

1987

# Vigil Topp v. N.D. "Pete" Hayward : Brief of Appellant

Utah Supreme Court

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David L. Wilkinson; Attorney General.

Elizabeth Bowman; Attorney for Appellant.

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IN THE SUPREME COURT OF THE STATE OF UTAH

870133, 870110

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VIGIL TOPP,	:	
	:	
Petitioner/Appellant	:	
	:	
v.	:	
	:	
N. D. "PETE" HAYWARD,	:	Case No. 870133
	:	
Defendant/Respondent	:	

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BRIEF OF APPELLANT

Appeal from order and judgment denying Petition for Writ of Habeas Corpus in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Richard H. Moffat, Judge, presiding.

ELIZABETH BOWMAN  
SALT LAKE LEGAL DEFENDER ASSOC.  
333 South Second East  
Salt Lake City, Utah 84111  
Attorney for Appellant

DAVID L. WILKINSON  
ATTORNEY GENERAL  
236 State Capitol  
Salt Lake City, Utah 84114  
Attorney for Respondent

**FILED**  
JUL 28 1987

IN THE SUPREME COURT OF THE STATE OF UTAH

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333 South Second East  
Salt Lake City, Utah 84111  
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ATTORNEY GENERAL  
236 State Capitol  
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Attorney for Respondent

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### JURISDICTIONAL STATEMENT

Appellant, Virgil Topp, is charged in Iowa with Third Degree Sexual Abuse, a Class C felony in violation of Iowa Code Ann. §709.4(3) (as amended) and Willful Injury, a Class C felony, in violation of Iowa Code Ann. §708.4 (as amended). These charges arose out of alleged acts of forcible oral and anal intercourse with a thirteen year old male.

The charge of Third Degree Sexual Abuse against Mr. Topp under Iowa law is comparable to the offense of Rape of a Child pursuant to Utah Code Ann. §76-5-402.1 which, if charged in Utah would be charged as a felony of the first degree.

Punishment for this offense under Iowa law is comparable to that which may be imposed in Utah for the offense of Rape of a Child. The crime of third degree Sexual Abuse of which Mr. Topp is charged in Iowa is comparable to Utah's first degree felony of Rape of a Child, therefore this Court has jurisdiction to review the denial of Mr. Topp's denial for a Writ of Habeas Corpus in the Third District Court. See Amended Docketing Statement for extensive discussion of jurisdiction.

STATEMENT OF ISSUES

1. Did the evidence of identity presented by the State at the Writ of Habeas Corpus hearing sufficiently prove the identity of Petitioner Topp?

IN THE SUPREME COURT OF THE STATE OF UTAH

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VIGIL TOPP,	:	
	:	
Petitioner/Appellant	:	
	:	
v.	:	
	:	
N. D. "PETE" HAYWARD,	:	Case No. 870133
	:	
Defendant/Respondent	:	

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BRIEF OF APPELLANT

STATEMENT OF CASE

The appellant, Virgil Topp, appeals from a judgment and order denying his Petition for a Writ of Habeas Corpus challenging extradition proceedings, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Richard H. Moffat, Judge, presiding.

STATEMENT OF FACTS

Virgil Topp was charged with seventy counts of sexual abuse and willful injury in Buchanan County, Iowa in November, 1986. In December, 1986, a Virgil Topp was arrested on a fugitive warrant in Salt Lake City. Mr. Topp filed a pro se Petition for a Writ of Habeas Corpus asserting the Virgil Topp named in the Governor's Warrant was not in fact Petitioner Topp. Mr. Topp also asserted in his Petition that he was not in the State of Iowa during the time of the commission of the underlying crimes.

