, I believe here that as a matter of law we have a doubt here. Firstly, on this first witness of the prosecution here, Judge. There were numerous inconsistencies, and *I will not bore the Court reading that. Of course the Court has copious notes on it, and I am sure it is very fresh in the Court's mind.* But on top of that, Judge, we have a questionable complainant, with a questionable way of how it happened, no witness other than this complainant.

"An officer who checked out this particular matter testified here and said that the man was working at that time. A definite denial by the defendant. And I believe that as a matter of law, Judge, there is a reasonable doubt here." App 66 (emphasis added).

Similarly, when the opportunity to summarize was

[422 US 870]

denied, appellant's counsel did not so much as suggest that he thought it necessary to refresh the judge's memory as to certain matters.² It should also be noted that in his earlier argument counsel had referred to most of the matters which the Court today suggests might have usefully been brought to the judge's attention in a final summation. See ante, at 864, 45 L Ed 2d 602. Finally, the fact that the judge

conducted this trial in a fair-minded fashion, and would not arbitrarily prevent a summation which could be expected to clarify his understanding of the case, is evidenced by his dismissal of one count over the vigorous protests of the prosecution.

Whatever theoretical effect the denial of argument may have had on the judgment of conviction, its practical effect on the outcome must have been close to nothing. The trial judge was not conducting a moot court; he was sitting as the finder of fact in a trial in which he had been present during the testimony of every single witness. No experienced advocate would insist on presenting argument to such a judge after he had indicated his belief that argument would not be of assistance. Trial counsel here did not insist, and the claim which

[422 US 871]

is today sustained by this Court is urged by other counsel.

The truth of the matter is that appellant received a fair trial, and I do not read the Court's opinion to claim otherwise. The opinion instead establishes a right to summation in criminal trials regardless of circumstances, by tagging that right onto one of the specifically incorporated rights. It thereby conveniently avoids the difficulties of being unable

2. The colloquy at the end of the trial was as follows:

"MR. ADAMS: Judge, at this time I respectfully move to—make two motions, Judge. Firstly, that the Court dismiss the two counts, first count and the second count of the indictment on the grounds the People have failed to make out a prima facie case; and on the further grounds the People have failed to prove the defendant guilty of each and every part and parcel of the crimes charged in count one and count two beyond a reasonable

doubt as a matter of law, and as a matter of fact.

"THE COURT: Motion denied. I will take a short recess to deliberate, and I will give you a verdict.

"MR. ADAMS: Well, can I be heard somewhat on the facts?

"THE COURT: Under the new statute, summation is discretionary, and I choose not to hear summations.

"THE CLERK: Remand." App 92.

to characterize appellant's trial as fundamentally unfair, but only at the expense of ignoring the logical difficulty of adorning the specifically incorporated rights with characteristics which are not themselves necessary for fundamental fairness.³

The nature of the right which the Court today creates is as curious as its genesis. Apparently it requires nothing more than pro forma observance, since the trial judge "must be and is given great latitude" in controlling the duration and limiting the scope of closing summations. He may determine what is a "reasonable" time for argument, and at what point the argument becomes repetitive or redundant, or strays "unduly" from the mark. "In all these respects he must have broad discretion." *Ante*, at 862, 45 L Ed 2d 600. That is, after 30 seconds, or some other minimal period of argument, the judge is free to exercise his discretion. It is not clear why this should be so. If it is

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true that "there is no certain way for a trial judge to identify accurately [those cases in which closing argument may be beneficial], until the judge has heard the closing summation of counsel," *ante*, at 863, 45 L Ed 2d 601, it is equally true that he cannot determine whether continued argument will be

repetitive, redundant, or otherwise useless until he has heard the continued argument. But in any event, the constitutional issue does rather quickly become framed once again according to the standards which should have governed all along—whether or not the judge's actions in the particular case deprived the defendant of a trial which was fundamentally fair.⁴

By propagating a right to summation—despite such a right's lack of textual basis, and despite the inability reasonably to conclude that the right is so basic that we cannot chance trial court discretion in the matter—the Court has furthered the practice of reviewing state criminal trials in a piecemeal fashion. The incident upon which this reversal is based was but one stage in a carefully conducted trial, and cannot be claimed to have permeated the entire proceeding as would trial without a jury, or without counsel. The Court is thus disregarding the basic question of whether the proceeding by which a defendant is deprived of his liberty is fundamentally fair.

The Court's decision derives no support either from logic or from the Amendment it professes to apply. Since it reverses a criminal conviction which was fairly obtained, I dissent.

3. While the Court, *ante*, at 862, 45 L Ed 2d 600, presents a variety of arguments supporting the wisdom and desirability of generally permitting closing arguments in nonjury trials, none of them impress me as rising to the level of fundamental fairness. They would be of substantial merit if presented to the New York Legislature, but are hardly relevant to the constitutional inquiry which it is our duty to perform. As for the Court's final flourish ("no aspect of such advocacy could be more important"), it is obvious hyperbole which can

only be uttered in complete disregard of such matters as cross-examination, the selection of trial strategy and witnesses, and attempts to exclude unconstitutionally obtained evidence.

4. I would also think it not unlikely under the Court's holding that post-trial briefing would be an adequate substitute for oral summation, since it meets the concerns which the Court expresses as the basis for its newly found constitutional right. See *ante*, at 862, 45 L Ed 2d 600.

7 Utah 2d 39

Charles JOSEPH, for himself and as Guardian ad litem for his children, Tamara Lee and Melanie, Plaintiff and Appellant,

v.

W. H. GROVES LATTER DAY SAINTS HOSPITAL, a corporation, and Dr. J. H. Carlquist, Defendants and Respondents.

No. 8557.

Supreme Court of Utah.

Nov. 26, 1957.

Action for death of deceased on alleged ground that hospital had negligently administered a transfusion of incompatible blood bringing on a kidney infection and proximately causing death. Judgment for defendants in the Third District Court, Salt Lake County, Martin M. Larson, J., and the plaintiff appeals. The Supreme Court, Crockett, J., held that exclusion of entries by doctors in hospital record was prejudicial error and that a nurse was entitled to testify that the deceased had received good nursing care in the hospital.

Remanded for a new trial.

McDonough, C. J., and Henriod, J., dissented.

1. Evidence ⇨351

In action for death of deceased on ground that hospital had negligently administered a transfusion of incompatible blood which brought on a kidney infection proximately causing death, notations recorded by doctors on hospital records with information deemed pertinent to the care and treatment by persons performing duties in that regard, were admissible notwithstanding that the notations represented in part the doctors' opinions as to the patient's condition.¹

2. Appeal and Error ⇨1027

The Supreme Court does not reverse a case merely because of error, and will

do so only when it appears to be prejudicial to the rights of a party, but such mandate does not authorize the court to ignore errors that may have a substantial effect upon an outcome of the trial. Rules of Civil Procedure, rule 61.²

3. Appeal and Error ⇨1027

If an error appears to be of such nature that it can be stated with assurance that it was of no material consequence in its effect upon the trial, because reasonable minds would have arrived at the same result, regardless thereof, the error would be harmless and the granting of a new trial would not be warranted, but if there is a reasonable likelihood that in absence of the error a different result would have eventuated, the error is prejudicial.

4. Trial ⇨121(1)

Counsel of plaintiff in argument to the jury should be permitted to refer to and use all of the competent evidence he has marshalled and presented at the trial, and to explain its meaning and argue its significance to his client's cause.

5. Appeal and Error ⇨1055(1)

In action for death of deceased on ground that hospital allegedly negligently administered a transfusion of incompatible blood bringing on a kidney infection proximately causing death, error in excluding notations made by doctors on hospital records and deemed pertinent to the care and treatment by persons performing duties in that regard was prejudicial error.