Judge Moffat of the Third District Court held a hearing on these matters on March 4, 1987. The State submitted affidavits from the victim and his mother identifying the Petitioner from a photo lineup. See Addendum A. At the hearing, Deputy Cowdell, a Salt Lake County Deputy assigned to the fugitive warrants division, testified that he mailed photographs of the Virgil Topp in custody in Salt Lake City to the authorities in Iowa and that the authorities in Iowa returned the photographs along with the affidavits identifying Petitioner. (T. 4-5). Deputy Cowdell acknowledged that he did not see the other five photographs included in the Iowa photo spread, and conceded that the individuals in Iowa could have been shown photographs of persons not resembling Mr. Topp such as five black individuals even though Mr. Topp is caucasian (T. 6). The Court found the affidavits established the identity of Virgil Topp (T. 7).

Mr. Topp chose not to introduce any evidence regarding the issue of whether he was in Iowa at the time of the alleged offenses and therefore the District Court did not address that issue. The Court denied Petitioner's petition for a Writ of Habeas Corpus.

#### SUMMARY OF ARGUMENTS

The Appellant asserts that the trial court erred in finding that Petitioner Topp is the same Virgil Topp sought by the State of Iowa, absent some credible corroborating evidence as to identification.

## ARGUMENT

### POINT I

#### THE TRIAL COURT ERRED IN DENYING PETITIONER'S WRIT OF HABEAS CORPUS IN THE ABSENCE OF CREDIBLE CORROBORATING EVIDENCE.

Langley v. Hayward, 656 P.2d 1020 (Utah 1982) set the standard in this state on what a petitioner who seeks release on an extradition matter through a writ of habeas corpus must prove. The State has the initial burden of proving that the person arrested is the same person named in the extradition papers. Id. at 1022. A prima facie case is made by showing that the arrested person has the same name as that appearing on the extradition papers. Id.

Once the state has made its prima facie case, the burden shifts to the petitioner to come forward with affirmative evidence that he is not the same person named in the extradition papers.

This Court in Langley stated:

Where the petitioner does this by sworn testimony or by a verified pleading and where the state provides no evidence in addition to its bare prima facie case (as defined above) to corroborate the petitioner's identity with the person named in the extradition papers, the petitioner is entitled to release. (citations omitted).

Id.

In this case, Mr. Topp contends that the State has provided no credible evidence in addition to its prima facie case and that he is therefore entitled to release. In Langley, this Court ruled that the introduction of a photo lineup and testimony that the victims had chosen the petitioner from the lineup was sufficient corroborative evidence.

The instant case can be distinguished from Langley in that the photo lineup was not introduced into evidence and there is no indication that the lineup shown the victims contained people resembling Mr. Topp. In fact, the deputy who testified in the District Court proceeding admitted it was possible that the photo lineup shown the victims might have contained photos of five black individuals even though Mr. Topp is caucasian (T. 6).

The need to preserve photographs used in identification proceedings has been discussed extensively in Hernandez v. State, 490 P.2d 1245 (Nev. 1971). In Hernandez, the Court stated "it is the duty of the state to preserve photographs used for identification purposes." Preservation of the photo spread guards against misidentification or untrustworthy in-court identification. Likewise it prevents impermissively suggestive presentment of the photographs. A defendant's right to cross-examination regarding photographic identification is effectively precluded if the photographs are not available. Id. at 1247. While the court in Hernandez held the failure to preserve the photographs was not fatal, it did state the importance of preserving photo lineups.

In United States v. Hamilton, 420 F.2d 1292 (D.C. Cir. 1969) the court stated:

But a danger of erroneous conviction lurks also in the possible inability of the accused to reconstruct the pictorial display -- and consequently any unfairness in it -- to which an identifying witness has been exposed. In the District of Columbia, the police department has responded admirably to a somewhat comparable though less difficult problem by photographing all lineups thus providing a visual record for future reference by counsel and court alike. The provision of a similar safeguard through maintenance of a record of photographs shown to

perspective identifying witnesses could be a healthy contribution to the administration of the criminal law.

Id. at 1295.

The risk of erroneous identification is just as real as the possibility of erroneous conviction that the court was concerned with in Hamilton.