6. Appeal and Error ⇨843(1)

Where the Supreme Court orders a new trial, it must pass upon all questions of law involved in a case presented upon appeal and necessary to a final determination. Rules of Civil Procedure, rule 76(2).

7. Evidence ⇨512

In action against hospital for death of deceased who allegedly was given an in-

1. In re Richard's Estate, 5 Utah 2d 106, 297 P.2d 542.

2. Startin v. Madsen, 120 Utah 631, 237 P. 2d 834; Bowden v. Denver & R. G. W.

R. Co., 3 Utah 2d 444, 286 P.2d 240; Boyd v. San Pedro, L. A. & S. L. R. Co., 45 Utah 449, 146 P. 282.

compatible blood transfusion, a nurse who cared for the deceased was entitled to express an opinion that deceased was given good nursing care as against the contention that such was the issue to be decided and that the witness invaded the province of the jury.

8. Evidence ⇨506

Whether testimony of an expert is as to the very issue before the jury is not a proper test as to its admissibility.

9. Evidence ⇨508

Where the subject of inquiry is in a field beyond the knowledge generally possessed by laymen, one properly qualified therein may testify to his opinion as an expert, and if the opinion evidence is such that it will aid the jury in understanding their problems it is admissible, irrespective of whether it bears directly upon ultimate fact that jury is to determine.³

10. Evidence ⇨508

A trial judge is allowed a wide discretion in regard to the allowance of testimony of an expert, where the subject of the inquiry is in a field beyond the knowledge generally possessed by laymen.

11. Trial ⇨295(1)

Instructions must be considered together in determining whether one instruction purportedly singled out one ground of alleged negligence and excluded others.

George H. Searle, Elias Hansen, Salt Lake City, for appellants.

Ray Quinney & Nebeker, Albert R. Bowen, Salt Lake City, for respondents.

CROCKETT, Justice.

Ten days following an operation for the removal of a tumor, Mrs. Lucille Joseph died in the L. D. S. Hospital of a "lower nephron nephrosis" (inflammation of the kidneys). Plaintiff, her husband, brought this action for himself and children, alleg-

ing that the hospital had negligently administered a transfusion of incompatible blood which brought on the kidney infection, proximately causing her death.

The two basic issues contested by the parties were: (1) Did Mrs. Joseph receive an incompatible blood transfusion from which she died; and (2) if so, was the defendant hospital negligent in connection with administering it, or in failing to stop it after an unfavorable reaction was noticed. The case was submitted to the jury which returned a verdict of no cause of action. Plaintiff appeals, charging error in certain rulings of the trial court relating to evidence and instructions.

The controversy over the rulings on evidence devolves upon the sustaining of defendant's objection to permitting plaintiff's counsel to read and use in his argument to the jury certain entries upon the hospital record made by two doctors, V. L. Rees and Kenneth A. Crockett, who had been called in to consult with respect to the treatment of Mrs. Joseph. The notations which counsel indicated a desire to read are as follows:

"Pelvic Laparoling 4-453 followed almost immediately by a chill and dark urine. * * * This pt is going into some type of renal decompensation possible on the basis of a transfusion reaction * * *." Signed "V. L. Rees."

And at the bottom of the same page of the Progress Notes:

"This is undoubtedly a Lower Nephron Syndrome from hemolytic Blood transfusion * * *." Signed "KAC"

The above entries have a direct bearing on a critical and disputed issue: whether Mrs. Joseph received a transfusion of incompatible blood which caused her death.

During the trial, Dr. Val Sundwall, who had performed the initial operation on April 4, testified that in his opinion the patient probably died as a result of a blood

3. Baker v. Wycoff, 95 Utah 199, 79 P.2d 77; Employers' Mutual Liability Ins. Co. of Wisconsin v. Allen Oil Co., Utah, 258

P.2d 445; Hooper v. General Motors, Utah, 260 P.2d 549; Jiminez v. O'Brien, 117 Utah 82, 213 P.2d 337.

transfusion reaction. However, Dr. John H. Carlquist, the pathologist and director of laboratories at the hospital, who was called in on the case and made tests of the patient after difficulties had developed, and who qualified as an expert in the field of blood transfusions and blood typing, being subjected to a searching examination by counsel for plaintiffs, was obviously evasive and persistently refused to concede that there was any definite proof that Mrs. Joseph either received, or died as a result of, a transfusion reaction. This is borne out by the following extracts from his testimony:

"Q. * * * now, that nephrosis was caused, was it not, by this incompatible blood? A. I have never said that.

"Q. But you didn't say it wasn't, did you? A. I said, I have had no proof it was incompatible blood.

"Q. You did say and you do believe now that that might have caused it? A. I have no proof of it.

"Q. That is the most probable cause of it, isn't it. A. I have never been able to prove it.

* * * * *

"Q. If this had been properly typed, this haematolysis would not have occurred, would it? A. I have never seen any evidence of haematolysis in this case.

* * * * *

"Q. But you doubt very much if she had haematolysis, is that right? A. Yes, sir; I was never able to prove there was any haematolysis took place.

* * * * *

"Q. Now, it is your testimony, to make it clear, that this patient didn't have haematolysis? A. No, sir, I was never able to prove there was any haematolysis.

"Q. But was that not the most likely injury to her kidney—most obvious?

A. It was one that had to be considered, * * *."

The above are but representative excerpts from several pages of similar testimony of Dr. Carlquist. The fact that he repeatedly refused to admit that there was any evidence from which a conclusion could be drawn that the patient had had an incompatible blood transfusion or that her death resulted from one, shows plainly that the entries in the record did not represent merely a recapitulation of other testimony brought out at the trial, but could reasonably be interpreted as opposed to his testimony. It was therefore evidence of extreme importance to the plaintiff's theory as to the cause of death. That issue was submitted to the jury by the court in Instruction No. 13. They were told that if they believed that "the death of Mrs. Joseph was from a cause other than the administration of incompatible blood * * *" then they must return a verdict of "no cause of action."

[1] Defendant urges that inasmuch as the doctors who made the notations were not employees of the hospital, such entries were neither admissible nor binding upon it. We are aware of rulings from other jurisdictions that exclude such record evidence where opinions are reflected.¹ But we adhere to the view which admits evidence of the character here in question notwithstanding the fact that it represents in part doctors' opinions as to the patient's condition.² The notations were recorded as information deemed pertinent to the care and treatment by persons performing duties in that regard. We have heretofore recognized that the entering of data on hospital records by personnel so engaged carries sufficient guarantees of trustworthiness to render them admissible in evidence and

1. See e. g. *New York Life Ins. Co. v. Taylor*, 79 U.S.App.D.C. 66, 147 F.2d 297.

2. *In re Richards' Estate*, 5 Utah 2d 104, 297 P.2d 542; *Allen v. St. Louis Public*, 365 Mo. 677, 285 S.W.2d 663; *People v. Gorgol*, 122 Cal.App.2d 231, 265 P.2d 69.

worthy of consideration by the fact finder in connecting with the other evidence in the case.³ The doctors attending Mrs. Joseph come within such classification and the entries they made upon the hospital record in connection with their duties in rendering medical service to this patient are competent evidence to be considered for such purpose. It is suggested that plaintiff could have called the doctors as witnesses. But why should he do so if he was satisfied with the records. The defendant, likewise, could have called the doctors had it so desired. Ancient defendant's contention in regard to matter which might obviously be inadmissible, e.g. entries which might be made by unauthorized persons having no connection with it, we remark aside that if some meddler, having no duty nor legitimate business doing so, made entries upon the hospital record, that would be subject to explanation by the hospital, facts not present here.