In State v. Classen, 590 P.2d 1198 (Or. 1979), the Court held the photographic lineup was so impermissibly suggestive that evidence the witness had identified defendant's photo was inadmissible. In Classen the court ruled the identification was impermissibly suggestive because the police showed the victim photos in which only the defendant appeared with a beard. The victim in Classen had described a man with a beard. The police in Classen had also told a witness that a suspect was included in the photo array.

In State v. Perry, 492 P.2d 1349 (Utah 1972), this Court was concerned with whether there was anything in an identification procedure "which should be regarded as so suggestive or persuasive that the identification was not a genuine product of the knowledge and recollection of the witness." Id. at 1352.

In this case, the affidavits identifying Mr. Topp should not have been considered by the District Court in reaching its decision. There was no evidence presented that would indicate that the identifications in this case were the result of the "knowledge and recollection of the witnesses" as required by Perry. The identifications could have been the result of a highly suggestive photo lineup and thus they should have played no part in the district court's decision.

Thus, under Langley, because the State has provided no credible evidence in addition to its prima facie case to corroborate Mr. Topp's identification, Mr. Topp is entitled to release.

CONCLUSION

For any and all of the foregoing reasons, Appellant seeks reversal of the denial of his Writ of Habeas Corpus.

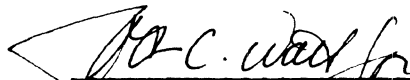
Respectfully submitted this 27 day of July, 1987.



ELIZABETH BOWMAN  
Attorney for Appellant

CERTIFICATE OF SERVICE

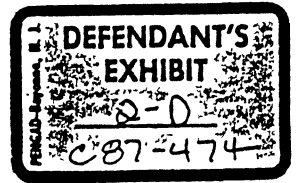
I, ELIZABETH BOWMAN, hereby certify that four copies of the foregoing Appellant's Brief will be delivered to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 27 day of July, 1987.



ELIZABETH BOWMAN  
Attorney for Appellant

DELIVERED by \_\_\_\_\_ this \_\_\_\_\_ day of July, 1987.

## ADDENDUM A



SWORN STATEMENT  
AND AFFADAVIT

I Pamela Huston, hereby state that I was shown a set of six photographs of male individuals for the purpose of identification of the individual known to me and by me as VIRGIL TOPP. I hereby state that picture number 3 is the subject VIRGIL TOPP.

Pamela Huston

Subscribed and sworn to me by the said Pamela Huston  
this 12 day of February 1987.

Jack L. Strawn

SWORN STATEMENT  
AND AFFADAVIT

Larry Huston, hereby state that I was shown a set of  
photographs of male individuals for the purpose of identification  
of individual known to me and by me as VIRGIL TOPP. I hereby state  
picture number 3 is the subject VIRGIL TOPP.

Larry Huston

Subscribed and sworn to me by the said Larry Huston  
16 day of February 1987.

Jack L. Stearns

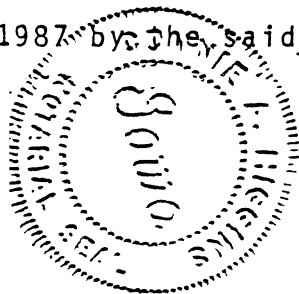
SWORN STATEMENT  
AND AFFADAVIT

I, Jack L. Straw hereby state that I did produce and show to Larry Huston and Pamela Huston an array of six photographs and that both individuals while separated from each other did identify the person in photograph number 3 as VIRGIL TOPP. I further state the subject in photograph number 3 is the subject being held in the State of Utah, County of Salt Lake. I further swear and state that photograph number 3 is the same photograph received from the Salt Lake County Sheriff.

Let it be known the subject has been identified as VIRGIL TOPP by the victim of the crime stated in the warrant directed to the Salt Lake County Sheriff.

Capt. J. L. Straw

Subscribed and sworn to me this 17<sup>th</sup> day of February  
1987 by the said Capt. J. L. Straw



Connie A. Higgins



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