[2] The defendant further argues that, assuming the notations are competent evidence, it was nevertheless but harmless error for the trial court to sustain his objection to their being read and argued to the jury because the records had actually been received in evidence and were there for the jury to read if they so desired. It suggests, therefore, that the result could not have been different in the absence of the error. We are aware of and in accord with the mandate not to reverse a case merely because of error, and we will do so only when it appears to be prejudicial to the rights of a party.⁴ Neither this statutory mandate, nor the policy we follow thereunder, goes so far as to require that we ignore errors that may have a substantial effect upon the outcome of a trial.⁵

[3] It is not always easy to tell when an error should be regarded as prejudicial, as attested by the division of the court in this case. It is necessary to survey all of the facts and circumstances disclosed by the record and if, in so doing, the error appears to be of such a nature that it can be said with assurance that it was of no material consequence in its effect upon the trial because reasonable minds would have arrived at the same result, regardless of such error, it would be harmless and the granting of a new trial would not be warranted. On the other hand, if it appears to be of sufficient moment that there is a reasonable likelihood that in the absence of such error a different result would have eventuated, the error should be regarded as prejudicial and relief should be granted. Measured by such considerations we assay the possible effect of the error complained of, realizing of course that it is now quite impossible to tell definitely whether the verdict would have been different.

[4] In regard to the suggestion that the records were in evidence for the jury to read if they so desired, it is pertinent to look at the notations themselves, quoted in the third paragraph of this opinion. It will hardly be denied that they are couched in such terms that they could stand some elaboration for the benefit of those uninitiated in the mysteries of medical terminology. This emphasizes the importance of according plaintiff's counsel the opportunity of performing one of his essential functions: that of arguing his case to the jury. In doing so, he should be permitted to refer to and use all of the competent evidence he has marshalled and presented in the trial, and to explain its meaning and argue its significance to his client's cause.⁶

3. In re Richard's Estate, 5 Utah 2d 106, 297 P.2d 542.

4. Rule 61, U.R.C.P.; See Startin v. Madsen, 120 Utah 631, 237 P.2d 834, and authorities therein cited.

5. Bowden v. Denver & R. G. W. R. Co., 3 Utah 2d 444, 286 P.2d 240; Startin v. Madsen, 120 Utah 631, 237 P.2d 834;

Boyd v. Sam Pedro, L. A. & S. L. R. Co., 45 Utah 449, 146 P. 282.

6. Standard Accident Ins. Co. v. Simpson, 151 Fla. 564, 10 So.2d 85; Givans v. Chicago, St. P., M. & O. Ry. Co., 238 Minn. 161, 56 N.W.2d 306, 38 A.L.R. 2d 1393; Annotation, 38 A.L.R.2d 1396; 53 Am.Jur., Trial, § 453.

[5] Some indication of the importance of the error with which we are here concerned is to be found in the fact that counsel thought the matter of sufficient consequence that he objected to the reading and use of the evidence in the argument to the jury. It strikes the writer as being somewhat inconsistent that counsel now urges that depriving plaintiff of the use of such evidence was merely harmless error. If it is so plain that it would not have helped plaintiff's case, one is led to wonder why counsel made the objection and insisted that it not be used. The obvious answer seems to be that defendant's counsel was actually apprehensive that it may have a substantial effect against his client. Of course, he could not be sure, nor can we.

In view of the fact that there is such substantial doubt that we cannot, with any degree of assurance, affirm that the use of such evidence would not have been helpful to the plaintiff, the doubt should be resolved in favor of allowing him to have a full and fair presentation of his cause to the jury.

[6] A new trial being ordered, it is our duty to "pass upon * * * all questions of law involved in the case presented upon the appeal and necessary to final determination * * *,"⁷ accordingly we comment briefly on two other assignments of error.

[7-10] The first is plaintiff's contention that a nurse who cared for deceased could not express an opinion that she was given good nursing care. The objection was on the ground that this was the very issue to be decided by the jury and the witness thus invaded its province. This objection is untenable. Whether the testimony of an expert is as to "the very issue before the jury" is not a proper test as to its admissibility. Where the subject of inquiry is in a field beyond the knowledge gen-

erally possessed by laymen, one properly qualified therein may be permitted to testify to his opinion as an expert. If the opinion evidence is such that it will aid the jury in understanding their problems and lead them to the truth as to disputed issues of fact, it is competent and admissible, irrespective of whether it bears directly upon the ultimate fact the jury is to determine.⁸ And the trial judge is allowed a wide discretion in regard to the allowance of such testimony.⁹

[11] Concerning an instruction which purportedly singled out one ground of alleged negligence and thus excluded others: upon retrial it may be well for the court to consider rephrasing it; yet if the instructions are considered all together, as they must be, we doubt that it can fairly be said that the instruction had the effect plaintiff suggests.

Remanded for a new trial. Costs to appellants.

WADE and WORTHEN, JJ., concur.

McDONOUGH, Chief Justice (dissenting).

I am unable to concur in the decision of the majority wherein it is held that the trial court committed prejudicial error in refusing counsel permission to argue to the jury the notations in the hospital record purportedly made by Drs. Rees and Crockett. In considering this question, more of the factual background than is revealed by the opinion must, in the judgment of the writer, be considered.

It is first to be observed that the notations referred to are conclusions of the persons making the notations. The record is absolutely devoid of evidence which would

7. Rule 76(a), U.R.C.P.

8. *Baker v. Wycoff*, 95 Utah 199, 79 P.2d 77; *United States v. Bowman*, 10 Cir., 73 F.2d 716; 7 Wigmore, Evidence Sec. 1918 et seq.; McCormick, Evidence p. 25; see Justice Wade's separate opinions in: *Employers' Mutual Liability Ins. Co.*

of *Wisconsin v. Allen Oil Co.*, Utah, 253 P.2d 445; *Hooper v. General Motors*, Utah, 260 P.2d 549; *Jiminez v. O'Brien*, 117 Utah 82, 213 P.2d 337.

9. See *United States v. Bowman*, *supra*; McCormick, Evidence p. 26; 7 Wigmore Evidence, Secs. 1920, 1921.

reveal the qualifications of such persons other than that they are medical doctors. What their training and experience is, is not shown. Insofar as revealed by the record, the conclusions referred to were drawn without ever seeing the patient. All the record reveals is that when Dr. Sundwall, the attending physician, was shown a dark sample of urine which indicated that there was probably blood in the urine, he consulted with Dr. Rees and Dr. Crockett. Whether they had anything else before them other than the other notations on the hospital record does not appear. These facts are important, since it is elementary that for a person to give his opinion as an expert, a foundation for his testimony must be laid by showing his qualifications and the extent of information upon which he bases his conclusions. The absence of such showing is more significant when it is recalled that Dr. Crockett and Dr. Rees were both subpoenaed by the plaintiff, were present in court and were not called upon to testify. The only explanation offered in appellant's brief for not calling the doctors is the following:

"It is reasonable to assume that when Exhibit 2-D was received in evidence, the necessity of calling the doctors whose statements were contained in such exhibit, in great part, disappeared and they were excused."

In the case of *In re Richards' Estate*, cited in the opinion of the court, there is quoted with approval from the prior case of *Clayton v. Metropolitan Life Insurance Co.*, 96 Utah 331, 85 P.2d 819, 823, 120 A.L.R. 1117, the following:

"Before such records can be admitted, in the absence of statute, the offering party must show the necessity of admitting the records without requiring the person or several persons who made the records to testify."

It cannot be overemphasized that we are not here dealing with notations of fact relative to symptoms, treatment, directions to hospital staff and other factual matters. We are

here dealing with the purported opinions of experts.

Counsel were not misled by the stipulation that the hospital records might be received in evidence, into believing that everything that might be contained in the hospital record was competent. During the cross-examination of Dr. Carlquist, when he was confronted with the notations in the record made by Dr. Rees and Dr. Crockett, respondent's counsel objected on the ground that it was not cross-examination and that it was hearsay. He was thereby advised that the contention would be made by counsel that this evidence could not be considered by the jury. Some 70 pages of testimony were thereafter adduced, and there was ample opportunity for counsel to recall Drs. Crockett and Rees and present their evidence to the jury. Whether their conclusions as to the cause of the uremia from which the patient concededly died would be the same at the time of the trial following an autopsy as they were when the notations were made cannot be determined. It is interesting, however, in that connection to note that Dr. Carlquist, the hospital pathologist, was confronted on cross-examination with statements made by him in his autopsy report. After stating therein the immediate cause of death and the symptoms leading up thereto his report stated: "The obvious answer is an incompatible blood transfusion." After that, the report went on to state that the doctor performed the autopsy and from that autopsy and other tests made he was unable to determine that there was an incompatible blood transfusion. Thus, the hospital pathologist was of the same opinion, based upon the same factual data, as was Dr. Crockett and only changed his opinion upon further information.

Conceding, therefore, in view of the stipulation, that it was error for the court not to permit counsel for the appellant to argue these notations to the jury—a conclusion which, to say the least, is doubtful—the writer is unable to find therein reversible or prejudicial error under the criteria sug-

gested in the opinion of the court as a basis for determining that question. "It is necessary," says the opinion, "to survey all of the facts and circumstances disclosed by the record and if, in so doing, the error appears to be of such a nature that it can be said with assurance that it was of no material consequence in its effect upon the trial because reasonable minds would have arrived at the same result, regardless of such error, it would be harmless and the granting of a new trial would not be warranted." It is inconceivable to the writer that but for the alleged error the jury in this case would have arrived at a different result. Had counsel for appellants been permitted to argue these matters to the jury, they could give them dictionary definitions of words therein found, some of which the writer has been unable to find in Webster's Unabridged Dictionary, and to emphasize the word, "undoubtedly," in Dr. Crockett's notation. Counsel could not testify as medical experts, nor could they testify as to the qualifications of the doctors who made the notations. Had they been permitted, however, to argue these entries, counsel for the respondents would undoubtedly point out to the jury the matters hereinbefore set forth to meet any such argument made by counsel for the appellants. In evaluating the probability of a different result had counsel been permitted to so argue, an observation in appellant's brief is enlightening. All of the hospital records were permitted by the court to be taken to the jury room. Commenting upon that fact, counsel for the appellants in their brief said, "In this connection it may be noted that the jury could not have examined the contents of Exhibit 2-D because they reported that they had agreed on a verdict before counsel had time to take their exceptions to the instructions." In view of this, and bearing in mind that the ultimate issue to be decided was the negligence of the defendant hospital, there does not appear to the writer a remote possibility that the verdict would have been different had appellant's counsel been permitted to comment upon the sketchy entries under discussion. Since I agree with the

court's disposition of the other errors assigned, I would affirm the judgment below.

HENRIOD, J., concurs in the dissenting opinion of Mr. Chief Justice McDONOUGH.



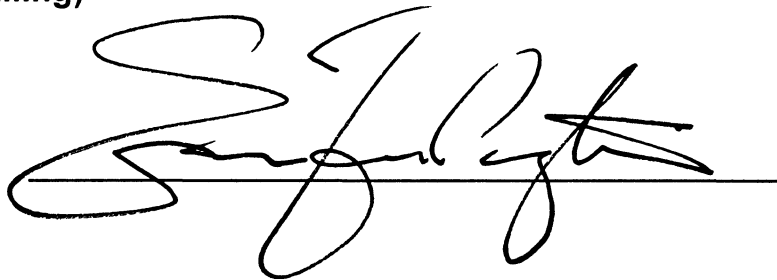
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLANT** was mailed via United States Mail first class, postage prepaid, unless otherwise indicated below, on the 20th day of March, 1999, to the following:

John E. Schindler
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Certified Mail #P966-327-657
[2 Copies]

Utah Court of Appeals
450 South State
Salt Lake City, UT 84114
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Joe W. Ruden, Jr.
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(U.S. Certificate of Mailing)
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A handwritten signature in black ink, appearing to read "Joe W. Ruden, Jr.", is written over a horizontal line.

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